

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF METROPCS COMMUNICATIONS, INC.

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MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, hereby respectfully submits its comments on the *Notice of Inquiry* (“*NOI*”) released by the Federal Communications Commission (the “FCC” or “Commission”) in the above-captioned proceeding.² As set forth in detail within, MetroPCS opposes the Commission’s effort to establish a framework for the regulation of broadband Internet access service. The following is respectfully shown:

¹ For purposes of these Comments, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

² *Framework for Broadband Internet Service*, GN Docket No. 10-127, FCC 10-114 (rel. Jun. 17, 2010) (“*NOI*”).

I. INTRODUCTION AND SUMMARY

In MetroPCS' view, the *NOI*, and the reversal of years of precedent that it proposes, represent an extreme overreaction to the *Comcast* decision.³ When read carefully, *Comcast* is in fact a narrow decision, finding only that, under the particular facts and circumstances of that case, the Commission failed to "tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility.'"⁴ The Court also rejected certain arguments advanced by the Commission as not having been reflected or properly preserved in the record – arguments that might, had they been preserved, have provided a proper basis for the Commission's action. The *Comcast* decision does not hold that the Commission is entirely unable to promulgate rules under Title I that impact the Internet under Title I. Rather, on the record in *Comcast* and with the rationale provided, the Commission failed to adequately tie the rules enacted under Title I to its statutory authority. The Commission still has a history of promulgating regulations affecting information services, such as its application of common carrier-type obligations to providers of VoIP services, and *Comcast* does nothing to change those determinations. While the Commission is understandably disappointed by the D.C. Circuit's decision, its pursuit of a draconian Title II reclassification scheme is unwise at best – and potentially devastating to the broadband industry at worst.

³ In *Comcast*, petitioner Comcast Corporation appealed an enforcement action of the Commission against the company for blocking its users from accessing certain peer-to-peer file sharing services over the Internet. Upon reviewing the Commission's rationale for imposing a penalty on Comcast, the D.C. Circuit found that the Commission's exercise of authority under its Title I ancillary authority was not sufficiently tied to any specific statutory authority, as was required. Accordingly, the Court overturned the Commission's penalty. *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) ("*Comcast*").

⁴ *Id.*

This proposed reclassification of broadband Internet access as a Title II service is not only unwise and potentially harmful, it also is impermissible based on longstanding Commission and judicial precedent. The *Cable Modem Declaratory Ruling*, the *Wireline Reclassification Order*, the *BPL Order* and the *Wireless Broadband Order* represent cohesive, consistent rulings, which stand for the proposition that the telecommunications provided in connection with broadband Internet access is an integrated information service that cannot be regulated under Title II as a telecommunications service. These decisions each found, with remarkable consistency of language, that the various broadband Internet services each “offer a single, integrated service (i.e., Internet access) to end users.”⁵ This conclusion also tracks the Supreme Court’s holding in *Brand X* that a service is defined by “what the consumer perceives to be the integrated finished product.”⁶ For the Commission’s proposed reclassification to succeed, each of these longstanding decisions would need to be overturned. But, overturning these longstanding precedents at this time would be detrimental to the public interest. Reversals of longstanding regulatory policy will cast the broadband Internet industry into disarray and frighten investors at the exact time when the nation is attempting to recover from economic disaster and the Commission is proposing ambitious plans to upgrade the existing broadband Internet access infrastructure in the *National Broadband Plan*. The Commission could not have chosen a worse time to take such a risky course.

⁵ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd 14853, in CC Docket Nos. 02-33, 01-337, 95-20, and 98-10, WC Docket No. 04-242, WC Docket No. 05-271, ¶ 14 (Sept. 23, 2005) (“*Wireline Reclassification Order*”).

⁶ *National Cable & Telecommunications Association, et al. v. Brand X Internet Services, et al.*, 545 U.S. 967, 990 (2005) (“*Brand X*”).

In order to overturn this series of prior decisions, the Commission would be required under applicable legal principles to show sufficient changed circumstances to warrant this reversal.⁷ In this instance, the Commission is entirely unable to do so. In the eight years since the *Cable Modem Declaratory Ruling* was released – and certainly in the three years since the *Wireless Broadband Order* was released – no material changes have occurred in the manner in which broadband Internet services are configured, marketed, sold or viewed by the consumer. Broadband Internet access still is sold as an integrated offering of the telecommunications transmission component of Internet connectivity coupled with the various information services offered by the provider into a single offering. Because there have been no significant changes in how broadband Internet access is provided, marketed or sold, the Commission is unable to make the showing required to effect a reasoned reversal of settled law. Nor can the recently released⁸ *National Broadband Plan* be seized upon to justify such a reversal. Nothing in the *National Broadband Plan* alters how broadband Internet access is provided, and thus it does not form the basis for changed circumstances.

To come up with a purported “Third Way compromise,” the Commission proposes applying a telecommunications service definition to broadband Internet access, which would allow Title II jurisdiction and regulations to apply to Internet access providers, while forbearing from the application of certain regulations (the “Third Way”). Although the Commission seems to minimize the implications of its Third Way, this forbearance approach requires the

⁷ *Schurz Commc’ns, Inc. v. FCC*, 982 F.2d 1043, 1053 (7th Cir. 1992) (“*Schurz*”) (noting that “a rational person acts consistently, and therefore changes course only if something has changed” and that an agency must act accordingly).

⁸ Notably, the *National Broadband Plan* was not “adopted” by the full Commission. It is a report prepared by a Commission Task Force and delivered to Congress pursuant to Section 6001(k) of the American Recovery and Reinvestment Act. See *Joint Statement on Broadband*, GN Docket No. 10-66 (rel. Mar. 16, 2010).

Commission to overturn prior Commission precedents and to reclassify broadband Internet access as a telecommunications service. In order to find that broadband Internet access is a telecommunications service capable of regulation under Title II, two essential elements are required: (i) the service provided must be telecommunications; and (ii) must be able to be regulated as a common carrier service. Unfortunately for the Commission, the transmission component of broadband Internet access, as provided directly to a customer in his or her home market in combination with an information service, is not a telecommunications service. And, even if it were found to be telecommunications, there is no basis for finding that such broadband Internet access, standing alone, is offered, or should be offered, on a common carrier basis – a requirement for finding that the service is a telecommunications service, and thus may be subject to Title II.

Nor can wireless broadband Internet access be regulated under Title III. Each of the Title III sections referenced by the Commission – sections 303, 307(a) and 316 – require a finding that the regulation be in the public interest.⁹ In a broadband Internet marketplace that is competitive, innovative and thriving, the Commission simply cannot make such a finding. Further, given the negative effects the current proposal has had on the capital markets for broadband Internet access providers, it is impossible to see how such regulation, if enacted, could advance the public interest goals articulated in the *National Broadband Plan* for universal broadband Internet access deployment.

Finally, even if Title III was an option for regulating wireless broadband Internet access, the Commission must refrain from applying broadband Internet regulations to the wireless industry. Broadband Internet access provided by wireless currently is in its infancy, and

⁹ See 47 C.F.R. §§ 303, 307(a), 316.

imposing common carrier regulation on it now would stifle the growth of wireless just at the time it is most needed to aid in the implementation of the Commission's *National Broadband Plan* goals and provide much needed additional competition to wireline broadband Internet access. Further, scarcity of spectrum, along with a host of other technical considerations, means that wireless broadband providers face unique challenges that wired providers do not. While wired providers can lay more fiber or cable to add capacity, wireless providers are severely constrained by the amount of spectrum that they can obtain – and in nearly all cases this spectrum will not be enough to meet rising consumer demand.

In short, there is no reason for the Commission to impose draconian common carrier regulations – regulations that were created to regulate a telephone service monopoly of almost a century ago – in an effort to impose unnecessary and potentially harmful net neutrality rules on the Internet. The market for broadband Internet access is thriving, competition is on the rise and innovation is everywhere. The latest market data indicates that this pro-competitive trend not only will continue, but in fact accelerate. MetroPCS urges the Commission not to fall into the trap of overreacting to a single court decision by overturning years of wise deregulatory policies. Instead, the Commission should continue to promote the pro-competitive policies that have worked to make the growth of the Internet the unparalleled success story of the modern era.

II. THE COMMISSION IS SEEKING TO REGULATE THE INTERNET

Prior to the release of the *NOI*, the FCC General Counsel set the stage for the Third Way Framework as a means to address the *Comcast* decision.¹⁰ His statement broadly proclaims that “*the Commission does not regulate the Internet*”¹¹ and cites the explicit statutory policy in section 230 of the Communications Act¹² that the Internet remain “unregulated.” The *NOI* pays lip service to these core principles, claiming that the Commission “do[es] not suggest regulating Internet applications, much less the content of Internet communications.” While this seems comforting, the reality is much different. The *NOI* expressly concedes that the Commission wishes to regulate “broadband communications networks used for Internet access.”¹³ This creates an alarming false dichotomy. The Internet is synonymous with access to the Internet. Simply put, without access, the Internet does not provide anything – applications are unable to reach consumers, communications go unread, and a vast trove of human knowledge lies untapped.

