Before the
Federal Communications Commission
Washington, D.C. 20554

Preserving the Open Internet	GN Docket 09-191
Broadband Industry Practices	WC Docket No. 07-52

REPLY COMMENTS OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

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Dated: April 26, 2010

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The Computer & Communications Industry Association ("CCIA"), by its undersigned counsel, files these Reply Comments in response to the Notice of Proposed Rulemaking released October 22, 2009, in these dockets ("NPRM").[1] CCIA will focus in these Reply Comments on explaining why, contrary to the belief of some commenters, the Commission has and should exercise its jurisdiction over broadband services in order to ensure that two-way public Internet access remains protected from discriminatory or unreasonable private interference.

SUMMARY

The time for adopting rules to safeguard broadband subscribers' unfettered access to the Internet is now, and the Commission has the authority to do so. Convergence and vertical integration by and among the owners of Internet access facilities — including wireline, wireless, cable, and satellite providers — are reaching unprecedented levels. And the lesson of *Comcast*[2] instructs that it is within the power of broadband Internet access providers ("IAPs") to manipulate traffic for their own commercial purposes in a manner that restricts consumer choice, perhaps undetectably.

As even IAPs recognize, all broadband Internet access is converging to the same IP-based technology, and thus the most sensible and even-handed action that the Commission can take is to apply Title II telecommunications law to the transmission component of Internet access service. The Commission should focus, finally, on functionality rather than medium or type of facility in order to apply the six Open Internet principles of the NPRM. Title II is the appropriate

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[1] On January 13, 2010, CCIA timely filed Initial Comments in this docket, hereinafter referred to as the "CCIA Comments."

[2] *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Rcd. 1028 (2008), *appealed sub. nom. Comcast v. FCC*, No. 08-1291 (D.C. Cir.) (opinion issued April 6, 2010) (vacating order).

statutory authority for effecting this result, for those provisions always have governed the offering of two-way communications paths, which is exactly what broadband IAPs provide today.

Even-handedness does not, however, require draconian or inflexible regulation. Certain technologies, particularly wireless services, have technological characteristics that are different from wireline or cable facilities. The Commission can accommodate those differences, and acknowledge the particular challenges facing wireless broadband IAPs, through its application of the "reasonable network management practices" caveat that is included in the Open Internet principles. What is reasonable for a Digital Subscriber Line provider or a wireless provider may not be reasonable for a fiber-optic broadband provider, and this divergence can be embraced easily via the definition of "reasonable network management practices." In the alternative, the Commission can employ its forbearance authority under Section 10, 47 U.S.C. § 160, to exempt certain carriers, or classes of carriers, from certain aspects of the Open Internet rules.

With regard to the proposed exception for "managed or specialized services" from the forthcoming rules, which appears targeted to enterprise contracts and one-way access to entertainment content, CCIA is concerned that this exception could have unintended negative consequences. The term is vague and ill-defined, rendering the proposed exception potentially so broad as to swallow the rules or, on the converse, so narrow as to force the Commission to determine, on a case-by-case micromanaged basis, which services are exempt and which are not. CCIA suggests that the Commission refrain from adopting the proposed exception until the term is better understood and its application more predictable. At this time, the best course lies in adopting the Open Internet principles as federal rules, and reserving further judgment on any exceptions until those rules take effect and the practical results on the IAP market can be measured.

I. OPEN INTERNET RULES ARE NECESSARY BECAUSE THE INTERNET ACCESS MARKET IS TOO CONCENTRATED AND TERMINATING ACCESS IS A BOTTLENECK

The Internet access market is in the hands of too few firms to permit the Commission to cling to "free market" bromides as a means of securing unfettered Internet access for American consumers. Concentration and vertical integration in this market is at the tipping point. This fact is demonstrated even in the comments of those who want to convince the Commission that meaningful competition among Internet access service providers exists. And, as CCIA explained in its Initial Comments, the fact that this handful of firms holds out the threat of non-deployment as their response to adoption of the open Internet principles in the NPRM, itself illustrates the power that these few behemoths hold.[3]

Statistics provided by Verizon, a fully integrated incumbent carrier covering the bulk of 10 states and select markets in 21 others, demonstrate that the wireline-cable duopoly blankets 96.5% of American homes.[4] Due to the demise of the CLEC industry and the complexities of local franchising law, that duopoly is not one merely of technology but also of companies; Verizon DSL and the resident cable franchise holder likely control more than 90% of the broadband facilities in any community within Verizon's territory. Thus, consumers in these regions have only two companies from which to purchase Internet access: their cable operator or Verizon. Though Comcast and others trumpet their recent restraint from raising broadband rates,[5]

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[3] CCIA Comments at 9.

[4] "There are about 27 million households in Verizon's local service territory, and 96.5% of them are in areas that have access to both Verizon's DSL service and cable modem broadband." GN Docket No. 09-191, Verizon/Verizon Wireless Comments, Decl. of Michael D. Topper ¶ 15 (Jan. 14, 2010).

[5] "[O]n numerous occasions we have doubled the broadband speeds available to customers without increasing prices." GN Docket No. 09-191, Comcast Corp. Comments at 8 (Jan. 14, 2010) ("Comcast Comments").

the fact remains that broadband IAPs retain substantial pricing freedom. No wonder that the National Broadband Plan contemplates making Internet access a covered, subsidized component of Universal Service.[6]

In addition, technological convergence, horizontal consolidation, and vertical integration in the telecommunications market is at the tipping point. The proposed Comcast-NBC Universal merger would pair the largest player for half of the IAP duopoly with an extremely powerful and diverse provider of news and entertainment programming and will, for several services, eliminate head-to-head competition between these firms.[7] The ability of the merged entity to attract and retain subscribers and to exert influence as a buyer of content will be unprecedented. In addition, this merger would raise the already high barriers to entering the content distribution market.[8] At this crucial stage of the Internet's development as a content distribution vehicle, affirmative Commission action is needed to ensure that broadband IAPs are constrained in the manner in which they manipulate the subscriber's Internet experience.

