

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

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

**REPLY COMMENTS OF XO COMMUNICATIONS, LLC**

Heather Burnett Gold  
Senior Vice President

Lisa R. Youngers  
Vice President, Federal Affairs

XO COMMUNICATIONS, LLC  
13865 Sunrise Valley Drive  
Herndon, VA 20171  
(703) 547-2000 tel

Donna N. Lampert  
E. Ashton Johnston  
Justin L. Faulb

LAMPERT, O'CONNOR & JOHNSTON, P.C.  
1776 K Street NW, Suite 700  
Washington, DC 20006  
(202) 887-6230 tel  
(202) 887-6231 fax

*Counsel for XO Communications, LLC*

April 26, 2010

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY _____	1
I. RULES ARE NEEDED TO PRESERVE THE OPEN INTERNET _____	4
A. Codified Rules Will Best Promote Certainty _____	5
B. The <i>Policy Statement</i> Principles Are Not Sufficient _____	7
II. THE FCC SHOULD EXERCISE JURISDICTION OVER LAST-MILE BROADBAND ACCESS SERVICE UNDER TITLE II OF THE COMMUNICATIONS ACT _____	8
A. Assumptions Underlying the FCC’s Conclusions in the <i>Wireline Broadband Order</i> and the <i>Cable Modem Order</i> Warrant a Fresh Look _____	10
B. There Are Additional Compelling Reasons to Regulate Broadband Access Service Under Title II _____	16
III. THE RECORD SUPPORTS ADOPTION OF THE PROPOSED COMPETITIVE OPTIONS RULE _____	17
IV. THE COMMENTS AFFIRM THAT MANAGED SERVICES RIDING ON BROADBAND INFRASTRUCTURE REQUIRE FURTHER STUDY _____	20
CONCLUSION _____	22

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

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

**REPLY COMMENTS OF XO COMMUNICATIONS, LLC**

XO Communications, LLC (“XO”), through its undersigned counsel, hereby respectfully files these Reply Comments in response to the October 22, 2009, Notice of Proposed Rulemaking proposing to codify rules preserving the open Internet.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

There is nothing new or radical about the course the Commission has proposed to follow to oversee today’s last-mile broadband access market. Far from “regulating the Internet,” as some have asserted, the proposed rules would narrowly target agency oversight and action to last-mile broadband transmission – the Commission’s core historical role. As such, the focus of this proceeding is relatively limited, addressing only broadband transmission and access functions, not Internet content or applications.

The proposed rules are critical to allow all Americans to continue to enjoy the benefits of unfettered access to the Internet and greater competition among providers of broadband services, networks, applications, and devices. In light of the recent *Comcast* decision,<sup>2</sup> the 2005 Internet

---

<sup>1</sup> *In the Matter of Preserving the Open Internet*, GN Dkt. No. 09-191, Notice of Proposed Rulemaking, 24 FCC Rcd. 13064 (2009) (“NPRM”).

<sup>2</sup> *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir., Slip op., Apr. 6, 2010) (“*Comcast*”).

*Policy Statement*<sup>3</sup> no longer can be held out as serving the interests of consumers and competitors against broadband provider practices that violate the *Policy Statement* principles. The record here is clear that Internet users and consumers, and network, content, application, and service providers, seek and deserve regulatory certainty, with clear rules and effective government oversight. Contrary to arguments of incumbent broadband providers, codified rules, not the *status quo* of unenforceable policies, will lead to greater certainty and transparency about provider practices and will result in greater broadband network and services investment, innovation, and adoption.

The NPRM asks whether the Commission should exercise its authority under Title I to adopt the proposed rules. In light of the *Comcast* decision, and to avoid the uncertainty and delay that would likely result if the Commission were to rely exclusively on Title I authority, XO believes the Commission should reasonably exercise its Title II jurisdiction consistent with providing certainty and balancing an array of public interest considerations. There are compelling reasons for regulating the broadband transmission, or broadband access, component of broadband Internet access services under Title II. The record is clear that the rationales and predictive judgments adopted years ago in support of the agency's belief that Title I authority was sufficient have not survived the passage of time. Robust wholesale competition and additional facilities-based competitors to the wireline/cable duopoly have not emerged; the notion that broadband access service "inextricably intertwines" information processing capabilities and data transmission is not supported by the record, and the Commission's reliance on ancillary jurisdiction to protect consumers has been seriously, if not fatally, undermined.

---

<sup>3</sup> *Appropriate Framework for Broadband Access to the Internet over Wireless Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Policy Statement*, 20 FCC Rcd. 14986 (2005) ("*Policy Statement*").

Established precedent dictates that it is both necessary and appropriate to re-examine those prior judgments in light of the current record and today's facts. It is also relevant that Title II classification of broadband transmission will further the goals of the *National Broadband Plan*<sup>4</sup> by promoting broadband adoption and usage, including allowing the Commission to utilize the Universal Service Fund to support the adoption of broadband services and to pursue other goals relevant to the *National Broadband Plan*. Notably, FCC exercise of its Title II jurisdiction need not entail burdensome, legacy-type regulation; the agency's ability to forbear is broad and the Commission can certainly implement a light regulatory touch along with its oversight.

