

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
	)	
Framework for Broadband Internet Services	)	GN Docket No. 10-127
	)	

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**COMMENTS OF DAVID A. BALTO**

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I provide these comments to express my concern with the Federal Communication Commission's ("FCC") expressed objective to premise Open Internet regulations through Title II of the Communications Act of 1934. This path to supporting the Open Internet presents significant legal problems that will envelop the entire Internet value chain in litigation and uncertainty for years. While the public does not know what precisely the FCC is proposing to adopt at its Open Meeting on February 26<sup>th</sup>, press reports indicate that the FCC's proposals will most certainly run afoul of the Administrative Procedure Act ("APA") and administrative law jurisprudence. Considering the FCC's poor track record with finding a legally acceptable basis upon which to premise Open Internet regulations, one would assume the FCC would be taking extra care in laying the groundwork for legally sustainable net neutrality regulations this time around; however, this is not the case.

I was the Assistant Policy Director of the Bureau of Competition of the Federal Trade Commission from 1998 to 2001, and attorney advisor to then-Chairman Robert Pitofsky from 1995 to 1997. In these positions I was actively involved in the Commission's advocacy program and regularly advised state and federal legislators as well as government regulators on proposed legislation and regulations.<sup>1</sup> I currently provide antitrust and public interest services to consumer organizations in my private practice, in which I continue to provide advice on various proposed legislation and regulation, including telecommunications, Internet and high-technology regulation, with a focus on effects on consumers.

I write to you in my role as a public interest advocate, substantially concerned that in its haste to enact goal driven net neutrality regulations, the FCC is setting itself up for failure. The FCC proceeds at its own peril down the path of using Title II as the basis of its Open Internet

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<sup>1</sup> In private practice I have, and continue, to advise state legislators, attorneys general office and government regulators on various proposed legislation and regulation, including telecommunications, Internet and high-technology regulation, and the effects on consumers.

rules as it will face heightened scrutiny in any future legal challenge of this rule making. In *FCC v. Fox Television Stations, Inc.*,<sup>2</sup> the Supreme Court ruled that “a more detailed justification” will be needed when the FCC’s “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.”<sup>3</sup> Both of these red flags are implicated in by the FCC’s radical departure from prior policies regarding the classification and regulation of broadband services.

The likely outcome of another legal challenge is once again vacatur of the FCC’s net neutrality regulations. Indeed, vacatur is the normal remedy.<sup>4</sup> The law instructs courts to set aside any agency action found to be “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law.”<sup>5</sup> All of these factors are implicated by the FCC’s current course of action.

While a court may sometimes decline to vacate an agency’s action, it is unlikely that that will occur in this case.<sup>6</sup> The factors a court considers in not vacating an agency action are “the ‘seriousness of the order's deficiencies’ and the likely ‘disruptive consequences’ of vacatur.”<sup>7</sup> Both of these factors cut against the FCC regarding its decision to change the definition of broadband services so that they can fit under the regulatory schema embodied in Title II. As

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<sup>2</sup> 556 U.S. 502 (2009).

<sup>3</sup> 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).

<sup>4</sup> *Allina Health Services v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (citing *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C.Cir.2005)).

<sup>5</sup> 5 U.S.C. § 706(2).

<sup>6</sup> *Allina Health Services*, 746 F.3d at 1110.

<sup>7</sup> *Id.* (citations omitted) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C.Cir.1993)).

explained below, there are several serious deficiencies in the use of Title II as the basis for Open Internet Regulations.<sup>8</sup>

The first issue is whether the FCC can change the definition of Internet services from information services to telecommunications services. The second issue is whether a rule regulating the Internet under Title II will be vacated for not being properly promulgated under the requirements of the APA. The final issue is whether subjecting the Internet to Title II common carrier regulations runs afoul of the takings clause.

Based on these three significant deficiencies with using Title II as the basis for Open Internet regulations, the FCC should at the very least issue a new notice of public rulemaking (“NPRM”) that properly notices a Title II regime. This should clear up some of the deficiencies that can defeat the FCC’s net neutrality regulations. However, a more appropriate solution is for the FCC to work with Congress to pass new legislation that gives the FCC adequate authority to impose net neutrality regulations.