The Commission recognized the tremendous power of the Internet to effect social change and economic growth in its *National Broadband Plan*, which rightly acknowledged that, much like “electricity a century ago, broadband is a foundation for economic growth, job creation, global competitiveness and a better way of life.”¹⁴ However, it is critical to recognize that the Internet itself is nothing without the public’s ability to access it and share information over it.

¹⁰ See Statement of FCC General Counsel Austin Schlick, “A Third-Way Legal Framework for Addressing the Comcast Dilemma,” (May 6, 2010) (“*Schlick Statement*”).

¹¹ *Id.* 1 (emphasis in original).

¹² 47 U.S.C. § 230(b)(4).

¹³ *NOI* ¶ 10.

¹⁴ FCC, CONNECTING AMERICA: A NATIONAL BROADBAND PLAN FOR OUR FUTURE, xi (2010) (“*National Broadband Plan*”).

Because no citizen can enjoy the benefits of the Internet without actually getting to the Internet, excessive and unnecessary regulation of broadband Internet access will have a direct, negative impact on the nature and extent of Internet services that are available to the public. Make no mistake about it: The Commission is seeking to regulate the Internet.

A. Regulating Only Internet Connectivity Leaves Out Many Other Actors Who May Have the Power to Influence or Affect the Internet

The *NOI*'s suggestion that regulating only broadband Internet access providers will somehow improve the already dynamic Internet services marketplace is profoundly mistaken. While MetroPCS does not advocate regulating other types of providers, by choosing to regulate only Internet connectivity the Commission begins a swift slide down a dangerous path full of unintended consequences. Many stakeholders agree that content providers can create significant bottlenecks to accessing the best that the Internet has to offer. The American Cable Association (the "ACA") recently noted that "powerful content providers are now pushing closed Internet business models, denying millions of users access to content."¹⁵ Massive content providers, like ESPN with its ESPN360 service (now renamed "ESPN 3"), "block access to their online content, unless a customer's broadband provider agrees to a wholesale arrangement," which reportedly entails "a per subscriber fee for all broadband subscribers, regardless of whether a particular subscriber wants, or ever uses, the service."¹⁶ In all, "ESPN denies access to ESPN360 to over 30 million United States broadband customers, based solely on the customer's selection of broadband provider."¹⁷ This is precisely the type of gatekeeping behavior over which the

¹⁵ Comments of the American Cable Association, GN Docket No. 09-191, WC Docket No. 07-52, 5, filed Jan. 14, 2010 ("ACA Net Neutrality Comments").

¹⁶ *Id.* 5.

¹⁷ *Id.* 5.

Commission seeks to assert authority with this *NOI*. However, these particular practices are coming not from service providers, but rather from the content providers themselves, who would not be regulated under any of the Commission's proposed approaches.

Companies other than facilities-based broadband Internet access providers also have the ability to block or degrade Internet traffic and to regulate content. The *NOI* only proposes to reach the facilities-based providers of transmission in connection with broadband Internet access. However, an Internet Service Provider ("ISP") that solely uses telecommunications facilities provided by others (such as a dial-up ISP that leases facilities from a third party) can, under the Commission's proposal, block and degrade traffic without any regulation. Since these providers will have servers and other related gear, they clearly have the capability to do deep packet inspection and content review. These providers generally purchase transit from the Internet backbone companies to receive and deliver traffic to the Internet and greater usage of these facilities will generally require greater payments by the ISP. These providers also may have an incentive to steer customers to particular search engines or other web sites in order to receive compensation. Accordingly, these providers have exactly the same incentives and reasons to block or degrade traffic as the facilities-based broadband Internet access providers.

Additionally, any company that provides a through connection to the Internet has the ability (and the incentives) to perform the very actions that the Commission wants to regulate – and yet the Commission's regulations would fail to reach them, as they are not providing telecommunications. For example, backbone providers provide facilities-based telecommunications, but the Commission explicitly mentions that it is not trying to reach those

providers since they do not provide retail services.¹⁸ The Commission’s proposal would single out for regulation only the last mile providers that happen to provide facilities-based telecommunications – a group that is not the only set of providers that can affect a user’s Internet experience. Although proponents of reclassification might argue that these other providers do not need to be regulated because they are subject to competition from other Internet providers, this is simply not true. For example, there are effectively only two search engines that garner virtually all of the searches on the Internet. It is unrealistic to expect that a new company could enter the search business and actually take away the dominant market position of these two search engines.

The Commission must take heed of these facts. Facilities-based service providers have been cast as the villains for too long in the “good vs. evil” net neutrality mythology that is spun by the content providers. In fact, far from being the good guys, content providers currently enjoy a “free ride” to their customers over service providers’ networks.¹⁹ Because of sites like Google’s YouTube, broadband networks are struggling to keep pace with exploding customer data use, while Google and others continue to pay little to nothing to reach their customers. Rene Obermann, CEO of Deutsche Telekom, recently noted that “[t]here is not a single Google service that is not reliant on network service.”²⁰ The Commission should strive to support the development of “smart networks” that can manage the flow of data traffic effectively rather than endorsing “dumb pipes” over which data flows indiscriminately. Content gatekeepers have

¹⁸ *NOI* n.1 (stating that the Commission “use[s] the term ‘broadband Internet service’ to refer to the bundle of services that facilities-based providers sell to end users in the retail market”).

¹⁹ See Andrew Parker and Richard Waters, “Google accused of YouTube ‘free ride,’” *Financial Times*, Apr. 9, 2010, available at <http://www.ft.com/cms/s/2/8f5d6128-4400-11df-9235-00144feab49a.html>.

²⁰ *Id.*

played a substantial role in “fuelling an explosion of data traffic on [providers’] networks,”²¹ which has caused problems for all consumers who share that network. If the Commission hopes to navigate the coming “data tsunami,” it must realize that an open Internet cannot be fostered – and fairness will not be achieved – by regulating only one discrete portion of the complex Internet ecosystem. If the Commission insists upon regulating gatekeepers (which MetroPCS strongly opposes), it must in fairness adopt a uniform approach which addresses all participants similarly.²² A better approach, of course, is to foster competition by making it easier to provide broadband Internet access services – so that the market will continue to function without Commission regulation.

Google also is a powerful content provider that has the ability to exercise market power over the Internet. In their net neutrality comments, the National Cable and Telecommunications Association (“NCTA”) cites the experience of some technology firms who found that it is not service providers, but rather “search engines like Google, Yahoo and Microsoft’s new Bing [that] have become the Internet’s gatekeepers.”²³ Google in particular fits this gatekeeper mold – “with 71 percent of the United States search market ... Google’s dominance of both search and search advertising gives it overwhelming control.”²⁴ NCTA believes that “Google’s ability to affect the Internet marketplace is apparent and certainly warrants at least as much attention as

²¹ *Id.*

²² MetroPCS does not believe the Commission can or should regulate any aspects of the Internet. MetroPCS believes that the better approach is to foster an environment of competition that allows the marketplace, rather than government regulation, to pick winners and losers.

²³ Comments of National Cable and Telecommunications Association, GN Docket No. 09-191, WC Docket No. 07-52, 47, filed Jan. 14, 2010 (“NCTA Net Neutrality Comments”).

²⁴ *Id.* 48.

any potential threat posed by cable operators and other ISPs.”²⁵ Numerous other commenters in the Commission’s net neutrality proceeding agree that there is a great need to regulate content and applications providers – and not merely restrict additional regulation to carriers.²⁶

As stated above, MetroPCS strongly advocates against regulating any providers in the broadband Internet marketplace. However, if the Commission only regulates the providers of retail, facilities-based broadband Internet access it will fail to address a substantial a portion of the community of companies that can and do influence the Internet. Regulating only a piece of the Internet would be a terrible mistake, and will result in the Commission concocting a regulatory regime that chooses winners and losers, rather than the marketplace.

B. There is Widespread Agreement That There is No Need to Impose Any Form of Net Neutrality Regulation

As comments submitted in the Commission’s net neutrality proceeding make clear, there simply is no need for any form of net neutrality regulation – whether such regulation is directed to applications providers, providers of Internet connectivity, or to any other stakeholder in between. MetroPCS has long argued that “the heavy handed net neutrality proposals of the Commission are unnecessary and ill advised.”²⁷ MetroPCS is far from alone in this opinion. Diverse commenters in the Commission’s net neutrality proceeding support this opinion.

²⁵ *Id.*

²⁶ *See, e.g.*, Comments filed Jan. 14, 2010 in GN Docket No. 09-191, WC Docket No. 07-52: SureWest Net Neutrality Comments 24; Time Warner Net Neutrality Comments 74; Cox Net Neutrality Comments 11; Comcast Net Neutrality Comments at 30.

²⁷ Comments of MetroPCS Communications, Inc., GN Docket No. 09-191, WC Docket No. 07-52, 4, filed Jan. 14, 2010 (“MetroPCS Net Neutrality Comments”).

