

April 28, 2010

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Julius Genachowski, Chairman
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Re: *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Preserving the Open Internet*, GN 09-191; *Broadband Industry Practices*, WC Docket No. 07-52

Dear Chairman Genachowski:

I submit these views in response to reports that the Commission is considering a “reclassification” of broadband Internet access services within Title II of the Communications Act of 1934.

Five years ago, the federal government represented to the United States Supreme Court that treating cable modem broadband Internet access as a Title II “telecommunications service” subject to traditional common carrier regulation would be “impossible to square with the deregulatory purposes of the Telecommunications Act of 1996.”¹ That statement reflected both the factual realities of how broadband access is provided and the Federal Communications Commission’s long-held interpretation of the 1996 Act. The Commission has *never* classified any form of broadband Internet access as a Title II “telecommunications service” in whole or in part, and it has classified all forms of that retail service as integrated “information services” subject only to a light-touch regulatory approach under Title I. These statutory determinations are one reason why the Clinton Administration rejected proposals to impose “open access” obligations on cable companies when they began providing broadband Internet access in the late 1990s, even though they then held a commanding share of the market.² The Internet has thrived under this approach.³

Recently, some have encouraged the Commission to reverse this settled view and treat broadband Internet access providers as offering both an “information service” and a “telecommunications service” subject to Title II regulation. Embarking on that course would bring an enormous sector of the economy within the ambit of public-utility-style common carrier

¹ FCC Reply Br. 3-4, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (Nos. 04-277, 04-281).

² See William Kennard, *The Road Not Taken: Building a Broadband Future for America*, FCC (June 15, 1999), <http://www.fcc.gov/Speeches/Kennard/spwek921.html> (explaining reasons for the Commission’s decision not to regulate cable broadband service).

³ The National Broadband Plan observes: “Fueled primarily by private sector investment and innovation, the American broadband ecosystem has evolved rapidly. The number of Americans with broadband at home has grown from eight million in 2000 to 200 million last year.” FCC, *Connecting America: The National Broadband Plan*, at XI (Mar. 2010) (“*Broadband Plan*”), available at <http://www.broadband.gov>.

regulation. Yet these transformative proposals are not driven by any relevant changes in either the law or the facts bearing on the relevant statutory definitions. Rather, advocates of this shift are motivated by doubts about the extent of the Commission's "ancillary" authority to regulate broadband service providers under Title I in light of the D.C. Circuit's recent *Comcast* decision, which rejected some (but not all) of the potential Title I rationales the Commission could attempt to invoke to regulate network management practices.⁴ These advocates have cited that decision as a basis for urging the Commission to advance an industry-transforming regulatory agenda. Title II classification, if adopted, could thus revolutionize government regulation of a vast sector of the economy without any warrant from Congress, all for the evident purpose of evading the consequences of a court decision limiting the Commission's authority. In the words of the *Washington Post* editorial staff, it would be perceived as "a legal sleight of hand" and "a naked power grab."⁵

Given the obviousness of these motives and the absence of any change in circumstances to justify the results, the Commission's assertion of authority to regulate broadband Internet access as a "telecommunications service" under Title II would be fundamentally at odds with principled agency decisionmaking and with the proper role of administrative agencies within our constitutional system. It would surely be met with skepticism by a reviewing court, and the odds of appellate reversal would be high—particularly given significant industry reliance on the Commission's prior, deregulatory interpretation of the same statutory scheme. Administrative agencies are charged with implementing the law, not with assuming for themselves the legislative authority that the Constitution vests in Congress. Unlike the local competition rules that the Commission enacted on the heels of the 1996 Act and that I defended in the Supreme Court,⁶ this is not a case where the Commission would simply be responding to a major *legislative* innovation by Congress or engaging in a mere gap-filling exercise. Instead, the Commission would be—for the first time ever and with no action by Congress—extending a common carrier regime, designed for the monopolist telephone market of the early twentieth century, to a dynamic Internet marketplace that you recently called "the foundation for our new economy."⁷ Such a significant and consequential policy choice should be made, if at all, by Congress.