CCIA appreciates the strides that network owners have made in deploying middle- and last-mile broadband facilities in the last few years. That progress cannot be overlooked. Nor can we overlook, however, how few firms accomplished that task. For the fact remains that

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[6] Federal Communications Commission, *Connecting America*: *The National Broadband Plan* at 140, 143-147 (Mar. 17, 2010) (recommending the creation of the Connect America Fund [Recommendation 8.2] and the Mobility Fund [Recommendation 8.3]) (hereinafter *National Broadband Plan*).

[7] Dr. Mark Cooper, Ph.D., Director of Research for the Consumer Federation of America, predicts that, if consummated, the merger will eliminate inter-firm competition in content provision for several local video markets as well as in distribution markets including the Internet. *Competition in the Media and Entertainment Distribution Market*: *Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the H. Comm. on the Judiciary*, 111th Cong. 3 (Feb. 25, 2010) (Testimony of Dr. Mark Cooper, Ph. D.), *available at* http://judiciary.house.gov/hearings/pdf/Cooper100225.pdf.

[8] *Id*.

however diligently wireline and cable firms build out networks, the market simply has too few such firms. The paucity of players requires that the Commission codify enforceable, pro-consumer Open Internet principles to ensure that Internet access subscribers retain basic access rights to compensate for their utter lack of negotiating power against today's wireline-cable duopoly.

Unsurprisingly, the comments of IAPs and their representative trade associations in this proceeding argue that the Commission lacks authority to adopt Open Internet rules.[9] AT&T, for example, first argues that ancillary jurisdiction under Title I of the Communications Act of 1934 cannot reach IAPs, which it characterizes as information providers,[10] and then asserts that Title II cannot support the proposed "rigid 'nondiscrimination' rule that is starkly more onerous than Section 202(a)."[11] Comcast likewise argues that ancillary jurisdiction is unavailing in this proceeding, there purportedly being no "specific statutorily mandated responsibility" of the Commission to protect American consumers from unfair treatment at the hands of IAPs.[12] Their message to the Commission is principally that it is powerless to act, buttressed by lengthy presentations as to the purported power of content and online services "hyper giants" such as

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[9] Comcast Comments at 22-26; GN Docket No. 09-191, AT&T Comments at 208-222 (Jan. 14, 2010) ("AT&T Comments"); GN Docket No. 09-191, Verizon/Verizon Wireless Comments at 86-109 (Jan. 14, 2010) ("Verizon Comments"); *see also* GN Docket No. 09-191, Nat'l Cable & Telecomms. Ass'n. Comments at 49-64 (Jan. 14, 2010) (proposed rules would violate First Amendment).

[10] The April 6 decision of the D.C. Circuit in *Comcast v. FCC* bolsters this position, as the court held that "the Commission's ancillary authority is really incidental to, and contingent upon, *specifically delegated powers under the Act*." *Comcast v. FCC*, No. 08-1291, slip op. at 21 (D.C. Cir. Apr. 6, 2010) (emphasis in original, quotations and citations omitted). By contrast, Commissioner Meredith Attwell Baker previously has stated that Title I does enable the Commission to regulate Internet access service. Remarks of Commissioner Meredith A. Baker, State of the Net Conference (Jan. 26, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295978A1.pdf.

[11] AT&T Comments at 214.

[12] Comcast Comments at 24-25. As noted in fn. 10, *supra*, Comcast prevailed with this argument before the D.C. Circuit in *Comcast v. FCC*.

Google, Amazon, and eBay.[13] These comments artfully ignore the irrefutable fact that last-mile IAP connections remain in the hands of a very few facility owners who today face neither scrutiny nor restriction in the manner in which they provision Internet access. Given the state of network buildout, convergence, and integration, the refrain of "do nothing" — often presented as "first do no harm" but having the same meaning[14] — cannot be the correct policy choice for the Commission.

Adoption of clear rules which clarify mandates that long have applied to telecommunications will not do harm. To the contrary, as several technology company founders and CEOs told the Commission, "[a]n open Internet fuels a competitive and efficient marketplace … yielding maximum growth and economic opportunity."[15] Adoption of the Open Internet principles thus will not impose onerous new regulations on the paths that lead Americans to the Internet, but rather will simply "ensure that the qualities that have made the Internet so successful are protected."[16] And as several longtime Internet investors aptly stated in this docket, "Net Neutrality policy is pro-investment, pro-competition, and pro-consumer."[17]

CCIA urges the Commission to reject calls by commenters to adhere to the tenets of antitrust for determining whether Open Internet rules are necessary; of course those commenters

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[13] AT&T Comments at 27-29; *see also* Verizon Comments at 13-14.

[14] AT&T Comments at 1.

[15] GN Docket No. 09-191, Letter from Jared Kopf, Chairman & President, AdRoll.com, *et al*. to Julius Genachowski, FCC Chairman (Oct. 19, 2009) (submitted under letter from Open Internet Coalition dated November 24, 2010) ("Tech Investor Letter").

[16] *Id*.

