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

In the Matter of	)	
	)	
Framework for Broadband Internet Service	)	GN Docket No. 10-127
	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES ON NOTICE OF INQUIRY

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TABLE OF CONTENTS

Page

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	)	
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I. INTRODUCTION & PRELIMINARY MATTERS

A. Executive Summary

On June 17, 2010, the Federal Communications Commission ("FCC" or "Commission") released a Notice of Inquiry ("NoI") seeking comment on the "legal framework for broadband Internet service."[1] More specifically, the subject of the Commission's inquiry is the legal framework for an "Internet connectivity service that is offered as part of a wired broadband Internet service":[2]

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[1] FCC GN Docket No 10-127 (rel. June 17, 2010).

[2] The Commission does indeed focus on the "wires" in this NOI:

> [We] use[d] the term "broadband Internet service" to refer to the bundle of services that facilities-based providers sell to end users in the retail market. This bundle allows end users to connect to the Internet, and often includes other services such as e-mail and online storage. In prior orders we have referred to this bundle as "broadband Internet access service." We use the term "wired," as in "wired broadband Internet service," to distinguish platforms such as digital subscriber line (DSL), fiber, cable modem, and broadband over power lines (BPL), from platforms that rely on wireless connections to provide Internet connectivity and other services in the last mile. We refer to the service that may constitute a telecommunications service as "Internet connectivity service" or "broadband Internet connectivity service." As discussed below, Internet connectivity service allows users to communicate with others who have Internet connections, send and receive content, and run applications online.

> [W]e ask questions about three specific approaches. First addressing the wired service offered by telephone and cable companies and other providers, we seek comment on whether our "information service" classification of broadband Internet service remains adequate to support effective performance of the Commission's responsibilities. We then ask for comment on the legal and practical consequences of classifying Internet connectivity service as a "telecommunications service" to which all the requirements of Title II of the Communications Act would apply. Finally, we identify and invite comment on a third way under which the Commission would: (i) reaffirm that Internet information services should remain generally unregulated; (ii) identify the Internet connectivity service that is offered as part of wired broadband Internet service (and only this connectivity service) as a telecommunications service; and (iii) forbear under section 10 of the Communications Act from applying all provisions of Title II other than the small number that are needed to implement the fundamental universal service, competition and small business opportunity, and consumer protection policies that have received broad support.[3]

The National Association of State Utility Consumer Advocates ("NASUCA")[4] files these comments on the NoI. We note that the NoI's question about the "'information service' classification of broadband Internet service" refers back to the Commission's 2002 *Cable Modem Order,* in which Commission classified Internet access over a cable modem as an

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NoI, n.1. While NASUCA believes that Title II protections should be extended to wireless *transmission* paths, this is somewhat academic because wireless broadband providers are themselves dependent on middle-mile, special access wires (usually owned by the incumbents). *See* NRRI/Bluhm & Loube, *Competitive Issues in Special Access Markets* (January 21, 2009 study commissioned by NARUC), available at http://nrri.org/pubs/telecommunications/NRRI_spcl_access_mkts_jan09-02.pdf, at 6 ("wireless carriers purchase 'backhaul' special access circuits … mainly from ILECs" to connect their cell towers to central switching facilities).

[3] Id., ¶ 2.

[4] NASUCA is a voluntary, national association of consumer advocates in more than 40 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

"information service."[5] NASUCA believes that this classification was incorrect when made, and has become ever more incorrect, inadequate, and destructive of broadband progress with each passing year.[6] This docket offers the Commission the opportunity to correct this historic mistake.

Although the U.S. Supreme Court deferred to the agency's authority to make the *Cable Modem Order* classification, it did so under *Chevron* deference without ruling on the merits of the Commission's judgment.[7] Three justices thought the *Cable Modem* ruling violated federal law.[8] The majority found that either changed circumstances, or a mere "change in administration," could justify reversal of the policy.[9] This Commission clearly has the authority, today, to reverse the disastrous missteps that the *Cable Modem Order* and subsequent rulings represent.

NASUCA has argued that "broadband Internet service," as that term is now used by the Commission, is actually two services, a telecommunications transport service and

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[5] *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, FCC No.02-77, 17 FCC Rcd 4798, 4870 (2002) (*Cable Modem Order*), *aff'd sub nom. National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*").

[6] *See, e.g.,* NASUCA's January 14, 2010 [Opening] Comments and April 26, 2010 Reply Comments *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52, Notice of Proposed Rulemaking, FCC 09-93 (rel. October 22, 2009) (*Open Internet* NPRM).

[7] *Brand X, supra*, 545 U.S. at 980 ("*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation"), 989 ("This construction passes *Chevron*'s first step. Respondents argue that … cable companies providing Internet service necessarily "offe[r]" the underlying telecommunications used to transmit that service. The word "offering" as used in *§ 153(46)*, however, does not unambiguously require that result"), relying on *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

[8] *Id.* at 1007 *ff.*

[9] *Id.* at 981 ("'the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis,' [citing *Chevron, supra, at 863-864*] … for example, in response to changed factual circumstances, or a change in administrations").

an information service – separable but not necessarily separate.[10] The telecommunications transport service is or should be subject to regulation as a common carrier service like other telecommunications services, under Title II of the Communications Act, *as the service was prior to 2002.*[11] Enforcement, or the possibility of enforcement, of the common carriage provisions of Title II is crucial where the incumbent carrier can be shown to have significant market power ("SMP") in identified market segments.[12] NASUCA therefore comes down squarely in support of the Commission's second option – reclassification, with a more careful, case-by-case, wait-and-see approach to forbearance.

As for the Commission-proposed "third way," NASUCA agrees that, like other telecommunications services, the telecommunications transport component of broadband Internet service need not be subject to the full panoply of Title II regulation. But NASUCA does not believe that the degree of forbearance proposed in the "third way" is necessary, in the public interest, or even doable. The proposed broad forbearance could undercut much of the ongoing governance of transmission activities vital to the Internet, like state resolution of interconnection disputes, for example.