Given the broad support in the record for the Commission to act to promote competition, investment, and consumer interests, it is also clear the FCC should adopt expressly the proposed Competitive Options rule. The rule is fully consistent with Congressional directives, including promoting the continued development of the Internet and broadband services. By codifying these directives, the Commission will best promote the interests of all interested stakeholders in robust competition for services, networks, content, and applications.

Finally, XO agrees with numerous commenters that the Commission would benefit from greater clarity and a fuller record regarding last-mile providers' "managed" services before deciding whether to apply the Open Internet rules to those services. A more complete record could result in establishment of a workable definition of "managed" services that will support the goals of robust and open broadband Internet access services to the public, and also would allow the Commission to give guidance as to what statutory and regulatory rules apply to such services.

---

<sup>4</sup> See *In the Matter of A National Broadband Plan for Our Future*, Connecting America: The National Broadband Plan, GN Dkt. 09-51 (rel. Mar. 16, 2010) ("*National Broadband Plan*").

The time for FCC action on the proposed rules is now. Assertion of the Commission's clear statutory authority will promote a clear, stable and competitive environment that will serve best all Americans and create a solid footing for our collective broadband-based future.

**I. RULES ARE NEEDED TO PRESERVE THE OPEN INTERNET**

The Commission set a clear but narrow course in this proceeding, which represents “the next step in an ongoing and longstanding effort” at the agency to preserve the openness of the Internet.<sup>5</sup> AT&T, Verizon, and others, however, have approached this proceeding as if adoption of the proposed rules would overturn well-established legal precedent. They assert the FCC is charting a radical new course that would “regulate the Internet,”<sup>6</sup> causing regulatory uncertainty and decreased investment.<sup>7</sup>

There is nothing new or radical about the Commission's proposed “next step.” Far from “regulating the Internet,” the proposed rules would narrowly target agency oversight and action to last-mile broadband transmission – the Commission's core historical role. The initial comments of many last-mile broadband access providers, however, attempt to sow fear and confusion about the purported scope and impact of the proposed rules. In truth, the focus of this proceeding is relatively limited, addressing only broadband transmission and Internet access functions, not Internet services, content or applications. Any disruption resulting from adoption of the rules likely would be solely to anti-competitive business models designed around today's largely duopoly broadband transmission, or broadband access, market structure. The proposed

---

<sup>5</sup> NPRM at ¶2.

<sup>6</sup> *See, e.g.*, Comments of AT&T Inc. (“AT&T”) at 1, 15, 49 (“Imposing any form of nondiscrimination via regulation would be a radical change from past Internet practice.”), 94, 95, 119 (quoting Exh. 1, Faulhaber & Farber at 16); Verizon and Verizon Wireless (“Verizon”) at 66, 84-85, 123; Time Warner Cable Inc. (“Time Warner Cable”) at 63.

<sup>7</sup> *See* Comments of AT&T at 89, 100, 102; Verizon at 51, 66.

rules are needed to allow all Americans to continue to enjoy the benefits of unfettered access to the Internet and greater competition among providers of services, networks, applications, and devices.

#### **A. Codified Rules Will Best Promote Certainty**

Notwithstanding the agency's good intentions, implementing the Internet *Policy Statement* has been problematic. The prior Commission committed to "incorporate the ... [*Policy Statement*] principles into its ongoing policymaking activities"<sup>8</sup> in order "to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers."<sup>9</sup> Subsequent events, however, have shown that the *Policy Statement* principles are of uncertain value as a guarantee against broadband provider practices that violate those principles. The lone FCC decision applying the principles to specific network management practices<sup>10</sup> has been vacated, on the basis that the FCC's exercise of ancillary jurisdiction with respect to the specific practices under review was unlawful.<sup>11</sup> The comments of major broadband providers in this proceeding confirm their view that the *Policy Statement* is of dubious enforceability, and thus is unlikely to constrain broadband provider practices.<sup>12</sup>

Consequently, even if the Commission finds in the future that particular practices violate the *Policy Statement*, consumers, competitors, and the FCC have no mechanism to prevent the

---

<sup>8</sup> *Policy Statement* at ¶5.

<sup>9</sup> *Id.* at ¶4.

<sup>10</sup> *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. 13028 (2008).

<sup>11</sup> *See Comcast*.

<sup>12</sup> *See Comments of AT&T* at 207.

provider from continuing, and no ability to redress any harm caused by, such practices. In short, the *Policy Statement* provides no long-term clarity or certainty.

At the same time, the record here is clear that many, including consumers and network, content, application, and service providers seek and deserve regulatory certainty, with clear rules and effective government oversight. These parties understand that rules will lead to more certainty, not less, and that transparency regarding provider practices will result in greater broadband network and services investment, innovations, and adoption.<sup>13</sup> As the Ad Hoc Telecommunications Users Committee notes, this certainty in turn will “preserve the economic benefits of conducting business over an open and transparent Internet” while substantially decreasing “the uncertainty and risk of anti-competitive behavior associated with concentration and consolidation among the network service providers who supply the Internet’s infrastructure.”<sup>14</sup>

