



May 10, 2010

The Honorable Henry A. Waxman
Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

Dear Chairman Waxman:

Last week, FCC Commissioner Robert McDowell submitted a letter to your office containing his view of the history of the regulatory classification of broadband Internet access services.¹ Certain broadband access providers and their trade associations have recently filed letters with the Commission that go into more depth along similar lines of analysis.² Public Knowledge (PK) respectfully disagrees with these views, and writes to you to explain why.

First, PK would like to thank you for your continued interest in protecting broadband consumers. In part because of you and your office, FCC Chairman Genachowski has announced a proceeding that will allow these issues to be explored in depth before the Commission. A full, formal proceeding – and not a continued exchange of letters such as this one – will allow the Commission to explore the impact of the *Comcast* decision³ on the National Broadband Plan, other pending Commission proceedings, and the Commission’s general authority to provide necessary protection for consumers and the public interest in the digital age.⁴

Until now, the failure of the Commission to provide a proper forum for this critical debate has created the current crisis atmosphere and the lamentable tendency of some parties, notably the carriers and their supporters, to engage in heated rhetoric and *ad hominem* attack.⁵ To remedy this, and as part of this Commission’s overall commitment to transparent and data driven decision making, a formal proceeding will now determine whether classification of broadband access service under Title II, or a requirement to separate the telecommunications component and return to the *Computer II/III* framework across all platforms, would best serve the public interest.

Title II Classification of Broadband Services Would Best Serve the Public Interest

The Commission owes it to the American people to determine the question of classification in the context of a formal proceeding and a complete factual record. The question

¹ Letter from Commissioner Robert M. McDowell to Chairman Henry A. Waxman, May 5, 2010, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297934A1.pdf.

² See Letter of NCTA, *et al.*, Docket Nos. 09-191, 09-51, 07-52 (filed April 29, 2009) (“*Second Carrier Letter*”); Letter of Seth Waxman for USTA, Docket Nos. 09-191, 09-51, 07-52 (filed April 28, 2009) (“*USTA Letter*”); Letter of NCTA, *et al.*, Docket Nos. 09-191, 09-51, 07-52 (“*First Carrier Letter*”).

³ *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. 2010).

⁴ Austin Schlick, *Implications of Comcast Decision on National Broadband Plan Implementation*, BLOGBAND, Apr. 7, 2010, <http://blog.broadband.gov/?entryId=356610>.

⁵ See, e.g., *First Carrier Letter* (“extremist form of net neutrality,” “radical agenda”), *USTA Letter* (“evident purpose of evading a court decision”); *Second Carrier Letter* (“alarmist rhetoric”).

of the Commission’s statutory basis for reform of universal service, privacy protection, adequate truth-in-billing, public safety, cybersecurity, protection of the open internet and other forms of competition policy and consumer protection remains unresolved. Even the extent of the Commission’s ability to collect necessary data remains unclear, and will vary from broadband platform to broadband platform dependent on whether the Commission acts as ancillary to a duty delegated under Title II, Title III or Title VI. Nor will the Commission be able to impose a single national policy where needed, as the Commission lacks power to preempt state and local government under Title I unless it can satisfy the demanding and restrictive analysis set forth in the *Comcast* decision.

On January 26, 2010, PK filed timely comments in response to NBP Public Notice #30.⁶ These comments traced the history of Internet access from the *Computer* proceedings to the present day, warned that the oral argument in *Comcast v. FCC* cast doubt on the Commission’s broad theory of Title I ancillary authority, and urged the Commission to begin a public proceeding to determine whether to reexamine its previous determination in the *Wireline Framework* and the *Wireless Framework* orders.⁷ The *Comcast* decision confirmed PK’s predictions. The *Comcast* court, while paying lip service to the concept of ancillary jurisdiction, made it clear that it would regard assertions of ancillary jurisdiction with hostility. Accordingly, in the reply comments to the *Open Internet Proceeding*, PK renewed its call for a public proceeding on the merits of Title II classification and/or regulation of the underlying telecommunications component of broadband access service.⁸

Since that time, opponents of Title II classification have waged a vociferous battle across the media,⁹ the blogosphere,¹⁰ and in informal letters addressed to Chairman Genachowski warning of dire consequences should the Commission grant Public Knowledge’s request. While one may savor the irony of parties that employ terms like “nuclear option” and “World War III” chastising proponents of Title II as “alarmist,” the essential concerns raised by Public Knowledge remain unanswered. How can the Commission proceed with the National Broadband Plan – or even adequately protect consumers, national security or public safety – without a firm statutory basis? The National Broadband Plan itself recognized this as an outstanding issue the

⁶ See Reply Comments of Public Knowledge to *A National Broadband Plan for Our Future*, GN Docket No. 09-51, filed Jan. 26, 2010 (“PK NBP Replies”), available at <http://www.publicknowledge.org/pdf/pk-nbp-replies-reclass-20100126.pdf>.