As NASUCA has consistently argued, the ultimate solution for broadband is a real and meaningful separation between the network facilities and the content and services offered over those networks.[13] There are many degrees of separation – from the common carrier non-discrimination rules that have characterized plain old telephone

[10] *See* NASUCA Opening Comments in GN 09-191.

[11] *See., e.g., AT&T Corp. v. Portland,* 216 F3d 871 (9th Cir., 2000).

[12] *See* discussion of SMP in NASUCA Opening Comments in GN 09-191.

[13] *Id.; see also* NASUCA Reply Comments in GN 09-191.

service ("POTS") for the better part of the last century (and under which the Internet as we know it today grew up); to the unbundling regime of the 1996 Act that was mired in litigation and abandoned for all practical purposes; to the functional separation model currently employed in Great Britain (that has generated a market increase in competition and investment, and concomitant decrease in retail prices); and ultimately to the structural separation (placing conduit and enhanced services in separate entities) of this Commission's own *Computer II* decision. One can argue about which approach is most efficient, and which would provide the most stable platform for a continuation of the generative explosion of new services and content that have marked the Internet's first quarter century. But the necessity for such moves should be clear – moves modest in terms of regulatory theory, but extremely controversial in today's political-economic climate where (there is no nice way to say this) the largest facilities-based carriers and their academic accomplices have so infected and controlled discourse on this subject.[14]

NASUCA appears here not just as a consumer advocate, but also as a citizen advocate, and in that role asks this Commission to consider whether a democratic country is justified in protecting a communication system increasingly essential to national deliberation and decisionmaking. While this proceeding can be viewed as an economic

[14] *See, e.g.*, Chong, *The 31 Flavors of the Net Neutrality Debate: Beware the Trojan Horse,* N.Y.L. SCH. ADVANCED COMM. L. & POL'Y CTR., 12 *passim* (2007) ("head-to-head intermodal competition has resulted in the build-out and improvement of networks"); Yoo, *Architectural Censorship and the FCC,* 78 S. Cal. Law Rev. 669, 673-74 (2005) (structural regulations like "must carry" provisions, ownership restrictions, and even rate regulation demonstrate "how structural regulation can have unintended effects on media content … [and] represent a form of 'architectural censorship'"). More recently, and directly responsive to the "Third Way" debate, see Davidson and Swanson, *Net Neutrality, Investment & Jobs: Assessing the Potential Impacts of the FCC's Proposed Net Neutrality Rules on the Broadband Ecosystem,* Advanced Communications Law & Policy Institute (June 2010); Ford and Spiwak, *The Broadband Credibility Gap,* Phoenix Center Policy Paper Number 40 (June 2010). These last two cloak best-case interpretations of industry intentions and worst-case possibilities of Commission action in scientific/econometric speculation. These exaggerations have also influenced congressional response. See, e.g., "Divided FCC Tees Up Framework for Agency Authority over Broadband ISPs," Telecommunications Reports (July 1, 2010).

competition, carriage and interconnection inquiry under Title II, it is simultaneously about electronic communications as an essential input in the democratic process (and one that relies on public resources such as rights of way and radio frequencies).

Like others, NASUCA is asking this Commission to show courage at this critical juncture.[15] The Commission's continued failure to do so will lead to the result that a mere handful of facilities-based carriers will exert control over communications in this country. Indeed, this is precisely the result for which the large incumbent carriers argued in the recent *Open Internet* proceeding.[16] The consequence of such facilities-based dominance is that hundreds of millions of real, human, individual speakers (not to mention corporate service and content providers) will be partially disenfranchised, leaving the incumbent carriers and cable companies as the only fully-empowered speakers in the country. The solution to this problem is not temporizing or timid half-measures by the Commission.

NASUCA will attempt to follow as much as logically possible the structure set out in the Commission's NOI in these comments. In many places, these comments rely on previous comments that NASUCA has filed, particularly in the *Open Internet* docket (GN 09-191).

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[15] *See New York Times* editorial, "The Price of Broadband Politics," (June 29, 2010), available at http://www.nytimes.com/2010/06/30/opinion/30wed2.html?ref=federal_communications_commission.

[16] *See* AT&T, Verizon and NCTA Opening Comments in GN 09-191. Verizon argues that "the [proposed] rules would raise serious constitutional problems under both the First and the Fifth Amendment's Takings Clause." Verizon Comments at 11. AT&T flatly asserts that "the proposed rules would violate the First Amendment" rights of AT&T as a network owner. AT&T Comments at 235-41. NCTA follows suit, alleging that "government attempts to dictate 'parity' with respect to private speech are fundamentally illegitimate." NCTA Comments at 50.

B. Definitions and Scope of Proceeding (It's the Wires!)

The subject matter of this proceeding is alternately described as "broadband Internet access service," "broadband Internet interconnectivity service" and "the Internet connectivity service underlying broadband Internet service as a telecommunications service."[17] NASUCA submits that any definitional attempt must be anchored to transmission paths. Broadband is delivered through physical components: transmission lines, modems, and routers.[18] Wireless transmission involves all of these, with the addition of wireless antennae to transport bits over the last mile. Microwave and satellite can be added to the mix. Such transmission or transport is an essential input in, and the *sine qua non* of, broadband Internet connectivity, and is – at least in the last and middle miles – a bottleneck.[19]

Telecommunications transport and transmission facilities – whether over traditional wires, optical fibers, or wireless spectrum – are often referred to as the "physical" layer of Internet transmission, and encompass wired, wireless, and optical fiber media.[20] Variously-described service and application layers ride on this physical

[17] *See* NOI, at fn. 1 and ¶ 71 respectively.