I. Agencies Have Discretion To Fill Gaps Left By Congress, Not To Create Law Beyond What Congress Has Enacted

Administrative agencies authorized to exercise substantial power are an accepted and necessary feature of modern governance. But as Justice Kennedy recently reminded us, "the amorphous character of the administrative agency in the constitutional system" requires that

⁴ See *Comcast Corp. v. FCC*, ___ F.3d ___, No. 08-1291, 2010 WL 1286658 (D.C. Cir. Apr. 6, 2010). The D.C. Circuit declined to consider the merits of several Title I arguments that the Commission had developed on appeal but not in the underlying administrative order. See *id.*, slip op. at 33-36 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943)).

⁵ Editorial, *Internet oversight is needed, but not in the form of FCC regulation*, Wash. Post, Apr. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041604610.html>.

⁶ See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

⁷ Video, "Announcing the National Broadband Plan," at 0:24, available at <http://www.broadband.gov/plan/>.

agency discretion cannot be unbounded.⁸ Hence, agency action must reasonably heed the statutory boundaries enacted by Congress, and agency decisionmaking must also be adequately justified in light of the relevant facts. These limitations and procedural requirements leave agencies with significant authority, yet they are meaningful: along with other principles of constitutional and administrative law, observance of these limits serves to secure the legitimacy of administrative agency power within the constitutional order.⁹ Federal courts play an important role in enforcing these constraints on agency action, but the members of this Commission also carry an independent obligation to observe these limits on their discretion.

Under the *Chevron* doctrine, ambiguity in a federal statute is understood as an implicit delegation by Congress to the administering agency of authority to make a policy choice within the bounds of that ambiguity, and courts will defer to that choice so long as it is reasonable.¹⁰ Where Congress leaves ambiguity in statutory meaning, it is the agency—armed with unique experience, expertise, and fact-finding ability—that has the right and the responsibility to interpret that ambiguity in a rational manner. In exercising that discretion, it may be appropriate for an agency to reconsider the wisdom of its existing policies or to reverse those policies or undertake new regulation when circumstances change.¹¹

But this rationale only goes so far. The *Chevron* doctrine protects normal exercises of agency discretion to fill gaps—to make policy in the interstices that Congress has left in its legislation.¹² Because, as Justice Breyer once wrote, “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration,” it is generally plausible that gaps created by

⁸ *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment).

⁹ Acknowledging the “significant antidemocratic implications” of governance by administrative action, Judge Friendly observed that enforcement of procedural requirements is “necessary” if administrative action “is to be consistent with the democratic process.” Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 880 (1962). Professor Jaffe similarly suggested that while judicial doctrines disfavoring delegation of legislative power to agencies threatened to hamper the administrative state, enforcement of procedural requirements and limits on legislative delegations could both improve the operation of administrative authority and “safeguard . . . its legitimate exercise.” Louis L. Jaffe, *Judicial Control of Administrative Action* 85-86 (1965). Jaffe thus wrote that while delegations of power to administrative agencies “may be exceptionally broad and may, indeed should, be taken to grant enormous room for the improvisation and consolidation of policy,” a delegation nonetheless necessarily “implies some limit.” *Id.* at 320. “Action beyond that limit is not legitimate.” *Id.*

¹⁰ *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984); *see also, e.g., National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996).

¹¹ *See, e.g., Brand X*, 545 U.S. at 981-982; *Smiley*, 517 U.S. at 742; *Chevron*, 467 U.S. at 863-864.