[17] GN Docket No. 09-191, Letter from Immad Akhund, Co-Founder, Heyzap, *et al.* to Julius Genachowski, FCC Chairman (Oct. 21, 2009) (submitted under letter from Open Internet Coalition dated November 24, 2010).

assert that those tenets do not indicate that such regulatory action is warranted.[18] Happily, the Commission's statutory mandate to regulate communications facilities and services is not constrained to antitrust analysis.[19] Rather, the Commission's authority is to serve the public interest and it is endowed with broad discretion to decide how best to achieve that goal.[20] CCIA urges the Commission to exercise that authority and discretion now — and not wait for full market failure as some IAPs advocate it should do — to ensure that American broadband subscribers continue to enjoy robust and unrestricted access to the Internet.

II. THE COMMUNICATIONS ACT OF 1934 AUTHORIZES THE COMMISSION TO ADOPT THE PROPOSED RULES FOR PRESERVING ACCESS TO THE INTERNET

CCIA adds its voice to commenters urging the FCC to classify broadband Internet access service as a Title II service.[21] This determination is well within the Commission's authority

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[18] GN Docket No. 09-191, CTIA Comments at 49-53 (Jan. 14, 2010).

[19] *E.g.*, *Application of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, WT Docket No. 08-95, Mem. Opinion & Order and Decl. Ruling, 23 FCC Rcd. 17444, 17461 ¶ 28 (2008) ("Our competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles. The Commission and DOJ each have independent authority to examine the competitive impacts of proposed communications mergers and transactions involving transfers of Commission licenses, but the standards governing the Commission's competitive review differ somewhat from those applied by DOJ.").

[20] *E.g.*, *M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 558 (D.C. Cir. 2009) ("the Commission's judgments on the public interest are 'entitled to substantial judicial deference.'") (affirming FCC order) (quoting *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981)); *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 222 (3d Cir. 2007) ("It is well-settled that 'the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference' because 'the weighing of policies under the public interest standard is a task that Congress has delegated to the Commission.'") (denying petition for review) (quoting *WNCN Listeners Guild*, 450 U.S. at 596).

[21] *See, e.g.*, GN Docket No. 09-47, Public Knowledge Reply Comments (Jan. 26, 2010) ("Public Knowledge NBP Reply Comments"); GN Docket No. 09-191, Google Comments at 43 (Jan. 14, 2010) ("Google Comments").

and this authority remains intact despite the D.C. Circuit's ruling in *Comcast v. FCC*, because the Court had no opportunity to rule on whether the Commission had authority under Title II (as opposed to Title I) to implement the Commission's proposed Internet policy.[22] Indeed, as Google noted in its comments, "[t]he FCC has always possessed explicit and clear Title II authority over the transmission component of broadband provider services."[23] The Commission does not lose this authority simply because it has chosen not to exercise it in the recent past. As Public Knowledge explained in its reply comments to *NBP Public Notice #30*:

> The Commission based its decision to classify broadband as an information service on several factors: the level of integration of the transmission and information processing components, the expectation that new facilities-based competitors would emerge, and the conclusion that the Commission retained adequate authority under Title I to protect consumers.[24]

CCIA joins with these other commenters in calling upon the Commission to examine whether changes in technology and market conditions have called these conclusions into doubt.

The Commission retains full authority to revisit the matter of how to regulate broadband access services so long as it adequately justifies its decision. As the U.S. Supreme Court acknowledged in its *Brand X* decision, "if the agency adequately explains the reasons for a reversal of policy, change is not invalidating, since the whole point of *Chevron* is to leave the

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[22] *See Comcast*, slip op. at 33-34 (noting that the FCC had failed to assert appropriately any basis for Title I ancillary authority based on its Title II responsibilities, and not examining whether Title II provided its own source of authority for implementing the Commission's order); *see also* Appropriate *Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, 20 FCC Rcd. 14986, 14988 ¶ 4 (2005).

[23] Google Comments at 43 n.132.

[24] Public Knowledge NBP Reply Comments at 2 (citing *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling & NPRM, 17 FCC Rcd. 4798, ¶¶ 43, 73, 75-79, 95 (2002) (hereinafter *Cable Modem Order*)).

discretion provided by the ambiguities of a statute with the implementing agency."[25] In a more recent case, the Supreme Court further clarified that it has never "implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance," and that while the agency must "show that there are good reasons for the new policy … it need not demonstrate …that the reasons for the new policy are better than the reasons for the old one."[26]

The *Cable Modem Order* and the language of the *Brand X* decision leave no doubt that the Communications Act of 1934, as amended ("the Act"), grants the Commission broad discretion to determine how broadband access services should be classified. In the *Cable Modem Order*, the FCC determined that in offering broadband services, a broadband cable provider necessarily "offers" a telecommunications service.[27] The Supreme Court's decision in *Brand X* turned in large part on whether this determination was a permissible reading of the Act. In upholding the FCC's decision not to classify cable broadband services as telecommunications services, the Court explicitly found that the definition of "telecommunications service" in the Act is ambiguous, and that the FCC's decision on how to interpret that term is therefore entitled to deference.[28] Given the deference to which the FCC is entitled and the discretion given an agency to reverse its previous decision, clear authority exists for the Commission to revisit the *Cable Modem Order* and find that the provision of broadband Internet access services constitutes a "telecommunications service" that can be regulated under the Commission's Title II authority.

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[25] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs..*, 545 U.S. 967, 981 (2005) (hereinafter *Brand X*).

[26] *FCC v. Fox Televisions Stations, Inc.*, 556 U.S. __, 129 S. Ct. 1800, 1810-11 (2009).

[27] *Cable Modem Order* ¶¶ 37-47.

[28] *Brand X*, 545 U.S. at 989-90.