[18] *See, e.g.*, Whitt, *Evolving Broadband Policy: Taking Adaptive Stances to Foster Optimal Internet Platforms*, 17 CommLaw Conspectus 417, 427 (2009).

[19] *See, generally*, Crawford, *Transporting Communications*, 89 B.U.L.Rev 871, 927-28, *passim* (2009).

[20] *See, e.g.*, Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 Fed. Comm. L.J. 207, 213 (2003). Frieden describes a "hierarchy of identifiable layers involved in the provision of information and telecommunications, including a network/physical layer (the wired, wireless, or optical medium), services carried over such networks (one-way, two-way, narrowband, or broadband), and applications/content (voice, data, video, or Internet) riding at the top of the layered stack." *Id.*

layer.[21] A separation of the physical transport layer on the one hand, from the service layers on the other, can be seen as a natural and inherent characteristic of next generation networks ("NGNs"):

> Electronic communications networks [are] becom[ing] packet switched, mostly or completely based in the IP. They will be multi-service networks, rather than service specific networks for audio (including voice), video (including TV-services) and data networks, allowing a decoupling of service and transport provision… A core feature of IP networks is the separation of … transport and service. This distinction potentially allows competition along the value chain more easily than in the PSTN world. A crucial point is the adoption of open and standardized interfaces between each functional level in order to allow third parties to develop and create services independent of the network.[22]

In other words, discussion of telephone, cable, or broadband networks as *separate*, stand-alone networks is becoming ever less relevant and accurate. IP is the *lingua franca* which allows many different services to ride on what is currently, and will hopefully remain, one interconnected public electronic network.[23] A unitary, interconnected network is essential to consumers because it is only this interconnection that makes real the prospect of ubiquitous, universal, and affordable telecommunications

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[21] Id. at fn. 19, describing the Open Systems Interconnection (OSI) Reference Model. See also Direct Testimony of Jeffrey Richter, in Petition of AT&T Wisconsin for Declaratory Ruling that Its "U-Verse Voice" Service is Subject to Exclusive Federal Jurisdiction, Wisconsin Public Service Commission Docket 6720-DR-101 (filed Nov. 14, 2008), at pp. 8-9 ("The OSI 7 Layer Model defines the relationship between the application (at the top) and the physical hardware (at the bottom). The TCP/IP model [in contrast] uses four layers"); *see also id.* at Exhibit 1 (illustrating the seven layers of the OSI Model, with physical layer at bottom and applications layer at top, with "each layer functionally independent of the others, but provid[ing] service to the layer above it, and receive[ing] service from the layer below it"), available at http://psc.wi.gov/apps/erf_share/view/viewdoc.aspx?docid=104379; see also http://en.wikipedia.org/wiki/OSI_model.

[22] ERG Consultation Document on Regulatory Principles of IP-IC/NGN Core (ERG 08) 26rev1, at 96-97. The Consultation Document is available at http://www.erg.eu.int/doc/publications/consult_ngn_2008/erg_08_26rev1_consul_ip_ngn_080604.pdf.

[23] *Cf.* Sandoval, *Disclosure, Deception, and Deep-Packet Inspection: The Role of the Federal Trade Commission Act's Deceptive Conduct Prohibitions in the Net Neutrality Debate*, 78 Fordham L. Rev. 641, 653-54 (2009). The Commission recently acknowledged the move to IP-based networks in its *NBP Public Notice #25* seeking comment on the *Transition from Circuit-Switched Network to All-IP Network.* Public Notice DA 09-2517 (rel. December 1, 2009) at 1-2, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-2517A1.pdf.

for all.[24] The problem, however, is that whoever controls the wires is in a position to control the shape of everything that rides on the wires.

So, the Commission should start with the wires. And should subject all wires to the same SMP analysis (if there is market power, then regulate). Comments filed in the *Transition from Circuit-Switched Network* proceeding by the Pennsylvania Public Utility Commission describe the folly of our current fragmented regulatory policy:

> The FCC inconsistently classifies some network facilities and services as "information service[s]" but other networks or services are classified as "telecommunications" with shared [state and federal] jurisdiction. It is intuitively understood, and the FCC has already acknowledged, that broadband network facilities are *jointly* used for the provision of telecommunications and information services. For example, fiber optic broadband facilities are jointly used for the *transmission* of legacy PSTN voice traffic, the transmission of IP-based [voice over IP] VoIP calls, the interconnection function between telecommunications common carriers and information service providers, etc. To arbitrarily label broadband network facilities as "information services" defeats on paper this network engineering reality.…[25]

Although the physical layer is not "the Internet," the latter depends on the former. Regulating transport facilities where one company or set of companies has SMP and effective control over those facilities is not regulating the Internet *per se*.[26] Demands that the Commission keep its "hands off the Internet"[27] ignore the layered reality of electronic NGN communication.

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[24] Werbach, *Connections: Beyond Universal Service in the Digital Age*, 7 J. Telecomm. & High Tech. L. 67, 68 (2009) ("Subsidy mechanisms to enhance ubiquity should be linked to obligations to preserve the unitary nature of the Internet").

[25] Comments of Pennsylvania PSC in response to *NBP Public Notice #25 [Regarding] Transition from Circuit-Switched Network to All-IP Network*, GN Docket Nos. 09-47, 09-51, and 09-137 *(Transition from Circuit-Switched Network*), at 2-3, available at https://portal.neca.org/portal/server.pt/gateway/PTARGS_0_0_307_206_0_43/http%3B/prodnet.www.neca.org/publicationsdocs/wwpdf/1221pa.pdf.

[26] Whitt, *Evolving Broadband Policy, supra*, at 429.

[27] Previously at www.handsoff.org; *see now* http://www.sourcewatch.org/index.php?title=Hands_Off_the_Internet.

