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Framework for Broadband Internet Service	GN Docket 10-127

COMMENTS OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

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The Computer & Communications Industry Association ("CCIA"), by and through counsel, files these Comments in response to the Notice of Inquiry released June 17, 2010, in this docket ("NOI"). These comments explain why the Chairman's proposed Third Way approach to establishing a legal framework for imposing a measure of procompetitive, pro-consumer protections on retail end user broadband Internet access services is both legally sound and appropriately tailored to achieving the nation's goals for ubiquitous, robust broadband service.

SUMMARY

Section I of these comments demonstrates that Title II of the Communications Act of 1934 (the "Act") plainly covers retail end user broadband Internet access services. No party has attempted to deny that two-way transmission paths to the Internet are "telecommunications," and considerable Commission precedent, most notably with regard to wireline broadband service, lays out this conclusion. Even if Title II were not so clear, the Commission retains broad discretion in interpreting the reach of Title II according to the Supreme Court in *Brand X*.[1] Record evidence reflecting market changes and the de-integration of the transmission and information components of broadband Internet service will fully support an express decision to classify broadband Internet access as telecommunications. In so doing, the Commission will not commence "regulating the Internet," as opponents are quick to tell the media, but rather will adhere to its mission of ensuring fair and nondiscriminatory access to the Internet.

Section II discusses each of the six provisions of Title II that the Commission has proposed to except from forbearance. Each of these sections is necessary and appropriate for maintaining consumer welfare and procompetitive, robust networks.

services must be provided in a just, reasonable, and nondiscriminatory manner. These provisions are

[1] *National Cable & Telecommunications Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967 (2005).

essential to protect consumers and carriers, and no provider of broadband Internet access should have an objection to adhering to these basic requirements.

violated and harm is caused to consumers or carriers. This provision was the vehicle for revealing Comcast's hidden network management practices and should remain in place for retail broadband Internet access. The Commission should explore how to employ the "technical advisory group" suggested in the NOI within the Section 208 framework.

carriers and imposes a minimal regulatory burden. To the extent that the Federal Trade Commission also wishes to protect the privacy of broadband Internet access users, the Commission can coordinate with that agency in crafting parallel rules as it has done previously, most notably in establishing the Do-Not-Call rules.

Plan. That provision authorizes the Commission to devote funds for broadband deployment and to apply the contribution requirement to retail broadband Internet access services under, at a minimum, the permissive authority granted by Congress in section 254(d).

service in order to ensure that persons with disabilities are not excluded from the benefits of the nation's achievements in deploying robust broadband networks.

Finally, Section III of these comments explains that the Commission's proposed plan of forbearance, which will apply nationwide, is both permissible under section 10 of the Act, 47 U.S.C. § 160, and appropriate. The structure and plain language of section 10 authorize the Commission to forbear from imposing any regulation of its own accord, provided that it completes the requisite market and consumer protection analysis. The Commission need not wait for a carrier to file a petition. Nor

must it limit forbearance to one geographic region; well-settled precedent demonstrates that section 10 imposes no "granularity" requirement to forbearance, and addressing a particular product market on a nationwide basis is not uncommon in competition analysis. In fact, as the Commission relates in the NOI, it has taken this tack with regard to wireless services by forbearing from imposing price regulation or tariffing requirements on commercial mobile radio service ("CMRS") despite the fact that Congress requires CMRS to be regulated as Title II common carriage. The forbearance afforded to CMRS is an instructive precedent for the wireless industry generally with regard to the proposed Open Internet guidelines,[2]

CCIA's focus on retail broadband Internet access stems directly from the Act: section 153 defines "telecommunications services" as telecommunications provided "for a fee directly to the public."[4] These are the services that Congress indisputably placed within the Commission's Title II authority and which the proposed Open Internet principles most closely would govern. As such, the Third Way approach to exercising authority over retail broadband Internet access services cannot be misconstrued as a ruse for regulating all transmission services associated with the Internet, such as wholesale transport, but rather end user transmission services.

These comments do not support the suggestion that, despite the *Comcast* vacatur, the Commission should attempt again to invoke ancillary jurisdiction under Title I as authority for adopting Open Internet rules. NOI ¶¶ 30-51. The D.C. Circuit already rejected sections 1, 230, and 706 of the Act for this purpose, because those provisions cannot satisfy the requirement that ancillary jurisdiction is "'independently justified,'"[5] by "statutorily mandated responsibilities."[6] For a carrier to continue to advocate ancillary jurisdiction under any of these rejected provisions is befuddling.[7] Moreover, recycling an analysis that was roundly criticized by the D.C. Circuit simply invites another appellate challenge to the Commission's forthcoming decision, further delaying the adoption of the Open Internet safeguards.[8] The surer course is to base Open Internet authority squarely in Title II. As

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[4] 47 U.S.C. § 153(46).

[5] *Comcast*, 600 F.3d at 651 (quoting *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976)).

[6] *Id.* at 649 (quoting *American Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

[7] One week after the *Comcast* decision was issued, AT&T apparently suggested that sections 1 and 706 are appropriate statutory tethers for Title I ancillary jurisdiction. GN Docket No. 09-191, Letter from Jonathan E. Neuchterlein, Counsel for AT&T Inc., to Marlene H. Dortch, Secretary, FCC (Apr. 14, 2010).