A. The Commission Should Apply Title II to Two-Way Internet Access Over Any Tangible Transmission Facility, Including Wireline and Cable Facilities

Title II of the Act governs the provision of telecommunications services, and imposes common carrier regulations on all carriers offering telecommunications to the public for a fee. In enacting Title II, Congress recognized that the telecommunications industry is a network industry requiring cooperation among network operators to ensure maximum benefits for the public, and that regulators cannot treat it as a normal marketplace for services if the network as a whole is to thrive.[29] Today, more than seventy years after the passage of the Act, the existence of clear rules governing the practices of common carriers remains essential to ensuring that America's communication network continues to be "a foundation for economic growth, job creation, global competitiveness, and a better way of life."[30]

"Telecommunications" is defined in the Act 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."[31] Essentially, telecommunications is the process by which information (voice or data) sent by one end user to another end user makes that journey.[32] Title II regulation exists to ensure that the data sent by one end user to another is not unfairly delayed, distorted, or blocked by the companies that own the wires or wireless connections over which the data travels (*i.e.*, the "telecommunications carriers"). Rather, it ensures that all carriers treat the data flowing over their network in a consistent, even-handed, and competitively neutral manner.

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[29] Phillip J. Weiser, *The Future of Internet Regulation*, 43 U.C. DAVIS L. REV. 529, 545 (2009).

[30] *National Broadband Plan* at xi.

[31] 47 U.S.C. § 153(43); *see also* 47 U.S.C. § 153(46) (defining "telecommunication service" as "the offering of telecommunications for a fee directly to the public").

[32] The content of the information is immaterial to Title II regulation.

The medium by which information is transmitted to and from the Internet is now irrelevant. The wireline, wireless, cable, and satellite companies all are striving to provide American consumers with the same service: a wide, robust pathway to and from the Internet. Those pathways, simple transmission links, enable an end user to send and receive content of his choosing between points of his choosing. Thus, the Commission's focus in this proceeding should remain steadfastly on the functionality of what IAPs provision rather than the type of facility — be it DSL, CATV, or 3G or 4G spectrum — for the entire communications industry has experienced a "rapid convergence of multiple services onto a single IP platform."[33]

Those who provision transmission paths to the Internet — the IAPs — regardless of the medium, necessarily exert, or can exert, total control over end users' ability to use them. This control may be used to serve the particular business interests of the IAPs rather than the needs or preferences of end users. These concerns reach beyond the traditional wireline voice market for telecommunications and into the data-driven Internet market. As Google has commented, "[the] sharing of last mile connectivity between 'private' uses and the 'public' Internet can raise concerns about whether consumers are being well served by the profit-driven business decisions of platform owners."[34] The Tech Investor Letter also expresses the undeniable fact that "network operators" have the ability "to close network platforms or control the applications market by favoring certain kinds of content[.]"[35] These concerns were validated by Comcast's decision to interfere with peer-to-peer traffic on its Internet network, and the ensuing court battle between Comcast and the FCC

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33 AT&T Comments at 41.

34 GN Docket No. 09-51, Google Reply Comments at 19 (July 21, 2009).

35 Tech Investor Letter at 1.

to determine the Commission's authority to restrict and/or prohibit this practice.[36] CCIA agrees with Public Knowledge that the Commission's earlier attempt to rely on Title I for its authority to regulate these types of network management practices "creates uncertainty for the Commission and imperils the goals of the National Broadband Plan."[37]

In order to ensure open access to the Internet and expand the benefits of broadband services to all Americans, the Commission must have authority to adequately regulate Internet access connections. CCIA emphasizes that this action would not constitute "regulating the Internet" as some have suggested. That result is neither appropriate nor advocated here. Rather, what the Commission can and should do, and is expressly authorized to do, is ensure that the telecommunications paths to the Internet are properly provisioned; these bit stream paths are functionally no different from the end user's perspective than the loops that carry plain old telephone traffic and which the Commission has regulated since 1934. What is at issue in this proceeding is broadband telecommunications service, and for any commenter to suggest that those facilities are outside the Commission's authority is specious. All the Commission is asking is for IAPs to behave in a reasonable and nondiscriminatory manner. No IAP reasonably can quarrel with that goal.

Continued regulation of broadband Internet services under Title I poses a host of other problems. For example, as Free Press points out, use of the Universal Service Fund to support broadband rollout could strain the Commission's Title I authority, because section 254 of the Act limits USF support to "telecommunications services."[38] Other items on the Commission's

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36 *See Comcast v. FCC*, No. 08-1291 (D.C. Cir.).

37 Public Knowledge NBP Reply Comments at 5.

38 GN Docket No. 09-191, Letter from Ben Scott, Policy Director of Free Press, to Julius Genachowski, FCC Chairman (Feb. 24, 2010).

agenda also might push the limits of the Commission's Title I authority, including truth-in-billing reform, privacy regulation, wireless data roaming requirements, and regulations designed to promote broadband adoption by persons with disabilities.[39] Ultimately, it is unclear whether the FCC can achieve its goals while limited by the confines of Title I authority—however, attempting to do so will certainly result in a tenacious legal battle where, even if the FCC is ultimately successful, the Commission will still face significant legal constraints.

In contrast, relying on Title II with forbearance from outdated common carrier regulations conveys a wide range of benefits. As an initial matter, the Commission will have clear authority to require IAPs to offer their services to all comers without discrimination.[40] In addition, as Public Knowledge points out, "the Commission can stop trying to shoehorn [broadband] services into some Title II responsibilities that the Commission has determined should remain regulated."[41] Title II authority over IAPs also would give the Commission power to ensure that IAP terms of service are "just and reasonable," impose carrier-of-last-resort obligations, and assess universal service fund contributions.[42] In addition, "more competitors will have access to networks they wouldn't have otherwise, leading to more competition, lower prices and more innovation," assuming the regime is strictly enforced.[43] Given the importance of broadband services to the well-being of the nation as a whole, such regulation is both appropriate and

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39 *Id.* at 3.