While the Commission may seek to exclude voice over Internet protocol ("VoIP") service from this Inquiry,[28] which is arguably reasonable because VoIP is more of an application on the network rather than a network component, NASUCA does not believe it is possible to analyze these issues in isolation. The confusion as to the status of broadband transmission has led to waves of litigation across the country as VoIP providers and transporters argue that broadband voice service is exempt from public switched telecommunications network ("PSTN") transport and termination charges, whether tariffed or contractual.[29] Other carriers use the confusion to escape regulatory scrutiny altogether.[30] An understanding of the place and role of voice transmission on a broadband network is also key to Commission's questions about universal service.

While VoIP is a protocol or a service, backbone providers – which the Commission also seeks to exclude from the scope of this proceeding[31] – are in the business of transmission. Although the Commission might forbear from regulation in a more competitive backbone marketplace, transport is transport. The Commission would be ill-advised to exclude backbone transmission from Title II categorization, as it may need Title II tools if present peering arrangements disappear, or simply for model

[28] NOI ¶10.

[29] Some of this litigation is described in the filings of the Pennsylvania and New Hampshire PUCs in Global NAPs' *Petition for Declaratory Ruling and alternative Petition for Preemption to the Pennsylvania, New Hampshire and Maryland State Commissions,* FCC WC Docket No. 10-60.

[30] *In re Transcom*, Case No. 05-31929-HDH-11, United States Bankruptcy Court for the Northern District of Texas, Dallas Division, Order of Apr. 28, 2005 (*Transcom*); *vacated sub nom. AT&T Corp. and SBC Telcos v. Transcom Enhanced Services, LLC,* 2006 U.S. Dist. LEXIS 97000, at *13-14.

[31] NOI ¶10.

consistency.[32] NASUCA believes that as bright and rational a line between regulated and less- or non-regulated services as can be drawn, the better. The Commission must realize that the ambiguous and sometimes counter-factual policies it has adopted to please industry have instead swamped this Commission, state agencies, and carriers of all sorts in wave after wave of litigation.[33]

II. DISCUSSION

A. Background

1. The Commission's Primary Classification Decision – the *Cable Modem Order* – Was Founded on Flawed Legal and Factual Analysis.

Functionally, broadband was never *not* telecommunications. "The term 'telecommunications' means 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."[34] A "telecommunications service," on the other hand, "means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[35] The "offering" may be the provision of a wholesale product, and

[32] The question of whether backbone is necessarily included in this NOI has also been raised by other parties, with disapproval rather than affirmation. *See* "AT&T says Broadband NOI Appears to Cover Backbone," (*TR Daily*, July 15, 2010). As discussed briefly in the section on forbearance below, NASUCA believes that backbone is transmission and thus should be included in this NOI, even if the FCC decides to forbear from many of the specific Title II requirements as due to the more competitive state of the market there.

[33] *See, e.g.*, FCC WC Docket No. 10-60 (reflecting nationwide litigation over IP-PSTN telephony).

[34] 47 U.S.C. § 153(43) (emphasis added).

[35] *Id.* at § 153(46).

include wholesale service offered indirectly to the public.[36] This is key, because only a telecommunications carrier that offers a "telecommunications service" comes under the Title II "common carrier" provisions of the Code.[37]

The Commission set itself up for failure in the *Cable Modem Order* by latching onto the "offering" requirement in order to introduce a further, non-statutory requirement that the telecommunications offered be "stand-alone" and "separate" from any information service[38] in order to qualify as a common carriage telecommunications service:

> As stated above, the Act distinguishes "telecommunications" from "telecommunications service." The Commission has previously recognized that "all information services require the use of telecommunications to connect customers to the computers or other processors that are capable of generating, storing, or manipulating information." Although the transmission of information to and from these computers may constitute "telecommunications," that transmission is not necessarily a separate "telecommunications service." We are not aware of any cable modem service provider that has made a stand-alone offering of transmission for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.[39]

For the requirement of a "stand-alone" offering, the Commission can only offer citation, in footnote 159 of the *Cable Modem Order,* to 47 U.S.C. § 153(46), the definition of

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[36] *See* 47 U.S.C. §251(c)(4) ("wholesale ... telecommunications service").. The FCC has affirmed that "telecommunications service" includes both retail and **wholesale** services:

> The Commission has previously held that the phrase "to the public" in the definition of "telecommunications service" does not mean a service must be offered to the entire public to qualify as a telecommunications service. A service offered to a defined class of potential customers is a telecommunications service as long as the service provider "holds itself out indiscriminately to serve all within that class." To qualify as a telecommunications carrier, companies only need to offer indiscriminate service to whatever public their services may legally and practically be of use.

Compass Global, Inc., 23 F.C.C.R. 6125, 6132-33, ¶ 15 and n.62 (2008) (footnotes omitted).

[37] *Id.* at § 153(44)

[38] The majority in *Brand X* labor to justify this addition to the statutory language: "'offering' can reasonably be read to mean a 'stand-alone' offering of telecommunications, *i.e.*, an offered service that, from the user's perspective, transmits messages unadulterated by computer processing." 545 U.S. at 949.

[39] *Cable Modem Order,* at ¶ 40 (footnotes omitted).

"telecommunications service," but as noted above, that section does not contain the word or concept of "stand-alone." This was an arbitrary and unnecessary addition to the statutory language. The Commission then goes on to complete its circularity: "Further, … there is no Commission requirement that *such an offering* be made."[40]

Once it posited the "stand-alone" requirement, the Commission went in search of a factual showing to satisfy this requirement. But the evidence adduced by *Cable Modem Order* is at best anecdotal, if not a null set. The Commission now says that the *Cable Modem Order* decision was "based on a factual record that had been compiled largely in 2000," and cites for this proposition the 2000 Notice of Inquiry in the *High-Speed Access to the Internet* docket.[41] But that was only a notice of inquiry, and was devoid of any **factual** basis to support the Commission's *Cable Modem* decision issued two years later.

