

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

In the Matter of )  
 )  
 )  
Framework for Broadband Internet Service ) GN Docket No. 10-127  
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**COMMENTS OF AT&T INC.**

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## INTRODUCTION AND EXECUTIVE SUMMARY

As the *Broadband Plan*<sup>1</sup> recognizes, the nation's overriding communications policy objective for the 21st century is to promote universal broadband deployment and adoption. Private investment, not prescriptive regulation, is the key to achieving that goal. According to the *Plan*, "the American broadband ecosystem has evolved rapidly" over the past decade, and this evolution has been "[f]ueled primarily by private sector investment and innovation."<sup>2</sup> Broadband providers are continuing to invest tens of billions of dollars each year in America's broadband future, creating thousands of new jobs—all despite the worst economic downturn since the Great Depression. But achieving the next phase of broadband deployment envisioned by the *Broadband Plan* will require more—according to the Commission's own estimates, \$350 billion more.<sup>3</sup> The *Broadband Plan* thus wisely endorses "actions government should take to encourage more private innovation and investment," while emphasizing that "the role of government is and should remain limited."<sup>4</sup>

If the Commission adheres to these conclusions, it will reject proposals to inflict legacy common-carrier regulation on the very sector of the Internet ecosystem—broadband Internet access providers—that it expects to undertake this massive \$350 billion investment of private risk capital. Reclassification of those providers as Title II "common carriers" would be unnecessary to advance any valid policy objective, would present risks and harms that dwarf any putative benefits, and would all but scuttle the Administration's ambitious broadband agenda.

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<sup>1</sup> FCC, *Connecting America: The National Broadband Plan* (2010), <http://download.broadband.gov/plan/national-broadband-plan.pdf> ("*Broadband Plan*").

<sup>2</sup> *Id.* at XI.

<sup>3</sup> Staff Presentation, *September 2009 Commission Meeting*, at 45 (Sept. 29, 2009), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-293742A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf) ("*September 2009 Staff Presentation*").

<sup>4</sup> *Broadband Plan* at 5.

And there is a far *better way* to achieve that agenda than trying to cram today’s broadband Internet access providers into an ill-fitting 20th century regulatory silo, as the NOI’s “third way” proposal would do.<sup>5</sup> The Commission should work with Congress to bring the Communications Act into the 21st century, while using its existing statutory authority, where necessary, to make more broadband spectrum available, reform the universal service program to support broadband, and encourage greater consumer-oriented transparency by broadband providers.

***Title II Reclassification Would Harm Broadband Investment and Job Creation.*** In report after report, industry analysts have warned that Title II reclassification proposals, even when accompanied by forbearance and portrayed as “third way” alternatives to maximal dominant-carrier regulation, would create enormous investment-detering regulatory uncertainty.

For example:

- Craig Moffett of Bernstein Research observed, on the day the Commission aired its “third way” proposal, that: “Markets abhor uncertainty. ***Today we got uncertainty in spades.***” He added that “it is unclear what, precisely, this means for [other] information service providers, including Google”; that he “expect[s] a ***profoundly negative impact on capital investment***”; and that the “third way” is “***an unequivocal negative development***[.]”<sup>6</sup>
- Jonathan Chaplin of Credit Suisse explained, also in the aftermath of the “third way” proposal, that “[t]he ***biggest disconnect between Washington and Wall Street is on how the competitiveness of the industry is viewed.*** . . . Competition is doing its job and regulations would make it very difficult for companies to get reasonable return on investment. . . . The threat of regulation could ***discourage investment and cost jobs***[.]”<sup>7</sup>

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<sup>5</sup> Notice of Inquiry, *Framework for Broadband Internet Service*, GN Docket No. 10-127, FCC 10-114 (rel. June 17, 2010) (“NOI”).

<sup>6</sup> Craig Moffett, *Quick Take—U.S. Telecommunications, U.S. Cable & Satellite Broadcasting: The FCC Goes Nuclear*, Bernstein Research, May 5, 2010 (“Moffett, *Quick Take*”) (emphasis added).

<sup>7</sup> Yu-Ting Wang & Howard Buskirk, *Reclassification Said to Pose Broad Risk to U.S. Economy*, Communications Daily, at 1 (June 14, 2010) (some emphasis added and some omitted).

- Mike McCormack of J.P. Morgan agrees that investors are “*extremely nervous* about what’s coming” out of this proceeding, and added that “[b]roadband is a *very competitive place so there’s no point [in] fixing it*.”<sup>8</sup>
- Anna-Maria Kovacs of Regulatory Source Associates notes that it would “*take years to know whether [any reclassification decision] is upheld in court*. . . . [W]e would expect the industry—telco, wireless, and cable—to *assess capital investments from this point in light of the potential for new and more extensive regulations*.”<sup>9</sup>
- Stanford tech analyst Larry Downes claims that a reclassification “would be the worst example in history of a tail wagging the dog” and perhaps “the *worst idea in communications policy to emerge in the last 75 years*—that is, since the [FCC] was first created in 1934.”<sup>10</sup>
- PC Magazine commentator and MarketWatch analyst John Dvorak describes the proposed Title II reclassification as “the worst possible outcome” of the net neutrality debate and “a terrible idea” that would “*destroy the Internet as we know it*.”<sup>11</sup>
- Former Chairman Michael Powell, now with Provident Equity Partners, “fear[s] a prolonged period of uncertainty and instability” in the wake of any Title II reclassification decision that would “*undermine the shared goal of intensifying our nation’s investment in broadband*.”<sup>12</sup>
- The Washington Post editorial page explains that any attempted reclassification under Title II would be “a *legal sleight of hand* that would amount to a *naked power grab*” and “could *damage innovation* in what has been a vibrant and rapidly evolving marketplace.”<sup>13</sup>

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<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> Anna-Maria Kovacs, *Telecom Regulatory Note: D.C. Circuit vacates FCC’s Comcast network-management order*, Regulatory Source Associates, LLC, at 2 (Apr. 7, 2010) (emphasis added).

<sup>10</sup> Larry Downes, *What’s in a title? For broadband, it’s Oz vs. Kansas*, CNET News, Mar. 11, 2010, [http://news.cnet.com/8301-1035\\_3-20000267-94.html](http://news.cnet.com/8301-1035_3-20000267-94.html) (“*Oz vs. Kansas*”) (emphasis added).

<sup>11</sup> John Dvorak, *Net neutrality becomes a dangerous issue*, MarketWatch, Apr. 16, 2010, <http://www.marketwatch.com/story/story/print?guid=2012C86A-55C5-4CA0-821F-F203C21E2B6E> (emphasis added).

<sup>12</sup> Michael K. Powell, *My Take on the Appeals Court Decision*, Broadband for America, Apr. 7, 2010, <http://www.broadbandforamerica.com/blog/michael-powell-my-take-appeals-court-decision> (“Powell, *My Take on the Appeals Court Decision*”) (emphasis added).

<sup>13</sup> Editorial, *Internet oversight is needed, but not in the form of FCC regulation*, Wash. Post, Apr. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041604610.html> (emphasis added).

And just yesterday, a panel of financial experts held at New York University law school agreed with all of these concerns:

- Height Analytics Managing Director Tom Seitz warned that “the FCC could be inhibiting investment through its net neutrality and reclassifications investigations” because “[i]nvestors hate uncertainty and clearly what is being created right now is uncertainty in the marketplace[.]”
- Citigroup Managing Director Mike Rollins expressed concern that reclassification would open the door for “a later FCC to . . . limit the number of Title II provisions from which it will forbear[.]” This risk, he added, would have an investment impact today, because “[w]hen investors are looking at policy decisions *they’re not just looking at what the FCC wants to accomplish today but what those policies can do over time.*”
- Wise Harbor founder Keith Mallinson noted that “people are hungry to have more capabilities [in their broadband connections] and the market has the capability to deliver that, but *increasing regulation has the risk of stifling that through the uncertainties but also by limiting some basic economic freedoms.*”<sup>14</sup>

Given these concerns, it should come as no surprise that a majority of the combined membership of the U.S. Senate and House of Representatives has urged the Commission not to pursue the NOI’s reclassification proposal.<sup>15</sup> As the 74 Democratic Members signing one of the

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<sup>14</sup> Howard Buskirk, *Regulatory Uncertainty Created by FCC Seen Limiting Network Investment*, Communications Daily, July 15, 2010 (“Buskirk, *Regulatory Uncertainty*”) (emphases added); see also John Curran, *Panelists: Neutrality, Title II Broadband Issues Breeding Investor Uncertainty*, TR Daily, July 14, 2010 (“Curran, *Panelists*”).