[8] As Commissioner Copps aptly stated in an interview with C-SPAN,

> "We don't have a year or two years or three years or five years to come up with wonderful permutations of Title I authority. And every time we do that someone is going to drag us into court. The cleanest way to do this, the best way to do this, in my mind the only viable way to do this, is to reclassify."

shown in these comments, Title II is both plainly applicable and sufficiently robust to support the preservation of a procompetitive and pro-consumer Internet.

It bears mention that what CCIA supports, and what the Commission seeks to do, is not "regulating the Internet." Rather, the focus of this proceeding and the Open Internet proceeding is to ensure, on a technologically neutral basis, that the infrastructure used for broadband Internet access is operated in a reasonable, nondiscriminatory manner. This goal addresses a substantial, identifiable harm — made real by Comcast's conceded efforts to manipulate end user Internet access without notice — and will, according to a letter filed by several prominent economists, "maximize the value of the Internet."[9]

A. Two-Way Retail Internet Access Services Plainly Constitute "Telecommunications" Under Title II

The provision of a two-way transmission path over which end users receive and send communications is, beyond a doubt, telecommunications. No commenter in this or the Open Internet docket has attempted to assert otherwise.[10] Ample Commission precedent supports this conclusion.

Communications Daily, *Title II Reclassification 'Only Viable Way' to Proceed, Copps Says*, p. 1 (Apr. 30, 2010).

[9] GN Docket No. 10-127, Letter from Subhajyoti Bandyopadhyay, Associate Professor of Information Systems and Operations Management, University of Florida, *et al*., at 2 (July 9, 2010).

[10] In the Open Internet proceeding, opponents of Commission's six proposed Open Internet principles argued not that broadband Internet access services fail the definition of "telecommunications," but rather that the Notice of Proposed Rulemaking did not articulate adequately the statutory basis on which adoption of the principles would rest. *E.g*., GN Docket No. 09-191, Comments of AT&T Inc. at 214-222 (Jan. 14, 2010); Comments of Comcast Corporation at 22-26 (Jan. 10, 2010). Others argued that the Open Internet principles violate the First Amendment. *E.g*., GN Docket No. 09-191, Comments of Verizon and Verizon Wireless at 111-118 (Jan. 14, 2010); Comments of the National Cable & Television Association at 49-64 (Jan. 14, 2010). Months later, NCTA, Verizon, and others argued that "Internet Access [H]as [N]ever [B]een [S]ubject to Title II [R]egulation" but did not deny that the transmission of data to and from the Internet via a broadband connection constitutes telecommunications. GN Docket No. 09-191, Letter from NCTA, Verizon, USTA, CTIA, TIA, ITTA, AT&T Inc. and Time Warner Cable to Chairman Julius Genachowski, FCC, at 3 (Apr. 29, 2010). This letter came to be known as the "Industry Letter" but is referenced herein as the "IAP Industry Letter," wherein IAP refers to Internet Access Providers.

1. The Commission has long recognized Internet transmission paths as telecommunications.

Well-settled precedent dictates that retail broadband Internet access service is telecommunications. The Commission's treatment of wireline broadband Internet transmission services provides the most germane examples of this precedent.[11] In 1998, the Commission considered how best to regulate so-called "advanced services," or the "[p]acket-switched transmission of digitized information" in order to ensure that "all Americans … have meaningful access" to them.[12] Advanced services, for purposes of the *1998 Advanced Services Order*, principally included Digital Subscriber Line ("DSL") services which incumbent local exchange carriers ("ILECs") had recently tariffed as new telecommunications services. The Commission found that DSL "allows transmission of data over the copper loop at vastly higher speeds than those used for voice telephony," and "at the same time" enables a consumer to "make ordinary voice calls over the public switched telephone network."[13] The Commission thus concluded that advanced services, particularly DSL, "provide members of the public with a transparent, unenhanced, transmission path" and as such "are telecommunications services."[14] It noted that not one party, not even the ILECs who sought "a deregulated environment" for DSL,[15] disagreed with that conclusion.[16]

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[11] As the NOI states, Title II already applies to CMRS by virtue of Section 332(c) of the Act. NOI ¶ 75.

[12] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 *et al*., Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24,012, 24,016 ¶¶ 7-8 (1998) ("*1998 Advanced Services Order*").

[13] *Id*. at 24,026-27 ¶ 29.

[14] *Id*. at 24,030 ¶ 36.

[15] Bell Atlantic, US West, and Ameritech each had filed petitions seeking the Commission's forbearance from applying certain Title II provisions, including Sections 251 and 271, from their DSL services. *1998 Advanced Services Order*, 13 FCC Rcd. at 24,023-25 ¶¶ 23, 25.

[16] *Id*. at 24,030 ¶ 36.