---

<sup>13</sup> See, e.g., Comments of Open Internet Coalition at 40 (openness rules provide basic “rules of the road” that provide certainty to all); Google Inc. (“Google”) at 37 (greater market certainty reduces risk and provides greater incentives for all stakeholders to innovate and invest; all parties need to know the normative standards, mechanisms and policies that are appropriate for addressing network congestion, and which practices are impermissible because they limit the usefulness and benefits of the Internet to the public as a whole); Sony Electronics Inc. (“Sony”) at 3, 8-9 (without the assurance and greater certainty afforded by fully-implemented network neutrality rules, Sony and other similarly situated companies would be hard pressed to continue such extensive outlays into developing Internet-based businesses); Computer & Communications Industry Association at 7 (codifying an open Internet access regime is best solution for guiding existing market forces in a manner that encourages investment, innovation, and subscription; clear rules of the road provide greater certainty); Vonage Holdings Corp. (“Vonage”) at 6 (continued uncertainty will raise the costs for innovators to access credit markets and invest in ideas; adopting rules will improve market certainty and allow application and content providers and broadband network operators alike to move ahead with investment decisions); Netflix Inc. (“Netflix”) at 4 (rules will allow all parts of the industry to continue to innovate at a rapid pace, unburdened by the unnecessary intervention of network operators or regulators); National Association of Telecommunications Officers and Advisors and the Benton Foundation (“NATOA/Benton”) at 7 (transparency is needed to promote consumer understanding and acceptance of broadband services); Free Press at 10 (lack of firm nondiscrimination rules creates market uncertainty) and 85 (FCC must go beyond case-by-case adjudication and increase certainty for all parties); Center for Media & Justice, Consumers Union, Media Access Project, New America Foundation, and Public Knowledge (“Public Interest Commenters”) at 22 (because of the vital importance of the interests at stake, the FCC must adopt rules that will create regulatory certainty).

<sup>14</sup> Comments of Ad Hoc Telecommunications Users Committee at 3.

## **B. The *Policy Statement* Principles Are Not Sufficient**

In sharp contrast to those who argue that the *Policy Statement* principles are vague and unenforceable, others assert that the Commission need not adopt rules because the *Policy Statement* principles are sufficient. AT&T, for example, “contends that the four existing Internet principles, combined with general antitrust enforcement, are sufficient to govern *all* Internet-based services,”<sup>15</sup> and Cox argues that those principles “have served the Internet world well.”<sup>16</sup> Tellingly, USTelecom links its goal of maintaining the regulatory *status quo* with a desire not to alter “today’s balance” in the broadband access marketplace.<sup>17</sup>

But AT&T is well aware that “stick[ing] with ... the *status quo*”<sup>18</sup> will not lead to greater certainty. Comcast’s successful challenge to the FCC’s attempt to enforce the *Policy Statement*, and the current prevalence of questionable network management practices,<sup>19</sup> highlight both the

---

<sup>15</sup> Comments of AT&T at 206 (emphasis in original).

<sup>16</sup> Comments of Cox Communications, Inc. (“Cox”) at 3. *See also* Comments of Qwest Communications International, Inc. at 2 (FCC should “deal with potential market imperfections on a case-by-case basis through enforcement of the [*Policy Statement*] principles....”); National Telecommunications Cooperative Association at 2 (“the ... four principles ... will help to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers”); CenturyLink at 22 (the *Policy Statement* “provides a more than sufficient bully pulpit to help the market discipline broadband service providers.”); Cisco Systems, Inc. (“Cisco”) at 2 (*Policy Statement* has proved to be an effective tool in influencing providers’ actions); USTelecom Association (“USTelecom”) at 39 (asking the Commission not to “change the current course set by the. . . *Policy Statement*”).

<sup>17</sup> Comments of USTelecom at 39.

<sup>18</sup> Comments of AT&T at 1.

<sup>19</sup> *See, e.g.*, Comments of Netflix at 5-6 (discussing broadband providers’ demands that content and applications providers pay for priority access); 4Info, Inc. at 15 (discussing AT&T’s blocking of text messages based on its unilateral determination of “potential copyright infringement”); Verizon at 74 (Verizon’s application store includes applications or content only from providers that share a portion of their revenue with Verizon); Cox at 22-30 (discussing its trial of network congestion management techniques); AT&T at 56 (discussing its use of traffic prioritization technologies). *See also* Comments of Time Warner Cable at 52 (its goal is to “experiment[] with different business models and practices – whether such practices relate to pricing, network management, or any other aspect of their service”); AT&T at 13 (any rules should permit broadband providers to take any action that would “otherwise further a legitimate interest of the network operator”).

broadband providers' control over last-mile transmission facilities and the need for effective oversight and certainty about whether such practices should be permitted. It is disingenuous for these providers to claim that the *status quo* is simultaneously sufficient to address discriminatory practices *and* also beyond the Commission's statutory authority.

## **II. THE FCC SHOULD EXERCISE JURISDICTION OVER LAST-MILE BROADBAND ACCESS SERVICE UNDER TITLE II OF THE COMMUNICATIONS ACT**

The goal of last-mile broadband access providers participating in this proceeding is clear: to offer broadband access services with no meaningful or effective oversight by the Commission. That result plainly would be inconsistent with specific responsibilities of the FCC under the Communications Act to promote and protect the public interest, with Congress' broad grant to the FCC of authority over "all interstate and foreign communication by wire or radio,"<sup>20</sup> and with Supreme Court precedent. Although the FCC's Title I authority to adopt the rules proposed in this proceeding is highly uncertain in light of the D.C. Circuit's recent decision, the FCC lawfully may exercise its jurisdiction over providers of last-mile broadband access services under Title II in a manner consistent with precedent and the public interest. To avoid any uncertainty or delay in resolution that may result if the Commission were to rely exclusively on Title I authority, the Commission should reasonably exercise its Title II jurisdiction consistent with its goals of providing certainty and balancing an array of public interest considerations against private business considerations.<sup>21</sup>

Verizon's assertion that the Commission may not "find that broadband Internet access is a telecommunications service" because, among other things, the Supreme Court affirmed the

---

<sup>20</sup> 47 U.S.C. § 152(a).