<sup>15</sup> See Letter from Representative Gene Taylor, Representative Gene Green, et al., to Julius Genachowski, Chairman, FCC (May 24, 2010), [http://netcompetition.org/House\\_Democrat\\_Letter.pdf](http://netcompetition.org/House_Democrat_Letter.pdf) (“*House Democrat Letter*”); Letter from Senator Sam Brownback, Senator Kay Bailey Hutchison, et al., to Julius Genachowski, Chairman, FCC (May 24, 2010), [http://netcompetition.org/Senate\\_Republican\\_Letter.pdf](http://netcompetition.org/Senate_Republican_Letter.pdf) (“*Senate Republican Letter*”); Letter from Representative Joe Barton, Representative Cliff Stearns, et al., to Julius Genachowski, Chairman, FCC (May 28, 2010), <http://www.reclaimthemedial.org/files/GOPBroadbandletter-28May10.pdf> (“*Barton/Stearns Letter*”). Governors of eighteen states, and the Lieutenant Governor of a nineteenth state, have also sent letters to Chairman Genachowski explaining the detriments of classifying broadband services under Title II. See Letters from Gov. Haley Barbour (R-MS) (May 25, 2010), Gov. Mike Beebe (D-AR) (May 17, 2010), Gov. Steven L. Beshear (D-KY) (June 15, 2010), Gov. Janice K. Brewer (R-AZ) (June 15, 2010), Gov. Donald L. Carcieri (R-RI) (June 17, 2010), Gov. Brad Henry (D-OK) (May 20, 2010), Lt. Gov. Brian K. Krolicki (R-NV) (June 11, 2010), Gov. Theodore R. Kulongoski (D-OR) (June 25, 2010), Gov. Jack A. Markell (D-DE) (June 11, 2010), Gov. Robert F. McDonnell (R-VA) (June 15, 2010), Gov. Jeremy W.

House letters explained, reclassification would mark an unprecedented break from the deregulatory Title I framework for broadband Internet access “first adopted in 1998 by the Clinton Administration’s FCC”; would “create regulatory uncertainty” and thus “serve as a distraction from what should be our Nation’s foremost communications priority,” ubiquitous broadband deployment; and, perhaps most important, would “jeopardize jobs and deter needed investment for years to come.”<sup>16</sup> They further admonished that reclassification is “not something that should be taken lightly and should not be done without additional direction from Congress. *We urge you not to move forward with a proposal that undermines critically important investment in broadband and the jobs that come with it.*”<sup>17</sup> And just two days ago, House Majority Leader Steny Hoyer announced that “lawmakers”—and not the FCC—“have the authority on this critical matter[.]”<sup>18</sup> In his view, concern about whether the Commission could walk the “very careful legal path” necessary to “develop[] a reclassification plan” starkly “underscores the utility of . . . having Congress . . . legislate a consensus approach[.]”<sup>19</sup>

The concerns expressed by both Wall Street and Congress about long-term, investment-detering regulatory uncertainty are, if anything, understated. First, by themselves, the threshold legal challenges to the Commission’s reclassification decision could consume much of the next

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(Jay) Nixon (D-MO) (June 4, 2010), Gov. Martin O’Malley (D-MD) (June 16, 2010), Gov. C.L. “Butch” Otter (R-ID) (June 9, 2010), Gov. Tim Pawlenty (R-MN) (June 9, 2010), Gov. Beverly Eaves Perdue (D-NC) (June 1, 2010), Gov. Sonny Perdue (R-GA) (June 16, 2010), Gov. Bob Riley (R-AL) (June 11, 2010), Gov. Mark Sanford (R-SC) (May 20, 2010), and Gov. Arnold Schwarzenegger (R-CA) (May 11, 2010), to Julius Genachowski, Chairman, FCC.

<sup>16</sup> *House Democrat Letter* at 1.

<sup>17</sup> *Id.* at 1-2 (emphasis added).

<sup>18</sup> Sara Jerome, *Hoyer: Congress has the authority on broadband* (July 13, 2010), <http://thehill.com/blogs/hillicon-valley/technology/108495-hoyer-congress-has-the-authority-on-broadband>.

<sup>19</sup> *Id.*



decade, depending on the number of judicial remands. The communications industry suffered through similar regulatory chaos following the Commission’s effort in 1996 to shape the industry around the UNE-P model of synthetic intramodal “competition” for voice telephony services. That model ultimately succumbed to judicial challenges—but only eight years later, in 2004, after multiple and increasingly skeptical remands by the Supreme Court and the courts of appeals.<sup>20</sup>

Second, quite apart from direct legal challenges to the Title II regime itself, any reclassification decision would ignite multi-year regulatory controversies on a variety of issues, including (1) the precise extent of forbearance from particular Title II requirements, including the many regulations that are based in whole or in part on sections 201 and 202; and (2) how the various provisions from which the Commission suggests it may *not* forbear (such as sections 222 and 255) would apply in this novel context. For example, the NOI is studiously silent on the question of whether those section 201/202 standards, from which the Commission does not propose to forbear, would apply for the first time to retail prices and the other terms and conditions of retail Internet access services. If the answer is yes, it belies the Commission’s recent assurances that reclassification would merely preserve the pre-*Comcast* Title I regime,<sup>21</sup> which never purported to address retail pricing or other terms of service.

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<sup>20</sup> See *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 810-12 (8th Cir. 1997) (upholding Commission’s application of “impairment” standard), *rev’d in relevant part, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389-92 (1999); *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 425-26 (D.C. Cir. 2002) (remanding Commission’s determination that switching element met impairment standard); *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (vacating same determination after remand).

<sup>21</sup> Julius Genachowski, Chairman, Federal Communications Commission, *The Third Way: A Narrowly Tailored Broadband Framework*, May 6, 2010, <http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html> (“*Genachowski “Third Way” Statement*”) (“The goal is to restore the broadly supported status quo consensus

The NOI similarly disregards the fact that Title II reclassification would trigger *self-executing* prohibitions that could expose broadband providers to liability for any business practice they undertake today that some future Commission finds “unjust” or “unreasonable,” despite general assurances from *this* Commission about what the section 201/202 standards mean. This stands in stark contrast to the pre-*Comcast* Title I regime, where providers could not be held liable for any conduct that the Commission had not affirmatively proscribed. Thus, even if the Commission forbore from all substantive provisions of Title II besides sections 201 and 202, broadband providers could still face potential liability under those provisions whenever they engage in new anti-piracy measures, network-management techniques, or commercial arrangements with particular applications and content providers. That potential liability could deter such initiatives to the detriment of broadband providers, application and content providers, and ultimately consumers.

And finally, any forbearance determinations the Commission makes would undoubtedly be appealed by those with a vested interest in or ideological bent towards more regulation. And those decisions may in all events be reversed by subsequent Commissions. The Commission tries to downplay these concerns, but its insistence that its forbearance determinations would be essentially irreversible is belied by its failure to dismiss several pending proceedings that seek “unforbearance” from prior Commission decisions—and by proposed new wireless regulations that, if adopted, would depart from the bi-partisan, market-based policies of past Commissions. No issue would ever be settled, leaving the Internet ecosystem in a state of perpetual uncertainty.

The Commission also cannot simply ignore disquieting concerns about how broadly its reclassification decision would sweep throughout the Internet ecosystem. As an initial matter,

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that existed prior to the court decision on the FCC’s role with respect to broadband Internet service.”).

when end users purchase Internet access service, they do not purchase a “last mile” service from their ISP, as the Commission seems to suggest. Instead, they obtain connectivity to the entire Internet. If the Commission were to reclassify such Internet connectivity service as a “telecommunications service,” its decision would necessarily extend to *IP-based communications through the Internet backbone to all points on the Internet*. Any suggestion that this “third way” proposal would address only the “on-ramps” to the Internet, rather than “the Internet itself,” is incoherent.

More broadly, the Commission’s apparent attempt to confine Title II reclassification to owners of last-mile transmission facilities would crash headlong into the statutory language, Supreme Court precedent, and 75 years of Title II jurisprudence. The classification of any provider as a Title II “common carrier” has never depended on whether the provider owns transmission facilities, let alone last-mile facilities. That is why standalone long-distance telephone companies, such as the legacy AT&T Corp., MCI, and Sprint, were always treated as Title II carriers even though they depended on local exchange carriers for their last-mile connectivity, and why even long-distance *resellers* are treated as Title II carriers even though they often own no facilities at all. Here, the retail service that ISPs offer to consumer and business users encompasses end-to-end access to all points on the Internet, even though each user’s ISP must generally rely on other providers to supply some of the links to each of those points (for example, through peering and transit arrangements among Internet backbones).