This opposition to net neutrality regulation truly comes from all corners of the industry, including large, small, urban and rural providers. Big-4 wireless leader AT&T states unequivocally that the “Commission identifies no present market failure or other problem that these rules could rationally address, and the Commission can resort only to theoretical speculation about ‘problems’ that might someday arise in the future,” concluding that “preemptive intervention now would be arbitrary and capricious for that reason alone.”²⁸ Rounding out the Big-4, Verizon,²⁹ Sprint Nextel³⁰ and T-Mobile³¹ joined AT&T in its opposition to net neutrality regulations. Additionally, mid-tier providers Leap Wireless and MetroPCS, who often find themselves at odds with the largest carriers on regulatory policy issues, came to the same conclusion. Wireline providers joined the chorus as well. Qwest opined that “[i]n the absence of intrusive regulatory intervention, competition is thriving in the broadband market and robust growth is evident.”³²

²⁸ Comments of AT&T, GN Docket No. 09-191, WC Docket No. 07-52, 96, filed Jan. 14, 2010 (“AT&T Net Neutrality Comments”).

²⁹ Comments of Verizon and Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52, 12, filed Jan. 14, 2010 (“Verizon Net Neutrality Comments”) (“Precisely because broadband Internet access services – and the Internet ecosystem more generally – remain early in their development, it is particularly important that the Commission not impose regulations that would impede or even halt their continued growth and evolution by discouraging investment and innovation or distorting competition.”).

³⁰ Comments of Sprint Nextel Corporation, GN Docket No. 09-191, WC Docket No. 07-52, 12, filed Jan. 14, 2010 (“Sprint Nextel Net Neutrality Comments”) (“Given this environment and history, the Commission should continue to follow its precedent by imposing new regulation on the competitive mobile sector only upon demonstration of a clear cut need.”).

³¹ Comments of T-Mobile USA, Inc., GN Docket No. 09-191, WC Docket No. 07-52, 6, filed Jan. 14, 2010 (“T-Mobile Net Neutrality Comments”).

³² Comments of Qwest Corporation, GN Docket No. 09-191, WC Docket No. 07-52, 8, filed Jan. 14, 2010.

The list does not stop there, either. Equipment providers,³³ noted economists³⁴ and content providers³⁵ also urged the Commission not to adopt any damaging net neutrality regulations. One academic noted that “[t]here is simply no basis for believing that there is any kind of generalized or systematic market power one would expect would require as a precondition of the prohibitive ex ante regulations the commission has proposed.”³⁶ What each of these diverse commenters have in common is an understanding that competition is a better solution than regulation.

Proponents may argue that broadband Internet access services should be regulated because they may be a substitute for existing traditional telecommunications. However, they would be incorrect in doing so. Broadband Internet access services are not a substitute for traditional telecommunications services. Although certain wireless data services are quickly eclipsing wireless voice services, the same cannot be said to be true with respect to wireline voice services. Although VoIP providers have made significant inroads over the last several years, nonetheless most of the communications traffic in the United States still is telecommunications services traffic. Further, even though broadband Internet services allow consumers to be connected to each other, most adults in the United States still have some form of traditional voice telecommunications service.

³³ See Comments filed Jan. 14, 2010 in GN Docket No. 09-191, WC Docket No. 07-52: Nokia Siemens Networks Net Neutrality Comments 1; Ericsson Net Neutrality Comments 6; Qualcomm Net Neutrality Comments 7.

³⁴ Howard Buskirk, “Economic Arguments for Net Neutrality Rules Fall Short, Economists Say,” *Communications Daily*, 3, Apr. 13, 2010 (noting a group of economists’ conclusion that “the economic evidence doesn’t justify the net neutrality rules the commission is considering”) (“*Buskirk Article*”).

³⁵ Comments of Amazon.com, GN Docket No. 09-191, WC Docket No. 07-52, 1, filed Jan. 14, 2010.

³⁶ *Buskirk Article* 3.

MetroPCS believes that the Commission should focus on how to promote additional competition in the market for broadband Internet service, rather than how best regulate a smoothly-functioning market. To trot out an old saying, “if it ain’t broke, don’t fix it.” There simply is no reason for the Commission to overhaul its regulatory treatment of broadband Internet, when that treatment has thus far led to unparalleled market success. The type of reclassification that the Commission proposes in the *NOI* is a solution in search of a problem.

C. The *NOI* is Overly-Broad and Contemplates Open-Ended Internet Regulation

MetroPCS also was struck by the remarkable scope of the *NOI*. Rather than propose a series of finely tuned solutions in areas where the Commission sees potential problems in the wake of *Comcast*, the *NOI* instead is an exceedingly broad notice that contemplates a regulatory sea-change with the inevitable result of permitting the Commission to have open season on Internet regulation. This strikes MetroPCS as an improper way to proceed in such an important area. Instead of proposing a complete, and unwarranted, overhaul of a spectacularly successful regulatory environment, the Commission should instead concentrate on putting forth specific proposals on discrete issues in the context of a series of rulemaking proceedings. In the *NOI* the Commission mentions several areas, such as universal service or privacy, which it is concerned that it may not have the authority to regulate absent a reclassification. Each of these items should be explored in discrete proceedings so that interested parties may offer informed comment on each issue. By simply attempting to cut a new regulatory regime out of whole cloth, the Commission is creating a new kind of broad, ever-expanding jurisdiction without end for itself.

D. Internet Regulation Should Be Left to Congress

Fundamental changes to the Commission's long-standing Internet regulatory regime should be left to Congress. The 1996 Act does not mention the Internet or the Commission's authority to regulate it. However, section 230 of the Act, added in 1998, recognizes "[t]he policy of preserving the Internet as a generally unregulated free-market forum" and Congress' conclusion that the Internet will flourish "with a minimum of government regulation."³⁷ In view of this express Congressional intent, is not appropriate for the Commission to cast aside a long-standing "hands-off" policy and grant itself additional authority; it should wait for Congress to provide a new direction prior to taking such broad actions. A congressional solution has the benefit of avoiding the almost-certain litigation that will result from a Commission reclassification of the broadband Internet. Years of litigation surely will disrupt a functioning Internet marketplace and also will freeze the investment necessary to accomplish the Commission's goals set forth in the *National Broadband Plan*.

Congress is the ultimate source of the Commission's authority. Under the circumstances here, without direction from Congress, the Commission simply should not and cannot act. The Commission's power to regulate the Internet is unclear at best and non-existent at worst. Recently, 241 members of the House of Representatives have unequivocally declared that the Commission should wait for a congressional solution before proceeding with broadband reclassification or other net neutrality regulation.³⁸ Numerous Senators have done the same.³⁹

³⁷ *Schlick Statement* 1; 47 U.S.C. § 230(a)(4).

³⁸ See Letter dated May 28, 2010 from John D. Dingell, Member of Congress, to Julius Genachowski, Chairman, Federal Communications Commission dated May 27, 2010; Letter from Joe Barton, Ranking Member, House Committee on Commerce and Energy, and Cliff Stearns, Ranking Member, Subcommittee on Communications, Technology and the Internet to Julius Genachowski, Chairman, Federal Communications Commission.

These letters have on common theme – that the Commission should not move forward with “a major shift in FCC policy that is highly controversial and has been previously endorsed by Congress and both Democratic and Republican administrations.”⁴⁰ Rather than embarking on yet another unhappy journey to the federal appeals courts, the Commission would be wise to wait for Congress to step in and clarify whether the current law, and the “hands off” approach to the Internet, should change.

III. THE COMMISSION’S “THIRD WAY” APPROACH IS AN EXTREME OVERREACTION TO THE COMCAST CASE

Contrary to the implication in General Counsel Schlick’s Third Way memoranda, *Comcast* does not stand for the proposition that the Commission has no power over the broadband Internet access marketplace. There are in fact a number of instances, such as with voice over Internet protocol (“VoIP”), where the Commission has exercised its ancillary jurisdiction over certain aspects of Internet access and has not been challenged. The Commission has applied certain common carrier-type obligations to VoIP providers using its Title I ancillary authority. For example, when determining whether to apply E911 requirements to VoIP providers, the Commission “analyze[d] the issues addressed in this Order primarily under [its] Title I ancillary jurisdiction” because it has not yet determined whether VoIP is an information service or a telecommunications service.⁴¹ The *VoIP E911 Order* found that “regardless of the regulatory classification, the Commission has ancillary jurisdiction to promote

(...continued)

³⁹ Letter dated May 24, 2010 from 37 separate Senate Republicans to Julius Genachowski, Chairman, Federal Communications Commission.

⁴⁰ *Id.*

⁴¹ *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, ¶ 22 (2005) (“*VoIP E911 Order*”).

public safety by adopting E911 rules for interconnected VoIP services.”⁴² The Commission also has “exercise[d] [its] ancillary jurisdiction under Title I of the Act to extend universal service contribution obligations to interconnected VoIP providers.”⁴³ Accordingly, it simply is not true that the Commission has been unable to regulate other aspects of the broadband Internet under its Title I ancillary jurisdiction. The Commission, as long as it points to specific provisions of its statutory authority, retains Title I ancillary jurisdiction. The *Comcast* holding does nothing to change that fact.