Opponents of the Open Internet principles have no serious answer to the *1998 Advanced Services Order*. Indeed, they ignore it. The United States Telecom Association ("USTA"), in an extensive letter cited by industry incumbents,[17] completely ignores this order when setting forth its analysis of why Title II classification would be "extraordinary."[18] The IAP Industry Letter likewise excludes the *1998 Advanced Services Order* from its several pages of analysis, but does mention a subsequent order, identified as the "*GTE ADSL Order*,"[19] in response to an entry on Public Knowledge's blog. The IAP Industry Letter then goes on to mischaracterize the Commission's holding in that order.

The *GTE ADSL Order* dealt with a different question. Unlike the forbearance issue raised by the ILECs in the *1998 Advanced Services Order*, there the Commission was investigating GTE's retail ADSL tariff pursuant to which it would "provide their end user customers with high-speed access to the Internet[.]"[20] The Commission found that this retail broadband service was "interstate telecommunications," and more specifically, a form of "special access service."[21] The Commission did not hold, contrary to the IAP Industry Letter's assertion, that DSL service was telecommunications only insofar as it was sold "*to* competing ISPs."[22] Rather, the Commission held that GTE's proposed ADSL service, which was sold directly to end users, was a telecommunications service.

Advanced services remained "telecommunications services" until 2005 when the Commission, in response to *Brand X*, decided to "establish a new regulatory framework for broadband

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17 IAP Industry Letter at 2 n.6.

18 GN Docket No. 09-191, Letter from Seth P. Waxman, Counsel to USTA, to Chairman Julius Genachowski, FCC, at 5 (Apr. 28, 2010).

19 *GTE Tel. Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd. 22,466 (1998).

20 13 FCC Rcd. at 22,466 ¶ 1.

21 *Id*. at 22,480 ¶¶ 25-26.

22 IAP Industry Letter at 4 (emphasis in original).

In light of this consistent analysis, the concept of treating retail broadband Internet access as telecommunications under Title II can surprise no one. Its core is telecommunications, and for years the wireline versions of this service were regulated telecommunications services. Indeed, hundreds of carriers still categorize their broadband offerings in this way. Putting aside the policy question of whether Title II regulation is welcomed by IAPs, the legal question of whether these services fall under Title II authority is easily answered in the affirmative.

The Commission should also find comfort in the fact that efforts have been underway for many weeks to convince Congress to amend the Act in a manner that would preclude the application of Title II to broadband Internet access. For example, H.R. 5257, the Internet Investment, Innovation and Competition Preservation Act, introduced on May 11 of this year, would amend Title I of the Act to prohibit the Commission from regulating "the rates, terms, conditions, provisioning, or use of an information service or an Internet access service" without first providing a report to Congress identifying a "market failure." If the Act already precluded the FCC from regulating any aspect of Internet access service, such an amendment would be unnecessary.

2. Classifying retail end user broadband Internet access as a Title II service comports with the definitions of "telecommunications" and "information service" in the Act.

The Act's definitions of "telecommunications" and "information services," 47 U.S.C. § 153(20) & (43), themselves support the Commission's proposed Title II classification of retail broadband Internet access service. The core feature of this service — providing a high-speed transmission path to and from the Internet — fits nicely within Congress's express understanding of "telecommunications." Further, as the NOI recognizes, the inclusion of some protocol conversion and routing functions within broadband Internet communications need not disqualify these services from the "telecommunications" category. *See* NOI ¶ 59 & n.170. The Commission thus reasonably can

conclude that broadband Internet access belongs to the "telecommunications" class of service rather than to "information services."

The Act defines "telecommunications" as

> the **transmission**, between or among points specified by the user, **of information of the user's choosing**, without change in the form or content of the information as sent and received.[30]

It cannot be disputed that the marquee function of broadband Internet access is to provide exactly such transmission paths.[31] Consumers have vast choices of information services and content, ranging from Hollywood films to web-based email. The modern consumers' view of broadband service, which is a valid factor in the Commission's classifications,[32] is that broadband is just the onramp to the Internet, and the content they seek is something entirely separate from that service.[33]

The Act defines "information service" as

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing**, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service**.[34]

The NOI pointedly recognizes the wide caveat in this definition: network management and routing information are ***not*** "information services." NOI ¶ 59 & n.170.

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[30] 47 U.S.C. § 153(43) (emphasis added).

[31] "Telecommunications services" are those which are provided "for a fee to the public," 47 U.S.C. § 153(46), which, as explained above in the introduction of Section I, refers to retail services.

[32] In *Brand X*, the Supreme Court noted favorably that the Commission reviewed cable modem service in the way that it was "[s]een from the consumer's point of view." 545 U.S. at 988.

[33] *See, e.g.*, FCC, Connecting America: The National Broadband Plan, § 3.1 at 16-17 (discussing how businesses and consumers use broadband to access video, applications, and content).

[34] 47 U.S.C. § 153(20) (emphasis added).