40 Susan Crawford, *Transporting Communications*, 89 B.U.L. REV. 871, 878 (2009) (discussing the general obligations of carriers subject to "common carriage" regulations).

41 GN Docket No. 09-51, Public Knowledge *et al.* Comments at 24 (June 8, 2009).

42 *See* 47 U.S.C. §§ 201(b), 254(d); 47 C.F.R. § 54.203.

43 *Id.* at 25.

necessary to protect the public interest.[44]

B. The Commission Should Require That All Two-Way Internet Communications Services Must Be Made Available on a Standalone Basis

As part of its exercise of Title II authority over IAPs, the Commission should explicitly recognize and require that IAPs offer the transmission component of their information services on a standalone basis. As a practical matter, this is not a departure from the present-day reality for most customers. Customers of broadband providers such as Comcast, Verizon, and Time Warner do not perceive the services they purchase as providing access to the information stored on the private networks of those companies—rather, they are paying for high-speed access to the Internet as a whole (*i.e.*, the transmission component). In the *Cable Modem Order*, the Commission concluded that broadband Internet access should be construed as the offering of an "information service" inseparable from its transmission component because the IAPs' service offerings, "including e-mail, newsgroups, and the ability to create a web page" as well as Domain Name Server ("DNS") services, were fully integrated into the service offering as whole.[45] And there were hundreds of other independent information services "riding on top" of the ISP's physical network connections. Up until 2002, viewing ISPs' data transmission as part of an integrated "information service" may have been reasonable, but today this simply is no longer the case. With respect to e-mail, web-based e-mail providers have risen to prominence, with Google's

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[44] Crawford, 89 B.U.L. REV. at 883 (stating that common carriage regulation is appropriate to carriers providing services "affecting the public interest"); *see also* Thomas B. Nachbar, *The Public Network*, 17 J. COMM. L. & POL'Y 67, 83 (2008); Statement of Chairman Genachowski, March 2010 Open Agenda Meeting, "A National Broadband Plan for Our Future" (Mar. 16, 2010) (stating that broadband is "essential to our global competitiveness[,]…for opportunity in America[,]…and to solving so many of the challenges facing our nation – including education, health care, energy and public safety."), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296911A1.pdf.

[45] *Cable Modem Order* ¶¶ 37-38.

Gmail, Yahoo! Mail, Microsoft Hotmail, and AOL E-mail combining for more than 206 million unique U.S. visitors in a single month in 2009.[46] Similar third-party services exist for individuals who choose to browse newsgroups or to have their web pages hosted, and end users can now use third-party DNS hosting services to surf the web without using any information service provided by their IAP.[47] Even if, as the largest IAPs allege, "millions of consumers continue to view ISP-provided e-mail and similar applications as integral components of the broadband Internet access service offered to them," the widespread availability of other options conclusively demonstrates that e-mail services *are not* integrated parts of the broadband access service, but rather can be hosted and provided to end users by any company on the Internet — even those that are not IAPs.[48] The existence of these third-party alternatives essentially neutralizes the technical findings of both the FCC in the *Cable Modem Order* and the Supreme Court in *Brand X*, and suggests that most IAPs truly are providing a standalone telecommunications service as part of their bundled offerings.[49]

Despite protests to the contrary by broadband IAPs, requiring that two-way Internet access is offered on a standalone basis will neither limit the ability of IAPs to provide additional services nor cause mass confusion in the Internet access marketplace. Rather, the sole effect, at least initially, would be to increase the number of options available to consumers and to provide

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[46] Eric Schonfeld, *Gmail Nudges Past AOL Email in the U.S. To Take No. 3 Spot*, TECHCRUNCH (Aug. 14, 2009), *available at* http://techcrunch.com/2009/08/14/gmail-nudges-past-aol-email-in-the-us-to-take-no-3-spot/.

[47] For example, Google (http://code.google.com/speed/public-dns/) and OpenDNS (http://www.opendns.org) offer DNS services that end users can use as an alternative to the DNS service provided by their broadband service provider.

[48] *Contra* GN Docket No. 09-191, Letter from NCTA, CTIA, USTA, TIA, ITTA, Verizon, AT&T, Time Warner, & Qwest, to Chairman Genachowski at 7 (Feb. 22, 2010).

[49] *Cable Modem Order* ¶¶ 37-38; *Brand X*, 545 U.S. at 999-1000.

the Commission greater flexibility in regulating the physical transmission connection between the end user and the Internet. Although the Commission *could* eventually choose to impose open access or additional interconnection obligations upon IAPs, these obligations do not necessarily follow from a requirement that the IAPs offer the transmission component of their broadband services as a standalone service.[50] As such, although requiring that two-way Internet communications be provided as a standalone service would provide the Commission with additional regulatory tools, it does not necessitate the use of those tools or mandate specific outcomes. These outcomes will ultimately be determined through separate policy analysis and rulemaking proceedings.

C. Two-Way Internet Communications Via Radio and Satellite Spectrum Should Be Subject to Title II Regulation

The same logic that applies to wireline IAPs also applies to wireless IAPs. As Chris Riley, counsel to Free Press, explains, "there is only one Internet, regardless of the technology used in the last mile… [and] consumers don't distinguish between access provided via Internet devices, applications and network technologies."[51] Neither should the nation's broadband policies.

As the National Broadband Plan revealed, 74% of all new personal computers sold today are laptops.[52] In addition, there were approximately 47 million Internet-capable

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[50] 47 U.S.C. § 160 (allowing the Commission to forebear from enforcing certain title II regulations when the FCC determines that sufficient competition exists); *see also Cable Modem Order* ¶¶ 43-45 (waiving the open access requirements for ISPs in the event that the information service provided by broadband providers is deemed to contain a telecommunications service within it).