<sup>21</sup> See NPRM at ¶50.

*Cable Modem Order*,<sup>22</sup> is erroneous. *Brand X* itself is a clear reminder that the agency is free to set a new course provided it adequately explains its reasons for doing so,<sup>23</sup> as Verizon itself concedes.<sup>24</sup> This Commission is free to revisit prior agency decisions, and indeed must do so to fulfill its statutory public interest obligations.<sup>25</sup> Where, as here, there are compelling reasons for regulating the broadband transmission, or broadband access, component of broadband Internet access services under Title II, and the prior Commission's rationales and predictive judgments have not survived the passage of time, it is necessary and appropriate to revisit the regulatory classification of last-mile broadband transmission.<sup>26</sup>

The Commission has classified the transmission component of broadband Internet access as telecommunications; however, it has declined to impose or has eliminated a requirement that broadband Internet access providers separately offer that component on a common carrier basis. In doing so, the Commission removed broadband transmission from its direct oversight under Title II, relying on policy justifications and predictions that have not borne out. However, the record in this proceeding provides ample justification for the Commission to reevaluate its

---

<sup>22</sup> Comments of Verizon at 95.

<sup>23</sup> The majority in *Brand X* clearly understood that by classifying Internet access service via cable modem service as an integrated offering not subject to Title II, the FCC was deliberately changing course from prior decisions. See *National Cable & Telecommunications Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967, 1000-1001 (2005).

<sup>24</sup> See Comments of Verizon at 125 (acknowledging that it is well settled that so long as the FCC explains its reasons, it is free to exercise its statutory obligations in a manner that may differ from its prior decisions).

<sup>25</sup> See *FCC v. WNCN Listeners' Guild*, 450 U.S. 582, 603 (1981) (citing *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943)).

<sup>26</sup> The fact that an agency had a prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so. *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009). Moreover, an agency need not demonstrate that the reasons for a new policy are better than the reasons for a prior policy; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better. *Id.* at 1811.

predictions and assert Title II jurisdiction over the last-mile broadband transmission component and the practices of all last-mile broadband access providers, which it may reasonably implement consistent with the goal of light regulation and Section 10 forbearance standards.

**A. Assumptions Underlying the FCC’s Conclusions in the *Wireline Broadband Order* and the *Cable Modem Order* Warrant a Fresh Look**

Prior FCC decisions establishing “a new regulatory framework for broadband Internet access services”<sup>27</sup> outside of Title II relied on the expectation that wholesale competition and additional facilities-based competitors to the wireline/cable duopoly would emerge;<sup>28</sup> on a conclusion that, as then provisioned, Internet access enhanced functions and broadband access transmission were a “functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service”;<sup>29</sup> and, significantly, on the understanding that the FCC could exercise ancillary authority under Title I in order to protect consumers’ interests and otherwise further the public interest.<sup>30</sup> Each of these factors now must be re-examined in light of the current record.<sup>31</sup>

---

<sup>27</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, at ¶1 (2005) (“*Wireline Broadband Order*”).

<sup>28</sup> *Id.* at ¶¶ 3, 50.

<sup>29</sup> *Id.* at ¶ 9. See also *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶ 39 (2002) (“*Cable Modem Order*”).

<sup>30</sup> See *Wireline Broadband Order* at ¶ 109 (“the predicates for ancillary jurisdiction are likely satisfied for any consumer protection, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers”).

<sup>31</sup> See Reply Comments of Public Knowledge at 7-13, *National Broadband Plan* Public Notice #30, GN Dkt. 09-51 (filed Jan. 25, 2010) (“Public Knowledge Jan. 25, 2010 Reply Comments”).

First, competition has not emerged for last-mile residential broadband access.<sup>32</sup> The market remains, at best, a duopoly,<sup>33</sup> and may be tending towards a high-speed broadband monopoly.<sup>34</sup> As set forth in the *National Broadband Plan*, the lack of robust intermodal competition highlights the need for the Commission to undertake a significant review of its wholesale access policies:

Because of the economies of scale, scope and density that characterize telecommunications networks, well functioning wholesale markets can help foster retail competition.... Therefore, the nation's regulatory policies for wholesale access affect the competitiveness of markets for retail broadband services provided to small businesses, mobile customers and enterprise customers.<sup>35</sup>

Significantly, the Commission also recognizes the need to revamp the incumbent LEC copper retirement rules in order for competitive providers to offer high-speed broadband access to customers via existing copper loop and Ethernet technology.<sup>36</sup> These rule modifications hold great promise for broadband usage and adoption: “[e]stimates indicate that approximately 80% of business locations are served by copper because they are located in buildings that do not have

---

<sup>32</sup> See *National Broadband Plan* at 37 (“Given that approximately 96% of the [U.S.] population has at most two wireline providers, there are reasons to be concerned about wireline broadband competition in the United States. Whether sufficient competition exists is unclear and, even if such competition presently exists, it is surely fragile.”) The *National Broadband Plan* also finds that wireless broadband is not a competitive substitute for wireline broadband service. See *id.* at 41.