As a result, *Comcast* has done nothing to change the manner in which the Commission has regulated certain aspects of the broadband Internet in the past. The only proposition for which *Comcast* stands is the requirement that, in regulating under Title I using its Internet openness principles, the Commission must “tie its assertion of ancillary authority over Comcast’s Internet service to [a] ‘statutorily mandated responsibility.’”⁴⁴ Thus, the decision merely said that, under the particular set of facts and circumstances surrounding Comcast’s decision to block peer-to-peer services, the Commission did not sufficiently tie its actions to its statutory authority. In no way does this holding indicate that the Commission could not sufficiently tie its actions in a similar circumstance to its statutory authority, it merely held that, in this particular instance, it did not. In fact, the Court even suggests an alternative manner in which the Commission could have properly regulated Comcast’s conduct under the circumstances. The Court stated that “[p]erhaps the Commission could use section 230(b) or section 1 to demonstrate such a

⁴² *Id.* ¶ 26.

⁴³ *Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service*, 21 FCC Rcd 7518, ¶ 46 (2006).

⁴⁴ *Comcast*, 600 F.3d at 661.

connection [to statutory authority], but that is not how it employs them here.”⁴⁵ Further, the Court noted that section 706 of the Act, as currently construed by the Commission, did not provide an adequate basis on which to hang Title I regulations.⁴⁶ However, the Court seemed to suggest that if the Commission overturned its prior decision, which found that section 706 did not provide the Commission with an independent grant of authority, it might be able to use that section as a basis for ancillary Title I jurisdiction. Thus, according to the Court’s own ruling, a path to Commission regulation of broadband Internet service under its Title I ancillary authority has not been foreclosed and there is no cause for a radical new approach.

It is important for the Commission to be extremely cautious about overturning long standing decisions in the wake of *Comcast*. For example, in the *NOI*, the Commission explicitly considers overturning its decision with respect to 47 U.S.C. § 706, wherein it found that this section “does not constitute an independent grant of authority.”⁴⁷ Overturning an administrative decision requires the agency to elucidate a reasoned rationale for doing so, and point to the changed circumstances that led to the reversal of a decision.⁴⁸ Indeed, the D.C. Circuit specifically references this requirement in *Comcast*, noting that “agencies ‘may not . . . depart from a prior policy *sub silentio*.’”⁴⁹ The mere fact that the Commission has received what it considers to be a bad judicial decision in *Comcast* does not constitute sufficiently changed circumstances to justify the reversal of the Commission’s section 706 decision, or any other FCC

⁴⁵ *Id.*

⁴⁶ *Id.* at 658.

⁴⁷ *NOI* ¶ 36 (quoting *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 FCC Rcd 24012, ¶ 77 (1998)).

⁴⁸ See discussion *infra* section V.

⁴⁹ *Comcast*, 600 F.3d at 659 (quoting *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)).

precedent. The bottom line remains that the Commission should not jettison decades of precedent in a highly nuanced and complex area simply to circumvent the result of a single case that it does not like.

IV. THE COMMISSION SHOULD NOT OVERTURN ITS PRIOR CONCLUSIONS THAT BROADBAND INTERNET ACCESS IS AN INFORMATION SERVICE

The Commission has long held that broadband Internet access is an information service. In decision after decision, the Commission has found that broadband Internet access is an integrated, non-severable service, citing the comprehensiveness of the service offering and the importance of the end-user's experience in deciding how to classify such services. In the time since each of the Commission's decisions classifying broadband Internet access as an information service, all made within the last eight years, nothing has changed in the marketplace with regard to the way in which broadband Internet access is configured, marketed, or viewed by consumers. Although broadband technology has undoubtedly improved in many ways (due in large part to competition, rather than regulation), nothing about the service has changed that would in any way justify altering its regulatory classification.

In the 2002 *Cable Modem Declaratory Ruling*, the Commission held that, "taken together, [the components of cable modem service] constitute an information service, as defined in the Act."⁵⁰ The decision found that any such classification must "turn[] on the nature of the functions that the end user is offered."⁵¹ The service "combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to

⁵⁰ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 33 (2002) ("*Cable Modem Declaratory Ruling*").

⁵¹ *Id.* ¶ 38.

run a variety of applications.”⁵² Furthermore, classification is not determined on an offering-by-offering basis. That is, classification as an information service “is so regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service.”⁵³ The *Cable Modem Declaratory Ruling* also makes clear that the telecommunications component of the offering is part of “a comprehensive service offering,” noting that “[a]s provided to the end user the telecommunications is part and parcel of a cable modem service and is integral to its other capabilities.”⁵⁴ The preceding statements, which describe the essence of cable modem service, remain just as true in 2010 as they did in 2002.

Similarly, in the 2005 *Wireline Reclassification Order*, the Commission classified wireline broadband Internet access service as an information service “because its providers offer a single, integrated service (i.e., Internet access) to end users.”⁵⁵ The Commission again focused on the offering of combined transmission functions and information services⁵⁶ and found that these components “encompass the capability for ‘generating, acquiring, storing, transforming, and processing, retrieving, utilizing, or making available information via telecommunications.’”⁵⁷ Even today these services remain part of one integrated service offering.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* ¶ 39.

⁵⁵ *Wireline Reclassification Order* ¶ 14.

⁵⁶ *Id.* (finding that “wireline broadband Internet access service combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications (e.g., e-mail, web pages, and newsgroups)”).

⁵⁷ *Id.*

Then, in its 2006 *BPL Order*, the Commission used nearly identical language in finding that BPL-enabled service also “offers a single, integrated service (i.e., Internet access) to end users, in that BPL-enabled Internet access service combines computer processing, information provision, and computer interactivity with data transport.”⁵⁸ The capabilities of the elements of BPL-enabled service “taken together constitute an information service as defined by the Act.”⁵⁹ The Commission further held that the transmission component should not be considered separately from the other elements of broadband Internet access, that is, as a “telecommunications service,” “because it is part and parcel of the Internet access service’s information service capabilities.”⁶⁰

Most recently, in the 2007 *Wireless Broadband Order*, the Commission again placed great importance on the fact that wireless broadband Internet service “offers a single, integrated service to end users, Internet access, that inextricably combines the transmission of data with computer processing, information provision, and computer interactivity, for the purpose of enabling end users to run a variety of applications.”⁶¹ And, as in previous decisions, the Commission held that it was concerned only with the experience of the end user, whom “expects to receive (and pay for) a finished, functionally integrated service that provides access to the Internet, rather than receive (and pay for) two distinct services – Internet access service and a

⁵⁸ *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281, in WC Docket No. 06-10, ¶ 9 (Nov. 7, 2006) (“*BPL Order*”).

⁵⁹ *Id.*

⁶⁰ *Id.* ¶ 14.

⁶¹ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, in WT Docket No. 07-53, ¶ 26 (March 23, 2007) (“*Wireless Broadband Order*”).

distinct transmission service.”⁶² As a facilities-based provider of wireless broadband Internet access, MetroPCS can assure the Commission that nothing has occurred in the preceding three years to change the nature of this service. As such, the regulatory classification of wireless broadband must stand.

Unfortunately for the Commission, nothing about the fact that the Commission lost the *Comcast* case serves to change the way in which broadband Internet access is provided, marketed, or viewed by consumers or the Commission. Further, the technology used to provide retail broadband Internet services has not changed significantly in the years following the Commission’s decisions. Indeed, with the exception of increased broadband speeds, the technology and the service actually provided as part of retail broadband Internet access has remained relatively constant for the last eight years. Broadband Internet access is still a “comprehensive service offering,” the components of which, “taken together, constitute an information service as defined by the Act.” With the nearly decade-long consistency of these rulings in mind, the Commission must not overturn its prior conclusions that broadband Internet access is an information service.

However, if the Commission is determined to overturn the many years of precedent outlined above, it must undertake a reasoned analysis in order to do so. Such an analysis must specify the changed circumstances that necessitated the Commission’s about-face reclassification – changed circumstances that simply do not exist in this case. But, as is openly conceded in the Statement of Austin Schlick, the Third Way framework is not addressing changes in the manner in which broadband services are provided; rather, it is “addressing the *Comcast* dilemma.” The action is not motivated by a change in circumstances regarding broadband Internet access; rather,

⁶² *Id.* ¶ 31.

it is motivated by an effort to overcome “a recent court decision that creates serious doubt on the FCC’s current strategy.” While these may be understandable motivations, they are not sufficient legal rationales for the Commission to abandon and reverse itself on well-settled legal principles.

V. IN ORDER TO REVERSE ITSELF ON THE ABOVE ORDERS, THE COMMISSION MUST SUPPLY A REASONED JUSTIFICATION, AND NONE EXISTS

If the Commission reverses its prior decision, it must supply a reasoned analysis that provides an explanation of the changed circumstances that warrant such a reversal because “a rational person acts consistently, and therefore changes course only if something has changed.”⁶³ Here, no such relevant change has occurred.

Courts faced with similar situations in the past have long held that “where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.”⁶⁴ In light of its previous decisions classifying broadband Internet access as an information service and certain of these decisions being upheld on appeal, discussed above in Section III, the Commission would unquestionably be “depart[ing] from established precedent without reasoned explanation.” In order to properly make such a departure, the Commission “‘must supply a reasoned analysis’ establishing that prior policies and standards are being deliberately changed.”⁶⁵

⁶³ *Schurz*, 982 F.2d at 1053.

