Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
IP-Enabled Services	)	WC Docket No. 04-36

COMMENTS OF

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS;
NATIONAL LEAGUE OF CITIES; NATIONAL ASSOCIATION OF COUNTIES;
U.S. CONFERENCE OF MAYORS; NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS;
TEXAS COALITION OF CITIES FOR UTILITY ISSUES;
WASHINGTON ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS;
GREATER METRO TELECOMMUNICATIONS CONSORTIUM;
MT. HOOD CABLE REGULATORY COMMISSION;
METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS;
RAINIER COMMUNICATIONS COMMISSION;
CITY OF PHILADELPHIA;
CITY OF TACOMA, WASHINGTON;
AND
MONTGOMERY COUNTY, MARYLAND

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SUMMARY

The NPRM suggests that in an effort to establish a structure for regulating IP-enabled services, the Commission may be contemplating a comprehensive review of the regulatory structure established by the Communications Act. The Local Government Coalition believes that any action the Commission can take at present must be consistent with the terms of Titles II, III, and VI of the Act. Consequently, if the Commission is to take any action outside that framework, it must first obtain specific authority from Congress.

The history of communications regulation in the United States is a success story. In a dynamically changing world of technology delivering information and efficiency, the Communications Act has played a central role in restraining monopoly power, extending universal service, requiring socially responsible actions by major telecommunications vendors, and supporting the fundamental democratic and economic underpinnings of our democracy. The Commission must respect and use this history to inform its actions as it considers the disruptive and revolutionary possibilities presented by the deployment of IP-enabled services.

Local governments are large scale users of telecommunications and information services, and keenly aware of the importance of this rulemaking to their constituents, themselves, and society in general. But we are also aware that there are many issues and interests at stake over and above the regulatory classification of IP-enabled services. Local governments are concerned with the preservation of a fair and effective universal service program, as well as with meeting their obligations for managing the public's investment in rights-of-way, cable customer service, zoning, land use, and public safety matters. All of these interests could be affected by ill-considered action in this proceeding.

Despite the pressure on the Commission to take sweeping steps, the agency must resist because it has no authority to develop a rational and comprehensive regulatory scheme. The

Commission may have authority to act in a partial manner, but even that authority is limited. Under *GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), the Commission may have the authority to adopt rules governing the provision of information services by telecommunications providers, cable operators, and other entities regulated by the Communications Act. But it does not have the authority to regulate the provision of information services by entities not involved in regulated activities. On the other hand, under *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), the Commission may be able to adopt rules governing otherwise unregulated entities – but only to the extent the Commission seeks to advance the policies of Title II, Title III or Title VI of the Act. The Commission has no power to adopt a comprehensive scheme for regulating information services independent of Title II, Title III, or Title VI. The decision of the Ninth Circuit in *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), illustrates the complexity of this area and how difficult it will be for the Commission to move ahead with any degree of certainty.

The Coalition also urges the Commission to bear in mind that important social policies beyond advancing competition for the delivery of IP-enabled services are at stake. The Commission must not take any action that threatens the effectiveness of universal service, CALEA, 911 service, access to persons with disabilities, or consumer protection. Promoting IP-enabled services without due regard to those policies could have undesirable consequences. Instead, the Commission should act to extend those policies to IP-enabled services, in a technology-neutral manner. For example, public safety and homeland security demand that all providers of IP telephony services and data services capable of 9-1-1 emergency communications be required to develop and implement the technology necessary to deliver

automatic number and location information to 9-1-1 centers for emergency callers on their systems.

Before it acts, the Commission should also consider a number of other policy considerations that are not addressed in the NPRM. They include:

- The federal government should respect and preserve the police powers of state and local governments, including right-of-way management, zoning, and cable customer service.
- Facilities owners that do not face meaningful competition should be regulated accordingly.
- Commission action should not have the effect of undermining local taxing authority.
- PEG access promotes open government, free speech, and public participation in community affairs.
- Users of the public rights-of-way should pay fair prices for the use of public property.

Finally, asserting jurisdiction and then forbearing from regulation is not the answer. The Commission's forbearance power is limited to telecommunications carriers and telecommunications services, so it is not a universal principle. Furthermore, an effort to forbear that undercuts any of the other public policies of concern to local governments would not be in the public interest.

In closing, the Commission is constrained by the express provisions of Titles II, III, and VI, and must act accordingly.

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AND
MONTGOMERY COUNTY, MARYLAND

I. INTRODUCTION

These comments are filed on behalf of the following organizations and local governments, known collectively for purposes of this proceeding as the "Local Government Coalition:"

- the National Association of Telecommunications Officers and Advisors ("NATOA");
- the National League of Cities ("NLC");
- the U.S. Conference of Mayors ("USCM");
- the National Association of Towns and Townships ("NATAT");

- the National Association of Counties ("NACo");
- the Texas Coalition of Cities For Utility Issues ("TCCFUI");[1]
- the Washington Association of Telecommunications Officers and Advisors ("WATOA");
- the Greater Metro Telecommunications Consortium ("GMTC");
- the Mt. Hood Cable Regulatory Commission ("MHCRC");
- the Metropolitan Washington Council of Governments ("MWCOG");
- the Rainier Communications Commission ("RCC");
- the City of Philadelphia;
- the City of Tacoma, Washington; and
- Montgomery County, Maryland.

NLC, USCM, NACo, and NATAT collectively represent the interests of almost every municipal or county government in the United States. NATOA's members include telecommunications and cable officers who are on the front lines of communications policy development in hundreds of local governments. TCCFUI represents 82 Texas cities in matters affecting the authority of local governments over rights-of-way and consumer protection. WATOA is a professional organization of individuals and organizations serving citizens in the development, regulation, and administration of cable television and other telecommunication systems in the state of Washington. GMTC represents Denver and 29 other municipalities and counties in the Denver area, working together on telecommunications issues. MHCRC advocates for, and protects the public interest in, the regulation and development of cable communications systems in Multnomah County and the Cities of Fairview, Gresham, Portland, Troutdale and Wood Village, Oregon. MWCOG is an association of the District of Columbia and 18 surrounding jurisdictions which comprise the National Capital region. RCC is a cooperative effort among the majority of cities and towns in Pierce County, Washington, as well

[1] TCCFUI is also filing separate comments in this docket, addressing the regulatory status of VoIP in Texas and other matters. *See* Comments of TCCFUI, WC Docket No. 04-36 (filed May 28, 2004).

as the County of Pierce, whose purpose is to identify telecommunications issues and advise member jurisdictions.