⁷ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14853 (2005); Appropriate Regulatory Treatment for Broadband Access to Internet Over Wireless Networks, *Declaratory Ruling*, 22 FCC Rcd. 5901 (2007).

⁸ Reply Comments of Public Knowledge to *Preserving the Open Internet*, GN Docket No. 09-191, filed Apr. 26, 2010, available at http://www.publicknowledge.org/files/docs/PK_NN_Reply_Comments_4-26-10_FINAL.pdf.

⁹ John Eggerton, *Q&A: Michael Powell: Title II Move Could Spark “War,”* MULTICHANNEL NEWS, Mar. 29, 2010, http://www.multichannel.com/article/450846-Q_A_Michael_Powell_Title_II_Move_Could_Spark_War_.php; Larry Downes, *Reality Check on “Reclassifying” Broadband*, CNET, Apr. 19, 2010, http://news.cnet.com/8301-1035_3-20002842-94.html.

¹⁰ See Hank Hultquist, *The Myth of Broadband “Reclassification,”* AT&T PUBLIC POLICY BLOG, Apr. 12, 2010, <http://attpublicpolicy.com/broadband-policy/the-myth-of-broadband-reclassification>; Harold Feld, *DSL Was Never Regulated, Oceania Has Always Been At War With Eastasia, And My Offer To AT&T*, PUBLIC KNOWLEDGE POLICY BLOG, Apr. 13, 2010, <http://www.publicknowledge.org/node/2999>.

Commission must address.¹¹ Yet carriers, their trade organizations, and supporters would have the Commission cut off this vital debate before it can formally begin.

To assist your office in understanding this complex issue, PK primarily addresses the arguments raised in the most recent filings by the carriers and their trade associations. PK stresses that this letter is not our last word in support of Title II classification for “broadband Internet access service” as defined by the Commission in the Open Internet proceeding,¹² but is merely intended to correct the record.

The History of the Classification Issue

Opponents of classification insist that residential broadband access has never been defined as a Title II service. As PK observed in its *NBP Replies*, however, the Commission did not propose a definition of “broadband Internet access service” applicable across all platforms until the *Open Internet NPRM*. Rather, in a series of *ad hoc* declaratory rulings beginning in 2002, the Commission has made fact-based determinations with regard to specific services such as cable modem service, DSL, broadband over power lines (BPL) and wireless.¹³ Indeed, PK cites the Commission’s determination that there now exists a definable “broadband Internet access service”¹⁴ applicable across all delivery platforms as one of the reasons the Commission can, and should, reexamine its previous technology-specific *ad hoc* determinations.

The Relevance of the Stevens Report To The Current Discussion

Opponents of Title II have frequently cited the Commission’s 1998 report to Congress on the statutory definitions of “information service” and “telecommunications” in the 1996 Act, and the impact of these classifications on the Universal Service Fund (USF).¹⁵ They claim that in this “seminal” report, “after a thorough factual and legal analysis found that Internet access is an integrated ‘information service’ without a ‘telecommunications service’ component.”¹⁶ When confronted with evidence that the Commission history is not quite so simple and straightforward, the carriers have responded with hair-splitting over the precise meanings of DSL tariffs and challenging the word choices in opinion pieces. If PK understands this argument correctly, the carriers appear to assert that the Commission so thoroughly examined the issue in 1998, and so

¹¹ CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 337 (2010).

¹² Preserving an Open Internet, *Notice of Proposed Rulemaking*, 24 FCC Rcd. 13,064, 13,128 (defining “broadband Internet access service” as “Any communication service by wire or radio that provides broadband Internet access directly to the public, or to such classes of users as to be effectively available directly to the public,” and “broadband Internet access” as “Internet Protocol data transmission between an end user and the Internet [excluding dial-up access].”)