## The FCC Will Face Significant Difficulty in Redefining Internet Services to be Covered Under Title II

The primary hurdle that the FCC will have to overcome in invoking Title II to enact net neutrality regulations is its ability to define Internet access as a telecommunications service rather than an information service.<sup>9</sup> The FCC has previously chosen to define Internet access as an information service, not a telecommunications service, on four separate occasions and this

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<sup>8</sup> This discussion of sources of challenges is non-exhaustive and more important issues may come to light after the full net neutrality proposal is released to the public.

<sup>9</sup> Even the staunchest advocates for Title II acknowledge that the FCC faces serious legal hurdles in attempting to change the definition of information services so that they fall within the ambit of Title II. See Jon Brodtkin, *Net neutrality advocates identify holes in FCC’s net neutrality plan*, Ars Technica (Feb. 16, 2015, 5:40 PM), <http://arstechnica.com/tech-policy/2015/02/net-neutrality-advocates-identify-holes-in-fccs-net-neutrality-plan/>

definition was supported by a Supreme Court ruling.<sup>10</sup> In order to counteract this precedent, the FCC must either conclude as factual matter that Internet services are no longer information services but instead telecommunications services, or change its interpretation of the statute.

The Telecommunications Act of 1996 (“Telecommunications Act”) defines information services as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications”<sup>11</sup> and telecommunications as “the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.”<sup>12</sup> These definitions are important because while telecommunication services are regulated under Title II, information services are exempt from Title II.

The FCC fought for, and won, an information services definition before the Supreme Court in *National Cable & Telecommunications Assn. v. Brand X Internet Services* (“Brand X”). There the Supreme Court made several key findings that will be difficult, if not impossible, for the FCC to walk back in order to redefine Internet services as telecommunications services. For one, the Supreme Court found that Internet access offers the capability for acquiring, storing, retrieving, utilizing information.<sup>13</sup> The Court believed it was mistaken to think of Internet service as a transparent transmission from the consumer’s perspective.<sup>14</sup> Rather, “the high-speed transmission used to provide [Internet] service is a functionally integrated component of that service because it transmits data only in connection with the further processing of information and is necessary to provide Internet service.”<sup>15</sup>

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<sup>10</sup> See *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005).

<sup>11</sup> 47 U.S.C. § 153(24).

<sup>12</sup> 47 U.S.C. § 153(53).

<sup>13</sup> See *Brand X*, 545 U.S. at 999-1000.

<sup>14</sup> *Id.* at 998.

<sup>15</sup> *Id.*

The Supreme Court focused on two aspects of Internet services in holding that Internet service is an information service. First, the Court focused on that way in which Internet service involves the provision of Domain Name System (“DNS”) services.<sup>16</sup> Every Internet user – from consumers to edge providers – is assigned a series of numbers called an IP address to identify them on the network. However, Internet users do not need to memorize these numbers because of DNS. Instead, we use a common language Web site address and DNS “matches the Web site address the end user types into his browser (or “clicks” on with his mouse) with the IP address of the Web page’s host server.”<sup>17</sup> The Court stated that “[i]t is at least reasonable to think of DNS as a “capability for . . . acquiring . . . retrieving, utilizing, or making available” Web site addresses and therefore part of the information service [Internet service] companies provide.”<sup>18</sup>

Second, the Court focused on Internet service companies’ usage of caching to speed up information retrieval on the Internet.<sup>19</sup> There are several bottlenecks that can slow down the transmission of data over the internet. These include the distance the information has to travel, the capacity of all lines and connections along that route, and the capacity of the servers that serve the information. Caching speeds-up Internet service by storing commonly accessed information in local servers that are physically closer to the customers and retrieving that information when the customers ask for it.<sup>20</sup>

Since *Brand X* was decided, information services provided by Internet service providers have become wildly popular with millions and millions of consumers. Parental controls allow parents to identify and filter out content they do not want their children exposed to. Consumers are offered multiple email accounts that can store information, be accessed, utilized, and made

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<sup>16</sup> *Id.* at 999.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 999-1000.