The key legal rationales for any Title II reclassification decision that are set forth in the NOI would thus logically extend to any Internet provider that holds itself out to customers as *arranging* for the transmission of data from one point on the Internet to another, whether or not it *owns* transmission facilities. As discussed below, this category would extend to ISPs such as

Earthlink and AOL that do not own last-mile transmission facilities; to content delivery networks (“CDNs”) such as Akamai that hold themselves out to the commercial public as transporters of data to distant points on the Internet; to providers of e-readers like Amazon.com, which provides Internet access through the Kindle; to companies like Google that provide advertising-supported Internet search services and, on behalf of countless commercial customers, arrange for the transmission of advertising content to end users; and to a variety of other online transport providers ranging from Netflix to Level 3 to Vonage. In short, Title II reclassification would be a sledgehammer, not a scalpel.

The Commission apparently hopes to avoid comment on these issues by arbitrarily deeming them “outside the scope of this proceeding.” NOI ¶ 107. But the Commission cannot lawfully ignore these concerns and punt them to some future day or the next Commission. The Commission proposes to change the legal foundations of American telecommunications policy in ways that logically create self-executing legal consequences for providers far beyond those the Commission apparently wishes to regulate. Basic tenets of reasoned decisionmaking require the Commission to face up to that concern now, *before* triggering those consequences through “reclassification” of the entire broadband industry.<sup>22</sup>

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<sup>22</sup> The term “reclassification” is often used improperly to suggest that the NOI’s proposal would “return” Internet access to a mythical regulatory status it supposedly occupied before it was purportedly “deregulated” by the prior Administration. As AT&T and others have pointed out, however, Internet access has *always* been treated as a Title I information service—through both Democratic and Republican Administrations—ever since the Commission first addressed the matter in 1998. See Letter from National Cable & Telecommunications Association, CTIA—The Wireless Association, United States Telecom Association, Telecommunications Industry Association, Independent Telephone and Telecommunications Alliance, Verizon, AT&T Inc., Time Warner Cable, and Qwest to Chairman Julius Genachowski, FCC, GN Docket No. 09-191 (filed Feb. 22, 2010) (“*First Industry Title II Letter*”) (attached as Exh. A); Letter from Seth P. Waxman, Counsel for United States Telecom Association, to Julius Genachowski, Chairman, Federal Communications Commission, GN Docket No. 09-51 & WC Docket No. 07-52 (filed Apr. 28, 2010) (“*USTA Letter*”) (attached as Exh. B); Letter from National Cable &

## *Title II Reclassification Is Unnecessary to Achieve the Broadband Plan's Core*

**Objectives.** Against this backdrop, the Commission has identified no *need* for reclassification that could possibly justify the ensuing regulatory instability and suppression of broadband investment incentives. Instead, it has based its claim of need on a false trichotomy: (1) case-by-case exercises of ancillary authority in perpetuity; (2) implausibly intrusive, dominant-carrier-style regulation under Title II; and (3) a so-called “third way” approach, which would forbear from dominant-carrier rules but nonetheless subject broadband Internet providers for the first time to legacy “common-carrier regulation” under the exceptionally indeterminate standards and prohibitions of sections 201 and 202. This false trichotomy overlooks the *best way* forward: maintaining the regulatory status quo while seizing this uniquely auspicious opportunity to work with Congress in updating the Communications Act for the broadband era.

For the past dozen years, the Commission has treated all Internet access services as what they are: paradigm-shattering information services that cannot and should not be shoehorned into the legacy service-category silos of the Communications Act. Any concern about the Commission’s existing legal authority results not from that longstanding legal and policy judgment, but from the failure of the Communications Act itself—frozen in the pre-broadband world of 1996—to keep pace with technological change.

In the wake of the *Comcast* decision,<sup>23</sup> and for the first time in nearly a generation, a broad consensus is emerging among many diverse stakeholders in support of targeted congressional action. The Commission should not squander the momentum for legislation by

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Telecommunications Association, CTIA—The Wireless Association, United States Telecom Association, Telecommunications Industry Association, Independent Telephone and Telecommunications Alliance, Verizon, AT&T Inc., and Time Warner Cable to Chairman Julius Genachowski, FCC, GN Docket No. 09-191 (filed Apr. 29, 2010) (“*Second Industry Title II Letter*”) (attached as Exh. C).

<sup>23</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

rushing to “reclassify” broadband Internet access services as though they were legacy voice telephone services subject to regulation under Title II of the Communications Act. Instead, the Commission should focus on supporting and informing those legislative efforts.

The Commission also does not need to throw American Internet policy into turmoil through Title II reclassification in order to accomplish the two core objectives of the *Broadband Plan*—spectrum and universal service reform. *First*, Title III unquestionably authorizes the Commission to begin implementing the *Plan*’s strategy for “unleashing 500 Mhz of spectrum for wireless broadband.”<sup>24</sup> No one suggests that the Commission’s spectrum initiatives somehow hinge on reclassification of wireless broadband Internet access as a Title II service. *Second*, the Commission also has existing authority to support its universal service funding objectives for broadband, both under section 254 and directly under section 706(b). The Commission would increase, not reduce, anti-investment regulatory uncertainty by trying to achieve the same objective through the far clumsier tool of Title II reclassification.

In addition, as to *transparency* in the provision of broadband Internet access, the *Comcast* decision itself affirms the Commission’s significant authority under section 257 to require disclosures by broadband providers about their network-management and consumer-oriented practices. Other policy concerns, such as *privacy* and *cybersecurity*, already fall well within the active jurisdiction of other agencies, including the FTC, DHS, and NSA. In fact, those agencies are institutionally better positioned than the Commission to address these issues in the first place,

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<sup>24</sup> Federal Communications Commission, Press Release, *Chairman Genachowski Statement on Obama Administration’s Wireless Broadband Initiative*, June 28, 2010, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-299209A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-299209A1.pdf); see also Austin Schlick, *Implications of the Comcast Decision on National Broadband Plan Implementation*, Blogband-broadband.gov, Apr. 12, 2010 (“The Comcast/BitTorrent opinion has no effect at all on most of the Plan. Many of the recommendations for the FCC itself involve matters over which the Commission has an ‘express statutory delegation of authority.’ These include critical projects such as making spectrum available for broadband uses.”).

because they have broader jurisdiction over providers of Internet-based products and services; over application, software, and equipment-manufacturing providers; and in related markets where privacy and cybersecurity issues typically arise. For similar reasons, *disabilities access*, while an essential component of broadband adoption policies, requires a particular focus on applications providers and equipment manufacturers, not broadband providers. In all of these cases, Title II reclassification would achieve very little benefit, if any, for the American public, even as it imposed great costs.

Finally, despite the NOI's pervasive yet unsupported assumption to the contrary, no exigent circumstances support a sea-change in regulatory policy to address *net neutrality* issues now, while Congress considers legislation. In the dozen-year history of broadband, the Commission has intervened exactly twice to address net neutrality-related matters, and both times the relevant provider discontinued the disputed practice promptly and voluntarily. They did so, moreover, even though there has always been legal uncertainty about the Commission's authority to enforce the principles of the *Internet Policy Statement*, which until recently did not even purport to be binding. Indeed, broadband Internet access providers are following the letter and spirit of those principles because doing so makes obvious business sense.

There is no plausible basis for fearing that broadband Internet access providers en masse will suddenly start violating the existing principles to the detriment of their consumers and their own competitiveness. To the contrary, since the *Comcast* case was decided, broadband Internet access providers have shown their commitment to those principles by working with key Internet players such as Google, Microsoft, Cisco, and others to develop a self-governance structure for the broadband industry, known as the Broadband Internet Technical Advisory Group ("BITAG"). Under the supervision of Dale Hatfield—one of the most respected, experienced,

and fair-minded technology experts in this industry—this private initiative will seek consensus on best practices for network-management techniques. And it may also support private resolution of disputes about such techniques and help shine a public spotlight on any controversial practices.

Moreover, in the exceedingly unlikely event that regulatory intervention is needed in the interval preceding congressional action, there would still be no vacuum the Commission could reasonably justify filling with precipitous Title II reclassification. First, the Commission has not explored the full extent of its authority under Title I and other provisions of the Act, as discussed. Second, despite the NOI's myopic fixation on *this Commission's* powers in isolation, the FTC has considerable authority to eliminate “unfair business practices” under section 5 of the FTC Act, and it has expressed its intent to use that authority to address net neutrality and transparency issues should the need arise. Ironically, the proposed reclassification could divest the FTC of any jurisdiction over broadband Internet access providers by presumably placing them squarely within the “common carrier” exception to the FTC's section 5 jurisdiction. The Commission has not explained why, without congressional approval, it could or should commandeer regulatory authority from a sister agency. And even apart from the Commission and the FTC, the Justice Department, private litigants, and generally applicable state laws provide more than ample authority to protect consumers against any harmful network practices.