¹³ Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, *Internet Over Cable Declaratory Ruling*, 17 FCC Rcd 4798 (2002); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14853 (2005); Appropriate Regulatory Treatment for Broadband Access to Internet Over Wireless Networks, *Declaratory Ruling*, 22 FCC Rcd. 5901 (2007); 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 FCC Rcd. 13281 (2006).

¹⁴ See *supra*, note 12.

¹⁵ *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501 (1998) (“*Stevens Report*”).

¹⁶ *First Carrier Letter* at 2.

little has changed in the market since 1998, that the Commission remains unalterably bound by its 1998 conclusions.

The actual history is somewhat more complex. Confronted by cable modem service in 1998, the Commission stubbornly declined to classify the service, leaving the federal courts to make determinations on an *ad hoc* basis. If, as the carriers insist, the Commission unambiguously classified all ISPs (including broadband access providers) as “information service providers,” how do they explain the Commission’s repeated representations to federal courts that the Commission had *not* decided the issue?¹⁷ As late as 2002, the Supreme Court noted that the FCC “has reiterated that it has not yet categorized [cable modem] Internet service.”¹⁸ Indeed, the Supreme Court noted that “Respondents are frustrated by the FCC’s refusal to categorize [cable] Internet services.” This would seem rather at odds with the forceful insistence by carriers and their trade organizations that the FCC definitively settled the matter in 1998. Furthermore, the Commission, with the blessing of the D.C. Circuit and the *support* of carriers, classified broadband access as a “telecommunications service” for purposes of CALEA.¹⁹

Further, even if the carrier’s correctly characterize the FCC’s findings in the *Stevens Report*, they ignore the relevant context in which the Commission made its findings. An examination finds that the Commission always exercised sufficient jurisdiction over the telecommunications component and over access to internet service to protect consumers – or thought it did. Since the first *Computer* proceeding, the Commission always reserved the right to exercise direct authority over “enhanced service providers” (including ISPs) where necessary.²⁰ The Commission contented itself, however, with regulating the Title II component as adequate to promote competition and protect consumers. It forbore from direct regulation of ISPs in anticipation that sufficient competition would emerge to provide adequate protection for consumers.²¹ But the Commission never foreswore direct regulation of ISPs should events so warrant.²² To the contrary, in both 2002 and 2005, the FCC explicitly sought comment on whether it should regulate broadband access providers directly for a variety of purposes.²³

In other words, when the Commission found it served the public interest to classify broadband access as “telecommunications,” as it did with CALEA, it did not hesitate to do so. When the Commission found it served the public interest to regulate broadband access providers directly under Title I, it sought to do that as well. In neither case did the horrendous

¹⁷ See *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000) (“We note at the outset that the FCC has declined, both in its regulatory capacity and as *amicus curiae*, to address the issue before us.”)

¹⁸ *NCTA v. Gulf Power Co.*, 534 U.S. 327, 338 (2002) (also noting that the FCC had expressed “willingness to reconsider its conclusion that Internet services are not telecommunications.”)

¹⁹ Communications Assistance for Law Enforcement Act and Broadband Access and Services, *First Report and Order and Further Notice of Proposed Rulemaking*, 20 FCC Rcd 14989, ¶ 10 (2005), *aff’d sub nom American Council on Education v. FCC*, 451 F.3d 226 (2006).

²⁰ Reg. and Policy Problems Presented by the Interdependence of Computer and Communications Services, *Final Decision*, 28 FCC2d 267 (1971); Second Computer Inquiry, *Final Decision*, 77 FCC2d 384 (1980).

²¹ *Cable Modem Order*, 17 FCC Rcd 4798, ¶¶ 6, 73; *Wireline Framework Order*, 20 FCC Rcd 14853, ¶ 62.

²² *Wireline Framework Order* ¶¶ 157, 159.

²³ *Cable Modem Order* ¶ 78; *Wireline Framework Order* ¶ 4.

consequences predicted by the carriers – unduly burdensome regulation or the death of investment – come to pass.