<sup>20</sup> *Id.*

available. In addition, online storage services are becoming a common part of Internet service packages. Online storage allows consumers to store their important information for later access and retrieval. Some Internet service providers have gone even further by offering programming content, spam protection, pop-up blockers, instant messaging services, on-the-go access to Wi-Fi hotspots, and various widgets, toolbars, and applications. None of these services resemble a dumb pipe, but rather are “functionally integrated component[s]” of Internet services that “transmit[] data only in connection with the further processing of information and is necessary to provide Internet service.”<sup>21</sup>

This further and non-uniform integration of information services into Internet service offerings means that the FCC will have to examine every Internet service provider and their service offerings and conclude that they offer stand-alone pure telecommunications services in order to make the requisite factual findings. Even if the FCC could make such a finding, the attempt could likely encourage providers to simply integrate their transmission functions even more tightly with information services, bypassing the FCC’s siloed definition, rendering moot the entire point of the regulation. This process would ultimately leave classification up to the Internet service providers and may harm consumers by creating an environment where unwanted services are forced upon them.

Recognizing the factual problems in redefining Internet service as a telecommunications service, the FCC may instead choose to re-interpret the Telecommunications Act so that it can define Internet service as both an information service and a telecommunications service. This would presumably allow the FCC to impose common-carrier Title II regulations on Internet service providers based on the telecommunications component of their service. However, there are a number of problems with this approach.

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<sup>21</sup> *Id.* at 998.

As a preliminary matter, the FCC has already determined, and the Supreme Court has affirmed, that information service and telecommunications service are mutually exclusive categories of service.<sup>22</sup> This makes sense from a statutory interpretation standpoint. Congress created two distinct and non-overlapping categories of services in the Telecommunications Act that are regulated in two distinct ways.<sup>23</sup> Allowing any service with a transmission component to be regulated as a telecommunications service would effectively swallow the information service category entirely. This could not have been the intent of Congress when it drafted these distinct categories.<sup>24</sup> Indeed, the Court stated in *Brand X* that such an interpretation would “conflict with [the] regulatory history” against which the 1996 Act was adopted.<sup>25</sup> Until now, the FCC has supported this view, stating “[t]he language and legislative history of both the House and Senate bills indicate that the drafters of each bill regarded telecommunications services and information services as mutually exclusive categories.”<sup>26</sup>

The FCC is not saved by attempting to separate out and regulate a transmission component as a telecommunications service. The Supreme Court in *Brand X* already looked at whether the transmission component is separate or fully integrated with the information service.<sup>27</sup> The Court found that the transmission component is “sufficiently integrated, because [a] consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component

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<sup>22</sup> *Id.* at 994-97.

<sup>23</sup> *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).

<sup>24</sup> *Id.*

<sup>25</sup> *Brand X*, 545 U.S. at 994

<sup>26</sup> Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11524 ¶ 43 (1998) (“Stevens Report”)

<sup>27</sup> *Brand X*, 545 U.S. at 990-92.

of Internet access.”<sup>28</sup> The Court also agreed with the FCC’s conclusion that “a consumer cannot purchase Internet service without also purchasing a connection to the Internet and the transmission always occurs in connection with information processing.”<sup>29</sup>

Even if the FCC is able to overcome this barrier, going down this path will create a number of problems that might themselves defeat the FCC’s attempt at regulating net neutrality under Title II. For example, the Supreme Court in *Brand X* warned that the consequences 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.”<sup>30</sup> This warning is particularly applicable today when most edge providers offer services with a transmission component and most electronic devices have integrated transmission based features. There is no clear boundary that would separate Internet service providers from other technology based companies.<sup>31</sup> Any attempts by the FCC to create such boundaries will only open its regulations up to further challenges by opponents.

The FCC has also indicated that it may include mobile internet service in its Title II regulations. In this, the FCC is on even shakier legal ground. Section 332 specifically states that “[a] person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter.”<sup>32</sup> Under the Act, private mobile service is a catch-all for any service that is not a

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<sup>28</sup> *Id.* at 990 (citation omitted).

<sup>29</sup> *Id.* at 992.

<sup>30</sup> *Brand X*, 545 U.S. at 994; *see also* 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.”).