¹² *See Chevron*, 467 U.S. at 843 (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974))).

ambiguity in statutory terms should be construed as a delegation of authority for the agency to make policy—particularly given the agency’s comparative advantages in doing so.¹³

The *Chevron* doctrine is rooted in *and delimited by* this presumption about Congress’s delegatory intent. Where an agency takes action that tests these boundaries, the Supreme Court has cautioned that “there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation.”¹⁴ Particularly where an agency asserts broad new authority in an important area without a clear statutory basis, or makes a fundamental change in its implementation of a statute that upsets settled practices and reliance interests, the agency should not assume that its determinations will enjoy the ordinary degree of deference. Rather, as Professor Sunstein has observed, “it would be a major error to treat all ambiguities as delegations,” and deference may be reduced where an “agency is seeking to extend its legal power to an entire category of cases, rather than disposing of certain cases in a certain way or acting in one or a few cases.”¹⁵ Courts properly show *less* deference to such actions due to the strain they place on the checks and balances that otherwise make the role of administrative agencies reconcilable with our constitutional system.¹⁶

Of particular relevance here, where agencies cite supposed “ambiguities” in a statute to effectuate major shifts in federal policy or assert aggressive new regulatory authority over broad subject areas, courts have refused deference on the ground that the cited ambiguity cannot plausibly be thought to delegate such enormous discretion. One instructive case is *FDA v. Brown & Williamson Tobacco Corp.*¹⁷ In that case, after many years of proceeding otherwise, the FDA undertook an exhaustive rulemaking and concluded that cigarettes were subject to regulation under the federal Food, Drug, and Cosmetic Act. Although the literal statutory language supported the agency’s conclusion, the Supreme Court rejected the FDA’s interpretation. The Court expressed doubt that the rationale of *Chevron* should apply where, as in that case, the “breadth of the authority” the agency had asserted made it less plausible that Congress would have intended an implicit delegation of such broad discretion.¹⁸ However pliable the relevant statutory terms might be, the Court was “confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”¹⁹

¹³ Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986).

¹⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

¹⁵ Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2090, 2100 (1990).

¹⁶ See Breyer, *supra* note 13, at 370 (degree of deference may vary depending on “whether the legal question is an important one”); see also Sunstein, *supra* note 15, at 2100; Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 231-242 (2006) (discussing cases in which the Supreme Court has shown less deference to agency resolutions of major questions).

¹⁷ 529 U.S. 120 (2000).

¹⁸ See *id.* at 159-160.

¹⁹ *Id.* at 160. The FDA was similarly rebuffed when the Supreme Court rejected the FDA’s position that state tort suits against drug manufacturers alleging failure to warn should be preempted because they interfere with the purposes and administration of the federal drug regulatory regime. See *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). The Court held that the FDA’s position merited no deference in part because it “reverse[d] the FDA’s own longstanding

The Supreme Court's decision in *Gonzales v. Oregon* reflects a similar principle.²⁰ There, the Attorney General had asserted authority to define legitimate medical practice and prohibit doctors from participating in medically assisted suicide in accordance with state law. Although the Attorney General asserted this authority under the guise of enforcing the federal Controlled Substances Act, the Court again rejected the notion that ambiguity in that statute could be read as a broad delegation of the "extraordinary authority" claimed by the Attorney General: "The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation ... is not sustainable. 'Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'"²¹

Decisions of the federal appeals courts provide similar examples. For instance, in *American Bar Association v. FTC*,²² the FTC had cited an ambiguity in a statutory definition as a basis for asserting authority to regulate attorneys engaged in the practice of law as "financial institutions" subject to the privacy provisions of the Gramm-Leach-Bliley Act. But the D.C. Circuit invalidated that decision on the ground that the existence of ambiguity alone did not support the conclusion that Congress *intended* to delegate authority of the nature the FTC had asserted. In light of other features of the statute, the court found it "difficult to believe that Congress, by any remaining ambiguity, intended to undertake the regulation of the profession of law" when that profession was not mentioned in the statute and had never before been seen to fall within the statute's reach.²³ Similar considerations drove the court of appeals to invalidate this Commission's action in *American Library Association v. FCC*, in which the court criticized the Commission for attempting to justify a claim of "sweeping authority" it had "never before asserted."²⁴

II. Classifying Broadband Internet Access As A Common Carrier Telecommunications Service Would Be An Extraordinary Assertion Of Broad New Authority, Not A Gap-Filling Measure

Whether resolved on the ground that the agency had acted outside its delegated authority, that Congress had spoken directly to the issue, or that the agency's position was unreasonable,

position without providing a reasoned explanation," *id.* at 1201, and "represent[ed] a dramatic change in position" that was inconsistent with Congress's evident intent, *id.* at 1203.