The integration of transmission capability with some computer processing functions that often takes place in Internet access service in no way forecloses these services from again being classified as "telecommunications services." As the NOI recognizes, the pre-1996 Act regime of "basic" and "enhanced services" allowed for so-called "adjunct-to-basic" services that went "beyond mere transmission" but nonetheless were treated as telecommunications. NOI ¶ 59. Signaling is the best example of "adjunct-to-basic" telecommunications: without signaling, call completion is impossible, and yet it is not created or chosen by the retail end user and does not satisfy the strict definition of "telecommunications" in section 153(43), 47 U.S.C. § 153(43). Signaling is nonetheless so integral to the call transmission itself that it must be treated as part of the transmission for regulatory purposes.[35]

This precedent maps easily to the Internet age, and answers the Commission's questions about the "functional 'layers' that compose the Internet[.]" NOI ¶ 60. Of course, within any Internet communication there lies protocol information, which is not "information of the user's choosing,"[36] that is necessary to retrieve and route data. According to AT&T, this routing information constitutes "layer 3" services.[37] But, being integral to the communication path itself, and causing no change in the end user's chosen content, the provision of such routing information is simply "adjunct" to the Internet communication and thus remains telecommunications.

If the providers of Internet access service continue to insist that they are providing "information service," then they should be asked to demonstrate why that classification is appropriate. They should not be permitted simply to self-identify as "information services" providers and on that

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[35] *E.g.*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15,499, 15,723 ¶¶ 452-54 (citing *Intelligent Networks*, CC Docket No. 91-346, Notice of Inquiry, 6 FCC Rcd. 7256 (1991) (identifying signaling is an Unbundled Network Element under 47 U.S.C. § 251).

[36] 47 U.S.C. § 153(46).

[37] GN Docket No. 10-17, Letter from Henry Hultquist, Vice President – Federal Regulatory, AT&T Inc., to Marlene H. Dortch, Secretary, FCC (June 24, 2010).

basis attain deregulation. Rather, those providers should demonstrate that their service offerings in the market always include the provision of applications, content, embedded search functions, or other features that properly may be considered information services. Further, the providers should demonstrate that those information services are not "separable" from the underlying telecommunications service, for, as the Supreme Court observed in *Brand X*,[38] the Commission's decision in the *Cable Modem Order* to apply the "information services" classification to cable modems rested on the fact that the "telecommunications component is not … separable from the data processing capabilities of the service."[39] Thus, the mere provision of routing and protocol conversion, which are simply the kind of "adjunct-to-basic" services discussed in Paragraph 59 of the NOI, should not be sufficient to qualify these services for treatment as information services. Absent an evidentiary showing that their market offerings truly provide "a single, integrated service,"[40] Internet Access Providers should not be allowed to bootstrap telecommunications services into the 'information services' category in a game of self-service deregulation.

B. The FCC Retains Broad Discretion In Classifying Internet Access Services

The Supreme Court's decision in *Brand X* instructs that the Commission has broad discretion in determining which services are "telecommunications" under the Act. Thus, even if retail broadband Internet access were not so clearly within the purview of Title II, a Commission decision to classify these services as Title II telecommunications surely will enjoy considerable deference and survive any reasonable appellate scrutiny.

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[38] *Brand X*, 545 U.S. at 997 (rejecting argument that carriers could "'evade' common-carrier regulation by the expedient of bundling information service with telecommunications").

[39] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4823 ¶ 39 (2002) ("*Cable Modem Order*").

[40] *Id.*, 17 FCC Rcd. at 4823 ¶ 38.

Brand X makes clear that the Commission's duty to make "difficult policy choices,"[41] entitles it to deference in its interpretation of the Act under *Chevron*.[42] More specifically, the Supreme Court found that "telecommunications service" as defined in the Act can "admit of two or more reasonable ordinary usages" — it could mean a standalone offering of pure transmission, or it could mean an integrated transmission and information service.[43] And because no court ever had held that the definitions of "telecommunications service" and "information service" are unambiguous, the Supreme Court "ha[d] no difficulty concluding that *Chevron* applies."[44] Applying *Chevron* deference, the Court accepted the Commission's reasoning that cable modem service provided a "comprehensive capability for manipulating information," including "access to the Domain Name System (DNS)."[45]

But, as *Brand X* also instructs, "'[a]n initial agency interpretation is not instantly carved in stone.'"[46] The Commission may alter its interpretation of the Act "for example, in response to changed factual circumstances."[47] Indeed, in the Spring of 2002 when the Commission released the *Cable Modem Order*, its experience was that

> E-mail, newsgroups, the ability for the user to create a web page that is accessible by other Internet users, and the DNS are applications that are commonly associated with Internet access service. … As currently provisioning, cable modem service supports such functions … .[48]

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41 *Brand X*, 545 U.S. at 981.

42 *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

43 *Brand X*, 545 U.S. at 989.

44 *Id*. at 982.

45 *Id*. at 987.

46 *Brand X*, 545 U.S. at 981 (quoting *Chevron*, 467 U.S. at 863).

47 *Id*. (citing *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 59 (1983)).

48 *Cable Modem Order*, 17 FCC Rcd. at 4822 ¶ 38.