<sup>31</sup> For more information, see Robert E. Litan, *Regulating Internet Access as a Public Utility: A Boomerang on Tech If It Happens*, *Brookings Institute* (June 2, 2014), available at [http://www.brookings.edu/~media/research/files/papers/2014/06/regulating\\_internet\\_access\\_public\\_utility\\_litan/regulating\\_internet\\_access\\_public\\_utility\\_litan.pdf](http://www.brookings.edu/~media/research/files/papers/2014/06/regulating_internet_access_public_utility_litan/regulating_internet_access_public_utility_litan.pdf)

<sup>32</sup> 47 U.S.C. § 332(c)(2).

commercial mobile service.<sup>33</sup> In order to be a commercial mobile service, the service must be interconnected with the public switched network.<sup>34</sup> The FCC has defined the public switched network as the traditional telephone network per Congressional intent.<sup>35</sup> What this adds up to is that mobile internet service is a private mobile service specifically barred from being treated as a common carrier per Section 332(c)(2) of the Communications Act. The FCC has repeatedly reiterated that “mobile wireless broadband Internet access service does not fit within the definition of ‘commercial mobile service’ because it is not an ‘interconnected service.’”<sup>36</sup>

The United States Court of Appeals for the D.C. Circuit (“D.C. Circuit”) has also stated that Section 332 precludes the FCC from regulating mobile internet service as common carriage. In 2012, the court explained that “section 332 specifies that providers of ‘commercial mobile services,’ such as wireless voice-telephone service, are common carriers, whereas providers of other mobile services are exempt from common carrier status.”<sup>37</sup> The court determined that there was a “statutory exclusion of mobile-internet providers from common carrier status.”<sup>38</sup> The court further explained that “[e]ven though wireless carriers ordinarily provide their customers with voice and data services under a single contract, they must comply with Title II’s common carrier requirements only in furnishing voice service.”<sup>39</sup> In sum, the impending challenges to the proposed definitional changes is likely sufficient to void the regulations.

## The FCC’s Actions are in Violation of the Administrative Procedures Act

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<sup>33</sup> 47 U.S.C. § 332(d)(3).

<sup>34</sup> 47 U.S.C. § 332(d)(2).

<sup>35</sup> *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1436-37 ¶¶ 59-60 (1994)

<sup>36</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5916-17 ¶¶ 41-43 (2007)

<sup>37</sup> *Cellco P’Ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012).

<sup>38</sup> *Id.* at 544.

<sup>39</sup> *Id.* at 538.

The issues outlined above are compounded by the fact that the FCC has failed to adequately follow proper procedures as outlined by the APA. The most blatant example of this is that the FCC did not even include “reference to the legal authority under which the rule is proposed” in its initial Notice of Proposed Rulemaking released after the court’s decision in *Verizon v. FCC* which overturned the FCC’s earlier net neutrality regulations.<sup>40</sup> “The required specification of legal authority must be done with particularity” and “must be sufficiently precise to apprise interested persons of the agency’s legal authority to issue the proposed rule.”<sup>41</sup> This issue alone is often dispositive and grounds for vacatur of agency action.<sup>42</sup> It is clear that the FCC did not properly reference the legal authority under which Title II would be imposed. The FCC even asks the public: “What would be the legal bases and theories for particular open Internet rules adopted pursuant to [a Title II] approach?”<sup>43</sup>

It is clear from the NPRM and statements by FCC Chairman Tom Wheeler that the original intention was to regulate net neutrality under Section 706 of the Communications Act. This is shown in the NPRM itself -- the Commission never proposed adopting rules under any specific provision of Title II and failed to cite a single Title II provision in the ordering clause.<sup>44</sup> It was not until the White House released a video in November 2014 in which the President encouraged the FCC to pursue Title II that FCC Chairman Wheeler indicated in a blog that he

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<sup>40</sup> 5 U.S.C. § 553(b)(2).

<sup>41</sup> Sen. Doc. No. 248, 79th Cong. 2d Sess. 258 (1946); Attorney General’s Manual on the Administrative Procedure Act at 30 (1947).