In fact, it was abundantly clear by 2002 that telecommunications was entirely separable from enhanced services. The Commission could only arrive at a contrary conclusion by allowing cable company marketing to dictate the Commission's regulatory classification holding, and focusing on that to the exclusion of any serious functional or system analysis.[42]

Three years later, Justice Scalia followed up with his famous "pizza" analogy, ridiculing the Commission's conclusion in *Cable Modem Order* that the transmission element of a cable internet access was in no way "separable"[43]:

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[40] *Id.*

[41] [*Framework*] NOI, at ¶ 16 and n. 29, citing *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 FCCR 19287 (2000) (*High-Speed Access NOI*).

[42] *Cable Modem Order* at ¶58 ("the mere existence of [a telecommunications] component, without more, does not indicate that there is a separate offering of a telecommunications service to the subscriber").

[43] *Cable Modem Order* at ¶39 (the "telecommunications component" of cable modem service is in no way "separable from the data-processing capabilities of that service").

> If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common "usage" would prevent them from answering: "No, we do not offer delivery – but if you order a pizza from us, we'll bake it for you and then bring it to your house." The logical response to this would be something on the order of, "so, you *do* offer delivery." But our pizza-man may continue to deny the obvious and explain, paraphrasing the FCC and the Court: "No, even though we bring the pizza to your house, we are not actually 'offering' you delivery, because the delivery that we provide to our end users is 'part and parcel' of our pizzeria-pizza-at-home service and is 'integral to its other capabilities.'" Any reasonable customer would conclude at that point that his interlocutor was either crazy or following some too-clever-by-half legal advice.[44]

The Commission completely ignored the fact that the Internet, in 2002, had grown exponentially for over ten years **based on a common carrier regime**.[45] The *Cable Modem Order* was a break with the then-existing *status quo*, the traditional notion that the only speech on a telecommunications network was that of the subscribers, and that there was in fact and law a *strict separation* and high wall between the system owner and the subscriber's speech.[46]

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[44] *Brand X, supra*, 545 U.S. at 1007 (Scalia, J., dissenting) (citations omitted, including to *Cable Modem Order*, 17 FCC Rcd at 4823, ¶39). Indeed, paragraph 39 of the *Cable Modem Order* appears self-contradictory: The Commission both *admits* that the purported broadband "information service" is provided "via telecommunications," and *denies* that there is a "telecommunications service inherent in the provision of cable modem service." The Commission there relied on a perception that "[a]s provided to the end user the telecommunications is part and parcel of the cable modem service," i.e., it is inseparable from the information service.

[45] *See, e.g., AT&T v .Portland, supra,* 216 F3d at 876-80 (cable modem providers telecommunications carriers); *In re Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 FCC 2d 384 (1980) (*Computer II*).

[46] Comments of Prof. Tim Wu (Wu) in 09-151, at 3-5, tracing birth of telephone regulation to the regulatory scheme in the Interstate Commerce Act of 1887 which "barred 'undue or unreasonable' discrimination both as between customers, 'localities' and forms of traffic"; *see also* Ross, *First Amendment Trump? The Uncertain Constitutionalization of Structural Regulation Separating Telephone and Video,* 50 Fed Comm. L.J. 281, 284 (1998) ("nearly a century of statutory and common law excluding common carriers from content control"); *Industrial Radiolocation Service,* 5 FCC 2d 197, 202, ¶ 19 (1966) ("fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and between such points and points on the systems of other carriers connecting with it; and that a carrier provides the means or ways of communication for the transmission of such intelligence as the customer may choose to have transmitted so that the choice of the specific intelligence to be transmitted is the *sole responsibility or prerogative of the customer and not the carrier*") (emphasis

As Commissioner Copps stated in his 2002 dissenting opinion:

> The decision the Commission will make today strays far afield from the regulatory construct established by Congress. Congress provided statutory frameworks for cable and for telecommunications carriers under Title VI and Title II, respectively. The statute makes clear that, to the extent that a cable operator serves as a common carrier subject to the provisions of Title II, the regulations prescribed by Title VI do not apply … [T]he statutory provisions accommodate cable system operators' delivery of new or hybrid services, even where those services may not fit neatly into the existing regulatory classifications. For example, there is widespread agreement that telephony provided over the cable plant is subject to Title II regulation. A powerful case has been made that cable modem services should also be subject to Title II. [47]

But the Commission simply ignored that "powerful case."

2. The Commission's Policy Goals

The Commission has always acted – in this area at least – on the assumption that it was retaining the ability to protect the public interest. As discussed below, the *Comcast* decision threw that assumption into doubt. Post-*Comcast*, the *Internet Policy Statement* may not be enforceable without a clear reclassification of broadband service to Title II. Even if enforceable under Title I, anything less than a bright line test (or as bright a line as the Commission can draw) will just invite more years of litigation

"Congress's aims," as referenced in the NOI,[48] of "encouraging widespread deployment of broadband," were and are based on the notion of competition. But the promised competition, particularly the notion of facilities-based competition for

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added); POOL, TECHNOLOGIES OF FREEDOM (1983) at 172 ("At the maturity of cable, it cannot in a free society be other than a [common] carrier").

[47] *Cable Modem Order*, at ¶.

[48] NOI, ¶22.

broadband, has simply not materialized, a fact that the *National Broadband Plan* acknowledges.[49]

There are many metrics by which this assertion can be further explored. One is assigned numbers. Although the North American Numbering Plan Administration's ("NANPA's") data is consistently asserted to be trade-sensitive and confidential, the Commission has access to assigned number inventories, and could provide one index of the consolidated nature of the industry by reporting the precise percentage of numbers controlled by the incumbent carriers, their affiliated wireless companies, and by facilities-based cable companies. NASUCA is informed and believes that the facilities-based ILEC-cable incumbents, and their wireless affiliates, control over 80-90% of all assigned numbers in the United States. That is SMP.