⁶⁴ *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995); *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 304 (D.C. Cir. 2009) (“*Verizon*”) (“[I]t is arbitrary and capricious for the FCC to apply such new approaches without providing a satisfactory explanation when it has not followed such approaches in the past.”).

⁶⁵ *Verizon*, 570 F.3d at 301 (quoting *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 57); see also *Wis. Valley Improvement v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001) (“[A]n agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so.”); *Telecomms. Research and Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986) (“When an
(continued...)”)

The “reasoned analysis” standard applied by the judiciary is not merely a cursory exercise, either. Courts require that the Commission clearly explain, with strong supporting evidence, the changed circumstances that necessitated the change in Commission policy. In instances where the Commission has failed to make a persuasive showing in the past it has been sharply rebuked by the courts.⁶⁶ For example, the Commission attempted to ignore a prior finding of “no market power” for a number of broadcast television networks when instituting new financial interest and syndication rules. In explaining its reasons for the new rules, the Commission expressed a desire to retain “some restrictions ... necessary to assure adequate diversity of television programming.”⁶⁷ This belief that certain restrictions remained necessary, however, was in direct contradiction to a “Commission conce[ssion] that the networks may already have lost so much of their market power as no longer to pose a threat to competition.”⁶⁸ While the Court recognized that the Commission has the ability to change its mind, “[w]hat it could not do, consistent with the principles of reasoned decisionmaking, was pretend that it had never found that the networks had lost market power.”⁶⁹ With the proposed reclassification of broadband Internet access, the Commission proposes a similar “head-in-the-sand” approach – it (...continued)

agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms.”).

⁶⁶ See, e.g., *CBS v. FCC*, 454 F.2d 1018 (D.C. Cir. 1971) (holding that “[u]nable to articulate reasons for overruling or distinguishing [a prior decision], the Commission effectively ignored its own obvious precedent” and accordingly “[u]nder the circumstances, its arbitrary action may not stand”); *Verizon Tel. Cos.*, 570 F.3d at 304 (holding FCC action was “arbitrary and capricious” where “the FCC changed track from its precedent” without explanation); *Mobile Communs. Corp. of Am. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996) (rejection FCC decision because “[w]hen Commission reversed course, it failed to address such questions as whether its new position was consistent”).

⁶⁷ *Schurz*, 982 F.2d 1048.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1054.

appears content to “pretend that it ha[s] never found,” in four separate and recent decisions, that the telecommunications component of broadband Internet access service was inseverably integrated with the information service component, so as to constitute a single information service offering. Much like the Court required in *Schurz*, the Commission is required to “explain what ha[s] happened in eight years to justify [its] about face, or if nothing ha[s] happened, why the ... decision[s] had been wrong from the start.”⁷⁰ As MetroPCS has shown, this is an impossible task, as the way that broadband Internet access is marketed, sold, purchased and viewed by consumers has not changed at all.

The problem that the Commission has is that its prior conclusions regarding the nature of Internet access service, and the manner in which it is perceived by users, remains correct. The Commission’s Third Way memoranda reads as if there is imminent harm in the broadband Internet marketplace unless regulation is imposed, while pointing to none. As well, in the Commission’s *Net Neutrality NPRM*, it noted that “some conduct is occurring in the marketplace that warrants closer attention and could call for additional action by the Commission, including instances in which some Internet access service providers have been blocking or degrading Internet traffic, and doing so without disclosing those practices to users.”⁷¹ However, the Commission has been able to produce almost no evidence to back up these claims. In fact, in the *Net Neutrality NPRM*, the Commission was only able to point to two instances of the type of harm that might require action or intervention – and one of those occurred before the most recent

⁷⁰ *Id.* at 1053.

⁷¹ *Preserving the Open Internet, Broadband Industry Practices*, 24 FCC Rcd 13064, ¶ 50 (2009) (“*Net Neutrality NPRM*”).

pronouncements by the Commission that broadband Internet access is an information service.⁷² Nothing about a functioning market with thousands upon thousands of market participants and hundreds of millions of consumers – and two isolated complaints separated by a number of years – smacks of “changed circumstances” that might necessitate a broad change in regulatory classifications. Indeed, the only incident that would even be relevant from a timing perspective was Comcast. However, even then the Commission did not reference changed circumstances until the court of appeals handed down the *Comcast* decision.

Indeed, the Commission may not “depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”⁷³ Rather, the Commission must explain why it is “disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁷⁴ Otherwise, the rules that it changes without reasoned analysis will quickly be struck down on judicial review.

With this attempt at reclassification of broadband Internet connectivity, the Commission is hard-pressed to assemble a cogent explanation for directly contradicting its well-grounded, thoroughly reasoned prior decisions of the past decade because, as noted above, no such changed circumstances exist in the market for broadband Internet access services. Indeed, all of the prior decisions point the same way and are entirely consistent. The Commission must explain its reversal of each one – even ones such as the *BPL Order* where there is almost no current

⁷² The Commission cited the *Madison River* case and also the *Comcast Complaint*, which was the subject of the *Comcast Corp. v. FCC* appeal. *Madison River Communications, LLC*, Order, 20 FCC Rcd 4295 (Enf. Bur. 2005) (“*Madison River*”); *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008) (“*Comcast Complaint*”).

⁷³ *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

⁷⁴ *Id.*

deployment of BPL. In fact, no changed circumstances exist which can support a reversal of all these decisions. These services are provided in the same way and remain sold in the same way, marketed in the same way, and viewed in the same way by consumers. By all measures the market remains robustly competitive, innovative and pro-consumer. Indeed, a retail consumer has the choice in many instances of at least nine competitors today using six different platforms, and additional competitors, such as BPL, mobile satellite services, WiMAX providers, and other wireless providers, are poised to enter new markets. The Commission previously has found that a market with only four operators was competitive.⁷⁵ None of these traits require a departure from the currently-successful regulatory regime and in fact point in the exact opposite direction. Accordingly, any attempts to turn from the current classification of broadband Internet access service as an information service to the archaic, monopoly-driven provisions of Title II regulation (even with forbearance from certain sections) would be unlikely to survive on appeal.

By all measures the Internet access market remains robustly competitive, innovative and pro-consumer. Simply put, losing a court decision – and subsequently attempting to find a way around that decision – does not constitute a legally sufficient changed circumstance to warrant a significant departure from a successful regulatory schema that has resulted in a robustly competitive marketplace.

⁷⁵ See, e.g., *Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless; For Consent To Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Docket No. 09-104, FCC 10-116, ¶ 66 (2010) (finding that “any attempt by the post-transaction entity to engage in anticompetitive behavior would likely be unsuccessful because customers have four other competitors with sufficient coverage in this market from which to choose”).

VI. BROADBAND INTERNET ACCESS CANNOT BE REGULATED UNDER TITLE II BECAUSE THE TELECOMMUNICATIONS COMPONENT IS INSEVERABLE FROM THE INFORMATION SERVICE COMPONENT

The Commission's attempt to regulate broadband Internet access under Title II also must fail because the telecommunications component of the service is entirely inseverable from the information service component. Although the Commission seeks to make much of its Third Way approach, at the core of the Third Way is an unsuccessful attempt to bludgeon a square peg into a round hole. Whether the Commission chooses to regulate broadband Internet connectivity under a traditional Title II common carrier approach, or under its Third Way forbearance proposal, the Commission still must reclassify certain elements of integrated broadband Internet connectivity services as telecommunications services in order to apply common carrier regulation. As earlier noted, the Commission lacks the justification for such a reclassification. Additionally, any reclassification approach is likely to result in substantial and extended litigation. If the Commission proceeds in this manner it runs a substantial risk of being overturned as "arbitrary and capricious." Any such litigation will also breed uncertainty in the market for broadband Internet services at the precise time that the Commission requires market stability for the capital-raising required to implement the *National Broadband Plan's* goals.

Even the FCC's own Commissioners have recognized the adverse effects that the Third Way proceeding may have on broadband Internet access investment. Commissioner Baker, for example, cautioned against "opening a proceeding [that] creates so much regulatory uncertainty that it harms incentives for investment in broadband infrastructure and makes providers and investors alike think twice about moving forward with network investments under this dark

regulatory cloud.”⁷⁶ Democratic House Members have voiced concern as well about the potential for reclassification to adversely affect jobs and infrastructure investment, admonishing the Commission that “the uncertainty this proposal creates will jeopardize jobs and deter needed investment for years to come.”⁷⁷ Further, these Members “urge[d] [the Commission] not to move forward with a proposal that undermines critically important investment in broadband and the jobs that come with it.”⁷⁸ Indeed, there already is evidence in the marketplace that the mere proposal of the Commission’s Third Way reclassification scheme has begun to chill investment in broadband infrastructure. Academics have warned that:

Reclassification will expose with a positive and increased probability, the Internet to “heavy handed” regulations that “chill investment.” In other words, it seems fair to say that the existence of strong authority under Title II will not diminish, but will, in fact, increase the chances that, ultimately, the broadband firms face significant price regulation. Thus, all Internet firms, and particularly broadband service providers, would plausibly and reasonably incorporate a higher probability of prescriptive regulation into their investment decisions upon reclassification⁷⁹

Others have likewise cautioned that a “well-intentioned but nonetheless problematic third-way forward will engender increased regulatory uncertainty, decreased investment and adverse

⁷⁶ Commissioner Meredith Atwell Baker, *Framework for Broadband internet Service*, GN Docket No. 10-127, Dissenting Statement (Jun. 17, 2010); *see also* Commissioner Robert M. McDowell, *Framework for Broadband Internet Service*, GN Docket No. 10-127, Dissenting Statement (June 17, 2010) (stating that “the proposed new regime will place the heavy thumb of government on the scale of a free market to the point where innovation and investment in the ‘core’ of the ‘Net are subjected to the whims of ‘Mother-May-I’ regulators”).