<sup>33</sup> See Comments of Larry Strickling, Assistant Secretary for Communications and Information, United States Department of Commerce at 6, GN Dkt. 09-51 (filed Jan. 4, 2010) (urging FCC to be alert to potential anticompetitive behavior by incumbent providers given slow progress in the development of vigorous competition in local broadband markets to date, and urge an examination of what is at best a duopoly market).

<sup>34</sup> *National Broadband Plan* at 42 (“in areas that include 75% of the population, consumers will likely have only one service provider (cable companies with DOCSIS 3.0-enabled infrastructure) that can offer very high peak download speeds”).

<sup>35</sup> *National Broadband Plan* at 47.

<sup>36</sup> *Id.* at 48-49.

fiber facilities.”<sup>37</sup> As the Commission has observed, where effective competition is lacking, “it is more likely that price and quality discrimination will have socially adverse effects.”<sup>38</sup>

Second, the realities of the Internet and the current marketplace contradict the Commission’s rationale that broadband Internet access constitutes a single fully-integrated information service, rather than components readily identifiable by consumers and broadband providers. The Commission classified Internet access as an information service due in part to its finding that the service combines the offering of powerful computer capabilities with telecommunications.<sup>39</sup> In truth, however, the heart of the primary service that broadband access service providers offer today is mere transmission of an end user’s information to a destination on the Internet.<sup>40</sup> As the Commission has recognized, it is the Internet destination or application that actually offers the end user an information service that provides the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information.”<sup>41</sup>

While the Commission initially classified Internet access as an information service “regardless of whether subscribers use all of the functions and capabilities provided as part of the service (*e.g.*, e-mail or web-hosting),”<sup>42</sup> there is little basis for presuming that such functions and

---

<sup>37</sup> *Id.* at n.86.

<sup>38</sup> NPRM at ¶70.

<sup>39</sup> *Wireline Broadband Order* at ¶14; *Cable Modem Order* at ¶38; *see also Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501, ¶73 (1998).

<sup>40</sup> *See* Comments of Public Interest Commenters at 14 (“No matter what terms are used, the distinction between Internet access functions and Internet applications, or between telecommunications services and information services, mirrors the original distinction between basic and enhanced services. . . . The first service, no matter what name is used to describe it, is the basic underpinning of the Internet.”)

<sup>41</sup> *Wireline Broadband Order* at ¶14.

<sup>42</sup> *Id.* at ¶15.

computer capabilities are anything more than conveniences or add-ons not required for an end user to gain access to the Internet, or more specifically, to a particular Internet destination or application.

In fact, even what may seem to be the most rudimentary of information services related to the Internet, Domain Naming Service (DNS) capability, is not inextricably linked to a broadband access provider's offering of data transmission to access an Internet destination. In the *Wireline Broadband Order*, the Commission reasoned that an "end user of wireline broadband Internet access service *cannot* reach a third party's web site without access to the Domain Naming Service (DNS) capability."<sup>43</sup> But in today's marketplace it is not the case that an end user must utilize its service provider's DNS look-up capability. On the contrary, the information processing elements of many Internet applications, including DNS look-up, have become increasingly disaggregated, and can be and are provided by entities other than the access provider. Furthermore, customers may simply type in an IP address to reach a particular website rather than utilizing any DNS look-up capability, and often choose to use email and website hosting services not provided by their own broadband access provider. To be sure, a broadband access provider may offer similar information services to customers, but a customer's access to any particular Internet destination or application does not depend on utilizing any of those information services from the access provider.

Moreover, residential consumers can readily distinguish between the two components of their broadband Internet access service; thus, to the extent that whether a carrier is providing telecommunications service turns on what the entity is "offering ... to the public," and

---

<sup>43</sup> *Id.* (emphasis added).

customers' understanding of that service,"<sup>44</sup> the Commission's conclusion that customers expect and pay for a single, functionally-integrated service no longer holds.<sup>45</sup> Consumers are offered, and purchase, based on factors such as speed and price, a transmission service that allows them to access the Internet. Consumers certainly understand that a broadband access provider has little or no control over the actual information retrieved or processing capabilities provided by any individual Internet destination or application (other than, for example, the provider's own email or web hosting services). In fact, end users are aware that their experience in terms of the look and feel of a particular Internet destination or application is usually impacted more by the software or Internet browser they use on their own computer than by the broadband provider. In clear contrast, the broadband provider has control over the speed and reliability of the data transmission, which is the essence of telecommunications, to the millions of Internet applications and information services provided by others. It is this transmission over which the FCC should affirm its oversight in order to ensure that no provider implements policies or practices that discriminate or otherwise harm consumers' use of Internet applications.

In short, there is no longer justification for the Commission's conclusion that consumers have no expectation or understanding of the separate services they receive when accessing and using the Internet. Thus, the Commission should reverse its finding that broadband Internet access service is a fully-integrated information service. There is also strong support for the Commission to redefine broadband Internet access as essentially equivalent to the transmission component of its current definition and to classify broadband Internet access service as a whole

---

<sup>44</sup> *Id.* at ¶104.