Consequences of Accepting the Stevens Report As Definitive

The carriers insist that without reclassification, the Commission retains “the authority to accomplish to implement the centerpiece of the National Broadband Plan – universal access to the broadband Internet for all Americans.”²⁴ Brushing aside for the moment the multiple other goals of the National Broadband Plan over which this assertion elides, this statement is directly at odds with the carriers elevation of the *Stevens Report* to unalterable Holy Writ. As the *Stevens Report* explained, the Communications Act imposes a significant trade off for classification as an “information service”:

Under our framework, Internet service providers are not treated as carriers for purposes of interstate access charges, interconnection rights under section 251, and universal service contribution requirements. This treatment admittedly provides some benefits to such companies, but it also imposes limitations. Internet service providers are not entitled under section 251 to purchase unbundled network elements or discounted wholesale services from incumbent LECs, they are not entitled to federal universal service support for serving high-cost and rural areas, and they are not entitled to reciprocal compensation for terminating local telecommunications traffic.²⁵

Carriers have responded that court decisions relating to E-Rate demonstrate the FCC has adequate authority under Title I to repurpose the USF High Cost, Link-Up and Lifeline funds to broadband. The *Stevens Report* distinguishes between E-Rate and the other funds:

The one case in which Internet service providers and carriers enjoy similar treatment is in the provision of certain services to schools and libraries at discounted rates. In that case, Congress expressly directed the Commission to create “competitively neutral rules” to facilitate “access to advanced telecommunications and information services.”²⁶

The carriers cannot have it both ways. The *Stevens Report* found explicitly that to be “faithful to the balance struck by Congress,” information service providers could not receive support outside of E-Rate. If the *Stevens Report* represents the unalterable last word on the classification of broadband access providers, then carriers must accept the limitations the *Stevens Report* says flow from this classification.

Finally, although not covered by the *Stevens Report*, PK notes that the carriers – with the express support of Commissioners McDowell and Baker – have sought preemption of state and local efforts to collect last-mile broadband deployment data.²⁷ If the carriers are correct that the *Stevens Report* unalterably classified broadband access as an “information service,” the FCC

²⁴ *Second Carrier Letter* at 2.

²⁵ *Stevens Report* at 11,552.

²⁶ *Id.*

²⁷ See National Association of Regulatory Utility Commissioners Petition, *Memorandum Opinion & Order*, WC Docket No. 09-193, FCC 10-70 (concurring statements of Commissioners McDowell and Baker).

would appear to lack the authority to preempt the states – at least with regard to wireline services.²⁸ While preemption is not actually a goal of the National Broadband Plan, the lack of FCC preemption power for broadband access service highlights the broad consequences of the *Comcast* decision, particularly if the 1998 *Stevens Report* remains the last word on the subject.

The FCC’s Authority Under the APA To Classify Broadband Access Service as Title II

Carriers have also raised objections to classification of broadband access as a Title II service on the grounds that it would violate the Administrative Procedures Act (APA). Arguments that the Commission lacks an adequate factual record are, of course, entirely premature. The carriers are entitled to their opinion as to what they think the record after a proceeding *would* show, or what they think the record compiled in the National Broadband Plan shows. But even the carriers cannot claim sufficient powers of prophecy to state definitively what a properly developed record in a proceeding of the kind requested by Public Knowledge (and now announced by the Chairman Genachowski) will support or not support.

The Commission Retains The Same Delegated Authority It Had In Brand X

The carriers have argued that somehow, despite the express finding of the Supreme Court, the Commission lacks the authority to determine the proper classification of broadband access service. Unfortunately, many of these arguments blatantly mischaracterize what Public Knowledge has proposed. For example, with all due respect to Former Solicitor General Waxman, a formal agency proceeding to assess the appropriate response to a significant court case hardly constitutes an effort to “evade” the *Comcast* decision.²⁹ Surely Mr. Waxman does not suggest that the D.C. Circuit attempted to exceed its bounds as an Article III court to define the FCC’s authority forevermore. Indeed, such a statement stands in marked contrast to the public statements (and even some of the filed statements) of the carriers themselves, who have argued that the Commission retains full authority over broadband.³⁰

Further, USTA’s argument that Congress did not delegate power to the Commission to determine the appropriate classification for broadband access flies in the face of the explicit holding of *Brand X*, which expressly found the definitional statutes ambiguous.³¹ Indeed, as explained by the majority opinion, it is precisely *because* Congress delegated power to the FCC to make a determination on classification that the FCC could overrule the Ninth Circuit’s previous determination that cable modem service constituted a “telecommunications service.”