⁷⁷ Letter dated May 24, 2010 from the Honorable Al Green *et al.*, U.S. House of Representatives, to the Honorable Julius Genachowski, Chairman, Federal Communications Commission.

⁷⁸ *Id.*

⁷⁹ George S. Ford, PhD, and Lawrence J. Spiwak, Esq., *The Broadband Credibility Gap*, 23-24, The Phoenix Center, June 2010, available at <http://www.phoenix-center.org/pcpp/PCPP40Final.pdf>.

effects for consumers.”⁸⁰ The Commission should heed these words as it considers the proposals set forth in the *NOI*.

A. It is Undisputed That the Computing Functionality Provided In Connection With Broadband Internet Access is An Information Service

It is beyond dispute that that certain computing capabilities provided in connection with Internet connectivity are information services. And, it is also beyond dispute that the Commission has no authority to regulate information services under Title II, which is explicitly limited to the regulation of common carrier “telecommunications services.” Under 47 U.S.C. § 153(20), an “information service” is defined 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.⁸¹

Integrated services offered by broadband Internet service providers fit this definition exactly. In the past, the Commission has characterized DNS as an information service function.⁸² In addition, many broadband Internet access providers offer email, file storage, streaming video and local news or weather information. Many wireless broadband providers also now offer GPS, navigation and other location-based services. The offering of these types of services, which clearly constitute the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,” means that the Commission has no choice

⁸⁰ Statement of Barbara Esbin Concerning the FCC's "Third Way" Internet Regulation Proposal, The Progress and Freedom Foundation, May 6, 2010, *available at* http://www.pff.org/news/news/2010/2010-05-06-Esbin_statement.html.

⁸¹ 47 U.S.C. § 153(20).

⁸² MetroPCS does not agree with this characterization. Rather, MetroPCS sees DNS as a service used in the “management, control or operation” or a telecommunications service. 47 U.S.C. § 153(20). *See* MetroPCS Data Roaming Reply Comments 47.

but to classify these services as information services. Furthermore, a number of these services typically are offered by broadband Internet access providers. Thus, even if a given service was not offered in a particular instance, it would not make sense to relegate those isolated instances where an information service is not coupled with the broadband Internet access service to being telecommunications services. The broadband Internet access market remains the same regardless of whether a provider offers some or all of these information services. Further, a number of broadband Internet access providers cache highly-sought information for their customers in order to keep such information closer to the end-user, thus reducing the amount of traffic over the provider's transit facilities to the Internet. These same providers may also check to ensure that the cached pages are current, which is another form of information service. Accordingly, even if a provider only offers browsing, that service is an information service itself, as the provider may generate, acquire or store information for transmittal to the end-user.

B. Broadband Internet Access Cannot Be Regulated Under Title II

Because the Commission recognizes its inability to regulate these integrated information services under its Title II authority, it now attempts an “end-around” of this statutory prohibition by proposing to sever the transmission component of broadband Internet access from the information service component. This not only flies in the face of years of settled FCC precedent, but also is a legally unsustainable conclusion. In the simplest of terms, in order to regulate broadband facilities under Title II, two essential elements are required: (i) a finding that the service provided is a telecommunications service; and (ii) a finding that the service provided is able to be regulated as a common carrier service. Importantly, a service may include telecommunications, but not be a telecommunications service because it is not offered separately as a service, but rather bundled together with an information service. Absent an affirmative finding that the service provided meets both elements, a service is prohibited from being

regulated as a common carrier under Title II. Unfortunately for the Commission’s proposed Title II or Third Way theories, broadband Internet access fails both of these necessary steps.

1. The Transmission Component of Broadband Internet Access is Not Separately-Provided Or Severable Telecommunications

The transmission component of broadband Internet access, although telecommunications, cannot properly be regulated as a telecommunications service, as it is inextricably intertwined with the information service component of the offering. In effectively all circumstances, these two components are seen as one combined integrated service by consumers. A wireless consumer generally does not purchase his telecommunications from AT&T while purchasing the information services from MetroPCS – instead, these services are offered as a single, bundled offering. Similarly, a Comcast cable modem subscriber does not purchase Internet connectivity from Comcast and separate information services from Cox. Not only would most consumers be entirely uninterested in such a complicated arrangement, these types of arrangements simply are not offered in the marketplace. Longstanding Commission and judicial precedent indicate that service offerings are not defined by how components could be broken down, but instead how the finished product is viewed by the consumer. Indeed, under the majority decision in *Brand X*, the Supreme Court held that a service or product is defined by “what the consumer perceives to be the integrated finished product.”⁸³

Proceeding with this analysis, the Supreme Court held that broadband Internet access is a “single, integrated offering”⁸⁴ that is not “separable from the data-processing capabilities of the service.”⁸⁵ Finding that broadband Internet access was a single, integrated service, the Court

⁸³ *Brand X*, 545 U.S. at 990.

⁸⁴ *Id.* at 967.

⁸⁵ *Id.* at 997; *see also Stevens Report* ¶¶ 57-60.

next turned to the question of “whether the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering,” concluding unequivocally that it was.⁸⁶

Commission precedent tracks this conclusion precisely. As discussed more fully in Section III, the *Wireless Broadband Order*, the *Cable Modem Declaratory Ruling*, the *Wireline Reclassification Order* and the *BPL Order* each found that the telecommunications transmission component of an integrated wireless broadband Internet access service offered to end users using the provider’s own transmission facilities was not a telecommunications service, but rather constitutes an information service, because the transmission component (*i.e.*, telecommunications) was “part and parcel of the Internet access service’s information service capabilities.”⁸⁷ Given this longstanding judicial and agency precedent, it seems almost inconceivable that the Commission could now, upon receiving an adverse decision in the courts, flippantly upend its analytical approach which underpins the entire Internet regulatory regime. Unfortunately for the Commission, the above body of law stands strongly for the fact that the transmission component of broadband Internet access, when offered in conjunction with an information service, is not a telecommunications service, and is therefore ineligible for regulation under Title II.

2. The Transmission Component of Broadband Internet Access is Not Offered On a Common Carrier Basis

Even if the Commission were to somehow conclude – despite the overwhelming judicial and Commission precedent to the contrary – that the transmission component of broadband Internet access, when provided as a single integrated offering with the computing capabilities of

⁸⁶ *Brand X*, 545 U.S. at 988.

⁸⁷ *BPL Order* ¶ 14.

an information service, is a telecommunications service, the Commission still must show that it is offered on a common carrier basis in order to bring the service under Title II. In *NARUC I*, the D.C. Circuit established a two-pronged test for common carrier regulatory treatment. According to that test, the court

must inquire, first, whether there will be any legal compulsion ... to serve [the public] indifferently, and, if not, second whether there are any reasons, implicit in the nature of ... the operations to expect an indifferent holding out to the eligible user public.⁸⁸

Thus, the test can be satisfied either by (1) the provider's actions (*i.e.*, the indiscriminate offering of service to the public) or (2) a Commission determination that the public interest requires the service to be offered indiscriminately to the public. If a service satisfies either prong of the two-part test, common carrier treatment is indicated. Here, neither prong is satisfied; thus common carrier treatment may not be applied to the transmission component of broadband Internet access services.

In applying the first test, the Commission must consider whether a carrier is holding itself out to such classes of users as to be deemed offering service generally to the public. It is clear that for most, if not all, broadband Internet access service providers, the telecommunications component of Internet access is offered on an integrated basis with the information services component. As discussed in the examples above, consumers simply do not purchase their telecommunications from one provider and their information services from another. And, even if consumers desired such a convoluted connectivity scheme, broadband Internet access services simply are not marketed or sold in this manner. Internet-bound consumers no longer use their local dial-up lines (telecommunications, purchased from their local phone company) to contact

⁸⁸ *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976), cert. denied., 425 U.S. 992 (1976) ("*NARUC I*").