²⁰ See 546 U.S. 243 (2006).

²¹ *Id.* at 267 (quoting *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)).

²² 430 F.3d 457, 469 (D.C. Cir. 2005).

²³ *Id.*

²⁴ See 406 F.3d 689, 691, 704, 708 (D.C. Cir. 2005). While this and the other examples discussed each involved judicial disapproval of agency *assertions* of regulatory authority, similar reluctance to construe statutory ambiguity as license for agencies to undertake a fundamental shift in a regulatory scheme also influenced the Supreme Court to reject this Commission's *surrender* of regulatory authority in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994). There, the Court held that the Commission's authority to "modify" any tariffing requirement of 47 U.S.C. § 203 did not authorize the Commission to make tariff filing optional for all nondominant long-distance carriers. The Court found it "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion." *Id.* at 231.

these cases illustrate courts' appropriate reluctance to infer from statutory ambiguity a delegation of agency discretion to assert broad regulatory authority over a whole new category of issues. A decision by the Commission to extend common carrier regulation to broadband Internet services, based on nothing more than alleged ambiguity in the definitional terms of the Act, would fall in the same category. It would be just another case in which an agency had reversed itself and seized broad new authority to pursue a favored regulatory agenda despite the absence of any clear congressional authority—indeed, despite the agency's own prior conclusion that Congress had affirmatively *withheld* such authority.

According to many of its proponents, authority for Title II classification would supposedly derive from alleged ambiguities in the statutory definitions of “telecommunications service” and “information service.” But as history makes clear, Title II classification would require far more than an interstitial implementation of these terms. Broadband Internet access service has never been regulated under Title II. From the advent of the Internet, the Commission has instead treated broadband Internet access as an “information service” without a separate “telecommunications service” component, subject only to the Commission's ancillary authority under Title I.

The Commission's 1998 *Report to Congress* articulated the key interpretations of the 1996 Act that have formed the basis of that consistent treatment of broadband Internet access.²⁵ The Commission determined there that Congress specifically intended that “telecommunications services” and “information services” be construed as mutually exclusive categories, and that application of these statutory terms required examination of how service is “offer[ed]” to the end user.²⁶ Thus, the Commission explained that an “information service” offered to end users as a functionally integrated whole should not simultaneously be treated as a “telecommunications service,” even though by definition it includes a telecommunications component.²⁷

These conclusions in turn built upon a framework that pre-dated the 1996 Act. In the *Computer Inquiry* proceedings, as traditional communications common carriers moved into the nascent field of computer data processing, the Commission distinguished between “basic services” (defined as the offering of “a pure transmission capability”) and “enhanced services,” which combined basic services with computer processing applications.²⁸ Critically, the Commission determined that “enhanced services” were not within the scope of its Title II jurisdiction, but rather were subject only to the Commission's ancillary authority under Title I.²⁹

²⁵ See Report to Congress, *Federal-State Joint Board on Universal Service*, 13 F.C.C. Rcd. 11,501 (1998).

²⁶ *Id.* at 11,507 ¶ 13, 11,520 ¶ 39, 11,522-11,523 ¶ 43, 11,529-11,530 ¶¶ 58-59.

²⁷ *Id.* at 11,520 ¶ 39.

²⁸ See *id.* at 11,512-11,514 ¶¶ 23-28, 11,520 ¶ 39 (discussing Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C. 2d 384 (1980) (“*Computer II*”)); see also Order, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C. Rcd. 14,853, 14,866-14,868 ¶¶ 21-24 (2005) (“*Wireline Broadband Order*”) (discussing *Computer II*).