There are other metrics. Miles of wire in the ground, for instance. As NASUCA predicted, access to data would be key as the Commission grapples with maintaining an open Internet, and related issues that implicate the Title II classification of broadband.[50]

The classification of broadband attains greater importance when viewed in conjunction with the Commission's ongoing attempt to re-examine its media cross-ownership rules.[51] If we are indeed moving to the convergence of all electronic media (and some print media as well) onto one broadband platform, then the instant proceeding really becomes the *meta*-level ownership proceeding. Both the vertical integration of the

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[49] *National Broadband Plan*, at section 4.1 (even if cost of entry were lowered, it "is unlikely to create several new facilities-based entrants competing across broad geographic areas"), and Exhibit 4-A (91% housing units have access to only two wireline broadband provider, 13% to only one provider).

[50] NASUCA Opening Comments in GN 09-191, at 3-6, discussing the confidentiality and trade secret claims of the incumbent carriers.

[51] I*n the Matter of 2006 Quadrennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 21 FCC Rcd 8834 (2006) (with extensions of time through this year).

ILECs and that of the cable companies (witness Comcast-NBC) should give the Commission pause, particularly the ILECs with their domination of last mile and middle-mile marketplace.

3. Legal Developments – The *Comcast* Case

The *Comcast* decision was foreseeable.[52] The Commission's net neutrality rules, or freedoms, were a castle built on the sand of Title I. While NASUCA supported the Commission's exercise of Title I jurisdiction in the *Open Internet* docket, it did so from the start with the acknowledgement that the Commission's model for regulation of Internet connectivity was flawed and incomplete.[53] The *Comcast* Court only recognized that fact.

B. Classification

1. The Commission's Title I Jurisdiction Was Always Inadequate to Regulate Essential Transmission Services.

It made no sense in 2002 or 2005, and it makes no sense today, to divide the electronic transport world into two artificial halves, where – for example – part of the ILECs' wire into the house is classified as an information service and part is classified as telecommunications service:[54]

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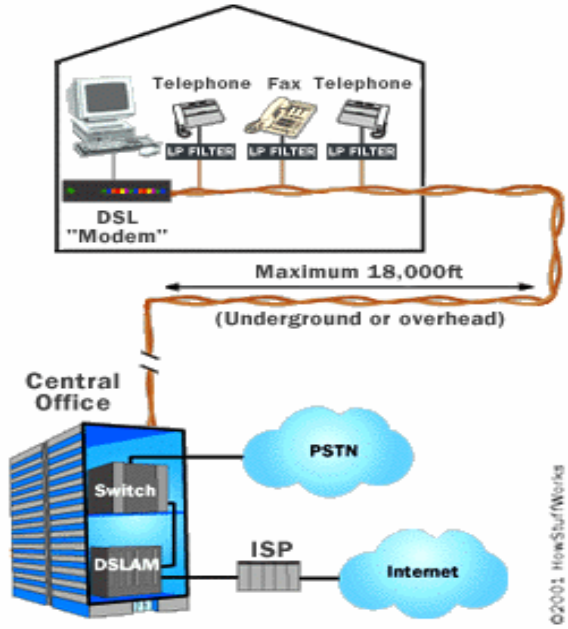
[52] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (*Comcast*)

[53] Opening Comments, at 2-3 ("We believe that there is much to recommend the common carrier system that provided the data transport capabilities during the Internet's formative years; indeed, much of the physical infrastructure on which the Internet runs today was built as part of the public switched telephone network ("PSTN") and should continue to be subject to the open access, non-discrimination, interconnection, and unbundling rules the FCC typically applied to the PSTN"); Reply Comments at 14 *ff*, 18("return to the *status quo* prior to the Commission's 2002 *Cable Modem Order*"). .

[54] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC No. 05-150, FCC Rcd 14853 (2005) (*Wireline Broadband Order)* (DSL modem not common carrier telecommunications service); *aff'd sub nom. Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007).



Such arbitrary categories also make no sense when carriers, even PSTN carriers, may use IP for long-distance routing while retaining traditional technology for call origination and termination.[55] The nonsensical and artificial legal distinctions among transmission technologies or protocols has led to years of unnecessary interconnection disputes and litigation, and a less efficient system.[56]

2. A Clear Title II Separation Between Conduit and Content Has Always Been the Most Rational Way to Approach Regulation of Broadband Transmission.

NASUCA has consistently stated that the best approach to preserving Internet freedom – the four freedoms plus two – is to return to the *status quo* prior to the

[55]See, e.g., *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, (2004) (IP-in-the-Middle).

[56] A central question in much of this litigation is the hairsplitting as to what constitutes a "net protocol conversion." See, e.g., *S. New Engl. Tel. Co. v. Global NAPs*, 2005 U.S. Dist. LEXIS 25898, at *14-15. The absurdity of this is clear when one considers that protocol conversions are ubiquitous in the network – conversion of calls from wireless to wireline protocols, for example.

Commission's 2002 *Cable Modem Order*; when both DSL and (arguably) cable broadband were considered to be Title II telecommunications services.[57] As set forth above, NASUCA believes that *Cable Modem Order* was counter-factual when it was decided. Moreover, developments in the broadband marketplace have made it increasingly clear that broadband transmission is a service separate and apart from information services made accessible by that transmission. When analyzing the broadband marketplace, the Commission should not focus only on how it is held out to customers, or "customers' understanding of that service."[58] Of far greater importance is the inherent "characteristics of the services being provided."[59]

In the related *National Broadband Plan* docket, Public Knowledge has explained why the "inseparability" theory of the *Cable Modem Order,* even if it was correct in 2002, is no longer empirically supported, and why broadband transmission is more properly understood under a the common carriage regime: (1) broadband transmission is becoming ever more fungible, commoditized, and separable from the information services, applications, and content found throughout the Internet;[60] and (2) the market is

[57] Opening Comments in GN 09-191, at 2-3.