In sum, the proposed reclassification would:

- Ignore the express will of more than half of the combined membership of the U.S. Senate and House of Representatives;
- Upset decades of bipartisan consensus against common-carrier regulation of any aspect of the Internet;
- Be unnecessary to serve any legitimate policy goal of the Commission in particular or the government in general;



- Seize authority from the FTC in an effort to expand the FCC’s own power to regulate the Internet;
- Threaten to impose government regulation, for the first time, on unpredictably broad swaths of the Internet ecosystem;
- Trigger years of legal and economic uncertainty and litigation; and
- Chill investment, innovation, and job creation.

For all that, this proposed “reclassification” would ultimately come to naught because it would rest on an untenable legal foundation. In particular, as discussed within Part Two of these comments, the reclassification proposal described in the NOI would:

- Rest on fundamental misconceptions about how the Internet works, and would substitute contrived wordplay (“broadband Internet connectivity service”) for a genuine examination of how consumers actually purchase and use access to the Internet (Section I);
- Wrongly presuppose that the enhanced data-processing functionalities of broadband Internet access services are somehow less integrated with transmission services today than they were on all the previous occasions in which the Commission deemed those services integrated “information services,” whereas in fact those features are, if anything, *more* integrated (Sections II.A and II.B);
- Independently violate section 230 of the Communications Act, which (among other things) establishes a federal policy favoring an unregulated Internet and guarantees Internet access providers broad discretion to limit access to “obscene,” “excessively violent,” and other “objectionable” material (Section II.C);
- Be arbitrary and capricious because the proposed reclassification would impose significant harms while serving no legitimate governmental interest (Section III);
- Raise substantial Takings Clause concerns (Section IV); and
- In the case of wireless broadband Internet access, violate Section 332(c)’s ban on treating non-CMRS services as common carrier services (Section V).

Finally, Section VI of Part Two explains why, as the Commission itself concluded as long ago as 1998, forbearance could not eliminate the radical regulatory uncertainty created by Title II reclassification, and why the CMRS regime the Commission cites as its exemplar for the “third way” approach is a source of concern rather than comfort.

## PART ONE: THE BEST WAY FORWARD

As the NOI recognizes, the *Comcast* decision raises questions about the extent of the Commission’s ancillary jurisdiction to regulate broadband Internet access service. NOI ¶ 9. But the NOI is wrong to assume that those questions leave a regulatory vacuum that the Commission must immediately fill with its so-called “third way” proposal. Broadband consumers are not without protection today, any more than they have been for the past decade. Indeed, in the face of the industry’s incipient self-governance efforts and the further growth of competition, broadband consumers are unquestionably better off and more protected now than ever. In assuming the need for an immediate expansion of Commission authority, the Commission’s immodest “third way” proposal thus overlooks the *best* way forward: using its existing authority to address key broadband-related policy goals, as and if necessary, while working with Congress to craft 21st-century broadband legislation and grant the Commission any express authority it needs to effectuate national broadband policy.

As the Commission notes, Congress is actively considering legislation in response to the *Comcast* decision. NOI ¶ 9. A broad bipartisan coalition in Congress—including more than a third of the Senate and a *majority* of the House of Representatives—has urged the FCC to defer acting while Congress enacts new legislation consistent with Congress’s national policy objectives.<sup>25</sup> And it is entirely appropriate to defer to Congress to the extent a regulatory gap emerges where technology has moved beyond what the drafters of the Communications Act may have envisioned. This is also a uniquely favorable time for congressional involvement, given the broad consensus among industry stakeholders about legislation authorizing the Commission to

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<sup>25</sup> See *House Democrat Letter*; *Barton/Stearns Letter*; *Senate Republican Letter*.

address the consumer-oriented principles of the *Internet Policy Statement*.<sup>26</sup> The Commission should avoid taking actions that would slow the momentum for new legislation and squander this opportunity to bring the nation’s communications laws into the broadband era.

On the merits, Congress is also better suited than the FCC to adopt a comprehensive solution. Any solution by the Commission must apply legacy legal and regulatory categories—such as the existing distinction between “information services” and “telecommunications services”—that originated in the 1970s and early 1980s, two decades before the rise of the broadband Internet. Only Congress can free the Commission from these regulatory silos and authorize the Commission to enforce the policy choices that make sense for American consumers, irrespective of obsolescent legal classifications. In addition, Congress’s involvement may be necessary to address a variety of interrelated issues—including privacy, cybersecurity, disabilities access, and various consumer-protection issues—that require solutions that go beyond the Commission’s current jurisdiction.

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<sup>26</sup> See Tim McKone, AT&T Executive Vice President, Federal Relations, *AT&T Response to the Internet Protection, Investment, and Innovation Act*, AT&T Public Policy Blog (May 11, 2010), <http://www.att.com/gen/public-affairs?pid=17881&goback=group01&article=broadband> (“We applaud Representative Stearns for drafting a bill designed to address the dynamism of the Internet while protecting consumers from harm . . . . New legislation is needed and this is an encouraging first step.”); Tom Tauke, Verizon Executive Vice President, Public Affairs, Policy and Communications, Verizon PolicyBlog, *Internet Ecosystem and FCC’s Net Neutrality Proceeding* (Apr. 26, 2010), <http://policyblog.verizon.com/BlogPost/725/InternetEcosystemandFCCsNetNeutralityProceeding.aspx> (“We urge Congress to pass new legislation and adopt a policy that is designed for the Internet. The last time Congress looked at this issue, it decided, wisely, to keep the Internet separate from the traditional modes of regulation designed for telephony, cable and broadcast. Now it’s time to take the next step—to construct the right policy to encourage the growth and use of the technologies of modern communication.”); Kyle McSlarrow, President, National Cable & Telecommunications Association, *Statement Regarding the FCC Proceeding on Broadband Internet Access Legal Framework*, NCTA Media Center (June 17, 2010), <http://www.ncta.com/ReleaseType/Statement/2010bbandFCCNOI.aspx> (“We . . . very much appreciate and agree with the Chairman’s statement of support for legislative efforts to provide much needed certainty. We believe that is the right next step, and we can preserve our ability to protect consumers, maintain an open Internet, and encourage continued investment and innovation through carefully targeted legislation.”).

**I. THE INDUSTRY’S SELF-GOVERNANCE INITIATIVE AND EXISTING LAW MAKE IMMEDIATE COMMISSION ACTION UNNECESSARY AND UNWISE.**

While Congress considers the best path forward, the Commission should maintain the status quo, under which Internet access is properly characterized as an unregulated, integrated information service. There is no pressing need for the Commission to upend the current regime to address short-term concerns about a supposed regulatory “vacuum” pending congressional action.

As an initial matter, there is no actual problem that calls for Commission action. As AT&T has detailed in pleadings filed in many other Commission proceedings, the broadband marketplace is robustly competitive, broadband providers are investing billions of dollars to deploy facilities and improve their services, broadband speeds are increasing dramatically even as the prices for service plummet, the industry is creating thousands of jobs, and innovation is flourishing.<sup>27</sup> Moreover, during the twelve-plus years of broadband service in America, the Commission has found the need to address the practices of broadband Internet access service providers only *twice*: once in 2004 (Madison River) and once in 2007 (Comcast). The rarity of Commission intervention alone belies any claim of exigent circumstances requiring immediate Commission action. Nor has there been any sudden rash of abuse in the wake of the *Comcast*

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<sup>27</sup> AT&T has described the robustly competitive nature of the broadband Internet access marketplace on many occasions. Rather than repeat that discussion again here, we incorporate by reference our prior filings on this topic. See Comments of AT&T Inc., *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 100-02, 108-09, 115-19, 128-31 (filed June 8, 2009); Comments of AT&T Inc., *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191 & WC Docket No. 07-52, at 5-6, 78-87, 145-56 (filed Jan. 14, 2010) (“*AT&T Net Neutrality Comments*”); Comments of AT&T Inc., *Fostering Innovation and Investment in the Wireless Communications Market; A National Broadband Plan for Our Future*, GN Docket Nos. 09-157 & 09-51, at 12-52 (filed Sept. 30, 2009).

decision, despite the sky-is-falling rhetoric favored by some advocates.<sup>28</sup> To the contrary, that decision has prompted the industry to develop expert-driven, voluntary norms for the broadband industry. Just last month, a broad cross-section of the industry—including AT&T, Verizon, Comcast, Level 3, Cisco, Google, Microsoft, and others—announced the formation of the Broadband Internet Technical Advisory Group (BITAG or TAG).<sup>29</sup> The TAG will bring together engineers and other technical experts to develop consensus on network management practices and related technical issues affecting users’ Internet experiences. Participants agree that the TAG’s mission could also include (1) educating policymakers on such technical issues; (2) addressing specific technical matters in an effort to minimize related policy disputes; and (3) serving as a sounding board for new ideas and network management practices.