Local governments strongly support the deployment of new technologies, including the IP-enabled services addressed by the Notice of Proposed Rulemaking ("NPRM") Not only is the availability of new technology essential to economic development in individual communities, but local residents need and want the benefits of new services. The development of IP-based services promise to revolutionize the communications industry, and we understand the Commission's desire to move ahead. Nevertheless, the Commission must be careful not only to stay within the bounds of its authority, but to consider the full range of affected interests Even if the Commission has the power to act – and we believe that any such power is limited – action in a matter of this magnitude would do more harm than good.

Local governments are particularly concerned because they have fiduciary responsibilities to their constituents that could be directly affected by Commission action in this docket. *See, e.g., Erie Telecommunications v. Erie*, 659 F. Supp. 580, 595 (W.D. Pa. 1987) (city holds streets in trust for the public). For example, local governments have been charged with exercising their police powers to manage the public's investment in the public rights-of-way, and to oversee land use and zoning matters. Local governments have authority over cable customer service issues. Local governments are also the entities primarily responsible for public safety matters, including responding to emergency calls using the 911 system. Local authority in these areas is granted under state law, and these subjects are traditionally matters of local concern. Indeed, because of their responsibilities for these fundamental governmental functions, local governments have a greater day-to-day involvement with and effect on the average American than any other level of government. The quality of life of our citizens is tied directly to the

autonomy and effectiveness of local governments. The possibility that Commission regulation might hamper the ability of local governments to perform such basic functions thus raises great concern.

In short, the NPRM could affect local governments in many ways. The Coalition urges the Commission not only to consider such effects carefully, but to respect the principle of federalism and the interests of local governments.

II. LOCAL GOVERNMENTS WELCOME THE INTRODUCTION OF IP-ENABLED SERVICES.

Local governments constitute a key sector of the U.S. economy, employing approximately 11,379,000 people,[2] and spending a total of over $ 1 trillion every year to pay salaries and acquire goods and services.[3] A large part of that spending – billions of dollars a year – is devoted to information technology and communications. For example:

- The City of Enumclaw, Washington, population 11,000, spends about $50,000 on telecommunications and IT matters, out of a total budget of $12 million.
- The City of Hoover, Alabama, population 66,000, has a telecommunications budget of just over $2.01 million, and a total budget of $83 million.
- Orlando, Florida, population 200,000, spends over $10 million a year on telecommunications and IT out of a total budget of $590 million.
- The City of Minneapolis, Minnesota, population 370,000, devotes 17,000,000 million a year to telecommunications and IT, and has a total budget of $1.13 billion.
- The City of Kansas City, Missouri, population 441,500, spends almost $16 million a year on telecommunications and IT, and has a total budget of just over $1 billion.
- The City of Charlotte, North Carolina, population 614,330, devotes $23.4 million a year to telecommunications and IT, and has a total budget of $1.5 billion

[2] U.S. Census Bureau, Local Government Employment and Payroll (March 2004), *available at* http://www.census.gov/govs/www/apesloc02.html.

[3] U. S. Census Bureau, Summary of State and Local Finances by Level of Government, 2000-01, *available at* http://www.census.gov/govs/www/estimate01.html.

- Clark County, Nevada, with a population of 650,000, spends nearly $18 million per year on telecommunications services and related items, out of a total general fund budget of $1.06 billion.
- Mecklenburg County, North Carolina, with a population of just over 700,000, spends $18.2 million dollars on telecommunications and related services; the County's annual budget is $1.1 billion.
- The City and County of San Francisco, population 740,000, devotes $80 million a year to telecommunications and IT, and has a total budget of $4.5 billion
- Fairfax County, Virginia, population 985,000, has a total budget of about $4.65 billion, and spends about $34 million annually on telecommunications and information technology.
- The City of Philadelphia, population 1,500,000, in fiscal year 2004 is spending approximately $100 million for telecommunications and IT services, out of a total operating budget of $3.3 billion.
- The City of New York, population 8 million, has a total budget of over $45 billion. The City's Department of Information Technology and Telecommunications has a budget of over $100 million; this does not include IT and telecommunications expenditures by other agencies.

Local governments thus are heavy users of telecommunications services, information services, and related technologies, and have a great deal at stake in the successful deployment of IP-enabled services. Any technology that makes government operations less costly and more effective benefits not only the public, but local governments as individual entities.

Some local governments have already deployed VoIP and other IP-enabled services. For example:

- The City of Enumclaw, Washington, has introduced VoIP in most City departments.
- The City of Rockville, Maryland, population 47,000, has deployed VoIP at more than 400 telephones throughout the City.
- The City of Hoover, Alabama, has introduced VoIP service at remote municipal offices and is currently deploying VoIP at remote fire stations and police offices. The Hoover Board of Education has been using VoIP services for about three years.
- The City of Miramar, Florida, population 97,000, is using IP-based services for telephony, voice mail, alarm service, call detail recording, and other purposes.

- The City of Tacoma, Washington, population 199,000, plans to introduce VoIP at remote locations over the next two years. The Tacoma Housing Authority and Tacoma Public Schools are already using VoIP.
- The City and County of Denver, population 515,000, is using IP-based telephony in the main city hall and new municipal office building. Additional facilities will come online by the end of this year.
- The City and County of San Francisco has deployed VoIP as a pilot project serving 100 desk top phones in the recreation and Parks Department. The San Francisco Community College system has deployed about 1000 VoIP phones.
- The Metropolitan Washington Council of Governments is the convener and facilitator for all sub-federal homeland security planning, coordination, and communication for the National Capital Region. With assistance from Virginia and Maryland, and from the Department of Homeland Security, it has developed multi-modal communications systems to insure timely communication among first responders and their support networks. It is developing citizen notification systems and text-to-voice systems to better communicate with the public in times of emergency.
- The City of Charlotte, along with Mecklenburg County, North Carolina, employs IP services for a 311 Citizen Call-In Line; they are in the first stage of employing IP technology across all city/county-wide services.
- In 2003, as part of the relocation of its city hall, the City of Bloomington, Minnesota, moved to VoIP for telephone service. From the VoIP interface at city hall, the city's private IP network connects all municipal facilities.
- Kansas City, Missouri, is in the process of deploying VoIP.

Local governments also support the deployment of IP-enabled services because advanced technology is essential to the economic development of all communities. Businesses and individuals will demand the services they need to accomplish their goals, and each community in the country has an incentive to encourage current residents and businesses to stay and succeed, and to attract new residents. Local governments thus expect to benefit from the deployment of new services in several respects, and have every incentive to encourage deployment.