<sup>42</sup> See *Global Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1298 (5th Cir. 1983) (agency failed to cite 49 U.S.C. § 10923(d)(1) in the NPRM); *Nat’l Tour Brokers Ass’n v. United States*, 591 F.2d 896, 900 (D.C. Cir. 1978) (agency failed to cite 49 U.S.C. 302, 303, 304, 305, 311, and 320, and 5 U.S.C. 553 and 559 in the NPRM); *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 759 (D.C. Cir. 1987) (agency failed to cite 42 U.S.C. § 1395x(v)(1)(A)(ii) in the NPRM), *aff’d*, 488 U.S. 204 (1988).

<sup>43</sup> Notice of Proposed Rulemaking, Protecting and Promoting the Open Internet, GN Docket No. 14-28, FCC 14-61 ¶ 149 (May 15, 2014).

<sup>44</sup> *Id.* at ¶ 183.

had changed his mind and would embrace regulating net neutrality under Title II.<sup>45</sup> However, the FCC cannot “change[] its mind halfway through th[e] proceeding” without properly correcting any procedural deficiencies.<sup>46</sup>

Failure to provide adequate notice -- in this case, that net neutrality regulation under Title II is now the primary consideration -- is not merely a technical error. The FCC’s ability to regulate net neutrality under Title II is in contention, as outlined above. “Agency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto.”<sup>47</sup> Interested parties must “have a fair opportunity to comment on the relevant aspects of the . . . issue.” Improper notice deprives interested parties of that right.

Once again, this deficiency goes double for the regulation of mobile internet services under Title II. The only way that the FCC can get past Section 332 in order to regulate mobile broadband service as a common carrier service is to redefine “public switched network” or “the functional equivalent of a commercial mobile service.”<sup>48</sup> However, the FCC has given no proper notice that it intends to take such an action. This notice and comment is especially appropriate here, where such definitions would seem to contradict the statute’s clear text and the intent of Congress.

## The FCC’s Actions Could Implicate the Takings Clause

In order to regulate Internet service providers as common carriers under Title II, the FCC must confer common carrier status on those providers. However, the FCC does not have

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<sup>45</sup> Tom Wheeler, *FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality*, WIRED (Feb. 4, 2015, 11:00 AM), <http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality/>

<sup>46</sup> *Nat’l Tour Brokers Ass’n*, 591 F.2d at 899.

<sup>47</sup> *Global Van Lines*, 714 F.2d at 1298 (citation omitted).

<sup>48</sup> 47 U.S.C. § 332(d)(2)-(3).

“unfettered discretion . . . to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve.”<sup>49</sup> The D.C. Circuit has stated that “[a] particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.”<sup>50</sup> This long standing principle calls into question whether the FCC has the authority to compel Internet service providers to operate as common carriers.

Title II itself does not contain any language that purports to authorize the FCC to require that particular services be subject to its terms. Instead, Title II defines the requirements that apply to a service that already is offered as a common-carrier telecommunications service. Indeed, there does not appear to be a provision in the Telecommunications Act that grants the FCC the authority to require Internet access be offered as common carriage.

If the FCC were to force Internet service providers to offer particular services on common-carrier terms then it could implicate the Takings Clause of the constitution.<sup>51</sup> The Supreme Court has stated: “It is established that, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted into a common carrier by mere legislative command.”<sup>52</sup> The Supreme Court further explained that “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.”<sup>53</sup>

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<sup>49</sup> Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC, 525 F.2d 630, 644 (D.C. Cir. 1976).

<sup>50</sup> *Id.*

<sup>51</sup> U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation.”); 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 Thomas, and Ginsburg, J.J.) (observing that obligating cable operators to act as common carriers would implicate the Takings Clause).

<sup>52</sup> State of Wash. ex rel. Stimson Lumber Co. v. Kuykendall, 275 U.S. 207, 210-11 (1927) (citing State of Wash. ex rel. Stimson Lumber Co. v. Kuykendall, 275 U.S. 207, 211 (1927); Mich. Pub. Utils. Comm’n v. Duke, 266 U.S. 570, 577-78 (1925)).

<sup>53</sup> *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)).

Based on these fears, it would be necessary for the FCC to have express statutory authorization at a minimum to require Internet service to be offered on a common carrier basis. The FCC simply does not have that statutory authorization.

Respectfully Submitted,

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