The development of the TAG illustrates a broad industry commitment to resolving net neutrality concerns openly and cooperatively. It also undermines any claim of a net neutrality crisis requiring immediate FCC intervention. In a recent blog entry entitled “BITAG Brings Hope to Net Neutrality Debate,” BitTorrent—the putative victim in the *Comcast* case—noted approvingly that “innovation and collaboration with ISPs where all parties participate[] in some self-regulation [is] a more ideal approach than heavy-handed policy.”<sup>30</sup> CNET News likewise

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<sup>28</sup> See, e.g., Liz Rose (Free Press), *FCC Leaves the Internet Unprotected: 21 Days and Counting* (Apr. 27, 2010), <http://www.freepress.net/press-release/2010/4/27/fcc-leaves-internet-unprotected-21-days-and-counting> (insisting that “the clock is ticking at the FCC” and that “Internet users [are] in jeopardy”).

<sup>29</sup> *Initial Plans for Broadband Internet Technical Advisory Group Announced* (June 9, 2010), <http://www.prnewswire.com/news-releases/initial-plans-for-broadband-internet-technical-advisory-group-announced-95950709.html>.

<sup>30</sup> See *BITAG Brings Hope to Net Neutrality Debate*, BitTorrent blog, June 11, 2010, <http://blog.bittorrent.com/2010/06/11/bitag-brings-hope-to-net-neutrality-debate/>; see also *Three Cheers for New Broadband Internet Technical Advisory Group*, The Progress & Freedom Foundation Blog, June 9, 2010, [http://blog.pff.org/archives/2010/06/three\\_cheers\\_for\\_new\\_broadband\\_internet\\_technical.html](http://blog.pff.org/archives/2010/06/three_cheers_for_new_broadband_internet_technical.html).

hailed the TAG process as evidence that “a cooling of hostilities over Net neutrality rules is underway.”<sup>31</sup> The Commission should give this self-regulatory initiative its due and defer any new regulatory actions unless and until it has clear evidence of a real problem requiring government intervention.

In the interim, existing government oversight will continue to protect consumers. First, despite the NOI’s peculiarly FCC-centric view of government, the Federal Trade Commission, the Department of Justice, private litigation, and states acting under existing laws of general application will all continue to supplement the Commission’s own role in checking any anticompetitive net neutrality-related or other abuses that could possibly arise as Congress considers legislation.<sup>32</sup> Of particular significance, the FTC has consistently asserted jurisdiction over net neutrality and broadband practices generally on the ground that the FCC’s existing classification of broadband Internet access—as an “information service”—takes that service outside the scope of the “common-carrier exemption,” which limits the FTC’s jurisdiction under section 5 of the FTC Act, 15 U.S.C. § 45(a)(2).<sup>33</sup> The FTC has also vowed to “continue to

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<sup>31</sup> Declan McCullagh, *Net neutrality group signals cooling of hostilities*, Internet Freedom Coalition, June 11, 2010, <http://www.internetfreedomcoalition.com/?p=726>.

<sup>32</sup> Despite *Comcast*, the Commission retains full subject matter jurisdiction over broadband Internet access under 47 U.S.C. § 151. See *AT&T Net Neutrality Comments* at 208. Although the *Comcast* decision constrains the Commission’s authority to impose the most highly interventionist forms of “net neutrality” regulation, the court withheld any ruling on the merits of key Title I theories that the Commission itself had formulated on appeal as bases for ancillary authority to address core violations of the *Internet Policy Statement*. See *Comcast*, 600 F.3d at 660 (citing *Chenery* issues). AT&T expresses no view here on the ultimate validity of those legal theories because it believes that the self-governance structure of the BITAG and oversight by other federal agencies is more than sufficient to protect the integrity of the broadband marketplace pending congressional action.

<sup>33</sup> See Comments of the Federal Trade Commission before the Federal Communications Commission, *A National Broadband Plan for Our Future*, GN Docket 09-51, at 9 n.25 (filed Sept. 4, 2009) (“Because the provision of broadband Internet access is not a common carrier service, . . . the FTC and FCC have concurrent jurisdiction over the provision of broadband service. So that consumers can benefit from the FTC’s competition and consumer protection

devote substantial resources to maintaining competition and protecting consumers in the area of broadband Internet access.”<sup>34</sup> And no agency has more relevant expertise than the FTC in ensuring the transparency and accuracy of broadband provider disclosures to consumers, as discussed further below. Yet, ironically, the proposed Title II reclassification could *divest* the FTC of any authority in this area by holding that broadband Internet access service is subject to “common carrier” regulation after all—and thus may fall squarely within the section 5 common-carrier exemption. In short, that proposed reclassification would not even augment the federal government’s oversight of broadband practices; it would arguably just indulge one federal agency’s wish to take regulatory authority away from another without Congressional approval.

## **II. THE COMMISSION ITSELF ALREADY HAS THE AUTHORITY IT NEEDS TO ADDRESS ITS TWO MOST PRESSING BROADBAND CONCERNS: BROADBAND SPECTRUM AND UNIVERSAL SERVICE.**

Two of the chief objectives that the Commission articulated in the *Broadband Plan* include “[e]nsur[ing] efficient allocation of . . . spectrum” for broadband services, and “[r]eform[ing] current universal service mechanisms to support deployment of broadband and

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expertise, national broadband policies should preserve the FTC’s jurisdiction over broadband Internet access.”) (emphasis added). See also FTC, *Staff Report: Broadband Connectivity Competition Policy*, at 38 (2007), <http://www.ftc.gov/reports/broadband/v070000report.pdf> (“*FTC Net Neutrality Report*”) (“[B]ecause most broadband Internet access services are not provided on a common carrier basis, they are part of the larger economy subject to the FTC’s general competition and consumer protection authority[.]”); Letter from Deborah Platt Majoras, Chairman, Federal Trade Commission, to Hon. F. James Sensenbrenner, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives, at 1-2 (Apr. 14, 2006) (“To the extent an entity provides non-common carrier services such as ‘information services,’ the Commission considers the provision of those services to be subject to the FTC Act’s prohibitions against engaging in deceptive or unfair practices and unfair methods of competition.”); *id.* at 3 (“[T]he FTC has authority over the provision of wireline broadband Internet services on a *non-common carrier basis*.”) (emphasis added); *id.* at 4 (“We believe that the FTC has jurisdiction to investigate and bring cases involving broadband Internet access services, including cable modem and DSL services.”).

<sup>34</sup> *FTC Net Neutrality Report* at 12.

voice in high-cost areas.”<sup>35</sup> The Commission’s “2010 Broadband Action Agenda” lists as its top two goals (1) “Promot[ing] World-Leading Mobile Broadband Infrastructure and Innovation,” which includes allocation of “an additional 500 megahertz (MHz) of spectrum . . . for mobile broadband,” and (2) “Accelerat[ing] Universal Broadband Access and Adoption” through “once-in-a-generation transformation of the Universal Service Fund . . . to support broadband service.”<sup>36</sup> The Commission does not need Title II reclassification to achieve either of these important objectives. It has all the authority it needs under the existing Communications Act. Indeed, if anything, the reclassification dispute risks impeding the Commission’s pursuit of these goals.

**A. Reallocation of Spectrum for Broadband.**

The Commission has undisputed authority to reallocate spectrum for broadband purposes. While some of the Commission’s particular proposals may require legislation or modifications to existing rules, Title III of the Act broadly authorizes the Commission to allocate spectrum and assign bands of frequencies, grant wireless licenses, and auction spectrum. *See, e.g.*, 47 U.S.C. §§ 303, 307, 309. Nothing in Title III requires reclassification of broadband Internet access to ensure that the Commission can utilize its Title III authority in pursuit of broadband policies. And indeed, without expressing any purported need for reclassification, President Obama just directed NTIA to work with the Commission “to make available a total of 500 MHz of Federal and nonfederal spectrum over the next 10 years, suitable for both mobile and fixed wireless broadband use.”<sup>37</sup>

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<sup>35</sup> *Broadband Plan* at xi; 9.

<sup>36</sup> *See* Broadband.gov, <http://www.broadband.gov/plan/broadband-action-agenda.html>.

<sup>37</sup> *Presidential Memorandum: Unleashing the Wireless Broadband Revolution*, § 1(a) (June 28, 2010), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution>.