Members of the Coalition and other local government interests have been following issues related to those raised in the NPRM for some time. As noted in the NPRM, at ¶ 78, NLC, USCM, NACo, NATOA, the International Municipal Lawyers Association ("IMLA"), and the

Alliance for Community Media ("ACM") submitted a letter to Chairman Powell urging the Commission to refrain from acting in a number of pending proceedings until it had resolved the fundamental questions regarding the proper regulatory structure for VoIP.[4] NATOA, NLC, NACo and ACM made a similar request in reply comments filed in the Vonage proceeding.[5] TCCFUI filed comments and reply comments in the Vonage proceeding; these filings addressed the status of VoIP in Texas, stressed the importance of extending 911 obligations to VoIP providers, and urged competitively neutral action with respect to universal service and right-of-way compensation.[6]

In addition, the Alliance of Local Organizations Against Preemption ("ALOAP"), whose members include many of the members of the present coalition, filed extensive comments in response to the Commission's Declaratory Ruling and Notice of Proposed Rulemaking in GN Docket No. 00-185 and CS Docket No. 02-52, 17 FCC Rcd. 4798 (2002) (the "*Cable Modem Ruling*"). ALOAP pointed out, among other things, the limits on the Commission's jurisdiction

[4] That letter was filed in the following proceedings: *In re AT&T Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, WC Docket No. 02-361 (filed October 18, 2002); *In re Petition for Declaratory Ruling That Pulver.coms Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45 (filed February 5, 2003); *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (filed September 22, 2003); *In re BellSouth's Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Such Services to CLEC Voice Customers*, WC Docket No. 03-251 (filed December 9, 2003); *In re Petition of Level 3 for Forbearance from Assessment of Access Charges on Voice-Embedded IP Communications*, WC Docket No. 03-266 (filed December 23, 2003).

[5] Reply Comments of NATOA, NLC, NACo, and ACM, WC Docket No. 03-211 (filed Nov. 24, 2003), at p. 2.

[6] Comments of TCCFUI, WC Docket No. 03-211 (filed Oct. 23, 2003); Reply Comments of TCCFUI, WC Docket No. 03-211 (filed Nov. 21, 2003).

and authority under Title I.[7] ALOAP also noted that the Commission has no power to preempt local authority over information services delivered by a cable operator, except in the limited, prescribed ways set forth in Title VI.[8]

ALOAP also filed reply comments in response to the *Wireline Broadband NPRM*,[9] stating that "the Commission should leave to Congress the major questions of how to classify wireline broadband internet access for purposes of Communications Act oversight."[10] Finally, local governments have addressed relevant issues in the Commission's Section 706 proceeding.[11]

III. THE COMMISSION MUST RESPECT THE CURRENT REGULATORY STRUCTURE ESTABLISHED BY CONGRESS.

The Communications Act does not expressly address the regulation of information services, and remains tied to historical distinctions based on underlying transmission technologies. The NPRM, however, questions the basic premises of existing federal communications regulation. In an effort to establish a structure for regulating IP-enabled services, the Commission may be contemplating a comprehensive change in the regulatory structure established by the Communications Act. Nevertheless, the Commission can only exercise the powers delegated to it by Congress. Unless Congress changes the law, the

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[7] ALOAP Comments in CS Docket No. 01-52 (filed June 17, 2002) at pp. 32-37.

[8] *Id.* at 31.

[9] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd. 3019 (2002) ("*Wireline Broadband NPRM*").

[10] Reply Comments of ALOAP, CC Docket No. 02-33 (filed July 1, 2002), at p. 6.

[11] Comments of USCM, NACo, American Public Works Association ("APWA"), TCCFUI, Montgomery County, Maryland, MHCRC, GN Docket No. 04-54 (filed May 10, 2004); Reply Comments of USCM, NACo, APWA, TCCFUI, Montgomery County, Maryland, MHCRC, GN Docket No. 04-54 (May 24, 2004).

Commission must act within the scope of the Act as it stands today. If the Commission decides that actions outside the framework of Titles II, III, and VI are needed, it must first obtain specific authority from Congress.

The history of communications regulation in the United States is a success story. In a dynamically changing world of technology delivering information and efficiency, the Communications Act has played a central role in restraining monopoly power, extending universal service, requiring socially responsible actions by major telecommunications vendors, and supporting the fundamental democratic and economic underpinnings of our democracy. The Commission must respect and use this history to inform its actions as it considers the disruptive and revolutionary possibilities presented by the deployment of IP-enabled services.

The subject matter of the NPRM – IP-enabled services – is the perfect illustration of the larger dilemma in which the Commission finds itself. Technological convergence has reached the point that it is becoming increasingly difficult to set regulatory policy based on the nature of the end-user services provided to consumers.[12] The Commission last faced this problem in the *Computer II* inquiry.[13] *Computer II* was a dynamic solution that survived the test of twenty-five years of further market developments. But *Computer II* had the benefit of treating all of the underlying transmission platforms then capable of delivering information services comparably. That may no longer be an effective option as such services have migrated to wireless broadcast

[12] Throughout these Comments, the Local Government Coalition will use the following terms. "Transmission platform" and "transmission platform technology" refer to the nature of the facilities carrying the electronic signals, such as cable television networks, broadcast service transmitters or telephone networks. "End-user services" refers to the actual application that the consumer is using, such as voice communications, video programming, or data file transfers. "Transmission protocols" refers to the formatting of the electronic signals carrying the end-user services so that the services can be transmitted over different transmission platform technologies, or not.

[13] *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980).

services and coaxial cable television systems. More to the point, attempting to sustain and distinguish regulatory requirements based on the end-user services may prove to be no longer possible. The Commission does not have the legislative grant of authority to comprehensively regulate information services. *Computer II* avoided this problem by imposing service regulations as a condition for using the underlying transmission platform (*i e* , public switched telephone network providers). Unfortunately, rather than recognizing the limits imposed by the Communications Act on the Commission's authority, the NPRM suggests that the Commission can unilaterally assume power which Congress has not given the Commission. The NPRM suggests the Commission intends to make fundamental decisions about the appropriate regulatory structure for an entire new industry. The Commission must resist any temptation to proceed along this path. The Commission instead should be looking to use the tools it has been given in the Communications Act to create a stable and predictable operating and legal environment. Overreaching the authority in the Act will create legal uncertainty and increased investor risk, and will actually work to slow deployment of these new services.

A. The Communications Act Establishes Clear Delineations Among Categories of Services.

The Communications Act establishes a clear regulatory structure, based on divisions among communications services, transmitted by the traditional transmission platforms. The Commission must respect and act within the boundaries established by the different titles of the Act, except in those instances in which Congress has explicitly granted the power to do otherwise.[14] The Commission has no broad power to ignore those requirements.