²⁹ See *Wireline Broadband Order*, 30 F.C.C. Rcd. at 14,867-14,868 ¶ 23. Some have cited the so-called “unbundling” requirement of the *Computer Inquiry* regime as a basis for claiming that the proposed Title II classification of broadband service would be consistent with past (pre-2002) practice. But that argument confuses

In its 1998 *Report to Congress*, the Commission concluded that Congress intended the terms “telecommunications service” and “information service” in the 1996 Act to build upon the “basic” and “enhanced” service distinction the Commission had previously drawn, and it construed the terms to be mutually exclusive in light of Congress’s evident intent to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services “via telecommunications.”³⁰ The Commission thus concluded that “when an entity offers transmission incorporating the ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,’ it does not offer telecommunications. Rather, it offers an ‘information service’ even though it uses telecommunications to do so.”³¹

In later orders classifying various broadband Internet access technologies, the Commission straightforwardly applied this same statutory framework it had adopted in 1998. In the 2002 *Cable Modem Declaratory Ruling*, for example, the Commission concluded that cable modem service is provided to the end user as a single, integrated service, with a telecommunications component that is not separable from the computer processing, information provision, and computer interactivity functions.³² Applying the approach articulated in the 1998 *Report to Congress*, the Commission found, and the Supreme Court later agreed, that the service does not include an offering of telecommunications service.³³ Since 2002—and as recently as 2007—the Commission has repeatedly applied the same approach to find that even though it includes a transmission component, broadband Internet access service as provided through other technologies likewise constitutes an “information service” without a stand-alone offering of telecommunications service, and thus is subject only to the Commission’s ancillary authority under Title I.³⁴

In short, from their inception in the 1990s, broadband Internet access services have always been “information services” with no separate “telecommunications service” component,

two quite different issues: the threshold statutory classification of a service (the issue here), versus whatever regulatory consequences might follow from that classification (not the issue here). Under the so-called “unbundling” obligation, the Commission used to require wireline telephone companies (but not cable companies or wireless providers) to strip out the transmission component of any information (“enhanced”) service, tariff it, and sell it as a stand-alone telecommunications service to any willing buyer. *See Wireline Broadband Order*, 20 F.C.C. Rcd. at 14,867-14,868 ¶¶ 23-24. But the Commission never found that the finished Internet access services that those companies sold to end users were (or contained) Title II “telecommunications services.”

³⁰ *Report to Congress*, 13 F.C.C. Rcd. at 11,507-11,508 ¶ 13, 11,520 ¶ 39.

³¹ *Report to Congress*, 13 F.C.C. Rcd. at 11,520 ¶ 39.

³² *See Declaratory Ruling, Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C. Rcd. 4798, 4802 ¶ 7 (2002) (“*Cable Modem Declaratory Ruling*”), *aff’d*, *Brand X*, 545 U.S. 967 (2005) (intermediate history omitted).

³³ *See id.*, 17 F.C.C. Rcd. at 4820-4824 ¶¶ 34-41; *see also Brand X*, 545 U.S. 967.

³⁴ *See Wireline Broadband Order*, 20 F.C.C. Rcd. 14,853 (2005); Memorandum Opinion and Order, *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, 21 F.C.C. Rcd. 13,281 (2006); Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 F.C.C. Rcd. 5901 (2007) (“*Wireless Broadband Order*”).

and they have never been subject to regulation under Title II. The Commission has applied this position consistently, defended it successfully in litigation all the way to the Supreme Court, and repeatedly professed that it best reflects Congress's intent and the broad objectives of federal Internet policy.³⁵

Against this backdrop, any decision to reclassify broadband as a "telecommunications service" under Title II would be a startling about-face. After years of concluding that Congress wished to insulate broadband Internet access services from common carrier regulation in order to protect the healthy and competitive development of the Internet,³⁶ the Commission would abruptly reverse itself—and contradict its own account of congressional intent—by saddling those services with the burdens of a regulatory model that was developed for the monopoly public utilities of the last century. As in other cases, it would be irrational to presume that Congress wished to delegate authority to make a "decision of such economic and political significance"³⁷ and "alter the fundamental details of [the] regulatory scheme"³⁸ that had long applied in the industry, merely by including a supposed definitional ambiguity in the terms "telecommunications service" or "information service."