## **B. Universal Service.**

The Commission also has the authority it needs to transition the universal service program from subsidizing legacy telecommunications services to supporting tomorrow's broadband infrastructure and services in unserved high-cost areas, and nothing in the *Comcast* decision impedes that transition. That is so for two independent reasons. *First*, as summarized in the NOI itself (*see* NOI ¶ 32), section 254—viewed in light of the principles of section 1 (47 U.S.C. § 151) and section 706(b) of the 1996 Act (47 U.S.C. § 1302(b))—gives the Commission direct authority to promote broadband with universal service support. *Second*, section 706(b) contains additional, independent authority that empowers the Commission to adopt a broadband universal service funding mechanism.

### **1. Section 254(b).**

Section 254(b) directs the Commission to use federal universal service programs to promote access to information services. 47 U.S.C. § 254(b). It provides that “the Commission shall base policies for the preservation and advancement of universal service on” six principles, two of which concern information services. Specifically, section 254(b)(2) states that “[a]ccess to advanced telecommunications *and information services* should be provided in all regions of the Nation.” *Id.* § 254(b)(2) (emphasis added). Section 254(b)(3) provides that “[c]onsumers in all regions of the Nation, . . . should have access to telecommunications *and information services*, including interexchange services and *advanced telecommunications and information services*, that are reasonably comparable to those services provided in urban areas . . . .” *Id.* § 254(b)(3) (emphasis added).<sup>38</sup>

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<sup>38</sup> Section 254(b) provides that universal service policies “shall” be based on those principles. 47 U.S.C. § 254(b). Citing this statutory text, the Tenth Circuit has held that the principles are not merely aspirational: “This language indicates a mandatory duty on the FCC,” requiring the Commission to “work to achieve each [principle] unless there is a direct conflict

As the NOI notes (at ¶ 32), there is some tension between these principles and section 254(c)(1), which provides that “[u]niversal service is an evolving level of telecommunications services[.]” 47 U.S.C. § 254(c)(1). The same is true of section 254(e), which states that “only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support.” *Id.* § 254(e). *See* NOI ¶ 33. But these sections should not be read to bar the Commission from using universal service funds to support broadband. Section 254(c) itself rejects a static focus on legacy technologies. It refers instead to an “*evolving* level of telecommunications services that the Commission shall establish periodically under this section.” 47 U.S.C. § 254(c)(1) (emphasis added). Section 254(c) also expressly authorizes the Commission to “modif[y] . . . the definition of the *services* that are supported by Federal universal service support mechanisms.” *Id.* § 254(c)(2) (emphasis added).<sup>39</sup>

This interpretation comports with the Fifth Circuit’s decision in *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999). There, the court held that the language of section 254, combined with the Commission’s ancillary authority, “permit[ted] the FCC to expand the

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between it” and another principle or statutory obligation. *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199-1200 (10th Cir. 2001).

<sup>39</sup> This direction to “modif[y] . . . the definition” of universal service refers not to the “telecommunications services” that are to be supported—as in section 254(c)(1)—but instead to the “services” that are to be supported. As the Commission explained in connection with section 254(h), which sets out the framework for the schools and libraries program, “the varying use of the terms ‘telecommunications services’ and ‘services’ . . . suggests that the terms were used consciously to signify different meanings.” Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 439 (1997). Just as the Commission concluded that the use of the broader term “services” in section 254(h)(1)(B) authorized the Commission to support *non*-telecommunications services for schools and libraries even though section 254(h) itself is entitled “*Telecommunications Services for Certain Providers*,” *see id.* (emphasis added), so too does Congress’s use of that same broad term in section 254(c)(2) authorize the Commission to “modif[y] . . . the definition” of universal service to include *non*-telecommunications services, even though section 254(c)(1) refers to “telecommunications services.”

reach of universal [service] support to non-telecommunications carriers,” notwithstanding the textual limitations in the statute. *Id.* at 443-44. The court further noted that “Congress intended to allow the FCC broad authority to implement” section 254. *Id.* at 444.

Like many portions of the 1996 Act, section 254, with its apparently competing directives, is not “a model of clarity.” *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). But this compels the Commission to give the statute the most rational meaning, consistent with the intentions and policy choices expressed by Congress. And a reading of the statute that single-mindedly focuses on the “telecommunications service” language in section 254(c)(1) and the “telecommunications carrier” language in section 254(e) over the other statutory evidence would improperly elevate those portions of the statute and negate others in violation of congressional intent.

In particular, section 1 of the Communications Act and section 706 of the Telecommunications Act of 1996 both manifest congressional support for broadband funding, and that intent should inform the Commission’s interpretation of section 254.<sup>40</sup> First, the Commission’s core statutory mission—as expressed in the first sentence of the Communications Act—is “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” 47 U.S.C. § 151. In today’s world, a universal service funding plan that does not support the broadband Internet access services that most consumers use would have no chance of meeting this objective. Thus, section 1 supports reading section 254 broadly to permit the Commission to use universal service programs to promote broadband service.

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<sup>40</sup> *Comcast*, 600 F.3d 642 at 654 (“statements of congressional policy can help delineate the contours of statutory authority”).

Similarly, section 706(a) of the Telecommunications Act of 1996 provides that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” 47 U.S.C. § 1302(a). Section 706(b) further states that if the Commission finds that advanced telecommunications capability is not being deployed to all Americans, it “shall take immediate action to accelerate deployment of such capability.” *Id.* § 1302(b). Given the Commission’s findings regarding the obstacles to deployment of broadband in rural and high-cost areas, this provision clearly supports a broad interpretation of the FCC’s authority under section 254.

## 2. Section 706(b).

Quite apart from section 254, the FCC also may rely on section 706(b) as a *direct* source of authority for adoption of a broadband support mechanism. *Cf.* NOI ¶ 37. The *Comcast* court rejected the Commission’s reliance on section 706 to enforce net neutrality requirements on the ground that the Commission had ruled in the 1998 *Advanced Services Order* (13 FCC Rcd 24,012) “that section 706 ‘does not constitute an independent grant of authority.’” *Comcast*, 600 F.3d at 658. In the order underlying the *Comcast* decision, however, and in the *Advanced Services Order*, the FCC had relied solely on section 706(a).<sup>41</sup> But the Commission has never addressed the limits of section 706(b), and that provision is precisely suited to authorize FCC support for broadband universal service.

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<sup>41</sup> See Memorandum Opinion and Order, *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028, 13038, ¶ 18 (2008); *Advanced Services Order*, 13 FCC Rcd at 24,044-45 (“[W]e agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods. Rather, we conclude that section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services.”).

Section 706(b) directs the Commission, if and when it concludes that “advanced telecommunications capability” is not “being deployed to all Americans in a reasonable and timely fashion,” to “*take immediate action* to accelerate deployment of such capability by *removing barriers to infrastructure investment* and by promoting competition in the telecommunications market.” 47 U.S.C. § 1302(b) (emphasis added). Section 706(d) defines “advanced telecommunications capability” as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” *Id.* § 1302(d)(1). Section 706(b) thus provides a clear, discrete grant of authority for the Commission to address “barriers to infrastructure investment” in order to “accelerate [broadband] deployment.” Most, if not all, of the Commission’s USF-related initiatives could be described as “action to accelerate deployment of such capability” by “removing barriers to infrastructure investment.” Funding providers in unserved areas would certainly fit this bill.<sup>42</sup>

The direct grant of authority in section 706(b) is fully consistent with the goals that Congress articulated in section 254. As section 254 reveals, Congress expected universal service support to fund “advanced telecommunications and information services” in all regions of the country, and Congress enacted section 706(b) with that goal in mind. *See* 47 U.S.C. § 254(b)(2). Of course, as the Commission noted in the *Advanced Services Order*, it would be inappropriate

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<sup>42</sup> Lifeline and Linkup support should also qualify as mechanisms that remove barriers to infrastructure investment, since those programs would ensure that more residents in a given area ultimately subscribe to broadband Internet access (in industry terms, a higher “take rate”), which is a critical factor that providers consider in assessing whether broadband investment in an area can be justified by its projected returns.

As the NOI recognizes (at ¶ 37), section 706(b) authorizes action only insofar as the Commission has made a negative determination as to the “reasonable and timely deployment” of broadband. Thus, universal service programs based exclusively on section 706(b) authority would have to be targeted to unserved areas of the country subject to such a determination, which is the appropriate approach in all events.

to use the grant of authority in section 706 to *evade* explicit congressional policy choices embodied in other sections of the Act. For example, it would be untenable to view that provision as a basis for imposing regulatory *obligations* on broadband providers, given that section 706(b) specifically directs the Commission to *remove* barriers to infrastructure investment and expresses an explicit preference for *deregulation*.<sup>43</sup> The affirmative grant of authority in section 706(b) must be read consistently with the text of that provision and the rest of the Act. But certainly nothing in section 254 could be construed as an affirmative congressional policy choice *against* funding broadband.