[14] The Commission has the power to forbear from regulating in certain circumstances. But this should not be confused with the power to restructure the Communications Act or simply do whatever it pleases. Section 332 of the Act permits the Commission to exempt commercial mobile service providers from certain provisions of Title II. Section 10 allows the Commission

The structure and history of the Act show that the arrival of a new technology requires Congressional action to reestablish the proper balance of powers to be allocated among the federal, state and local governments. The historical example of the cable industry, which we discuss further below in the context of the scope of the Commission's authority, is illustrative, but not an exact analogy. The development of cable television is somewhat analogous to the present case in that after the potential of the new technology became clear, Congress recognized that it was responsible for establishing the overall framework for regulation of the industry, and the Act was amended to deal specifically with that industry.

It should be noted, however, that although cable television developed in the late 1950s and early 1960s, Congress did not choose to act upon it until 1984. If the Commission believes that IP-enabled services are different because they cut across current regulatory lines, and arise from the convergence of previously distinct technologies, then Congressional action is even more critical. In the meantime, however, the Commission must act within the confines of the Act as it stands.

B. Title I Does Not Authorize the Commission To Redraw the Jurisdictional Boundaries and the Regulatory Framework Established by the Act.

In several recent proceedings, the Commission has relied heavily on Title I of the Act and the Commission's so-called "ancillary jurisdiction" to develop a model under which "interstate information services" will not be regulated at the federal level, and, it is suggested, state and local regulation may be preempted.[15] The NPRM devotes little space to discussing the source

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to forbear from applying provisions of the Act or regulations with respect to telecommunications providers and services, if certain conditions are met. No comparable authority exists with respect to cable operators or cable service.

[15] *See, e.g.*, *Cable Modem Ruling* at ¶¶ 33, 96-108; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband*

and scope of the Commission's authority over IP-enabled services, but the NPRM invites comment on the scope of the Commission's authority, and suggests that the Commission might forge ahead under the same theory in this docket.

To the extent that the Commission is able to classify certain IP-enabled services as falling within the scope of Title II, it may have the authority to take some action. But it seems clear that many new services will not fall within the traditional statutory definition of telecommunications, or will do so only in part.[16] Thus, some additional source of authority is required, and the temptation to reach for the panacea of Title I is hard to resist. Still, the temptation must be resisted, because the Commission's ancillary jurisdiction is a very thin reed on which to base a comprehensive regulatory scheme that will shape the future of all telecommunications investment, deployment, and service delivery for the coming century. Even if upheld by the courts – which is by no means certain – the Commission (and investors relying on Commissoin decisions) would constantly be flying blind without guidance from Congress. Furthermore, for the Commission to act in such an important area without Congressional authority is profoundly anti-democratic. Decisions regarding the regulatory transformation of an entire industry of such critical importance to the national economy must be reserved to the elected representatives of the people.

Title I of the Communications Act "is not an independent source of regulatory authority." *California v. FCC*, 905 F.2d 1217, 1240 at n.35 (9th Cir. 1990), *citing United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). *See also FCC v. Midwest Video Corp.*, 440

Providers, CC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("*Wireline Broadband NPRM*").

[16] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27 (rel. Feb. 19, 2004).

U.S. 689, 706 (1979) ("without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under § 2(a) would be unbounded."); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1484 (D.C. Cir. 1994) ("[T]he Commission's expansive power under the Act does not include the 'untrammeled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority,'" *quoting National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976)); *Turner v. FCC*, 514 F.2d 1354, 1355 (D.C. Cir. 1975) ("[T]he Commission must find its authority in its enabling statutes"); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) (striking down Commission rules governing the depreciation of telephone plant that conflicted with state regulations) ("To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.") *Id.* at 374-75. Therefore, to the extent that the NPRM might suggest that the Commission has an independent right under Title I to regulate all facilities, equipment, and persons that have any relationship to communication, the answer is that there is no such authority.

While the Commission may enjoy broad jurisdiction under Title I, the Commission's authority to act under Title I is very limited in scope. This authority cannot be exercised in a way that contradicts the intent of Congress as expressed in the structure of the rest of the Communications Act. Accordingly, in addressing the treatment of IP-enabled services, the Commission must respect the overall statutory scheme.

Section 4(i), 47 U.S.C. § 154(i), must also be read and exercised in the context of the overall statutory scheme. Section 4(i) serves only to give the Commission authority in areas necessary to implement the *express* authority given by other sections of the Act. Section 4(i) confers no authority to regulate activities that are not otherwise within the Commission's

jurisdictional ambit. *North American Telecomms. Assn. v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985) ("Section 4(i) is not infinitely elastic").

The Supreme Court has held that, under Title I, the Commission may exercise authority that is "reasonably ancillary to the effective performance of the Commission's various responsibilities." *Southwestern Cable Co.* at 178 (1968). The term "ancillary jurisdiction" ultimately derives from this portion of the Court's opinion, but the phrase is actually a misnomer; a more accurate term would be "ancillary authority." The Commission's *jurisdiction* is limited by Section 2 of the Communications Act. The Commission has *authority* to engage in the specific activities set forth in the remainder of the Act; where its authority is not express, it may rely on its ancillary jurisdiction. The purpose of ancillary jurisdiction is to ensure that the Commission can fill in gaps in its authority over entities and activities it is empowered to regulate, *see, e.g.*, *Lincoln Tel. and Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981) (finding ancillary jurisdiction to impose upon telecommunications carriers interim billing method for interconnection charges); *New England Tel. and Tel. Co., et al. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987) (finding ancillary jurisdiction to order telecommunications carriers to reduce telephone rates), not to expand that authority to include otherwise unregulated entities or activities. Note, for example, that the Commission's authority over cable television in *Southwestern Cable* derived from its jurisdiction over broadcasting. As in that case, the Commission's authority over IP-enabled services must derive from one or more of the substantive provisions in the Act, located in Title II, Title III or Title VI.[17]

[17] *GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973) (FCC can regulate the offering of data processing services by common carriers only because of the Commission's authority over the carriers under Title II).

C. The Scope of the Commission's Jurisdiction Over Information Services Is Extremely Limited.

The Commission's decision in *Computer II* is sometimes cited for the proposition that the Commission can, under its ancillary authority, comprehensively regulate information services. But such statements misread that decision and the case law. No court has expressly ruled on that proposition, and there are at least two lines of authority that bring the proposition very much into question.

In *Computer II*, the Commission stated that it had jurisdiction over enhanced services, but elected not to adopt a comprehensive regulatory scheme for enhanced services. 77 FCC 2d 432-433. The rule adopted by the Commission applied only to enhanced services provided by communications common carriers. The *Computer II* decision was appealed and upheld in *Computer and Comm'ns Industry Ass'n v. FCC*, 693 F.2d 198 (1982) ("*CCIA v. FCC*"), but because the Commission had not actually exercised comprehensive jurisdiction over enhanced services, the Commission's statements in that regard were not really at issue in the case.