Proponents of Title II classification of broadband Internet access have cited the Supreme Court's decision in *Brand X* as providing carte blanche authority for the Commission to reverse itself and assert unprecedented authority to regulate the Internet, but that decision does not support any such presumption. The Court was not faced in that case with a seizure of broad new authority or a major policy shift of the type that is contemplated here; indeed, as discussed above, just the opposite was true. The Court's decision thus does not endorse the kind of anything-goes discretion the Commission would have to invoke to classify broadband Internet access as a Title II "telecommunications service." Moreover, the only question before the Court was whether the Commission's position that cable modem broadband Internet access service constituted an "information service" without a separate "telecommunications service" was "at least reasonable."³⁹ The Court held that it was, and that the statute did not "unambiguously require" the conclusion that cable modem broadband service providers "offer[ed]" telecommunications.⁴⁰ In doing so, the Court had no occasion to go further and decide whether, in addition, the statute might *compel* the Commission's interpretation and preclude the opposite outcome that the challengers had proposed there and that the advocates of reclassification

³⁵ See, e.g., *Report to Congress*, 13 F.C.C. Rcd. at 11,507-11,508 ¶ 13, 11,511 ¶ 21, 11,520-11,526 ¶¶ 40-48, 11,540 ¶ 82, 11,546-11,548 ¶¶ 95-97; *Cable Modem Declaratory Ruling*, 17 F.C.C. Rcd. at 4801-4802 ¶¶ 4-6; FCC Br. 8, 16, 29-31, *Brand X* (2005); FCC Reply Br. 3-4, *Brand X* (2005); *Wireline Broadband Order*, 20 F.C.C. Rcd. at 14,877-14,878 ¶ 44; *Wireless Broadband Order*, 22 F.C.C. Rcd. at 5902 ¶ 2.

³⁶ See *supra* note 35.

³⁷ *Brown & Williamson*, 529 U.S. at 160.

³⁸ *Gonzales*, 546 U.S. at 267.

³⁹ 545 U.S. at 990 (emphasis added).

⁴⁰ *Id.* at 989-990.

propose now. The opinion, however, suggests that the Court would not readily accept a reversal by the Commission on the regulatory classification of broadband service providers.⁴¹

Nor does the legislative record support an inference that Congress intended any statutory ambiguity to authorize a reversal of this magnitude. Indeed, to the extent the statutory scheme addresses the topic of Internet regulation, it indicates a strong congressional preference for keeping the Internet *unregulated*.⁴² When an agency adheres consistently to a particular view of statutory meaning, and Congress is aware of the agency's interpretation and takes no action to correct it, Congress's inaction is persuasive evidence that the interpretation is the one intended by Congress.⁴³ Here, Congress has known of the Commission's approach since the Commission presented it in the 1998 *Report to Congress*, applied it in the 2002 *Cable Modem Order*, and showcased it in the Government's *Brand X* arguments to the Supreme Court. During the ensuing years, Congress has never signaled disapproval of the Commission's current statutory interpretation or taken any action to overturn it—a strong indicator that the Commission's approach thus far has been the one intended by Congress. Indeed, while Congress has taken up several bills designed to authorize the Commission to regulate some aspects of broadband Internet access, it has not sought to accomplish this by redefining that service as (or as containing) a Title II telecommunications service.⁴⁴

Thus, rather than filling a gap in a manner consistent with congressional intent, the proposed Title II classification would occur solely on the Commission's say-so. Citing the Supreme Court's recent decision in *Fox Television*, some advocates of Title II classification have suggested that this say-so is all that is required, so long as the Commission cites a good reason.⁴⁵ That assertion is incorrect. To the contrary, *Fox Television* reaffirmed that when an agency changes course, it must provide a "more detailed justification [for the change] than what would suffice for a new policy created on a blank slate" if—as would be true in this case—its "new policy rests upon factual findings that contradict those which underlay its prior policy" or its