In all events, Congress is already moving to give the Commission even more express authority to fund broadband services, regardless of their classification.<sup>44</sup> It would be perverse for the Commission to upend the legal framework for Internet policy in the name of funding broadband when (1) the Commission already has existing authority to do so, *and* (2) Congress is (and has been since before the *Comcast* decision) working on legislation to reinforce that authority. If the Commission is uncertain about its authority under *existing law* (which it need not be), the answer is to work with Congress to produce a clear answer.

### **III. RECLASSIFICATION IS LIKEWISE UNNECESSARY TO ADDRESS TRANSPARENCY, DISABILITIES ACCESS, PRIVACY, AND CYBERSECURITY.**

The Commission also suggests that reclassification is necessary to address concerns about the transparency of broadband Internet access services, as well as broadband disabilities

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<sup>43</sup> 47 U.S.C. § 1302(b) (mandating that the Commission to “determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion” and, directing that, “[i]f the Commission’s determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”).

<sup>44</sup> *See, e.g.*, Twenty-first Century Communications and Video Accessibility Act of 2009, H.R. 3101, 111th Cong. (2009); Equal Access to 21st Century Communications Act, S. 3304, 111th Cong. (2010).

access, privacy, and cybersecurity. Each of these goals is undeniably important, but none presents a plausible rationale for reclassification.

**A. Transparency.**

The NOI expresses concern about the Commission's ability to police Internet service providers' "failure to disclose practices to consumers." NOI ¶ 50. No FCC regulation is needed to address this issue, but even if such regulation were needed, section 257 already authorizes the Commission to adopt it.

AT&T has consistently supported transparent, consumer-oriented disclosure as a fundamental requirement for full consumer participation in the communications marketplace. But there is no pressing need for the Commission to adopt rules to *enforce* such transparency because the marketplace is already producing increased and enhanced disclosure. Providers such as AT&T offer broadband customers extensive, detailed, and accessible disclosures concerning the terms and conditions of service and have adopted various tools to make usage limitations and other details of the service transparent to consumers.<sup>45</sup> These include tools that allow customers to compare the key details of Internet service plan options;<sup>46</sup> information on maximum speed capabilities and minimum speed floors for each tier of wireline broadband service and similar

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<sup>45</sup> See, e.g., AT&T U-verse Terms of Service, <http://www.att.com/u-verse/att-terms-of-service.jsp#internet>; AT&T Mobility, Plan Terms – Wireless from AT&T, <http://www.wireless.att.com/cell-phone-service/legal/plan-terms.jsp#data>; AT&T, Answer Center – How can I estimate my data usage?, <http://www.wireless.att.com/answer-center/main.jsp?t=solutionTab&solutionId=KB109365>; Saul Hansell, *A New List of How Much AT&T Knows About You*, NY Times Bits Blog, June 11, 2009, <http://bits.blogs.nytimes.com/2009/06/11/a-new-list-of-how-much-attknows-about-you/> (explaining AT&T's revised, explicit industry-leading privacy policy). See also Comments of AT&T Inc., *Consumer Information and Disclosure; Truth-in-Billing and Billing Format; IP-Enabled Services*, CG Docket No. 09-158, CC Docket No. 98-170, & WC Docket No. 04-36, at 21-22 (filed Oct. 13, 2009) (“*AT&T TIB NOI Comments*”).

<sup>46</sup> In addition to the service-comparison tools offered by providers, third parties such as Consumer Reports and various other entities now offer services and information designed to help consumers compare and understand their broadband service options. See *AT&T TIB NOI Comments* at 26-27.

information about expected upload and download speeds for wireless broadband customers; and maps of wireless service coverage, among other things. *See AT&T TIB NOI Comments* at 18-20; *AT&T Net Neutrality Comments* at 189.

Third-party tools such as Cisco's Network Magic and Speed Meter Pro, as well as the M-Lab platform, further empower consumers by allowing them to monitor their services and their providers' network management practices. Network Magic and Speed Meter Pro provide reports about Internet speeds so users can effectively monitor and address any service or performance issues they may have.<sup>47</sup> Similarly, M-Lab states that it enables a user to test his connection speed and identify issues slowing his connection, determine whether his provider is blocking or throttling specific applications or traffic, and test whether his broadband provider is differentiating applications or services, among other functions.<sup>48</sup> These tools create an additional and powerful incentive for transparent disclosures by providers.

Furthermore, there already is government oversight over transparency in the Internet ecosystem. The FTC has and regularly exercises its enforcement authority with respect to transparency and consumer disclosures relating to Internet services.<sup>49</sup> And the FTC has

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<sup>47</sup> *See* Cisco, Network Magic Pro Features, <http://www.purenetworks.com/product/pro.php>; Cisco, Speed Meter Pro, <http://www.purenetworks.com/product/speedmeterpro/>.

<sup>48</sup> *See* M-Lab, Use tools running on M-Lab to test your Internet connection, <http://www.measurementlab.net/measurement-lab-tools>.

<sup>49</sup> *See, e.g.*, Letter from Lydia P. Parnes, Director, Bureau of Consumer Protection, FTC to John Villafranca, Esq. and Lewis Rose, Esq., Kelley Drye Collier Shannon, Counsel for Sprint Nextel Corporation, Aug. 8, 2007, [http://www.ftc.gov/os/closings/staff/070808\\_sprintnextelclosingltr.pdf](http://www.ftc.gov/os/closings/staff/070808_sprintnextelclosingltr.pdf) (closing an investigation of Sprint Nextel's claims regarding "unlimited web usage" for its Blackberry smartphones); FTC, Press Release, *Sears Settles FTC Charges Regarding Tracking Software*, June 4, 2009, <http://www.ftc.gov/opa/2009/06/sears.shtml> (settling charges that "Sears failed to disclose adequately that software collected consumers' sensitive personal information") ("*FTC Sears Settlement*"); FTC, *2007 FTC Workshop "Ehavioral Advertising: Tracking, Targeting, and Technology"*, <http://www.ftc.gov/bcp/workshops/ehavioral/index.shtml> (announcing a town hall meeting to "address consumer



specifically expressed its intention to monitor such disclosures with respect to broadband services in particular, which makes Title II reclassification in pursuit of that same objective not only unnecessary but counterproductive, since it could strip the FTC of any such authority. *See* Section I, *supra*.

If, notwithstanding all of these vehicles for ensuring transparency, the Commission believes that more should be done, it has the necessary tools already at its disposal. As AT&T explained in the *Truth-in-Billing* proceeding, the Commission could bring all stakeholders together to work out best practices and a code of conduct, similar to the CTIA Code of Conduct. *AT&T TIB NOI Comments* at 35-36. Such an approach would allow for a collaborative process akin to the one being employed by the TAG—one that appropriately takes into account all of the various considerations at issue.

Finally, if the Commission deems it necessary to go even farther and adopt transparency rules, it does not need to reclassify broadband services to accomplish that goal. Section 257 already gives the Commission all the authority it needs for this purpose. Section 257(c) requires the Commission to report to Congress every three years concerning market-entry barriers for entrepreneurs and other small businesses in the provision and ownership of, among other things, “information services.” 47 U.S.C. § 257(c). Although the *Comcast* court rejected the Commission’s reliance on section 257 to support substantive non-discrimination obligations, it nevertheless made clear that “certain assertions of Commission authority could be ‘reasonably ancillary’ to the Commission’s statutory responsibility to issue a report to Congress [under section 257]. For example, the Commission might impose *disclosure requirements on regulated*

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protection issues raised by the practice of tracking consumers’ activities online to target advertising”) (“*FTC ‘Behavioral Advertising’ Workshop Announcement*”).

*entities in order to gather data needed for such a report.” Comcast*, 600 F.3d at 659 (emphasis added).

The court’s observation underscores the availability of section 257 as a basis for the Commission to impose transparency requirements, to the extent they are needed. The Commission is required to report on, among other things, any statutory measures it believes Congress should adopt in order to promote small business entry into the information services marketplace. *See* 47 U.S.C. § 257(c)(2). Under the *Comcast* court’s rationale, this reporting mandate would authorize the agency to require broadband Internet access providers to report their service terms and conditions, so that the Commission can evaluate (1) whether those terms and conditions are hospitable to small business entry and, (2) if they are not, whether to recommend legislation that would address any potential problem. Thus, *Comcast* makes clear that the Commission could require broadband Internet access providers to publicly post transparent, easy-to-understand terms and conditions online, so that the Commission could easily access and assess information concerning conditions for marketplace entry.