AOL (the information service, purchased separately). Consumers today take one direct route to the Internet – via one broadband Internet access service provider that provides a bundled offering of transmission and information services.⁸⁹

With respect to the second test, there simply is no reason – much less a compelling reason – to find that classifying the telecommunications/transmission component of broadband Internet access would promote the public interest. As discussed more fully in Section VIII below, competition is thriving and broadband is proliferating. As MetroPCS previously has noted, “[l]ong gone are the days of pay-by-the-minute dial-up Internet access – today, consumers are able to enjoy unlimited data access in their homes and on the go.”⁹⁰ Competition in the market for broadband Internet services remains on the rise. Recent studies have noted that “there are indications that [the broadband market] is moving in the direction of more competition”⁹¹ and that “national trends ... appear to show an increasing number of competitive alternatives [for broadband services] across all markets.”⁹² The competition and consumer access that the broadband service providers have provided has led directly to the innovation and rigorous competition currently found in the Internet applications market. Five years ago it would have strained the imagination to consider the breadth and depth of groundbreaking applications that are now available to all consumers. No one can question the statement that the Internet has been

⁸⁹ However, consistent with past Commission findings, if a broadband Internet service provider were to offer the transmission component separately from the information service component, that transmission service would properly be regulated as telecommunications. *See, e.g., Wireless Broadband Order* ¶ 33 (finding that “if a wireless broadband Internet access provider chooses to offer the telecommunications transmission component as a telecommunications service, then it is a common carrier service subject to Title II”).

⁹⁰ MetroPCS Net Neutrality Comments 15.

⁹¹ “Broadband Connectivity Competition Policy,” FTC Staff Report, 11 (Jun. 2007).

⁹² *Id.* 105.

an unabashed success. With these facts in mind, how could changing the regulatory mix that led to this spectacular success possibly be in the public interest?

Thus, it is clear that the telecommunications component of broadband Internet access is not offered to the public on a common carrier basis, and the overwhelming evidence stands against a public interest finding that it is a common carrier telecommunications service. Because the telecommunications component of broadband Internet access fails both prongs of the *NARUC I* test, the Commission may not regulate it as a telecommunications service. As the Commission repeatedly has noted, telecommunications services and information services are mutually exclusive.⁹³ Because broadband Internet access is not a telecommunications service, it must therefore be regulated as an information service, and accordingly be exempted from regulation under Title II.

VII. UNDER NO CIRCUMSTANCES SHOULD THE COMMISSION APPLY ITS THIRD WAY CLASSIFICATION REGIME TO WIRELESS BROADBAND INTERNET ACCESS PROVIDERS

While MetroPCS does not support the application of the Third Way classification regime to any broadband Internet access service providers, the Commission should in particular refrain from applying this reclassification to wireless broadband Internet access providers. Wireless carriers face a number of unique challenges that their wired counterparts do not. In addition, the Commission should allow the burgeoning wireless broadband Internet access marketplace to develop free from unnecessary regulatory intervention. Only in this way can wireless truly become a viable, at-home competitor to wired broadband, as is a stated goal of the *National Broadband Plan*.

⁹³ See, e.g., *Wireline Reclassification Order* ¶ 105.

A. Wireless Broadband Providers Share Unique Challenges and Constraints That Wired Broadband Providers Do Not

The Commission itself has recognized the “technological, structural, consumer usage, and historical differences between mobile wireless and wireline/cable networks.”⁹⁴ For instance, “cellular wireless networks are shared networks (as are some types of wireline networks), with limited resources typically shared among multiple users.”⁹⁵ Further, “[w]ireless networks must deal with particularly dynamic changes in the communications path due to radio interference and propagation effects such as signal loss with increasing distance of the wireless phone from the base stations, fading, multipath and shadowing.”⁹⁶ In addition, in many instances voice and data information ride over the same wireless spectrum, meaning that wireless broadband providers have to carry two types of traffic over the same pipe. Wired providers, on the other hand, can easily separate their voice and data pipes to capture efficiencies.

Most notably, however, whereas wired providers can always lay more cable to increase capacity, wireless providers currently are facing an acute lack of available wireless spectrum. This fact has been recognized by multiple parties at all levels of the legislative⁹⁷ and executive branches,⁹⁸ by service providers⁹⁹ and by academics.¹⁰⁰ The Chairman of the FCC himself has

⁹⁴ *Net Neutrality NPRM* ¶ 154.

⁹⁵ *Id.* ¶ 159.

⁹⁶ *Id.*

⁹⁷ A recent letter from Senator Olympia Snow made several recommendations regarding how to “solve the looming spectrum crisis.” Letter dated Jan. 5, 2010 from Senator Olympia J. Snow to Julius Genachowski, Chairman, Federal Communications Commission, 2.

⁹⁸ Memorandum on Unleashing the Wireless Broadband Revolution, DAILY COMP. PRES. DOCS., 2010 DCPD No. 201000556 (Jun. 28, 2010) (“*Obama Memo*”).

⁹⁹ MetroPCS Net Neutrality Comments 3; *see also* T-Mobile Net Neutrality Comments 2; Sprint Nextel Net Neutrality Comments 3; CTIA Net Neutrality Comments 67.

¹⁰⁰ *Buskirk Article* 3.

recognized that “the biggest threat to the future of mobile in America is the looming spectrum crisis.”¹⁰¹ In a recent memorandum, President Obama himself recognized the spectrum scarcity and directed the heads of all involved Executive Departments and Agencies to take concrete steps to free up additional spectrum to keep America from falling behind in the global wireless revolution.¹⁰² The *National Broadband Plan* also recognizes the unique problems faced by the wireless broadband industry, noting that the “growth of wireless broadband will be constrained if government does not make spectrum available to enable network expansion and technology upgrades.”¹⁰³ And, coming deployment of next-generation technologies, such as long-term evolution (“LTE”), while capacity-enhancing for carriers and groundbreaking for consumers, will only serve to fuel the exponential growth in demand for advanced wireless services and exacerbate the serious spectrum shortage. The Commission has recognized this fact as well, finding that these exciting 4G technologies “will increase the range of applications and devices that can benefit from mobile broadband connectivity, generating a corresponding increase in demand for mobile broadband service from consumers.”¹⁰⁴ While extremely important for consumers and supportive of the goals set forth in the Commission’s *National Broadband Plan*, the emergence of these new wireless broadband standards will only serve to “intensify the impact [of the spectrum shortage] on mobile broadband networks.”¹⁰⁵

¹⁰¹ Prepared Remarks of Chairman Julius Genachowski at the International CTIA Wireless I.T. & Entertainment Convention, “America’s Mobile Broadband Future,” Oct. 7, 2009, at 4, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293891A1.pdf.

¹⁰² *Obama Memo*.

¹⁰³ *National Broadband Plan* 77.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

The spectrum scarcity issue underscores the different circumstances faced by wireless and wireline providers with respect to net neutrality regulation. The fact that wireless carriers must provide service over a finite resource changes the game for them, and requires that they be able to take the necessary measures to ensure that networks are not clogged. With these facts in mind, the Commission would be ill-served to apply its Third Way rationale, or any other regulatory theory that results in Internet regulation, to wireless carriers. As it did with the wired broadband market, the Commission should allow this nascent industry to develop as directed by market forces, and not as directed by draconian regulatory regimes that were enacted to regulate monopoly service providers.

Lastly, even if the Commission were to reverse itself on its prior classification determinations regarding wireline broadband, such reversals would not necessarily require a reversal of the Commission's *Wireless Broadband Order*. Wireless broadband Internet providers offer many integrated information services not provided by their wireline counterparts, such as GPS navigation, application stores, proprietary video and music services and other fully-integrated components.

B. The Commission Lacks the Authority to Regulate Wireless Broadband Under Title III

The *NOI* notes a number of sections under Title III that the Commission believes provides it with the authority to regulate wireless broadband Internet connectivity. Specifically, the *NOI* cites sections 303,¹⁰⁶ 307(a)¹⁰⁷ and 316¹⁰⁸ as imbuing the Commission with authority to

¹⁰⁶ *NOI* ¶ 103 (stating that “Section 303 also authorizes the Commission, subject to what the ‘public interest, convenience, or necessity requires,’ to ‘[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class’ (quoting 47 U.S.C. § 303)).

undertake its proposed reclassification. While these sections have, in the past, been found to allow the Commission some manner of discretion in applying certain rules to wireless licensees,¹⁰⁹ each of these sections of the Act permits Commission action only where such action is found to be in the public interest. As MetroPCS repeatedly has shown throughout these comments, the broadband Internet marketplace is a spectacular success. It is functioning brilliantly, and improving – both with respect to speed, technology and adoption rates – at a stunning pace. In fact, the Commission itself has recognized the important impact its free market policies have had on the success of the Internet, noting that “[d]ue in large part to private investment and market-driven innovation, broadband in America has improved considerably in the last decade.”¹¹⁰

Part of the success of the Internet has been the consistency and certainty of “hands off” regulation, which has encouraged stable investment in necessary broadband infrastructure. As noted above, the Commission’s proposed reclassification will overturn nearly a decade of settled FCC precedent, throwing investor expectations about the marketplace into disarray.¹¹¹ This fact is even more apparent with respect to wireless broadband, an industry that is still in its infancy.

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¹⁰⁷ *Id.* (stating that “Section 307(a) ... authorizes the issuance of licenses ‘if public convenience, interest, or necessity will be served thereby’” (quoting 47 U.S.C. § 307(a))).

¹⁰⁸ *Id.* (finding that “Section 316 provides a similar test for new conditions on existing licenses, authorizing such modifications if ‘in the judgment of the Commission such action will promote the public interest, convenience, and necessity’” (quoting 47 U.S.C. § 316)).