⁴¹ See, e.g., *id.* at 990 ("it would, in fact, be odd" to adopt a reading of the statute under which cable modem providers "offer" the discrete transmission components of the "integrated finished product" offered to consumers); *id.* at 989, 990 (Commission's interpretation of "offer" best reflected "common" and "ordinary" usage); *id.* at 995 (expressing "doubt" that Congress intended the "abrupt shift in Commission policy" that would be required under the statutory interpretation offered by the advocates of Title II regulation). Cf. *Cuomo v. The Clearing House Ass'n L.L.C.*, 129 S. Ct. 2710, 2715 (2009) (presence of "some ambiguity as to the meaning" of relevant statutory terms "does not expand *Chevron* deference to cover virtually any interpretation").

⁴² See 47 U.S.C. §§ 230(a)(4), (b)(2), 1302(a).

⁴³ See *CBS, Inc. v. FCC*, 453 U.S. 367, 382-385 (1981); see also *United States v. Rutherford*, 442 U.S. 544, 553-554 & n.10 (1979). Cf. *Brown & Williamson*, 529 U.S. at 143-159.

⁴⁴ See, e.g., Internet Freedom Preservation Act of 2008, H.R. 5353, 110th Cong. (2008) (bill would have charged Commission to undertake study and report to Congress on issues pertaining to broadband Internet access service); Internet Non-Discrimination Act of 2006, S. 2360, 109th Cong. (2006) (bill would have imposed obligations on network operators without reference to Title II and authorized Commission to adjudicate violations).

⁴⁵ See, e.g., Reply Comments – NBP Public Notice # 30, Comments of Public Knowledge, GN Docket No. 09-47, 09-51, 09-137, at 4 (filed Jan. 26, 2010) (citing *Fox Television* as license for the Commission to declare broadband Internet access a "telecommunications service" so long as the Commission concludes that doing so would better serve the Commission's policy goals).

“prior policy has engendered serious reliance interests that must be taken into account.”⁴⁶
Failure to do so, the Court reaffirmed, requires judicial invalidation.⁴⁷

Here, there is no reasoned explanation the Commission could give for rejecting the considerations that underlay its own longstanding treatment of broadband service. Rather, Title II classification would appear to come as a direct and obvious response to the D.C. Circuit’s recent *Comcast* decision limiting the Commission’s authority to regulate the Internet under Title I. That this assertion of significant new regulatory authority would serve solely as a means to an end—as an effort to “provide a sounder legal basis” for a particular regulatory agenda in the wake of a court loss⁴⁸—would not satisfy *Fox Television*’s requirements for reasoned decisionmaking and would lessen the case for judicial deference further still. In short, this is not gap-filling of the sort *Chevron* contemplated, and it is not an appropriate undertaking for this Commission.

* * *

By classifying broadband Internet access as a “telecommunications service” under Title II, the Commission would essentially be making new law for a major sector of the economy. It would do so not to accommodate an improved understanding of statutory meaning or to account for new factual circumstances bearing on the relevant legal criteria, but solely in reaction to a court decision rejecting its prior assertion of regulatory power. As stewards of a critical national industry and of the Commission’s proper place in the governmental structure, the members of this Commission should pause before embarking on that course. The Commission’s discretion to tailor federal telecommunications policy to fit the changing needs of an evolving industry is cabined by the boundaries set by Congress and by the requirements of reasoned decisionmaking, and the proposed reversal on Title II falls outside those limits. Any sea change in the Commission’s overall regulatory framework should come from Congress, not from the Commission itself.

Sincerely yours,

/s/ Seth P. Waxman

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⁴⁶ *Fox Television*, 129 S. Ct. at 1811.

⁴⁷ *Id.*; see also *id.* at 1811 (Kennedy, J., concurring in part and concurring in the judgment) (an “agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past”).

⁴⁸ *Broadband Plan 337*; see also, e.g., Notice of Oral *Ex Parte* Communication of Free Press, GN Docket No. 09-51, GN 09-191, WC Docket No. 07-52 (Apr. 9, 2010) (urging reclassification of broadband Internet access service under Title II in direct response to *Comcast v. FCC*).