<sup>45</sup> *See, e.g.*, Public Knowledge Jan. 25, 2010 Reply Comments at 8 ("The rise of web-based email and 'cloud computing' has dramatically diminished the value of the information service offerings and made them easily separable from the underlying transmission.").

as telecommunications, while clarifying that the computer capabilities and content of Internet destinations and applications are information services. However the Commission chooses to unlink the telecommunications transmission component from the information service, once done, the Commission may then assert its Title II jurisdiction over the last-mile broadband transmission component as a common carrier service.

Finally, in both the *Cable Modem Order* and the *Wireline Broadband Order* the Commission relied extensively on its presumed ancillary jurisdiction under Title I (as it believed was confirmed by the *Brand X* Court) to give it continuing oversight over facilities-based broadband Internet access providers' practices.<sup>46</sup> That presumption, of course, has been upended by the D.C. Circuit's rejection of the Commission's reliance on Title I ancillary jurisdiction to enforce the *Policy Statement* with respect to Comcast's network management practices. Given the Commission's fundamental reliance on the presumption of its Title I authority, it is not at all clear that the Commission would have reached the classification decisions it did had its understanding of its jurisdiction been as narrow as indicated by the D.C. Circuit's decision.

Under established precedent, where, as here, there is a sound basis to step in to protect the public interest, the Commission may do so.<sup>47</sup> Given a more complete and current record, including reassessing predictions the FCC made about competition and its ability to rely on its ancillary jurisdiction, the Commission is justified in reassessing its prior rationales for finding

---

<sup>46</sup> See *Cable Modem Order*, Statement of Chairman Michael K. Powell ("The Commission is not left powerless to protect the public interest by classifying cable modem service as an information service. Congress invested the Commission with ample authority under Title I. That provision has been invoked consistently by the Commission to guard against public interest harms and anti-competitive results."); *Wireline Broadband Order* at ¶¶ 63 & n.316, 108-109, 145 ("[W]e . . . reserve the ability to act under our ancillary authority in the event of a pattern of anti-competitive conduct.").

<sup>47</sup> See *Nat'l Ass'n of Regulatory Utility Commc'ns v. FCC*, 525 F.2d 630, 640-43 (D.C. Cir. 1976) *cert. denied*, *Nat'l Ass'n of Radiotelephone Sys. v. FCC*, 425 U.S. 992 (1976), *Nat'l Ass'n of Regulatory Utility Commc'ns v. FCC*, 533 F.2d 601, 609-610 (D.C. Cir. 1976).

that the transmission component of “broadband Internet access” should not be classified as a Title II service.

**B. There Are Additional Compelling Reasons to Regulate Broadband Access Service Under Title II**

While there is sufficient justification to revisit the *Cable Modem Order* and *Wireline Broadband Order* on their own terms, additional reasons exist to do so. A determination that last-mile broadband access transmission is a common carrier service would promote the goals of the *National Broadband Plan*. In particular, broadband adoption and usage will be enhanced as a result of the Commission establishing a clear path for investment and innovation by competitive network providers and applications and service providers.<sup>48</sup> In addition, the Commission may readily utilize the Universal Service Fund to support the adoption of broadband services (and avoid litigation over whether ancillary jurisdiction is sufficient to support broadband with USF contributions),<sup>49</sup> while gathering important data regarding broadband access services that can inform the agency about future policies and directions that best serve the public interest.<sup>50</sup> Reliance on its Title II jurisdiction also would help minimize the potential risk of regulatory “creep” over other Title I information services that will almost certainly raise larger First Amendment and other similar concerns.

Moreover, without the protections of Title II and effective FCC oversight, broadband providers will be free to continue to engage in practices that, at best, are not transparent and

---

<sup>48</sup> See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 § 6001(b)(5) (calling for a National Broadband Plan to stimulate demand for broadband, economic growth, and job creation); *National Broadband Plan* at 10 (“Every American should have affordable access to robust broadband service, and the means and skills to subscribe if they so choose.”).

<sup>49</sup> See *National Broadband Plan* at 140.

<sup>50</sup> Recommendation 4.2 of the *National Broadband Plan*, for example, suggests revamping FCC Form 477 to collect data relevant to broadband availability, adoption, and competition. See *National Broadband Plan* at 43.

cause confusion, and at worst are discriminatory.<sup>51</sup> Today, there is no effective remedy or recourse to address these practices, which undermine important consumer protections and negatively impact investment and innovation. Bringing oversight of these practices under Title II makes available the established protections of Sections 207 and 208 of the Act, which serve to deter and redress discriminatory behavior.