[58] NoI ¶53, and n. 150, quoting from *Wireline Broadband Report and Order*, 20 FCCR at 14910, ¶ 104.

[59] NoI ¶ 53.

[60] January 26, 2010 Public Knowledge Comments in *National Broadband Plan,* GN 09-47, 09-51, and 09-137, at 8 (noting that the "rise of web-based email and 'cloud computing'" has diminished the importance of services formally associated with the ISP: "email, newsgroups, and the ability to create a webpage"), *citing Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, FCC No.02-77, 17 FCC Rcd 4798, ¶43 (2002) (*Cable Modem Order).* In fact, most ISPs purchase transmission from the incumbent ILECs – *see* www.dslextreme.com, www.saber.net – and operate almost completely as information services. In either case, the transmission component is separable.

much less competitive than the *Cable Modem Order* hoped it would become.[61]

Today, eight years after the *Cable Modem* decision, the Commission also has available to it empirical data from other countries' experience with functional and/or structural separation.[62] This data ratifies its previous determination in *Computer II* that a "basic transmission service … limited to the common carrier offering of transmission capacity for the movement of information" is in fact capable of segregation from the information, applications and services *carried by that service*,[63] and that the separation of conduit from content would in fact enhance competition in the communications marketplace.[64] Further antecedents and templates for such a separation may be glimpsed

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[61] *Id.* at 10, noting the failure of facilities- or platform-based competition to emerge (consumers still have "*exactly* the same facilities based choice [as] when the Commission established the existing regulatory classification"); *compare Cable Modem Order* at ¶ 73 ("we seek to encourage facilities-based broadband competition").

[62] *See, e.g., Next Generation Connectivity, a review of broadband Internet transitions and policy from around the world* (February 2010), available at http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Berkman_Center_Broadband_Final_Report_15Feb2010.pdf ("Berkman Final Report").

[63] *In re Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 FCC 2d 384 (1980) *Computer II*, 77 FCC 2d 384 at ¶ 96. Prof. Werbach argues that "telecommunications carrier" under the 1996 Act is "expressly broader than 'common carrier,'" citing section 153(44)'s mandate that "A telecommunications carrier shall be treated as a common carrier under this chapter *only* to the extent that it is engaged in providing telecommunications services." Werbach, *Off the Hook*, 95 Cornell L. Rev. 101, 168 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371222. Whether "telecommunications carrier" includes categories other than "common carrier" seems a moot question, however, in light of the further statutory definitions. "Telecommunications" is defined by section 153(43) 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 …," suggesting that a common carrier separation between conduit and content continues to be essential to the statute's meaning: While common carriage is often associated with telephony, there is no statutory provision limiting common carriage to telephony, and common carrier "telecommunications services" explicitly carry all "information of the user's choosing. *Compare* subsections 153(43) (44) and (46). The definition of common carriage is itself circular. *See* 47 USC § 153(10) ("'common carrier' or 'carrier' means any person engaged as a common carrier for hire"). *Computer II's* association of "basic transmission service" with common carriage was made prior to the 1996 Act, but we see no insuperable barrier to applying a common carriage regime to broadband telephony within the definitional matrix of the 1996 Act.

[64] *Computer II, supra* note 68, ¶¶ 93 and 202 *ff* ("separate subsidiary requirement operates on the vertically integrated structure of the firms subject to it"); *aff'd sub nom. Computer & Comm'ns Ind. Ass'n v. FCC*, 693 F.2d 198, 203-06 (DC Cir. 1982); *see also* discussion of expanded competition following separation in NASUCA's Initial and Reply Comments in GN 09-191.

in other sections of the Communications Act.[65]

A common carrier or separation regime under Title II, applied directly rather than under Title I ancillary jurisdiction, has the further virtue of reducing the uninformed chatter about the Commission "regulating the Internet." A direct Title II approach would make clear that the Commission was *not* regulating the Internet, i.e., the content carried on the wires, but merely the wires themselves, i.e., the underlying transmission network or physical layer. The proposed rules are thus understood as necessary to ensure that broadband carriers' "telecommunications" – i.e., 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"[66] – occur in a non-discriminatory way as required under both Sections 202 and 251.[67] With this statutory "link" firmly in place, the Commission could adopt the further Internet-specific rules set forth in the NPRM. Once Title II was reasserted, the Commission could forbear from rate and common carrier regulation that proved unnecessary as market conditions developed.

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[65] *See* 47 U.S.C. § 272 ("separate affiliate required for competitive activities"); *see also* § 259 (ILECs required to "make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested").

[66] 47 U.S.C. § 153(43) (definition of telecommunications).

[67] Direct Title II regulation of broadband *transmission* facilities would mean that Section 202's non-discrimination rules would directly apply. Section 202 provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

See also Section 251(c) (interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory").

3. The Across-the-Board Forbearance Contemplated as Part of a "Third Way" Could Seriously Compromise this Commission's (and State Commissions') Ability to Protect a Functioning, Let Alone Free and Open, Internet.

The Commission apparently proposes to forbear from all parts of title II except 201, 202, 208, 222, 254, and 255.[68] This forbearance could have disastrous consequences, both for this Commission's ability to protect and promote the public interest, and for States' ability to carry out simple tasks like resolution of intercarrier compensation disputes (as discussed in section II(G) below). In addition to governing intercarrier connection and compensation, Section 251 (47 U.S.C. § 251) also contains requirements on unbundling, numbering, and other features of a modern, competitive network.

The unbundling of broadband transport facilities, for example, may prove necessary to preserve competition in the bottleneck last and middle-mile. The Commission cannot remain blind to the SMP exerted by the facilities-based carriers over those bottleneck facilities, and must find a way – in the name of competition and efficiency – to allow multiple providers of Internet connectivity service to use those facilities on reasonable (i.e., competitive) terms and conditions.[69] Forbearance from the numbering provisions of Section 251(e) could likewise prevent the Commission from addressing numbering issues (and scams) in the converged marketplace.