Now, more than eight years later, "[t]he Commission retains full authority to revisit the matter," as CCIA stated in the Open Internet proceeding.[49] Standalone web-based email, such as Gmail and Yahoo!, is overtaking the email offerings of IAPs,[50] and several third-party DNS hosting services have entered the market.[51] In addition, the NOI itself notes the popularity of social networking (Facebook), web hosting (Go Daddy), and web portal (Netvibes) services that are web-based and independent of any ISP. NOI ¶ 56. This evidence militates against the Commission's 2002 conclusion that cable modem service "is a single, integrated service" such that its "telecommunications component is not … separable from the data-processing capabilities of the service."[52] It likewise countermands the Commission's 2005 conclusion that wireline broadband Internet access service is "a single, integrated service" that "combines computer processing, information provision, and computer interactivity with data transport."[53] The market has changed, and the Supreme Court will allow the Commission's classification of end user broadband Internet access to change with it.[54]

The root of the matter is this: in 2005, the Commission employed its discretion to deem retail broadband Internet access to be an integrated information service, though it undeniably contains a telecommunications component, based on its "predictive judgment" that such action served the public interest. Today, faced with evidence that network operators can manipulate and degrade — undetectably — end users' ability to obtain digital content via the Internet, the Commission can

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[49] GN Docket No. 09-191, Reply Comments of the Computer & Communications Industry Association (CCIA) at 8 (Apr. 26, 2010) ("CCIA 09-191 Reply Comments").

[50] CCIA 09-191 Reply Comments at 15 (citing Eric Schonfeld, *Gmail Nudges Past AOL Email in the U.S. To Take No. 3 Spot*, TechCrunch (Aug. 14, 2009), *available at* http://techcrunch.com/2009/08/14/gmail-nudges-past-aol-email-in-the-us-to-take-no-3-spot/).

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

[52] *Cable Modem Order*, 17 FCC Rcd. at 4823 ¶¶ 38, 39.

[53] *2005 Wireline Broadband Order*, 20 FCC Rcd. at 14,863 ¶ 14.

[54] *Brand X*, 545 U.S. at 981-82.

exercise that same broad discretion to hold that the transmission components of retail broadband Internet access must be treated independently as telecommunications and made subject to a narrow portion of Title II.

II. EACH OF THE SIX CORE TITLE II PROVISIONS IDENTIFIED IN THE THIRD WAY ARE NECESSARY AND APPROPRIATE FOR RETAIL END USER BROADBAND INTERNET ACCESS SERVICES

The six Title II provisions on which the Commission seeks comment — Sections 201, 202, 208, 222, 254, and 255 — are a necessary and narrowly tailored set of statutory requirements that should apply to all retail end user broadband Internet access services. In each of these provisions, Congress has mandated that the Commission accomplish a tangible goal, and each provision should apply to broadband Internet access either as a matter of statutory mandate, which is the case with certain sections of Title II as applied to wireless carriers, or as a necessary means of preserving the public interest.

A. Sections 201 and 202 Are Necessary for Protecting Retail Broadband Consumers

Sections 201 and 202 of the Act are the irreducible minimum of Congress's mandate for the nation's communications network infrastructure. Applying them to broadband Internet access service is essential to protect consumers and carriers from unreasonable or unfounded discriminatory treatment. *See* NOI ¶¶ 75-77. This proceeding will come to naught if the Commission holds that this type of service is a Title II telecommunications service but does not apply sections 201 and 202 to it.

Section 201 requires that all providers of common carrier communications provide service "in accordance with the orders of the Commission," 47 U.S.C. § 201(a), and that "[a]ll charges, practices, classifications, and regulations" for Title II communications must be "just and reasonable." *Id*. § 201(b). It is difficult to conceive of a legitimate reason that any provider of retail broadband Internet access would find these minimal, commonsense requirements to be unduly burdensome.

Nevertheless, Comcast's concededly secret manipulation of its end users' Internet access[55] is stark evidence that carriers must be told affirmatively that these protections are in place. In other words, applying the fundamental protections that Congress enacted for communications service are not 'a solution in search of a problem' as some repeatedly have suggested.

Section 202 simply ensures that no carrier engages in "unreasonable discrimination in charges, practices, classifications, regulations, or services" as to both fellow carriers and its end user customers. 47 U.S.C. § 202(a). By its plain language, section 202 does not prohibit all dissimilar treatment, but rather the dissimilar treatment of similarly situated entities and persons without justification.[56] Again, any Internet access carrier not willing to abide by this mandate is cause for concern.

Applying these provisions to retail broadband Internet access service does not equate to price regulation, and CCIA in any event does not advocate such regulation. Extremists may be quick to claim that price regulation is a necessary outcome of any Title II regime, but that rhetoric is simply unsupportable.

The Commission's treatment of the wireless industry easily bears out this conclusion. Wireless services already are bound by sections 201 and 202 of the Act via section 332(c), but enjoy forbearance from some of the Commission's implementing rules. *See* NOI ¶ 76. Applying these provisions generally to all forms of retail broadband Internet access service can be accomplished in the same way. That is, nothing precludes the Commission from applying sections 201 and 202 to

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55 *Comcast*, 600 F.3d at 644-45.