Of course, concluding that the provision of last-mile broadband access service is subject to Title II oversight does not mean that the Commission must or should exercise its jurisdiction in a heavy-handed manner. The goal of creating “Title II-lite” for broadband access services is worthwhile, and the FCC should be mindful to adapt its regulation as facts, technology and markets evolve. The FCC may, consistent with specific facts before it, forbear from applying certain provisions of Title II and otherwise tailor its oversight to changing market conditions.<sup>52</sup> As such, the Commission should not be swayed by providers’ claims of “onerous” regulation.<sup>53</sup>

### **III. THE RECORD SUPPORTS ADOPTION OF THE PROPOSED COMPETITIVE OPTIONS RULE**

Although commenters vary significantly on other proposed rules, the record reflects broad agreement that the Commission should promote competition, investment, and consumer interests. Indeed, numerous parties urge the FCC to focus on preserving and promoting incentives for investment and innovation, and enabling consumer choices.<sup>54</sup>

---

<sup>51</sup> *See, e.g.*, Comments of Netflix at 5-6 (discussing demands by broadband providers for priority access payments by content and applications companies); Independent Film & Television Alliance at I. (discussing provider’s packet shaping practices); Cox at 26 (consumers experiencing difficulty using only certain applications are not informed that the source of the difficulty could be the broadband provider and mistakenly believe it is the application and content provider).

<sup>52</sup> *See* 47 U.S.C. § 160(c).

<sup>53</sup> *See, e.g.*, Comments of AT&T at 95; Verizon at 101.

<sup>54</sup> *See, e.g.*, Comments of Verizon at 40 (FCC should focus on preserving and promoting incentives for investment and innovation and enabling informed consumer choices); Motorola, Inc. at 9 (FCC has responsibility to create proper incentives for the investments necessary to deploy broadband networks);

XO agrees that consumer choice is paramount for the continued success of the Internet. Consumers should determine which providers succeed or fail based on the services and benefits offered. The strong record emphasis on competition confirms that consumers should be entitled to competition throughout the Internet ecosystem, and supports adoption of the Commission's proposed "Competitive Options" rule.<sup>55</sup>

The Competitive Options rule is critical because it makes explicit that broadband Internet access providers may not hinder competition between providers.<sup>56</sup> The rule is consistent with Congressional directives to "promote the continued development of the Internet" and "preserve the vibrant and competitive free market that presently exists for the Internet."<sup>57</sup> By codifying these directives, the Commission will best promote the interests of all interested stakeholders in robust competition for services, networks, content, and applications.

The Competitive Options rule will further investment in competitive networks. Although opponents argue the rule will thwart network providers' incentives to invest in infrastructure,<sup>58</sup> these claims are empty threats that are contradicted by the record.<sup>59</sup> As XO has shown, its own

---

Communications Workers of America at 4; BT Americas Inc. at 1-2 (FCC should focus on increasing competition where there are upstream access bottlenecks); The National Association of Manufacturers ("NAM") at 1 (FCC should strengthen incentives for broadband infrastructure investment).

<sup>55</sup> See NPRM at ¶92 (to be codified at 47 C.F.R. § 8.11).

<sup>56</sup> See Comments of New Jersey Division of Rate Counsel at 18-19.

<sup>57</sup> 47 U.S.C. §§ 230(b)(1), 230(b)(2). See also NPRM at ¶47 ("it has long been U.S. policy to promote an Internet that is both open and unregulated.").

<sup>58</sup> See, e.g., Comments of CTIA-The Wireless Association at 34-35 (without carrier investment, the burgeoning wireless platform for innovation is put at risk); National Cable & Telecommunications Association at 17 (adopting the proposed rules would dampen investment in upgrades to Internet facilities).

<sup>59</sup> See Comments of XO at 5, n.3; Covad Communications Company at 2 (opening up ILEC wires on a nondiscriminatory basis and at reasonable rates will spur investment and lead to job creation); COMPTTEL at 7-8 (proposed rules will significantly promote investment in IP networks if managed networks are excluded from the definition of the Internet); Google at 37-38 (broadband providers have a strong

record of investment is strong and compares favorably to incumbents.<sup>60</sup> It is the *lack* of clear rules and certainty that is more likely to have a negative effect on investment.<sup>61</sup> In order for innovation and investment to continue, however, investors and innovators must be assured they have open and nondiscriminatory access to content, networks, and end users. Only through the FCC's failure to act will regulatory uncertainty continue, chilling investment and innovation.<sup>62</sup>

The Competitive Options rule also can play an important role in addressing competitive harms that result from market concentration and incumbent last-mile providers' bottleneck control. The proposed rule, by ensuring a user's entitlement to competition among network, service, and content providers, will ensure the user can access, for example, Bing, Google, or Yahoo to search for video content from multiple sources, regardless of which parent company owns the content, the network, or both.<sup>63</sup> Codifying a pro-competition rule also may serve to keep prices down, drive innovation, and prevent a consumer from being tied to a single last-mile provider.

---

incentive to invest in their networks, and have acknowledged that the *Policy Statement* has not deterred their incentives to make network investments); Open Internet Coalition at 32 (history suggests that nondiscrimination requirements will have little or no effect on broadband provider's investment choices); Public Interest Commenters at 28 (preserving the open Internet will promote, not hinder, broadband deployment, innovation, and economic development); Free Press at 13 (rules will promote edge economy investment, and in turn feed the virtuous cycle where access providers will continue to invest in network infrastructure as the Internet economy grows); The Greenlining Institute at 1-2 (rules will help close the digital divide by giving providers incentive to invest in their overall infrastructure); New Jersey Division of Rate Counsel at 6 (FCC should ignore threats that the proposed rules will lead to reduced investment, as history shows these threats to be empty).

<sup>60</sup> See Comments of XO at 5, n.3.