²⁸ *Comcast*, slip op. at 14-15.

²⁹ *USTA Letter* at 2 (citing Washington Post editorial of April 17, which also acknowledged the Washington Post’s financial interest in the outcome).

³⁰ See, e.g., *Second Carrier Letter* at 2; Statement of NCTA President & CEO Kyle McSlarrow, Apr. 6, 2010 <http://www.ncta.com/ReleaseType/Statement/comcastvfccstatement.aspx> (“Nor does the ruling alter the government’s current ability to protect consumers.”); Statement of Verizon Executive Vice President & General Counsel Randal S. Milch, Apr. 6, 2010, <http://newscenter.verizon.com/press-releases/verizon/2010/appeals-court-decision-on.html> (“The court recognized that the FCC does have Title I ancillary authority over Internet access. In this case, the FCC simply failed to link its actions to its statutory responsibilities.”)

³¹ 545 U.S. 967.

In Reclassifying Broadband, the FCC Would Be Entitled to Chevron Deference Because The Relevant Statutory Terms Are Ambiguous, and It Would Be Acting Within Its Delegated Authority to Resolve Them

Contrary to the *USTA Letter*, reclassification would not involve the kind of statutory interpretation present in *FDA v. Brown & Williamson Tobacco Corp.*³² That case stands for a simple point: that *Chevron* deference only applies to ambiguous statutes, where Congressional intent is not clear. In *Brown & Williamson*, the FDA had determined that tobacco was a “drug” subject to FDA regulation. In isolation, this may have been a “reasonable” interpretation. But the Court found that if tobacco were a “drug,” the FDA would be compelled to ban it; and that this result would be incompatible with a Congressional policy of regulating and taxing tobacco but not banning it.³³ Because the overall statutory scheme showed that Congress had “directly spoken to the issue,”³⁴ there was no ambiguity and *Chevron* did not apply. *Brown & Williamson* is not central to the reclassification debate because the Supreme Court has already definitively held that the relevant statutory language is ambiguous,³⁵ but even applying its analysis shows that Congress intended to delegate to the FCC the authority to make regulatory classifications of communications services.

In *Brown & Williamson*, the Court looked outside of the text of the statute to determine Congressional intent. Applying the same method to reclassification shows that Congress has decided that basic, common carriage communications services should be available to the public. To further that policy it delegated to the FCC (and its predecessor agencies) the authority to enact regulations and make expert judgments,³⁶ like those it made in the *Computer Inquiries*,³⁷ as to which services should be considered Title II telecommunications services and which should not be. By using broad terms like “telecommunications services,” Congress delegated to the FCC to determine *how* (not whether) to best ensure access to Title II services, and how to define and delineate those services on a technical level. Congress did not intend for the FCC to write off large portions of the Communications Act as no longer relevant, and it did not intend for a bedrock principle of communications law to sunset. Historically, the FCC has made a distinction between “basic” and “enhanced” services. Congress adopted this distinction in the 1996 Telecommunications Act (with the terms telecommunications and information services),³⁸ and it accepted the 1998 *Stevens Report*,³⁹ which assumed that access to information services would take place over a common carriage telecommunications link. When the FCC abandoned this policy, it assumed (along with the Supreme Court⁴⁰) that it could still preserve the nondiscriminatory nature of broadband services even without formally categorizing them as

³² 529 U.S. 120 (2000).

³³ *Brown & Williamson*, 529 U.S. at 137.

³⁴ *Id.* at 133.

³⁵ *Brand X*, 545 U.S. at 989.

³⁶ Congress expressed its intent in the Mann-Elkins Act of 1910, 36 Stat. 539; the Communications Act of 1934, 48 Stat. 1064; and the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56.

³⁷ Reg. and Policy Problems Presented by the Interdependence of Computer and Communications Services, *Final Decision*, 28 FCC2d 267 (1971); Second Computer Inquiry, *Final Decision*, 77 FCC2d 384 (1980); Amendment of Sections 64.702 of the Comm’n’s Rules and Regs., *Report & Order*, 104 FCC2d 958 (1986).

³⁸ 47 U.S.C. § 153.

³⁹ Federal State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd. 11,501 (1998).