56 For example, in *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), the FCC was affirmed in finding that Verizon Wireless had not engaged in unreasonable discrimination under section 202 by refusing to give the petitioner the same "sales concession" in her wireless plan that other customers had "haggled for". The D.C. Circuit found that the "competitive marketing strategy" that Verizon Wireless was using is simply a "normal feature of many competitive markets." *Id*. at 421. *See also Panatronic USA v. AT&T Corp*., 287 F.3d 840, 844-45 (9th Cir. 2002) (affirming summary judgment for AT&T in section 202 discrimination case on ground that it had "neutral, rational basis" for assessing Universal Connectivity Charge on some customers and not others).

broadband Internet access while also forbearing from the enforcement of certain of its implementing rules under these provisions. Pricing regulation is an example of a possible candidate for forbearance. The Commission should not, however, feel forced to view sections 201 and 202 as immediately burdensome in the first instance. Rather, these provisions reasonably can be viewed as a minimal set of basic consumer protections, the application of which is appropriate to any two-way communications service.

B. Section 208 Empowers the Commission to Redress Proven Harms

The application of sections 201 and 202 to retail broadband Internet access service would be meaningless unless section 208 applies as well. *See* NOI ¶ 77. Indeed, it was the section 208 complaint filed by Free Press and Public Knowledge that unmasked Comcast's undisclosed network management practices.[57] The Commission must have a means for enforcing the Open Internet principles, and injured consumers and carriers must have the ability to be made whole if they are subject to unreasonable practices. Forbearance from section 208 would render the outcome of this proceeding, and the Open Internet proceeding, a dead letter.

Affording aggrieved parties a means for obtaining relief under section 208 will not cripple the industry. The Enforcement Bureau has the flexibility to tailor proceedings in an efficient manner in order to minimize litigation costs. Most importantly, the Commission is the agency of expertise with regard to network operation and service management, and thus is the appropriate tribunal for adjudicating disputes.

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[57] Vuze Inc., a provider of BitTorrent applications, filed a Petition to Establish Rules Governing Network Management Practices By Broadband Network Operators in the companion proceeding, WC Docket 07-52, *Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management"*. Vuze requested that the Commission "clarify what constitutes 'reasonable network management' by broadband network operators and to establish that such network management does not permit network operators to block, degrade or unreasonably discriminate against lawful Internet applications, content or technologies'[]." DA 08-92, *Comment Sought on Petition for Rulemaking to Establish Rules Governing Network Management Practices By Broadband Network Operators* (Jan. 14, 2008) (quoting Vuze Petition).

On this point, CCIA supports the Commission's suggestion to "create technical advisory groups … to develop practices, resolve disputes, issue advisory opinions, and coordinate with standards-setting bodies." NOI ¶ 51. In fact, CCIA supported this concept in the Open Internet proceeding where it proposed that an "advisory body … be established and authorized to act as the tribunal of first resort for disputes regarding open Internet access."[58] CCIA suggested that appropriate members of this body would be "representatives of the telecommunications, equipment, software application, and website development industries as well as independent consumer advocacy and policy consulting organizations."[59] Employing this type of advisory panel approach will ensure not only that the Open Internet principles are crafted appropriale

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C. The Consumer Privacy Protections in Section 222 Will Complement Existing Privacy Safeguards

Section 222 of the Act safeguards consumers' right to keep their communications usage information — identified in the statute as Consumer Proprietary Network Information ("CPNI") — private from other carriers and the public. 47 U.S.C. § 222(a), (c). CCIA agrees that the Commission should apply section 222 to retail end user broadband Internet access services. NOI ¶¶ 82-83. As the Commission notes, "most providers are already subject to privacy requirements," *id*. ¶ 82, and the protections of section 222 simply advance the commonsense notion that carriers should not release information about the source, destination, timing, type, or amount of telecommunications that a customer uses without that customer's approval.[61] Compliance is largely effected through self-policing, whereby a carrier adopts an internal CPNI policy and certifies adherence to that policy via one annual Commission filing. 47 C.F.R. § 64.2009(d), (e). For these reasons, it seems unnecessarily magnanimous to exempt cable-based retail broadband Internet access from section 222 for any protracted period. *See* NOI ¶ 82. Cable-based carriers should be expected to comply with section 222 beginning January 1 of the calendar year following adoption of the Commission's decision in this proceeding.

CCIA also notes that section 222 protects not only consumer information, but carrier information as well.[62] As such, applying section 222 to all providers of broadband Internet access is as beneficial to carriers as it is necessary to consumers. Carriers should welcome the protections of this statute as a further means of safeguarding their trade secrets and other confidential network-related information.

With regard to privacy-related rules that the Federal Trade Commission ("FTC") already has put in place or is considering for broadband service, *see* NOI ¶ 83, those rules need not

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[61] 47 U.S.C. § 222(c)(1); 47 C.F.R. § 64.2005.

[62] 47 U.S.C. § 222(b).

preclude the Commission from applying section 222 protections in this proceeding. Consumer privacy is not a zero-sum game, and the FTC and FCC have decades of experience in reaching a desired goal cooperatively. The Do-Not-Call rules are the clearest example of successful interagency cooperation. As such, there is no reason at this time to alter in any way the CPNI rules as they already apply to wireline telephony which often is a component of broadband service.[63]

The simplest solution is for the Commission to identify the types of information associated with retail broadband Internet access service that constitute CPNI and thus warrants protection. Section 222 covers "information that relates to the quantity, technical configuration, type, destination, and amount of use" of a service, as well as "information contained in the bills" for service.[64] In the context of Internet access, such information includes, but is not limited to, (1) the type, or medium, of broadband service, (2) subscribed throughput speed, (3) actual throughput speed, (4) time periods of use, and, most importantly, (5) URL and routing information generated by searches and browsing. Carriers should protect this information as a matter of course, and customers deserve such protection.