[51] Chris Riley, *FCC: Apply the Same Rules to Wired and Wireless Networks*, SaveTheInternet.com (Jan. 25, 2010) *available at* http://www.savetheinternet.com/blog/10/01/25/fcc-apply-same-rules-wired-and-wireless-networks.

[52] *National Broadband Plan* at 18.

smartphones sold in the United States in 2009 alone.[53] The desire of consumers for mobility is likely to increase over the coming years, and, as users demand increased mobile Internet access, the distinction between mobile and fixed Internet access services eventually will blur and even disappear. Title II thus should apply equally to wireless broadband providers given the similar functionality of these technologies.

In suggesting such regulatory parity, CCIA is not suggesting that wireless networks have the same capacity and technical characteristics of wireline or cable networks. CCIA is sympathetic to the concerns of wireless carriers and CTIA that the challenges of signal attenuation and wireless spectrum management may yield the result that the six principles of the NPRM do not apply to wireless carriers *in all the same ways* that they apply to wireline providers. Moreover, CCIA recognizes that smaller wireless carriers, such as T-Mobile, face these challenges in a deeper way than the largest carriers: Verizon and AT&T. For example, these two largest communications carriers in the country dominate the provision of wireless backhaul for CMRS traffic, and all other smaller carriers must purchase backhaul from them.

For these reasons, the Commission may consider defining the "reasonable network management" practices caveat differently for wireless services. The Commission may presume that some network management practices are presumptively reasonable specifically for wireless carriers. Alternatively, as CCIA mentions above, the vehicle of forbearance is always available to carriers or classes or carriers to which certain regulations need not or should not apply. CCIA recognizes that striving for technologically neutral regulatory parity does not equate to one-size-fits-all regulation. Nor, however, do allowances for differences in network capability equate to exempting an entire industry segment from the Open Internet principles altogether.

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[53] *Id.*

Finally, treatment of wireless broadband providers under the Commission's Title II authority will not necessarily limit the ability of wireless providers to protect their networks. As with any Title II regulated carrier, the chief regulatory obligation placed upon a wireless IAP will be the obligation that it show that its practices are "just and reasonable."[54] If, as wireless carriers have assured the Commission, their network management practices are reasonable, then common carrier status will place no greater burden upon them than Title I does.

D. An IAP's Provision of Content, Such as Video Streaming, Should Be Subject to Limited Regulation to Prevent Discriminatory Treatment

CCIA generally shares the view of other commenters that the Open Internet rules proposed by the Commission should not extend to IP-enabled application providers,[55] and that the focus of this proceeding is properly constrained to those entities that provide access to the Internet, and to the extent they are providing such access. Nevertheless, CCIA is concerned that the proposed exceptions for "managed or specialized services" might inadvertently undermine the Commission's laudable goals. Accordingly, CCIA urges the Commission to avoid creating an exception for this poorly defined class of services and, to the extent the Commission does create any such exception, the Commission should nevertheless impose limited regulations on it through its Title I jurisdiction in order to ensure that the goals expressed in the NPRM are properly effectuated.

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[54] 47 U.S.C. § 201(b).

[55] *See, e.g.*, GN Docket No. 09-191, Voice on the Net Coalition Comments at 1 (Jan. 14, 2010) ("The VON Coalition opposes any application of the proposed rules to IP-enabled applications and services because the market for such applications and services is highly competitive. . . ."); GN Docket No. 09-191, Skype Communications S.A.R.L. Comments at 20 (Jan. 14, 2010) (". . .the proposed rules should not apply to software applications used with, content provided over, or devices attached to broadband Internet access networks.").

The Commission must protect both consumers and application providers from any unfair, discriminatory, or anticompetitive practices of IAPs that may also have incentive to favor certain affiliated application providers over competing providers. In this regard, CCIA shares the view of those that have raised concerns about the proposed exception for Managed or Specialized Services contained in the NPRM.[56]

The class of services discussed in the NPRM for "managed or specialized services" is vague and undefined. For example, it is unclear which services are in this proposed category. Though the NPRM discusses the possibility that one-way video or VoIP services provided to individual consumers may fall within this category, CCIA generally understands this term to have been reserved for enterprise services provided to sophisticated business consumers. And, without clarity of definition, the Commission runs the risk that this class of services may be defined either so broadly as to essentially excuse all IAPs from the Open Internet rules, or, on the other hand, so narrowly that Commission will be left in the position of reviewing IAP business plans on a case-by-case basis and thus imposing a hyper-regulatory, heavy burden on IAPs. Adopting the "managed services" exception thus could result in the perverse consequence of micromanaging Internet access.

Due to the lack of clarity regarding the scope of any proposed exceptions, CCIA believes it is premature to exclude Managed or Specialized Services from application of the proposed rules. Rather, CCIA urges the Commission to implement the proposed rules, with those

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[56] *See* NPRM ¶¶ 148-153; *see also* GN Docket No. 09-191, Vonage Holdings Corp. Comments at 27-29 (Jan. 14, 2010) ("Vonage urges the Commission to proceed cautiously in this area to ensure that any exemption granted for Managed or Specialized Services not undermine the Commission's goals of promoting innovation and competition."); GN Docket No. 09-191, Netflix, Inc. Comments at 9-10 (Jan. 14, 2010) ("The potential category of 'managed services' discussed in the NPRM is of concern, particularly if this category of services is exempt from the openness or nondiscrimination provisions of the rules.").

revisions previously proposed by CCIA,[57] and then undertake further analysis to determine whether forbearance of some or all of the proposed rules is appropriate for certain classes of clearly defined service. This process will allow the Commission to gather the additional facts necessary to craft a suitable definition and to ensure that any such forbearance is done with a full understanding of the potential consequences.