⁴⁰ *Brand X*, 545 U.S. at 976.

common carriage telecommunications services—in essence, it decided it could carry out Congressional policy without using the tools Congress gave it. It turned out to be wrong, and should therefore reclassify broadband as a Title II service. Unlike the situation in *Brown & Williamson*, reclassification would be an example of an agency acting to further, not thwart, Congressional intent.

A *Brown & Williamson*-type analysis of the broader legal context is largely superfluous, however, because the Supreme Court has already decided that the relevant statutory terms are ambiguous and that the FCC is entitled to *Chevron* deference in interpreting them. As the Court discussed at length, the term “offer” (among others) in the Communications Act is ambiguous.⁴¹ In *Brand X*, the FCC had determined (1) that cable modem service is comprised of telecommunications service and information service components, but that (2) the telecommunications service was not “offered” to consumers (because it was always bundled tightly with information services), and therefore (3) cable modem service providers were not telecommunications service providers, meaning that (4) cable modem service was an information service. This chain of reasoning was upheld because the Court found, among other things, that the FCC’s use of the word offer to mean only a “stand-alone” offer was reasonable.⁴² Justice Scalia disagreed and argued that this use was unreasonable.⁴³ If the FCC does nothing more than adopt Justice Scalia’s reasonable reading of the word “offer” and find that telecommunications services are “offered” to the public as part of broadband, it will have a sufficient legal basis to classify broadband as a Title II service and regulate it accordingly.

Reclassification would not present an issue like that in *American Library Ass’n v. FCC*.⁴⁴ There, the FCC attempted to regulate something outside its subject matter jurisdiction of “communication by wire or radio,” and thereby exceeded its delegated authority. The D.C. Circuit overturned the FCC, holding that an agency must be acting within its delegated authority for *Chevron* to apply. Other cases cited by the *USTA Letter* stand for the proposition that when an agency takes an admittedly vague statute in an unexpected new direction, it may be acting outside its delegated authority.⁴⁵ But the Supreme Court has already held that Congress has delegated authority to the FCC to classify broadband access as an information service or as a telecommunications service,⁴⁶ and so those cases are inapposite.

For the above reasons, the relevant statutory language is ambiguous, and Congress has delegated to the FCC the authority to adopt the interpretation that best furthers the policy of the Communications Act to ensure that the public has access to telecommunications free of unreasonable discrimination.

⁴¹ *Id.* at 986-997.

⁴² *Id.* at 989.

⁴³ *Id.* at 1007 (Scalia, J., dissenting).

⁴⁴ 406 F. 3d 689 (D.C. Cir. 2005).

⁴⁵ See *Gonzales v. Oregon*, 546 U.S. 243, 268-69 (2006) (Attorney General receives *Chevron* deference only when acting within delegated authority); *American Bar Association v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005) (an agency only has deference in interpreting an ambiguous statute if Congress has delegated it the authority to do so).

⁴⁶ *Brand X*, 545 U.S. at 980-82 (because the FCC is regulating a service within its jurisdiction, it is acting within its delegated authority, and *Chevron* deference applies).

The FCC Must Account for All the Facts in Reaching a Classification Decision, But It Faces No Additional Legal Burden When Changing Course

It is now a settled part of administrative law that an agency does not need to provide a more detailed explanation when it changes course than when it grapples with an issue *de novo*.⁴⁷ An agency can change its mind for no other reason than it thinks its new approach is better than the old one. The *USTA Letter* makes much of the fact that an agency must always account for all the facts.⁴⁸ This is true for all agency decisions, whether they involve a change of course or not; accounting for all the facts (including reliance interests) is a prerequisite of engaging in reasoned decision-making and is necessary to comply with the Administrative Procedures Act.⁴⁹ But the FCC faces no additional legal burden when it changes its mind.

Thus, there do not *need* to be any “new facts” for the FCC to change its mind as to the classification of broadband. There do not need to be any substantial changes to the market structure, the technology, or consumer expectations. The FCC would meet its burden of reasoned decision-making in reclassification if, after accounting for the unchanged facts, it finds a new interpretation of the same facts more persuasive than it did before, or if it announced that it finds that the new classification would better give it the tools it needs to carry out its policy objectives. Nevertheless, there *are* new facts on the ground that should inform the Commission’s judgment. They all point to the wisdom of reclassification.