Both *Computer II* and *CCIA v. FCC* must be read in light of the Second Circuit's earlier decision in *GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), which sets forth one line of analysis regarding the scope of the Commission's overall authority over information services. The court found that ancillary jurisdiction did not authorize the Commission to regulate data processing services provided by otherwise unregulated entities. The court found that the Commission could regulate the offering of data processing services by common carriers because of the Commission's authority over the carriers, but also held that the Commission has no jurisdiction over data processing itself. Data processing – which is, in today's parlance, an information service -- involves the transmission of signals over wires, often the same wires used to transmit communications; if the Commission had the authority to regulate all

"instrumentalities" that might be engaged in the transmission of communications, then it would seem that the Commission could have used that authority to regulate the data processing industry.[18] But the Second Circuit ruled that it did not, and expressly stated that the data processing market "is beyond [the Commission's] charge."[19]

The *GTE Service* case is still good law. As the NPRM notes, subsequent amendments to the Act have not established "any particular entitlements or requirements with regard to providers of information services . . . ."[20] The Commission may have the power, under its ancillary jurisdiction, to regulate certain aspects of the provision of information services by telecommunications providers and cable operators. But that authority is limited to matters within the scope of the Commission's charge, which is the communications market. *See GTE Service* at 733. And the Commission has no authority at all over a provider of information services if that provider falls outside the ambit of Title II, Title III or Title VI. Thus, the questions raised in the NPRM about the scope of the Commission's powers over IP-enabled services have largely

[18] The Commission's jurisdiction over non-carriers is indeed quite limited, and the Commission has been prepared in the past to seek additional authority when necessary. For example, the Pole Attachment Act was adopted specifically because the Commission determined that it did not have the power to compel electric utilities to grant access to their poles and conduit. S. Rep. No. 580, 1st Sess., at 14, *citing California Water & Tel Co. et al.*, 40 R.R.2d 419 (1977).

[19] In *GTE Service*, the Second Circuit reviewed a Commission order that promulgated rules governing the provision of data processing services by communications common carriers. Among other things, these rules barred common carriers from providing data processing service to third parties, except through separate subsidiaries. The court ruled that the Commission had the authority to regulate the entrance of common carriers into the data processing field, and thus upheld the separate subsidiary requirement. *GTE Service*, 474 F.2d at 731. But the court struck down rules governing certain activities of the separate subsidiaries, because the subsidiaries were not common carriers and the only justification for those rules was to protect the data processing market, rather than the communications market. The court stated "[The Commission's] concern here therefore is not for the communications market which Congress had entrusted to its care, but for data processing which is beyond its charge and which the Commission itself had announced it declines to regulate. We find the intrusion to be without authority in the Communications Act or in the cases construing it." *Id.*, 474 F.2d at 733 (footnote omitted).

[20] NPRM at ¶ 27.

already been answered: if IP-enabled services are information services, the Commission has no power to establish a rational, comprehensive regulatory scheme over IP-enabled services The Commission can only regulate such services to the extent they are provided by regulated entities

The second relevant line of authority consists of the Supreme Court's decisions in the two *Midwest Video* cases.[21] In those decisions, the Supreme Court made it clear that ancillary jurisdiction only allows the Commission to treat a new technology in the same fashion as an existing technology In *Midwest Video I*, the Court held that the Commission was permitted to impose obligations on cable operators comparable to those required of broadcasters, because the Commission was pursuing objectives within the scope of Title III. When the Commission tried to go beyond that, however, and imposed obligations on cable operators that extended beyond what it could require of broadcasters, the Supreme Court drew the line, noting in *Midwest Video II* that without such a limitation "the Commission's jurisdiction under § 2(a) would be unbounded." *Midwest Video II*, 440 U.S. at 706.

It may be possible, under *Midwest Video I*, to argue that the Commission has the authority to regulate information services providers to the extent that the Commission seeks to advance the policies of Title II, Title III, or Title VI – but only if the Commission can articulate clearly the underlying source of authority for its actions Even then, the Commission cannot go beyond those limits.[22] Thus, the Commission cannot under any theory adopt a regulatory regime for IP-enabled services that differs in substance from any regime it could otherwise apply to telecommunications providers, cable operators, and other entities subject to the Act. But having

[21] *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*); *FCC v. Midwest Video Corp, et al.*, 440 U.S. 689 (1979) (*Midwest Video II*).

[22] Thus, for example, we believe that, in the *Cable Modem Ruling*, the Commission could have imposed obligations on cable modem service consistent with treating it as a cable service Of course, this would not have been consistent with the *Brand X* decision.

said that, it is important to note that this result conflicts with the holding of *GTE Services*, which, although not a Supreme Court decision, is directly on point, since it dealt with a form of information service. Under *GTE Services*, the Commission is not permitted to regulate information service providers that are not also carriers (or, presumably, cable operators).

In the end, which line of authority the Commission chooses to follow, or is ultimately held to control, may not matter. The practical problem is that under either theory the Commission's range of options is limited. The Commission can either regulate all entities in accordance with existing statutory provisions, which were not drafted with the comprehensive regulation of information services in mind, or it can regulate only carriers and cable operators to the extent that they also provide information services, without regulating "pure" information services providers. Any resulting regulatory scheme will be either ill-adapted or incomplete, and in either case probably ineffective. Consequently, the Commission will do more harm than good if it proceeds.

D. The Ninth Circuit's *Brand X* Decision in the Cable Modem Proceeding Amply Exemplifies the Flaws in the Commission's Approach to Date.

The NPRM threatens to continue the unfortunate pattern of the Commission's recent approach to the regulation of information services and broadband networks, which amounts to a form of "regulation by roulette." Rather than acting within the scope of its authority, the Commission seems to have committed itself to a strategy of charting a new course, which has only led to delay, confusion, and increased investor risks, ultimately slowing deployment of new transmission platform technologies and information services. The Commission has thus further complicated the resolution of many of the issues raised in the NRPM.