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[68] NOI ¶86.

[69] See NASUCA Opening Comments in GN 09-191, at 19; Reply Comments at 6 ("the plain fact is that neither form of competition envisioned by the 1996 Telecommunications Act – facilities-based or shared network competition – has in fact materialized") (citations omitted).

And even if FCC could forbear from enforcing 251 just as to "broadband Internet connectivity service," or any of the similar formulations in the NOI, it would still have to define precisely what that service is, in contrast to POTS. And there's the rub: Both use the same wires. NASUCA hopes that, whatever the FCC does, it gives stakeholders a clear model, with bright lines between different legal categories. Better yet, the Commission should do away with the categories and put all transmission in one category.

C. Effective Dates – Timeline

The classification or reclassification of broadband transmission service under Title II should occur as soon as possible. Much of the trailing implementation could be accomplished in a measured but continuous process.

D. Terrestrial Wireless and Satellite Services

Consistent with NASUCA's focus on transmission, wireless and satellite transmission should not be excluded from Title II.

E. Non-Facilities Internet Service Providers

NASUCA supports the Commission's apparent readiness to analyze the legal categorization, rights and duties of non-facilities based ISPs differently from their facilities based counterparts. In its Reply Comments in the Open Network docket (09-151), NASUCA pointed out the confusion engendered by commenters' indiscriminate use of the term "Internet Service Provider" ("ISP") to refer to both large facilities-based ISPs, and small non-facilities-based ISPs that are primarily providers of bandwidth and

connectivity.[70] AT&T tipped its hand in that proceeding as to how malleable the vocabulary is in this field: "These comments use the terms 'broadband Internet access provider' and 'ISP' interchangeably."[71] At page 25 of its comments, AT&T provided a "schematic diagram of ISP network segments" that included everything from last-mile to "backbone."[72] Clearly the reference was to a facilities-based carrier like AT&T. On the other hand, there are many ISPs that essentially resell and rely on the ILEC's local loop,[73] as well as wireless ISPs that are dependent on the ILEC's middle mile.[74] Again, transmission capability is key to making necessary distinctions. Facilities-based carriers provide primarily transmission; the other ISPs provide primarily bandwidth, connectivity, and what *are* accurately described under current law as information services (webpages, e-mail, etc.). The former are network operators with SMP; the latter are service providers that rely on the large facilities-based incumbents for essential transmission inputs. Network operators and service providers are in very different situations, even if the vertically integrated incumbents combine both functions.

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[70]NASUCA Reply Comments in GN 09-191, citing Verizon Comments at 20 (referring to Wireless Internet Service Providers Association (WISPA) "which represents more than 300 wireless ISPs…"). AT&T informs us that "End users — from residential subscribers to enterprise customers, including content providers—connect to the Internet through the 'access' portion of an ISP's network," and then in a footnote informs us that "[a]n ISP ('Internet service provider') may also operate a Tier 1 backbone, as described previously, or may operate a Tier 2 or 3 backbone that connects to a Tier 1 backbone." AT&T Comments, at 24 and fn. 26.

[71] AT&T Comments in GN 09-191 at fn. 26.

[72] *Compare* Verizon Comments in GN 09-191 at 8 ("Internet Service Providers Have Not Been Subject To Regulation – Even in the Days of Dial-up Service").

[73] *See, e.g.*, www.dslextreme.com; www.saber.net. These small ISPs total reliance on the ILECs' local loop is plainly visible on their websites. On March 24, 2010, dslextreme.com advised its customers that "Some DSL subscribers in the ATT service area of Orange, Anaheim, CA may experience problems connecting to the Internet. Engineers are working to resolve the issue." A week earlier, dslextreme.com made a similar announcement about "ATT service area of Southern California."

[74] WISPA Comments in GN 09-191 at 7 ("Providers with market power (*e.g.*, large carriers with middle mile connectivity) should not be permitted to use over-inclusive network management techniques to hinder competition from other service providers").

F. Internet Backbone Services, Content Delivery Networks, and Other Services.

Here again, it is important to focus on transport. To be brief and blunt: backbone **is** transport; content delivery networks use transport as an input, but that does not completely define the service they provide.

G. Forbearance Could Threaten the Important Role Played by State Regulation of Broadband Internet and Internet Connectivity Services.

Section 10 of the 1996 Act, now at 47 USC § 160(e), states that "A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying." Thus, for example, forbearance from section 251 would have the effect of completely hobbling, if not forbidding, state mediation, arbitration, resolution and approval of carrier interconnection agreements regarding broadband transmission services. And the Commission must realize how inextricably linked such services are with both "regular" Title II services and broadband connectivity.

H. Related Actions

As NASUCA has pointed out previously, there are many, many open proceedings at the Commission that are related to the Title I/II framework issues – from interconnection to special access to universal service proceedings.[75] Clarity here will speed progress there.

[75] See, e.g., NASUCA reply Comments in GN 09-191 at 4-5.

III. CONCLUSION

Classification of broadband transport facilities as telecommunications services under Title II, i.e., asserting that they carry "information of the user's choosing without change in form or content of the information as sent and received,"[76] is necessary to preserve a free *and functioning* Internet, as well as – increasingly – to ensure viable voice telecommunications services. This service is offered directly and indirectly, as a stand-alone service and bundled, to "a public," i.e., to ISPs and other Internet-based businesses as a wholesale input, if not directly to end-use consumers. It is clearly cognizable as a separable, if not separate, legal category, and *the* underlying, essential, converged communication platform of today. Now is the time for the Commission to act to protect the public interest, convenience and necessity in this communications system.

Respectfully submitted,

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[76] 47 U.S.C. § 153(44).