- *New fact: Title I is insufficient to protect consumers.*

The *Comcast* decision demonstrates that the FCC’s reliance on Title I ancillary authority to protect consumers and promote an open Internet is quite limited. Comcast overcame the FCC’s (and Public Knowledge’s) legal arguments in the D.C. Circuit; it faces no further sanction for its past violations of the FCC’s Open Internet principles. Reclassification would not be an attempt to “evade” the implications of *Comcast*, it would be taking *Comcast* seriously as to the limits of the FCC’s authority over Title I services. This new legal reality must be taken into account, just as the FCC took its understanding of its legal authority into account when it first classified broadband services under Title I.

- *New fact: Competition has not emerged.*

⁴⁷ As the Supreme Court recently explained,

We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor 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. . . . [O]f course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; 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, which the conscious change of course adequately indicates.

FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810-11 (2009) (expressly overruling contrary DC Circuit opinion)(emphasis in original, citations omitted).

FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009).

⁴⁸ *USTA Letter* at 9-10.

⁴⁹ 5 U.S.C. § 706.

The FCC based its initial decision to classify broadband services under Title I in part on a prediction that facilities-based competition would emerge, and that market pressure would prevent broadband service providers from engaging in unreasonable discrimination. While “a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency,”⁵⁰ it has a duty to reexamine its predictions as events unfold.⁵¹ The evidence shows that facilities-based competition has not emerged in the years since the FCC’s initial deregulatory fury.⁵² New facilities-based competitors like broadband-over-powerline have been utterly unsuccessful in the marketplace,⁵³ and wireless services are mostly complements to (rather than substitutes for) wireline service.⁵⁴

- *New fact: The market is not a check on anti-consumer behavior.*

Because of this lack of competition, there is no market check preventing carriers from engaging in anti-consumer behavior. “Early termination fees” have made the transition from mobile phone service to home broadband, and keep rising.⁵⁵ Comcast and others have interfered with peer-to-peer protocols. One ISP recently experimented with replacing a consumer’s chosen search engine with one of its own.⁵⁶ ISPs signaled their willingness to enter into anticompetitive “quality of service” contracts with selected Internet application providers. These are not the signs of a market sufficiently competitive to protect consumers.

While the record before the FCC in the Open Internet proceeding gives the FCC strong reason to adopt rules protecting consumers, the legal and factual developments outlined above call must be fleshed out in a new proceeding, where advocates and opponents of reclassification can refresh the record as to whether the assumptions and predictions of the FCC’s original classification orders hold true.

Classifying Broadband Access Service as Title II Would Not Require Classification of Content or Application Providers as Title II

Finally, PK addresses the claim that classifying broadband access as a Title II service would somehow transform application and content providers such as Facebook, Netflix, or Google into Title II providers. These claims appear calculated solely for their political affect rather than from any basis in law or precedent. To the extent PK can discern any underlying

⁵⁰ FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 814 (1978) (citing FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 29 (1961)).

⁵¹ *Quincy Cable TV, Inc. v. FCC*, 768 F. 2d 1434, 1442, 1457-58, 1463 (D.C. Cir. 1985).

⁵² Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, *Fifth Report*, 23 FCC Rcd. 9615, ¶ 34 (2008); PEW INTERNET & AMERICAN LIFE PROJECT, HOME BROADBAND ADOPTION 23 (2009).

⁵³ See, e.g., Karl Bode, *Most Successful U.S. Broadband Over Powerline Network Shut Down*, DSL REPORTS, Apr. 8, 2010, <http://www.dslreports.com/shownews/Most-Successful-US-Broadband-Over-Powerline-Network-Shut-Down-107812>.

⁵⁴ Ex Parte Submission of the United States Department of Justice in A National Broadband Plan for Our Future, GN Docket No. 09-51 (filed Jan. 4, 2010), at 5.

⁵⁵ Karl Bode, *Verizon's FiOS ETF: \$360 Starting January 17*, DSL Reports, Jan. 6, 2010, <http://www.dslreports.com/shownews/Verizons-FiOS-ETF-360-Starting-January-17-106253>

⁵⁶ Matthew Lasar, *Windstream in Windstorm Over ISP's Search Redirects*, ARS TECHNICA, Apr. 6, 2010, <http://arstechnica.com/telecom/news/2010/04/windstream-in-windstorm-over-dns-redirects.ars>.

reasoning to this argument, it appears to flow from the mistaken impression that there is something magic about Internet Protocol (“IP”), so that any service that relies on IP would somehow be impacted by reclassification of broadband access service.