The Ninth Circuit's decision in *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003) exemplifies the problems with the Commission's strategy so far. In the *Cable Modem*

Ruling, the Commission elected to ignore the prior holding of the Ninth Circuit in *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), and adopt its own view of the proper regulatory classification of cable modem service. Whatever the Commission's reasons for doing so, in the end it is not entirely surprising that in *Brand X* the Ninth Circuit concluded that it was bound by its own prior decision in *Portland* and consequently had no choice but to reverse the FCC's decision in the Cable Modem Ruling. While there was an element of chance involved, in terms of which circuit ended up reviewing the Cable Modem Ruling, there was always a possibility that another circuit might well have found the reasoning of the *Portland* case persuasive, regardless of the deference the Commission might ordinarily expect. *Cf. Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000); *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp.2d 712 (E.D.Va. 2000). Issuing the *Cable Modem Ruling* in that environment was risky, and the Commission placed its bet, gave the wheel a spin, and took its chances.

Of course, it was also possible that a different circuit would have disagreed with the Ninth Circuit; the members of the Coalition certainly did, as did the lower court in *MediaOne Group, Inc. v. County of Henrico*. The Commission's desire to advance a different legal theory intended to address perceived problems with other approaches is understandable, although we disagree with the particular approach chosen, and might have succeeded. But the point is that now, having gambled and lost once on this issue, the Commission ought to think twice before taking another spin.

Nevertheless, the Commission now proposes to proceed with developing a regulatory structure for IP-enabled services even though the Commission's preferred theory about how to organize such a structure has been rejected by the Ninth Circuit twice, and may well be rejected by the Supreme Court. In fact, the government has not even decided at this point whether to seek

certiorari; it seems highly premature to have opened this proceeding without even knowing on what legal basis the Commission might be able to proceed. We do not by any means endorse the outcome in *Brand X*. But the fundamental issue is that the Communications Act does not say enough about how information services in general should be regulated to allow the Commission to move forward with any certainty. Further, it seems unwise to ignore the approach taken by the Ninth Circuit – that one service can and may fall within the statutory definitions and treatment of more than one section of the Act – thereby further complicating both decisions regarding treatment of the service and the effects of any classification.

If the Commission chooses to adopt a regulatory scheme that deviates from the existing structure of Title II, Title III, and Title VI, the Commission will no longer be engaged in responsible policy-making: instead, it will be gambling that eventually the right court will endorse its arguments. Of course, Congress may eventually step in – but until that happens, the Commission's approach is nothing but a recipe for lengthy litigation.

Finally, it is difficult for interested parties to comment intelligently when they can only speculate about key legal issues.

IV. AS A PUBLIC ENTITY, CHARGED WITH PROTECTING THE PUBLIC INTEREST, THE COMMISSION HAS A DUTY TO CONSIDER THE EFFECTS OF ITS ACTIONS ON MATTERS OUTSIDE ITS AREA OF IMMEDIATE RESPONSIBILITY.

Although the Commission has been charged with a certain set of responsibilities under the Act for overseeing a certain sector of the economy, the Commission remains only a small part of the federal government, and the federal government is only one component of our federal system. Furthermore, while the Supremacy Clause of the Constitution gives the federal government the power to preempt local laws, nothing in the Constitution says that a federal agency must preempt merely because it has that power. Before the Commission takes any

action, the Coalition urges the Commission to consider that there are many public interests at stake in the proceeding, all of which are worthy of respect.

A. The Public Interest Is Broader than the Interests of Service Providers.

The NPRM acknowledges that the Commission has been charged with a number of responsibilities of great importance to the public, including "ensuring that radio and wire communications are comprehensively available to all in our nation, that they serve the interests of the national defense, promote the safety of life and property, and provide individuals with disabilities with equivalent access to such services in the public interest." NPRM at ¶ 50. The NPRM also acknowledges the Commission's responsibilities with respect to consumer protection. NPRM at ¶ 71. These matters are fundamentally important, and it should not be forgotten that Congress has adopted specific and extensive legislation to deal with these topics. The Coalition urges the Commission not to lose sight of priorities. Such general goals as promoting the advancement of competition through deregulation must not be allowed to interfere with the Commission's specific statutory responsibilities. Accordingly, the Commission should not take any action that threatens the effectiveness of universal service, 911 services, CALEA, access to persons with disabilities, or other matters.

The classification of new services so that they fall outside of the scope of Titles II, III, or VI threatens to undermine all of the social policy goals described above. For example, the Act's provisions relating to universal service depend heavily on the concept of "telecommunications service" and "telecommunications carrier;" it may be difficult to extend universal service to include information services and information services providers in any effective and consistent manner. Similarly, the Coalition believes that subscribers to voice services of all kinds must have the benefit of unquestioned access to 911 and E911 services. Consumers will not only be

confused, but placed in danger of their lives, if they purchase VoIP services that are not functionally equivalent to existing services. Unfortunately, they will only discover this in an emergency situation. These and other customer service/safety issues will broaden as more and varied services converge on the IP platform.

As discussed earlier, the Commission has no authority under Title I to replace the current regulatory scheme. Nor does it have the right to take steps that undermine the statute. The Commission would fail in its duty to the public if it simultaneously exempted information services providers from meeting certain critical requirements, and encouraged the migration of traditional services to IP-based platforms. Social obligations need not impede the migration to IP platforms, and the resulting benefits will enhance providers' efficiencies and service offerings

The Commission should impose obligations on all IP-enabled service providers that are functionally equivalent to those required of traditional providers, consistent with its authority under Titles II, III and VI. For example, the Commission might extend universal service and 911 obligations applicable to telecommunications providers to VoIP providers.[23] Indeed, TCCFUI advocates such an approach in its separate comments in this proceeding [24] We understand that the National Emergency Number Association does as well. We agree with these organizations

[23] VoIP providers are in the same position as cell phone providers with respect to emergency 9-1-1 calls. New technology will be required to deliver the telephone number and location of a caller needing emergency assistance automatically and accurately to the nearest 9-1-1 call center The issue is the same as for wireless – a VoIP caller's location is not tied to a fixed address, but can be any geographical place in the country, or world, from which the caller can access the provider's IP network. The FCC has mandated cell phone providers to implement this "enhanced 9-1-1" or "E9-1-1" technology. The federal government must require the same of VoIP operators, and of data communications services that are or can be capable of 9-1-1 emergency communications. Rapid development of a solution is critical for public safety, particularly so given the imperatives of homeland security and the risk of terrorist attack. A federal solution is required if it is not to become another unfunded and very expensive mandate on local and state governments.

[24] Comments of TCCFUI, WC Docket No. 04-36 (filed May 28, 2004), at 3.

regarding the importance of these issues, and in principle we support such an approach The Commission should ensure that all providers of comparable services are subject to comparable requirements, on a technology-neutral basis. If the Commission cannot extend these requirements to all providers pursuant to existing authority under Titles II, III, and VI, then it will need to seek the advice of Congress.

B. The NPRM Fails To Mention a Number of Other Public Interest Considerations that Warrant Due Consideration and Respect.