To the extent that the Commission feels it must consider adopting an exception for Managed or Specialized Services, CCIA believes it is imperative that the Commission carefully tailor this exception. For example, CCIA believes that this category of services should meet at least the following criteria: (1) products or services provided by an IAP; (2) through the Internet; (3) for a fee; (4) that is assessed independently from any fees assessed by that IAP to the user for basic broadband Internet access. Thus, to be considered a Managed or Specialized Service, and therefore entitled to any deviation from the Open Internet rules, the Commission should ensure that the service is an independent offering that may be accepted or rejected by the consumer or small business, without consequence to the user's ability to receive unfettered access to the Internet. This definition would also ensure that the Commission does not inadvertently apply regulation to content and application providers that lack control over the consumer's Internet connection.

Again, assuming an exception for Managed or Specialized Services is eventually adopted, CCIA would also urge the Commission to impose only limited regulation on this class of

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[57] Specifically, CCIA suggested that the proposed caveats relating to compliance with the needs of law enforcement, NPRM ¶¶ 143, 146, should be made somewhat more narrow. CCIA Comments at 29-30. CCIA also suggested that the proposed sixth principle — transparency — should not be qualified by the "subject to reasonable network management" language, because it "can think of no situation where reasonable network management practices would dictate that an IAP's network management practices need not be disclosed." *Id*. at 32.

services under its Title I authority.[58] Namely, the Commission should confirm that its nondiscrimination principle applies to an IAP's provision of a Managed or Specialized Service. In other words, an IAP should not be permitted to discriminate, through "reasonable network management" principles or otherwise, in favor of its Managed or Specialized Services.[59] Thus, to the extent that an IAP offers, for example, affiliated one-way video or VoIP services, those products should not receive preferential treatment by the IAP or be prioritized in a manner that is different from equivalent third-party applications.

In addition, CCIA believes that imposing a transparency requirement on Managed or Specialized Services is also warranted. For example, to the extent that the Commission endorses the use of tiered pricing structures — in which consumers who use more bandwidth pay a premium — a transparency requirement may be necessary to protect consumers. Consider, for example, a hypothetical IAP who creates a tiered pricing model and offers a Managed or Specialized Service in the form of subscription-based video download service. Under this scenario, the IAP would not be incentivized to provide its video download service in the most efficient, lowest bandwidth-consuming manner possible. Rather, for those consumers who would

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[58] The Commission has already held that it has jurisdiction over certain IP-enabled applications, such as VoIP services. *See IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 10245, ¶¶ 26-35 (2005) (discussing the Commission's Title I authority over VoIP applications). CCIA believes that reclassifying broadband Internet access service to fall within Title II and codifying the Open Internet principles, is but minor additional regulation that is within the Commission's authority to effectuate Congress's stated goals.

[59] GN Docket No. 09-191, Sling Media, Inc. Comments at 1-2 (Jan. 14, 2010) ("To preserve openness and accessibility, network operators should not be permitted to deny subscribers access to desirable applications under the guise of network management, while at the same time allowing more bandwidth-intensive applications that are financially tied to a carrier with featured status."); GN Docket No. 09-191, Sony Elecs. Comments at 6 (Jan. 14, 2010) (". . . the Commission should clarify that any non-discrimination requirement extends beyond pricing limitations to encompass economic, contractual, or other conduct by an Internet access provider that has the same effect of limiting consumer demand for or access to Internet bandwidth.").

be required to pay a premium for using excessive bandwidth, the IAP would have a reverse incentive to cause the video transmission to be transmitted in a manner that consumes the maximum possible bandwidth. Thus, the IAP would benefit twice — first through the sale of the subscription and then by triggering increased usage fees for the consumer. Similar detrimental outcomes could result if Managed or Specialized Services are placed completely outside of the Open Internet rules. Such an outcome is certainly not aligned with the Commission's goal of promoting ubiquitous and affordable access to broadband.

In order to ensure that consumers receive the maximum benefit for their Internet dollar, the Commission must guard against allowing IAPs to bypass the goals of the NPRM through a broad exemption for Managed or Specialized Services. The Commission should require IAPs that offer Managed or Specialized Services must provide consumers with adequate information about the services to enable those consumers to make informed choices.

III. THE COMMISSION SHOULD NEITHER ENCOURAGE NOR DEPUTIZE INTERNET ACCESS PROVIDERS TO GENERALLY ENFORCE PRIVATE RIGHTS OR PUBLIC LAW

Certain rightsholder representatives, including the Motion Picture Association of America ("MPAA") and the Recording Industry Association of America ("RIAA"), urge the FCC to "encourage" IAPs to refuse to transmit copyrighted material "if the transfer of that material would violate applicable laws,"[60] claiming that "perfection is not required" when IAPs are deputized to be law enforcers.[61] The risks of imperfect public law enforcement by a private duopoly would be significant. If network management is construed to include generalized,

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[60] GN Docket No. 09-191, MPAA Comments at 11 (Jan. 14, 2010).

[61] GN Docket No. 09-191, RIAA Comments at 13 (Jan. 14, 2010).

proactive law enforcement, IAPs may block important speech and commerce based on ill-informed or improperly motivated accusations.