Unlike an “integrated” service such as broadband access, which combines telecommunications and information processing in a single service, “pure” information service providers such as Facebook engage in information processing, and use the telecommunications service provided by others to send and receive data. There is no underlying “telecommunications service” that Facebook offers to subscribers – a critical distinction.⁵⁷ For the same reason, companies such as Akami which offer services such as “edge caching,” would not become telecommunications service providers. To the contrary, these companies engage in precisely the sort of “data processing” that has been the hallmark of an “enhanced” rather than “basic” service since the FCC developed the distinction in *Computer I*.⁵⁸ To use a well understood example from the world of traditional voice, a dial-a-joke or voicemail service depends entirely on the phone network, but they are not telecommunications providers.

By contrast, an overly aggressive effort to expand Title I authority as urged by the carriers poses the greater risk to traditional internet companies. As Public Knowledge argued in its initial comments in the Open Internet proceeding, exercise of Commission authority must be properly limited by statutory constraints. As PK and other civil liberties organizations warned, an expansive theory of Title I that would give the FCC unlimited jurisdiction over “the Internet” rather than over the telecommunications component that supports “the Internet” would exceed the FCC’s authority and threaten the public interest.

The carriers insist that Title I provides sufficient authority to achieve “the goals of the National Broadband Plan,” by which they primarily mean Universal Service.⁵⁹ Carriers have also called for the FCC to preempt state data collection efforts.⁶⁰ But any exercise to extend ancillary authority over Title I entities to achieve these goals would apply to all Title I entities – including pure information service providers such as Facebook as well as integrated providers such as broadband carriers. This would set a dangerous precedent which the FCC could best avoid by properly classifying broadband access as Title II.

⁵⁷ In response to obfuscatory arguments such as those offered by the carriers, it is helpful to return to the relevant statutory definitions of “telecommunications,” “telecommunications service,” and “telecommunications carrier.” Neither Internet content and applications companies, nor edge caching services, offer “for a fee directly to the public,” “the transmission ... of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43), (46).

⁵⁸ In *Computer I*, “data processing” services were defined as “the use of a computer for the processing of information as distinguished from circuit or message-switching. ‘Processing’ involves the use of the computer for operations which include, inter alia, the functions of storing, retrieving, sorting, merging and calculating data, according to programmed instructions.” 28 FCC2d 267, 290.

⁵⁹ See AT&T Memorandum, GN Docket No. 09-51, Jan. 29, 2010, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020384662>; NCTA Letter and Memorandum, GN Docket No. 09-51, Mar. 1, 2010, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020392510>

⁶⁰ E.g., Comments of AT&T in *National Association of Regulatory Utility Commissioners Petition*, WC Docket No. 09-193, filed Nov. 2, 2009, at 3-4.

To conclude, PK does not imagine that this or any other letter will have exhaustively addressed all of the reasons to classify broadband access as a Title II service. Nor do the facts submitted by PK to the Commission necessarily provide a record sufficiently complete to support such a decision – although PK believes that the Commission has collected sufficient information in the National Broadband Plan and related proceedings to proceed with a declaratory ruling *sua sponte*.⁶¹ Thus, the proceeding on reclassification that the Chairman just announced will provide a proper forum in which parties can develop a sufficient record making for reasoned decision-making. Thankfully, the Commission has rejected the efforts by carriers and their supporters to close the book on broadband classification, dooming the National Broadband Plan and condemning consumers to a world of perpetual *caveat emptor*. Such a result would have ill-serve the public interest, and would have undermine the claim that *this* FCC makes its decisions on the basis of facts and law rather than political expediency. Pressure from your office was instrumental in preventing the Commission from making that mistake, and Public Knowledge thanks you for it.

Sincerely,
/s/
Harold Feld
Legal Director
Public Knowledge

cc:

The Honorable Joe Barton
The Honorable Rick Boucher
The Honorable Cliff Stearns
The Honorable Jay Rockefeller
The Honorable Kay Bailey Hutchison

⁶¹ As precedent, the *Wireless Framework* order was issued *sua sponte*. See 22 FCC Rcd. 5901.