One of the chief flaws in the NPRM is the failure to acknowledge the potential effects of the Commission's actions on the critical interests of a key player. Local governments own and manage much of the real property used by the communications industries to deliver their services to their customers, and they also have significant responsibilities for consumer protection. The NPRM's single reference to the role of local governments at ¶ 78 is not calculated to gather much useful information on the topic. Any fair and comprehensive regulatory scheme for IP-enabled services will need to take into account a number of specific concerns not raised by the NPRM, including the following:

1. **The federal government should respect and preserve the police powers of state and local governments, including right-of-way management, zoning, and the establishment of customer service requirements.** State and local government retain their police powers, and continue to exercise those powers to address matters that are beyond the authority of the federal government or its capacity to handle effectively. Federal law must distinguish between economic regulation of service providers in competitive markets, and the exercise of local police powers. There is no substitute for the role played by local governments in such matters as street construction, maintenance, and repair, and day-to-day

traffic management. In addition, federal law specifically recognizes local authority over right-of-way management, zoning and cable customer service matters. Those powers are creatures of state, not federal law, and the Commission has no power to preempt them without explicit authorization from Congress.

2. **Facilities owners that do not face meaningful competition should be regulated accordingly.** Most urban residential communities today are served by no more than two wireline facilities-based providers capable of supporting IP services, while large pockets of rural communities are still served by one.[25] Even head-to-head competition may not guarantee consumers the protections provided by a real choice in service providers. The GAO has documented that platform owners have a proclivity to favor their affiliated programming[26] and Chairman Powell has noted that a duopoly environment "would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers."[27] We are less sanguine than the

[25] See Comments of NTCA in Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Docket No. 04-54 (filed May 10, 2004)

[26] "Broadcasters and cable operators own many cable networks" and "cable networks affiliated with these companies are more likely to be carried by cable operators than nonaffiliated networks." U. S. General Accounting Office, GAO-04-262T, Testimony Before the Committee on Commerce, Science and Transportation, U.S. Senate, *Telecommunications: Subscriber Rates and Competition in the Cable Television Industry*, at 2 (Mar. 25, 2004).

[27] *Application of EchoStar Communications Corp., et al.*, Hearing Designation Order, 17 FCC Rcd. 20,559 (statement of Chairman Powell) (rel. Oct. 18, 2002). A recent report by Goldman Sachs predicted that once DSL-cable parity is reached, the regional Bell operating companies and the cable MSOs will maintain a "détente" at a 50/50 duopoly in which each side will recognize the benefits of industry equilibrium. Goldman Sachs, *Telecom Services: Wireline//Broadband* (April 16, 2004) at 7; *Telecom Services: DSL Broadband Share Just Over 50% This Qtr; Ideal Situation* (Apr. 29, 2004) at 1.

Chairman over the likelihood that even three providers will create meaningful competition. Furthermore, facilities-based providers will continue to have advantages over non-facilities-based providers, which could lead to market distortions. Thus, there will remain a need for regulation of facilities-based providers to ensure consumer protection and customer service.

3. **Commission action should not have the effect of undermining local taxing authority.** The communications industry is not entitled to special tax treatment. All businesses within the scope of a jurisdiction's general taxing power should be subject to that power, in accordance with the requirements of equal protection and other Constitutional considerations. Commission actions should respect this principle, and not inadvertently undermine it. For example, Commission statements regarding the interstate character of a service may be cited by providers in other contexts, in and effort to create tax exemptions for themselves. Consequently, the Commission should always carefully limit statements regarding its jurisdiction and the classification of any service by noting that different principles may apply in other contexts.

4. **PEG access promotes open government, free speech and public participation in community affairs.** In adopting the 1984 Cable Act, Congress recognized the enormous opportunity presented by cable television technology for allowing citizens to be better informed and to participate more effectively in local affairs. As our society gets ever larger and more complex, the need for improving citizen access to and knowledge about governmental processes, and for allowing citizens the opportunity to speak about matters of public concern, has grown

correspondingly. These values are as important now as they were in 1984, and the Commission should act to preserve them. Technological changes and new regulatory incentives should not be excuses for bypassing laws established by Congress to promote fundamental democratic values.

5. **Users of the public rights-of-way should pay fair prices for their use of public property.** Under current federal law, local governments can require cable television operators and telecommunications providers to pay for the right to use local rights-of-way. This is a fundamental principle of our economic system, and any effort to interfere with that right creates the risk of a violation of the takings clause of the Fifth Amendment, and a subsidy of private industry. The Commission has no authority to exempt any person from that obligation, and as ALOAP demonstrated in its comments in the Cable Modem proceeding,[28] subject to state law restrictions on the authority of a particular local government, information services providers who use public rights-of-way should expect to pay for the right, just as they would pay any other property owner.

6. **Creative interjurisdictional communications systems should be preserved.** As part of their efforts to better respond to and protect the public from terrorist attacks and other national and regional emergencies, local governments are linking their communications systems together horizontally and multi-modally. Any new regulatory scheme considered by the Commission must maintain maximum flexibility on the part of these intergovernmental linkages, and must

[28] Comments of ALOAP, CS Docket No. 02-52, at p. 60.

insure that communications between first responders and with the public at large are available to all persons, businesses, and public entities.

C. The Commission Must Recognize that Its Effort To Address IP-Enabled Services Has the Potential To Undermine Local Government Authority to Protect Consumers.

One of the Commission's goals in the *Cable Modem Ruling*, the *Wireline Broadband NPRM*, and the pending NPRM, among other items, appears to be to establish a regulatory framework that eliminates any significant role for state and local governments. For the reasons discussed in ALOAP's comments in response to the *Cable Modem Ruling*,[29] local governments dispute that the Commission's approach actually can achieve that goal. But whether successful or not, assigning a purely "interstate" label to such a broad and growing sector of the economy could have significant effects in other areas. For example, the traditional division of state and local taxation of telecommunications services depends on whether services are interstate or intrastate, and many state laws depend on the interstate/intrastate division for other services as well. *See, e.g., People's Choice TV Corp., Inc. v. City of Tucson*, 202 Ariz. 401 (2002) (MMDS deemed "interstate" service and therefore exempt from local transaction privilege tax). The FCC's classification could influence the courts in such cases and thus have far-reaching unintended effects.

In addition, a declaration by the Commission that a service is an "interstate" service could be interpreted as an effort to occupy the entire field, thus preempting traditional police powers. The Commission is not in a position to effectively oversee a large number of areas that have been traditionally left to local or state oversight. The area of consumer protection and

[29] Comments of ALOAP, CS Docket No. 02-52, at pp. 27-37.

customer service is one such topic, in which ill-considered Commission action could end up harming consumers.