D. Application of Section 254 Is Crucial for Achieving the Goals of the National Broadband Plan

Section 254 is the crucible for implementing the National Broadband Plan. Reforming the contribution and eligibility requirements of the Universal Service Fund ("USF") is absolutely necessary to fostering the deployment of an interoperable, high-speed broadband network. Section 254 should likewise apply to the operation of that network and the services provided over it. *See* NOI ¶¶ 78-81.

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[63] Voice-over-Internet-Protocol ("VoIP") services are governed by section 222 CPNI rules. 47 C.F.R. § 64.2003(o).

[64] 47 U.S.C. § 222(f)(1).

Even AT&T agrees that the Commission may rely on its section 254 authority "to support broadband deployment."[65] Congress's mandate in section 254 could not be clearer: the statute requires the Commission to ensure that "[a]ccess to advanced telecommunications and information services" is provided "in all regions of the Nation."[66] Indeed, this mandate applies to broadband Internet access service regardless of how it is classified, because it expressly includes "information services."[67] As such, the Commission has an extremely sound basis for employing section 254, and the USF, as a means to support broadband deployment.

With regard to section 254 contribution requirements, Internet-based and Internet-related services already must pay into the USF. Retail DSL service, which was deemed "interstate telecommunication" in 1998,[68] has been subject to funding requirements for more than a decade, and interconnected VoIP service has paid into USF since 2006.[69] Extending the requirement generally to retail broadband Internet access services is not only a logical step, but it is technologically neutral. Further, ample precedent, particularly the D.C. Circuit opinion in *Vonage*,[70] will protect any Commission decision to impose USF contribution requirements on services that may not strictly qualify as "telecommunications services."

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65 GN Docket No. 09-191, Letter from Jonathan E. Neuchterlein, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC (Apr. 14, 2010).

66 47 U.S.C. § 254(b)(2).

67 *Id*.

68 *1998 Advanced Services Order*, 13 FCC Rcd. at 24,030 ¶ 36.

69 *Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518 (2006), *aff'd in part*, *vacated in part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007), *clarified* WC Docket No. 06-122, Declaratory Order, 23 FCC Rcd. 1411 (2008).

70 The D.C. Circuit accepted the Commission's reliance on section 254(d), which states that "[a]ny other provider of interstate telecommunications may be required to contribute" to USF, as a reasonable exercise of permissive authority even despite the Commission's failure to classify VoIP service as "telecommunications service." *Vonage*, 489 F.3d at 1238.

E. The Accessibility Requirements of Section 255 Are Minimal and Appropriate for Retail End User Broadband Internet Access

Finally, the Commission should apply section 255, which ensures telecommunications access for disabled persons, to retail end user broadband Internet access service. NOI ¶¶ 84-85. In fact, it is difficult to conceive of a justification not to apply this requirement. As the NOI states, section 255 already applies to the wireline broadband service and VoIP service, *id*. ¶ 40, and extending it generally to broadband Internet access is an undeniably equitable result. Carriers, to the extent that they do not do so already, should ensure that this class of persons benefits equally from the nation's advances in achieving high-speed, reliable Internet access.

Not only is this result equitable, but it makes good business sense. Applying section 255 to all retail broadband Internet access will enlarge consumer demand for services. By adhering to the simple requirement that network equipment supports Telecommunications Relay Service and similar services, carriers will expand their subscriber base. In addition, these requirements preserve public safety. The Commission therefore should apply section 255 directly, through Title II, to retail end user broadband Internet access service as part of its goal to bring broadband to all Americans.

III. THE COMMISSION HAS BOTH THE AUTHORITY AND A SOUND BASIS FOR FORBEARING FROM APPLYING THE REMAINING TITLE II PROVISIONS

The Commission's suggested approach of forbearing from applying the remaining portions of Title II to retail broadband is supported by the Act, Commission precedent, and sound public policy. NOI ¶¶ 69-73. Although, as the Commission recognizes, such forbearance appears in "a different posture" than it has previously, *id*. ¶ 70, the authority Congress granted in section 10, 47 U.S.C. § 160, amply permits the type of nationwide, *ab initio* forbearance that the Third Way entails.

First, the Commission need not be concerned that it has not been presented with a "carrier's request to change the legal and regulatory framework." NOI ¶ 70. Subpart (a) of section 10 requires no such request:

> (a) Regulatory flexibility — Notwithstanding section 332(c)(1)(A) of this title, **the Commission shall forbear** from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, **if the Commission determines that** -
>
> > (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
> >
> > (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
> >
> > (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a) (emphasis added).

This subpart independently authorizes the Commission to forbear from applying any rule or statute after performing the requisite market and consumer protection analysis. It neither mentions a "request" nor references any other subpart of the statute. Rather, it is subpart (c) that covers requests:

> (c) Petition for forbearance — Any telecommunications carrier, or class of telecommunications carriers, **may submit a petition** to the Commission requesting that the Commission exercise the authority granted under this section …

Id. § 160(c) (emphasis added).