While requests to deputize IAPs are justified largely by the example of P2P file sharing, there is no indication that the proposed law enforcement would be limited to P2P. Would a broadband provider be permitted, for example, to block Web users from viewing any version of the iconic three-color "Obama HOPE" painting, based upon Associated Press allegations that artist Shepard Fairey infringed a (claimed) AP copyright by using an AP photograph as the inspiration for his work?[62] The notion of IAPs as providers of quasi-judicial injunctive relief against any and all Web content raises troubling prospects of suppressing lawful speech, perhaps even that of the U.S. Government. If a trial court were to subsequently find that Fairey's HOPE painting infringed an AP photo, could a broadband provider block even the Smithsonian's reproduction of the Obama portrait (which now hangs in the National Portrait Gallery), on the Smithsonian website?[63] It is unclear how far the IAP's entitlement to block would extend. Could it block representations of the painting in news stories covering the copyright dispute? Could it block a distance education copyright class where the picture served as an exam question? Although undoubtedly protected by Section 107 of the Copyright Act, each use might be argued to be an unlawful transmission.

If the litmus test for discrimination were alleged unlawfulness, an IAP might also discriminate, in federal circuits not bound by the Second Circuit's decision in the *Cartoon Network v. Cablevision* dispute,[64] against data provided to TiVo-like DVR devices on the basis that the

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[62] Erik Larson, *AP Sues Artist Over Obama 'Hope' Image Copyright*, Bloomberg (Mar. 11, 2010), *available at* http://www.bloomberg.com/apps/news?pid=20601120&sid=aO7SgiQqGWuc&refer=muse.

[63] *Id.*; *see also Now on View: Portrait of President Barack Obama by Shepard Fairey*, NATIONAL PORTRAIT GALLERY, *available at* http://www.npg.si.edu/collection/obamaportrait.html.

[64] *Cartoon Network LP LLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

devices enable users to engage in conduct that a federal court might find to infringe federal copyright.[65] This might be particularly attractive if the service competes with a similar offering made by the IAP.

Alternatively an IAP might elect to block targeted political satire sites, such as 'glennbeckrapedandmurderedayounggirlin1990.com', on the basis that the domain violated intellectual property rights of publicity or defamed the character of conservative pundit Glenn Beck.[66] Although a dispute resolution panel of the World Intellectual Property Organization (WIPO) cleared the domain registrant of cybersquatting charges, finding that the satire site was unlikely to confuse Internet users,[67] state or federal trademark claims might have been alleged against the site.

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[65] Disruptive technologies are frequently tarred with the brush of unlawfulness. Before it was blessed by the Supreme Court in *Sony Corp. v. Universal City Studios*, using a VCR was famously equated to murder by an industry representative in a Congressional hearing. *See* Nate Anderson, *100 Years of Big Content Fearing Technology — In Its Own Words*, ARS TECHNICA (Oct. 11, 2009), *available at* http://arstechnica.com/tech-policy/news/2009/10/100-years-of-big-content-fearing-technologyin-its-own-words.ars. For similar reasons, certain rightsholders attempt to mislead the Commission that infringement is "theft," notwithstanding the fact that a majority of the Supreme Court has ruled that "interference with copyright does not easily equate with theft, conversion, or fraud. … The infringer invades a statutorily defined province… [b]ut he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use." *Dowling v. United States*, 473 U.S. 207, 217-18 (1985) (citations omitted).

[66] Nate Anderson, *Can a Mere Domain Name Be Defamation? Glenn Beck Says Yes*, ARS TECHNICA (Sept. 9, 2009), *available at* http://arstechnica.com/tech-policy/news/2009/09/can-a-mere-domain-name-be-defamation-glenn-beck-says-yes.ars; Eriq Gardner, *Glenn Beck Satire Site Fights Back*, ADWEEK (Sept. 29, 2009), *available at* http://www.adweek.com/aw/content_display/news/agency/e3i49ed8b00bbe771aa3d0035e57251257f.

[67] *Mercury Radio Arts, Inc. and Glenn Beck v. Isaac Eiland-Hall*, WIPO Case No. D2009-1182, Oct. 29, 2009, *available at* http://www.wipo.int/amc/en/domains/decisions/html/2009/d2009-1182.html; *see also* Chloe Albanesius, *WIPO Rules in Favor of Glenn Beck Parody Site*, PC MAGAZINE (Nov. 6, 2009), *available at* http://www.pcmag.com/article2/0,2817,2355560,00.asp.

Indeed, if discrimination is permitted against any allegedly "unlawful" activity, then discrimination may extend well beyond IP rights infringement. Would IAPs be permitted to block access to any website that it deemed or that a user alleged to violate the FTC Act (15 U.S.C. §§ 41-58), for engaging in "unfair or deceptive acts or practices in or affecting commerce," or to violate local obscenity standards? In each case, the underlying behavior or content may be, in a broad and indefinite sense, alleged to be "unlawful." Such an allegation may come from a party benefiting from its suppression — perhaps even the IAP itself.

On occasion, Congress has explicitly directed IAPs to respond to law enforcement requests. In the nearly unique case of the Digital Millennium Copyright Act (DMCA), Congress encouraged IAPs to respond to private entities' requests for relief relating to the Copyright Act, albeit with safeguard provisions giving users an opportunity to be heard as well as ensuring rightsholder accountability for any misrepresentations.[68] Rarely, if ever, has Congress deputized IAPs to proactively adjudicate and enforce laws of the United States — much less all of them *at one time*. The Commission should decline invitations to venture down this road.

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[68] Notwithstanding the fact that DMCA compliance is voluntary, Congress acknowledged and took precautions against abuse of the DMCA by purported rightsholders who would misrepresent rights in order to suppress the speech of another. *See* 17 U.S.C. § 512(c) & (f).

CONCLUSION

For all these reasons, the Commission has both the authority and the duty to adopt rules in this proceeding that will ensure a procompetitive and robust environment for Internet access while allowing network operators to maintain optimal functionality and network security.

Dated: April 26, 2010

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