Similarly, decisions by the Commission declaring services to be an interstate information service can interfere with the desire of Congress to advance certain constitutional values. The *Cable Modem Ruling* already threatens to do that with respect to cable modem service – further ill-considered action in that docket or this one could seriously undermine Congressional policies. Under the Cable Act, for example, local franchising authorities are permitted to require cable operators to designate channels for public, educational and governmental use, and to provide funding to support those channels. Congress recognized that cable technology could be used to advance free speech, and to help inform the public about the activities of their local governments. By designating all IP-based services as information services, and refraining from imposing some form of public service obligations comparable to those required by the Cable Act, the Commission would undermine the policies advanced by the statute. A restructuring of the communications industry that harms existing local franchising and regulatory powers would thus undermine the policies adopted by Congress in Title VI of the Communications Act.

Title VI also allows local governments to obtain fair compensation for the use of their rights-of-way by cable operators, through payment of a franchise fee. The franchise fee is based on the operator's gross revenues, thus linking rent for the use of the rights-of-way directly to the value to the operator. The reclassification of services threatens to allow cable operators to transfer services from the traditional cable rubric to the new unregulated interstate information services rubric, thus potentially allowing cable operators to avoid paying fair rent for the use of public property. In essence, arguments by the Commission or other parties asserting that local governments cannot obtain compensation for the use of their property would raise claims under

the takings clause of the Fifth Amendment.[30] Such arguments would also circumvent the provisions of the Act – such as Section 253 and Section 622 – that uphold the right of local governments to obtain compensation for use their property. And efforts by the federal government to regulate the use of local property would raise claims under the Tenth Amendment.

We should note that the Coalition does not believe that reclassification necessarily limits local authority over providers of information services, for the reasons set forth in ALOAP's comments in the Cable Modem proceeding.[31] But Commission action would surely embolden cable operators to take such positions, and litigation would presumably be needed to resolve many of the resulting disputes.

The Commission's "interstate information service" classification scheme may thus advance some societal goals, but hinder others, and the Commission needs to keep that balance in mind. To the extent that the Commission feels compelled to promote the growth of IP-based services by providing regulatory certainty, the Commission must act within the scope of Titles II, III, and VI of the Act.

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[30] For example, the courts have generally interpreted the "compatible easement" provision of Section 621(a)(2) narrowly, in part to avoid potential takings claims. *See, e.g., Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993). Similarly, in a series of recent cases, telecommunications providers who installed facilities in certain railroad easements have settled claims for compensation to the owners of the underlying fee interest, because the scope of the easements did not include telecommunications facilities. *See, e.g., Uhl v. Thoroughbred Technology and Telecom., Inc.*, 309 F.3d 978, 980-982 (7th Cir. 2002); Alison Frankel, "Blood on the Tracks," *The American Lawyer*, June 2002, *available at* http://www.law.com/jsp/article.jsp?id=1022862310259. The Commission should not assume that the right to use rights-of-way for one purpose – such as cable or telephone service – includes new uses, such as the delivery of information services. This will depend on state law and the terms of each grant. *See, e.g., Marcus Cable Associates v. Krohn*, 90 S.W.3d 697 (Tx. 2002) (easement permitting construction of electric line did not allow installation of cable television lines).

[31] Comments of ALOAP, CS Docket No. 02-52, at pp. 27-37.

D. Forbearance by the Commission Will Undercut the Broader Public Interest.

Some parties will undoubtedly argue that, in the interests of deregulation and parity among different technologies, the Commission should wherever possible exercise its discretion and forbear from regulation. The Coalition has several observations in this regard.

First, the Commission's discretion to forbear is limited by the statute. Section 10(a) of the Act applies only to telecommunications services and telecommunications carriers, and so it cannot be used to eliminate all differences between technologies. These limitations indicate that Congress did not intend, even as recently as 1996, to relieve cable operators of any requirements related to cable service, nor did Congress intend to allow the Commission to dissolve the distinctions between Title II and Title VI.

Second, Section 10(a) requires the Commission to find that: (1) enforcement is not necessary to ensure that the charges, practices, classification or regulations are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement is not necessary for the protection of consumers; and (3) forebearance is in the public interest. Furthermore, in deciding whether forbearance is in the public interest, the Commission must consider whether enforcement will promote competitive market conditions, but may also take into account other factors. The statute also requires that each regulation or statutory provision be examined individually.

In examining a particular regulation, the Coalition believes that there might well be concerns regarding the first two standards listed above, but in general the third criterion is the critical one. As discussed elsewhere, there are a great many public interest obligations that need to be taken into account in any decision to forbear in this docket. Each of these needs to be taken into account, as does the cumulative effect of any other decision to forbear. That is, if the Commission chooses to lift additional requirements, the effects of removing those requirements

must be considered in any decision to forbear in enforcing other requirements. Furthermore, the record at this stage is not likely to be conducive to a fair assessment of the effects of forbearance. The NPRM is so broad that parties may propose forbearance on a large number of provisions under a wide range of specific regulatory proposals. At present, it is impossible to comment intelligently on all of the possible proposals. If the Commission chooses to proceed with such an approach, it ought to issue a separate further notice of proposed rulemaking outlining the overall regulatory scheme it intends to adopt, identifying each provision it wishes not to enforce, and describing the likely effects of forbearance.

Third, with respect to cable modem service in particular, the Coalition continues to believe that cable modem service is, at least in part, a cable service. *See MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712 (E.D.Va. 2000). Nevertheless, should the Commission choose to follow the *Brand X* decision, the Coalition does not believe that any forbearance is appropriate. Deregulation of that service would be contrary to the public interest because it would encourage the migration of traditional cable services to the IP platform, without providing adequate consumer protections, customer service, compensation for the use of rights-of-way, provision for media diversity, and e-democracy through PEG access capabilities and other social policies promoted by Title VI. Common carrier regulation under Title II may not offer a complete replacement for Title VI obligations, but in conjunction with state and local government police powers, it may be sufficient to provide appropriate regulatory certainty.

CONCLUSION

The NPRM fails to adequately acknowledge the limitations on the Commission's power. The Communications Act establishes the framework within which the Commission is authorized to act, and the Commission cannot act outside of the scope of Titles II, III and VI. Furthermore, any action by the Commission must be informed by and reflect all of the factors and policy considerations raised herein. The Commission must obtain specific authority from Congress if it seeks to take actions inconsistent with the authority provided by Titles II, III, and VI. To the extent that the NPRM suggests that the Commission seeks to act outside that framework, the Coalition believes the Commission must seek authorization from Congress.

Respectfully submitted,

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