The structure of Section 10 thus makes clear that the Commission is not precluded from forbearing in the absence of a carrier request. As such, the Commission can, as it posits, "simply observe the current marketplace for broadband Internet services to determine whether enforcing the currently inapplicable requirements is or is not necessary[.]" NOI ¶ 70.

Moreover, as the Commission observes, the issue is not whether it should ***continue to apply*** portions of Title II to retail broadband Internet access service, but rather whether it ***should continue not to apply*** them. As such, the Commission is not reversing policy or vacating existing rules

which requires an express rationale under *State Farm*. To the contrary, it is simply acting to avoid unnecessary regulation for the benefit of both carriers and consumers.

Secondly, with regard to the Commission's concerns regarding geographic scope, NOI ¶ 73, nothing in section 10 prohibits the Commission from forbearing on a nationwide basis. As the Commission is aware, "the law does not compel a 'particular mode of market analysis or level of geographic rigor' when the agency forbears from imposing certain requirements on broadband providers."[71] In addition, though the Commission is not bound by strict antitrust analysis in making decisions for the public interest,[72] courts have accepted a nationwide relevant geographic market in monopolization cases.[73] Accordingly, the Commission can conduct the requisite analysis under section 10 and forbear from applying the remaining provisions of Title II on a nationwide basis.

The wireless industry warrants specific mention in the context of forbearance. Both the Commission and CCIA have acknowledged that network capacity and operational complexities in wireless services present different challenges than wireline or cable-based broadband services.[74] In the Open Internet proceeding, CCIA suggested that the Commission can account for these differences by adopting a different definition of the delimiting "reasonable network management practices" factor for

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[71] *Ad Hoc Telecomms. Users Committee v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009) (quoting *EarthLink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006)); *see also NOI* ¶ 73.

[72] *E.g.*, *Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless*, WT Docket No. 09-104, Memorandum Opinion and Order, FCC 10-116, 2010 WL 2526678, ¶ 24 (June 22, 2010) (approving Verizon Wireless acquisition of ALLTEL Corporation).

[73] *E.g.*, *Republic Tobacco Co. v. North Atlantic Trading Co., Inc*., 381 F.3d 717, 738-39 (7th Cir. 2004) (applying nationwide market to affirm summary judgment for plaintiff on claims of attempted monopolization in cigarette paper market); *Barr Labs., Inc. v. Abbott Labs*., 978 F.2d 98, 101-102 (3d Cir. 1992) (applying national geographic market to affirm summary judgment on claims of monopolization and price discrimination in pharmaceutical industry).

[74] NOI ¶¶ 102-103; CCIA 09-191 Reply Comments at 17.

wireless services. In other words, "[t]he Commission may presume that some network management practices are presumptively reasonable specifically for wireless carriers."[75]

Applying forbearance to wireless services may be, however, another necessary measure for certain requirements. One existing example, and which appears in the NOI, is that the Commission forbore from imposing tariffing requirements on wireless carriers even though Congress deemed that wireless service should be regulated under Title II common carrier rules. NOI ¶ 76; *see also* 47 U.S.C. § 332(c). To the extent that some rules promulgated under the provisions of the Act (discussed in Section II above) place an undue burden on, or do not logically apply to, wireless carriers, the Commission should consider whether additional nationwide forbearance is warranted. Section 10's sweeping grant of authority is not only a powerful tool but also a flexible rubric. Where market circumstances or technical needs dictate it, the Commission need not be shy about using forbearance to acknowledge the particular limitations that wireless carriers may face.

With regard to wireline broadband Internet access, however, forbearance from Title II should not be so readily granted. More specifically, the Commission should not forbear from continuing to apply the precompetitive requirements of Title II that presently apply to incumbent wireline carriers. PAETEC and McLeodUSA have highlighted this issue in an *ex parte* submission in this docket, urging the Commission "to consider the impact of other services" as it resolves the classification question in this proceeding.[76] More specifically, these companies ask the Commission to hold expressly that "its decision to reclassify consumer Internet services and forbear from application of certain provisions of Title II is not intended to and does not affect any existing obligations … such as the obligations to provide interconnection, UNEs and special access under §§ 201, 251(a) and (c),

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[75] CCIA 09-191 Reply Comments at 17.

[76] Docket No. GN 10-127, Letter from Mark C. Del Bianco, Counsel to PAETEC Holding Corp., to Marlene H. Dortch, Secretary, FCC, at 1-2 (June 29, 2010).

256 and 271."[77] CCIA agrees that the Commission should be cautious not to dismantle the existing local competition rules by stating too broadly the legal conclusion it reaches here as to the classification of broadband Internet access or the breadth of its forbearance authority.

CONCLUSION

For all these reasons, the Commission should adopt the "Third Way" framework of legal authority, applying sections 201, 202, 208, 222, 254, and 255 to retail end user broadband Internet access service with appropriate exercise of its section 10 forbearance authority.

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[77] *Id*. at 2.