¹⁰⁹ *See, e.g., Schurz* 982 F.2d at 1048; *WBEN, Inc. v. United States*, 396 F.2d 601 (2d Cir. 1968).

¹¹⁰ *National Broadband Plan* 3.

¹¹¹ If the Commission reclassifies the transmission component of broadband Internet access, it will necessitate the overturning of its *Cable Modem Declaratory Ruling*, *Wireline Reclassification Order*, *BPL Order* and its *Wireless Broadband Order*. In addition to the chaos this would cause in the marketplace, the Commission also has not elucidated any compelling reasons whatsoever for this abrupt change in law and policy.

If the Commission hopes to achieve the noble goals set forth in its *National Broadband Plan*, each of which promote the public interest, it must not hamstring the wireless broadband industry by flooding it with unnecessary regulation. The Commission simply cannot provide a reasonable showing that reclassification of wireless broadband Internet connectivity could possibly serve the public interest. In fact, as MetroPCS has shown, it will likely have the opposite effect and in fact harm the public interest. This being the case, the Commission is barred from exerting its authority with respect to sections 303, 307(a) or 316 of the Act, as its proposed reclassification fails to satisfy the important public interest standard set forth in each.

VIII. THE BETTER SOLUTION IS COMPETITION

The Internet marketplace is an unbridled success. As MetroPCS previously has noted “[w]e are in a golden age of innovation with respect to Internet technology, applications and services.”¹¹² The rise of this golden age is largely due a regime that has allowed the Internet marketplace to flourish under the guidance of market competition. This competition has given rise to unparalleled innovation. Location-based services, such as turn-by-turn navigation systems and Google Maps, help consumers to find their way around new and exciting cities. Slingbox, Hulu and web-enabled digital video recorders (“DVRs”) allow consumers to enjoy their favorite shows or important public interest programming while in these new places. Innovative new devices like the Amazon Kindle have put a near-endless library within reach at a moment’s notice – and from anywhere in the country.¹¹³ And, the proliferation of social

¹¹² MetroPCS Net Neutrality Comments 11.

¹¹³ The Kindle, a joint service offering that provides Amazon content over the AT&T wireless network, typifies the power of Internet innovation. The device has proved to be exceedingly popular with consumers, recently becoming “the most gifted item in Amazon’s history.” See “Amazon Kindle is the Most Gifted Item Ever on Amazon.com,” Business Wire, Press Release, Dec. 26, 2009, *available at*

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networking sites allows consumers on these trips to meet new friends or catch up with old ones. As MetroPCS has shown, “[t]oday’s vibrant Internet industry is the result of service providers, equipment manufacturers and application developers having the ability to freely and creatively interact, create, develop, and test new products and to anticipate consumer needs without intrusive regulation.”¹¹⁴ In short, the Internet has revolutionized everything from the way that we stay at home to the way that we travel, and from the way that we interact with strangers to the way that we interact with friends. All of these remarkable achievements occurred as a result of – not despite – the Commission’s deregulatory regime.

There is no cause for concern, either, as the broadband Internet marketplace shows signs of robust – and continuing – competition. Within the next five years the wired broadband service is expected to be available in 95 percent of American homes.¹¹⁵ New 4G technologies will allow wireless broadband providers to compete head-on with wired providers for customers, increasing choice for all. Verizon Wireless estimates that, by 2013, 94 percent of the U.S. population will be covered by its fully-deployed LTE network.¹¹⁶ Clearwire is well on its way to covering 120 million pops by the end of this year.¹¹⁷ And, AT&T’s high speed wireless broadband service already covers 230 million Americans across the nation.¹¹⁸ Other competitors

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http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20091226005004&newsLang=en.

¹¹⁴ MetroPCS Net Neutrality Comments 13.

¹¹⁵ Robert C. Atkinson and Ivy E. Schultz, “Broadband in America,” Columbia Institute for Tele-Information, 7 (Nov. 11, 2009).

¹¹⁶ *Id.* 8.

¹¹⁷ *Id.* A-11.

¹¹⁸ See “The Truth About 3G,” AT&T, 2009, available at <http://www.att.com/truthabout3g/?WT.srch=1>.

loom on the horizon, as well. MetroPCS plans to launch its LTE service in the second half of 2010, creating yet another competitor in the many markets in which it operates. The growth of these new and improved services has substantially increased the availability of broadband nationwide. A recent study showed that the total number of high speed lines grew from approximately 10 million in June 2000 to nearly 140 million as of June 2008.¹¹⁹ The number of service providers is also expanding rapidly, growing from 116 in June 2000 to 1,395 in June 2008.¹²⁰

Not only is the number of service providers expanding rapidly, but also the number of broadband “pipes” continues to expand – with additional new technologies on the horizon. Indeed, in some markets consumers can now choose from up to six different kinds of broadband: (i) connections provided by traditional telecommunications companies, including digital subscriber lines (“DSL”) and fiber-to-the-home (“FTTH”) (at least one per market); (ii) cable broadband (at least one per market); (iii) satellite broadband (one or more per market); (iv) wireless broadband, potentially provided by a number of wireless carriers in their market (four or more per market); (v) broadband over power lines (“BPL”) (one per market); and, (vi) Wireless ISPs (“WISPs”), which provide important broadband services to many underserved rural communities. This stunning array of broadband alternatives results in nine competitors or more in many markets – a highly competitive marketplace by any measure.

The take-away from these impressive market numbers is that competition is working, and the Commission has provided no evidence otherwise. In fact, as noted above, the Commission has only been able to point to two instances of Internet access market failure that have

¹¹⁹ *High Speed Services for Internet Access: Status as of June 30, 2008*, Industry Analysis and Technology Division, Wireline Competition Bureau, July 2009, Chart 1 and Table 7.

¹²⁰ *Id.*

necessitated enforcement actions. With this nearly spotless record of provider behavior, and the overwhelming evidence that competition has allowed a tidal wave of Internet innovation to sweep over the nation, only one conclusion can be reached – competition is better than regulation. With this conclusion in mind, the Commission should refrain from a reactionary reclassification initiative and allow the broadband Internet marketplace to continue to function in the smooth, deregulated manner that has service it so well thus far.

Rather than spending its time regulating wireless broadband services, the Commission should devote its full time and attention to resolving the spectrum shortage in order to foster even more competition. The Commission must: (a) provide for more spectrum for wireless carriers to allow not only existing, but also new entrants, to provide a dizzying array of faster and faster wireless broadband Internet services, and (b) not impose tried-and-rejected command-and-control regulation on wireless broadband Internet access. Luckily, the Commission is already addressing the first point – to garner more spectrum to deploy for wireless services. This should be a top priority for the Commission as it considers how best to ensure that carriers have the incentives to not unfairly discriminate in providing broadband Internet access. Indeed, when robust competition exists, customers have choices when the provider they are using does not provide the service the consumer wants. For example, AT&T recently has announced that it is moving to tiered data plans for its wireless services.¹²¹ Just like an airline that raises its prices for a particular route, if the competitors do not follow, the competitor is forced to reduce its rates. For broadband Internet services if AT&T becomes a lone competitor offering tiered services,

¹²¹ “AT&T Tiered Data Pricing Plan A Worm In The Apple,” Forbes.com (Jun. 10, 2010), available at <http://blogs.forbes.com/greatspeculations/2010/06/10/att-tiered-data-pricing-plan-a-worm-in-the-apple/>. Verizon Wireless has also announced that it is considering moving to a tiered data pricing model. Lance Whitney, “Verizon Wireless eyeing tiered data service,” Cnet.com (Jun. 18, 2010), available at http://news.cnet.com/8301-1035_3-20008138-94.html.

then consumers can leave AT&T's service and join any of the other providers. What makes this possible is sufficient spectrum so all providers can provide services to a substantial portion of the market. The Commission can best ensure this by pursuing the policies it outlined in its *National Broadband Plan* to release an additional 500 MHz of spectrum for wireless services.

Second, the Commission must reject the oft tried, and always unsuccessful, approach of command-and-control regulation – which the Third Way represents. In the first instance, the Commission cannot foresee the future and tailor its regulation in such a way to make sure that unexpected unintended consequences do not occur. For example, if the Commission insists that all information services provided using the broadband Internet access are treated the same, a whole host of business models – including unlimited services and services packaged with other products – will undoubtedly vanish. Further, any set of rules will inevitably lead the Commission to having to draw ever finer lines around regulatory strictures – many of which will be outdated by the time they are released. The better approach is to allow the competitive markets to police the behavior of market participants and the Commission should only step in if the market is broken. Here, the market – particularly the wireless broadband market – is not broken and the Commission should not wade in. As MetroPCS mentioned with respect to net neutrality, the Commission's first duty is *primum non nocere* or to “first, do no harm.”¹²² In this instance, the Commission should promote competition rather than try to regulate it.

¹²² MetroPCS Net Neutrality Comments iv.

IX. CONCLUSION

The foregoing premises having been duly considered, MetroPCS respectfully requests that the Commission refrain from engaging in an unnecessary, and likely harmful, reclassification of the transmission component of broadband Internet connectivity, whether based on its Third Way legal theory or any other legal theory.

Respectfully submitted,

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