<sup>61</sup> See Comments of Sony at 3 (without assurance and greater certainty afforded by network neutrality rules, companies will be less likely to continue investing in Internet businesses); NATOA/Benton Foundation at 6 (the mere threat that a broadband provider could impede the transmission of a new service will discourage investment and innovation).

<sup>62</sup> See Comments of The American Library Association at 3. See also NPRM at ¶88 ("Codification will increase certainty regarding the Commission's approach to preserving the Internet").

<sup>63</sup> See NPRM at ¶92 (to be codified at 47 C.F.R. § 8.11).

**IV. THE COMMENTS AFFIRM THAT MANAGED SERVICES RIDING ON BROADBAND INFRASTRUCTURE REQUIRE FURTHER STUDY**

Numerous commenters agree with XO that the provision of both “managed services” and best-effort Internet access service over the same facilities serves Commission goals and the public interest, and can be accomplished without harming consumer interests.<sup>64</sup> The Center for Democracy & Technology noted, “managed or specialized services may allow providers to experiment with service offerings that might not be feasible to deliver over the regular Internet for technical or business model reasons.”<sup>65</sup> As Alcatel-Lucent put it, “a case can be made that the offering of managed services, whether operator provided or consumer-demanded, maintains and strengthens the open Internet environment the Commission is seeking to protect in this proceeding.”<sup>66</sup> Thus, managed services can meet the specialized needs of enterprise customers for virtual private networks, or other internal communications, while also providing the broadband service provider additional revenues to invest in its network to the benefit of all consumers, including broadband Internet access subscribers.

XO also agrees that the concept of managed or specialized services should not swallow the proposed open Internet rules whole. The initial comments confirm that, unless properly constrained, managed services could function inappropriately as a “loophole” permitting last-

---

<sup>64</sup> See, e.g., Comments of Clearwire Corporation at 13 (“Clearwire’s enterprise and wholesale customers demand managed services, supported by a Quality of Service (QoS) assurance, as a service that is distinct from broadband Internet access services.”); COMPTTEL at 7 (“networks of the future will carry Internet traffic as only one application alongside multiple other services, including managed services. The transition to managed networks that support multiple applications and uses should be encouraged.”); Cisco at 15 (“Service providers that offer such [managed] services meet important needs of residential and business users, and thus add great value to the economy.”); NAM at 4 (“Revenues derived from managed networks are critical to the health of the network, as those funds are reinvested for necessary maintenance and build-out of the network.”).

<sup>65</sup> Comments of the Center for Democracy & Technology at 47.

<sup>66</sup> Comments of Alcatel-Lucent at 21.

mile broadband providers operating under poorly defined “managed” service to engage in discriminatory practices and to undermine continuing investment in facilities to access the public Internet. As Vonage pointed out, “If broadband network providers have unfettered ability to designate their services as Managed or Specialized, competing services would not be able to match the quality of service offered by the broadband network providers, which would reduce competition and innovation in the service market.”<sup>67</sup> Similarly, XO believes it would be a mistake for the Commission to embrace USTelecom’s request to “define a basic Internet Access service, with anything outside that category deemed to be a Managed Service.”<sup>68</sup> Such an approach would encourage last-mile broadband providers to turn their broadband Internet access into anemic services, and to tilt their investments and new offerings toward “managed” services, substantially frustrating the Commission’s goals of a robust and open Internet.

Given the interrelationship between the Internet access service offerings of last-mile broadband providers that are the focus of the proposed rules, on the one hand, and other services riding on the same facilities, on the other hand, XO agrees that the FCC would benefit from greater clarity and a fuller record on last-mile providers’ “managed” services before deciding whether to take action.<sup>69</sup> This record could result in establishment of a workable definition of “managed” services that will support, and not detract from, the goals of robust and open broadband Internet access services to the public. In addition, such a record would allow the FCC

---

<sup>67</sup> Comments of Vonage at 27; Open Internet Coalition at 92-93; Google at 75.

<sup>68</sup> Comments of USTelecom at 54.

<sup>69</sup> Comments of Ad Hoc Telecommunications Users Committee at 30 (“We encourage the Commission to seek further comment on this issue after it identifies with greater specificity those services it intends to include within this category and details specifically the distinguishing characteristic of these services which make the application of the proposed rules unworkable or inappropriate.”); Free Press at 111 (same).

to give guidance for those services that properly fall in a “managed” services category, as to what statutory and regulatory Title II, III, and VI obligations apply to such previously unclassified services.

### **CONCLUSION**

For all of the foregoing reasons, XO urges the Commission to exercise its statutory authority and adopt the proposed rules to preserve the open Internet and promote competition, investment, and innovation.

Respectfully submitted,



Heather Burnett Gold  
Senior Vice President

Lisa R. Youngers  
Vice President, Federal Affairs

XO COMMUNICATIONS, LLC  
13865 Sunrise Valley Drive  
Herndon, VA 20171  
(703) 547-2000 tel

Donna N. Lampert  
E. Ashton Johnston  
Justin L. Faulb

LAMPERT, O’CONNOR & JOHNSTON, P.C.  
1776 K Street NW, Suite 700  
Washington, DC 20006  
(202) 887-6230 tel  
(202) 887-6231 fax

*Counsel for XO Communications, LLC*

April 26, 2010