#### **B. Disabilities Access.**

AT&T agrees that “disabilities should not stand in the way of Americans’ ‘opportunity to benefit from the broadband communications era.” NOI ¶ 40 (citations omitted). The Internet offers consumers with disabilities unprecedented access to remote educational, employment, entertainment, and shopping options, as well as a host of flexible communications choices. Nevertheless, the disabilities community has a disproportionately low adoption rate.<sup>50</sup> To address this problem, AT&T, together with the broad-based Coalition of Organizations for

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<sup>50</sup> The *Broadband Plan* indicates that only 42 percent of Americans with disabilities use the Internet at home, compared to two-thirds of the population overall. *Broadband Plan* at 23.

Accessible Technology (COAT) and other stakeholders,<sup>51</sup> supports the Twenty-first Century Communications and Video Accessibility Act of 2009, which was recently the subject of congressional hearings.<sup>52</sup>

As that pending legislation demonstrates, however, broadband Internet access reclassification would not meaningfully address disabilities access concerns. Effective disabilities access requires significant changes by *manufacturers* of PCs, video devices, and smartphones, and by *application* providers—not (at least principally) by *broadband Internet access providers*. Internet access itself, and particularly the “Internet connectivity” service the Commission proposes to regulate, is not a primary source of frustration for consumers with disabilities. The frustration arises because much of the equipment used together with Internet access is not accessible by consumers with certain disabilities or because applications offered *over* that service are not disabilities-friendly.

For example, as AT&T explained in response to NBP Public Notice #4, much of the video offered over the Internet, including YouTube and a host of other sites, is provided without closed captioning.<sup>53</sup> Even when video contains closed captioning (for example, when it is a

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<sup>51</sup> COAT is a coalition of over 300 national, regional, state, and community-based disability organizations advocating for legislative and regulatory safeguards that will ensure full access by people with disabilities to evolving high-speed broadband, wireless, and other IP technologies. See COAT, <http://www.coataccess.org/>.

<sup>52</sup> Twenty-first Century Communications and Video Accessibility Act of 2009, H.R. 3101, 111th Cong. (2009); see also Equal Access to 21st Century Communications Act, S. 3304, 111th Cong. (2010).

<sup>53</sup> Comments of AT&T Inc. — NBP Public Notice #4, *International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act; A National Broadband Plan for Our Future; Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket Nos. 09-47, 09-51, & 09-137, at 5-6 (filed Oct. 6, 2009). Given the explosive growth in YouTube video services, this is a significant issue. AT&T’s mobile traffic to YouTube doubled

retransmitted broadcast program), not all video players can decode the video captioning. As Hulu has observed, “[t]he closed-captioning data that’s used for broadcast TV isn’t easily translated for online use.”<sup>54</sup> Furthermore, the HDMI standard used to attach digital televisions to set-top boxes may strip closed captioning information from the signal due to the incompatibility of captioning with the digital rights management features of HDMI.<sup>55</sup> Similarly, consumers with hearing disabilities seeking to use broadband Internet access for over-the-top VoIP calling with TTY capabilities need accessibility support from their VoIP provider, not their underlying broadband provider. Title II reclassification aimed at regulating accessibility by the *broadband Internet access* provider will do nothing to ensure that providers like Skype, Google Voice, CallCentric, VoIP.com, and others make their services more accessible to consumers with hearing disabilities.

In short, the proposed reclassification would do virtually nothing to advance the interests of the disabilities community, since any effective solution will require the more holistic, industry-wide approach that Congress is currently considering in the pending accessibility bills. Indeed, reclassification could actually derail that legislation, which has significant support across the disabilities community. To serve the interests of Americans with disabilities, the Commission should promote legislation that effectively promotes that community’s needs—not complicate the prospects for its passage.

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within six months between fall of 2009 and spring of 2010, and every minute, more than 24 hours of video are being uploaded to the site. Josh Wei, *Video Traffic on Mobile Networks to Surge, AT&T CTO Says*, Communications Daily, July 13, 2010 (discussing remarks of AT&T Chief Technology Officer John Donovan at the MobileBeat 2010 conference).

<sup>54</sup> Hulu, Programming Info, [http://www.hulu.com/support/content\\_faq](http://www.hulu.com/support/content_faq).

<sup>55</sup> See HDMI FAQ, <http://www.hdmi.org/learningcenter/faq.aspx> (discussing difficulty with closed captioning and HDMI, and recommending that consumers “contact the manufacturers directly for the correct way to enable the CC feature within your product”).

### C. Privacy.

The Commission also suggests that reclassification might help it address the important privacy interests of broadband Internet access users. NOI ¶ 39. But here, as with disabilities access, reclassification is not the answer. The privacy issues raised by the Internet implicate the *entire* Internet ecosystem. Application, content, and search engine providers frequently gather and use deeply personal information about the sites that Internet users visit and even the content of emails. Subjecting a purported “Internet connectivity” service to Title II would do nothing to address those larger issues. In fact, it would be affirmatively counterproductive, because it could interfere with the FTC’s comprehensive efforts to ensure privacy throughout the Internet ecosystem.

There is no question that the privacy interests of Internet users are paramount. Consumers increasingly rely on the Internet for education, business, banking, entertainment, shopping, communication, and even medical care. AT&T has made its commitment to protecting the privacy of its customers clear by adopting a comprehensive privacy policy that applies across all of its services, including broadband Internet access.<sup>56</sup> But most companies’ privacy policies are hard to find and even harder to understand. Privacy practices are inconsistent across providers, sites, and applications, including those offering very similar services. And privacy *obligations* vary based on regulatory and legal distinctions that are beyond the comprehension of most consumers.

Title II reclassification would change none of this. By reaching out for jurisdiction over broadband Internet “connectivity,” the Commission could hope to protect only the information that is maintained by a consumer’s broadband Internet service provider in connection with the

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<sup>56</sup> See AT&T Privacy Policy, <http://www.att.com/gen/privacy-policy?pid=2506>.

consumer's use of that particular service. This may not even be necessary, since relevant federal and state wiretapping laws may provide consumers with considerable protection already. But more important, the FCC's rules would do nothing to address the collection of that same consumer's information by providers of the broadband *applications* that the consumer accesses over the same broadband connection. For example, when a consumer uses AT&T's U-verse Internet access service to access Google's search engine and then visits a shopping website, the Commission's proposed regime would subject AT&T to privacy obligations, but would presumably leave the consumer's even *more sensitive* information unprotected in the hands of Google and the operators of commerce sites.

In contrast, the FTC can protect privacy *throughout* the Internet ecosystem and has been actively overseeing online privacy issues since the FCC first raised these issues (in 2004) and then declined to resolve them.<sup>57</sup> The FTC already has considered the issues of behavioral advertising, ad networks, and the collection of clickstream data, as well as the principles that should guide privacy practices and disclosures online generally.<sup>58</sup> If the FCC does not precipitously impede FTC involvement by deeming broadband Internet access a Title II "common carrier" service that is arguably exempt from the FTC's section 5 jurisdiction, the FTC

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<sup>57</sup> Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4863, 4910, 4915, ¶¶ 71, 77 (2004).

<sup>58</sup> See, e.g., *FTC Sears Settlement; FTC 'Ehavioral Advertising' Workshop Announcement*. See also FTC, Press Release, *Twitter Settles Charges That It Failed to Protect Consumers' Personal Information; Company Will Establish Independently Audited Information Security Program*, June 24, 2010, <http://www.ftc.gov/opa/2010/06/twitter.shtm> (settling charges that Twitter "deceived consumers and put their privacy at risk by failing to safeguard their personal information"); FTC, Press Release, *Online Privacy and Security Certification Service Settles FTC Charges*, Feb. 25, 2010, <http://www.ftc.gov/opa/2010/02/controlscan.shtm> (settling charges that the online service "misled consumers" about the website privacy certification they provided).

could adopt privacy guidelines that apply in a consistent way to *all* entities in the Internet ecosystem.

Title II reclassification would undermine the effectiveness of this process not only by potentially negating any FTC role, but also by creating regulatory disparities that skew the competitive landscape without any rational policy basis. Indeed, the Commission itself recently recognized that it has been unworkable to have two different sets of rules governing prerecorded advertising calls, and it has initiated a proceeding to conform its rules to the FTC's more comprehensive approach.<sup>59</sup> But even more important, a patchwork approach to regulating online privacy would leave consumers where they are today—uncertain as they navigate the Internet about whether, when, and to what degree their information is protected.

For that reason, the privacy legislation recently proposed by Representative Boucher would give the *FTC*—not the *FCC*—comprehensive authority over online privacy.<sup>60</sup> The Boucher Bill would authorize the FTC to adopt binding rules and apply those rules to all stakeholders in the Internet ecosystem, including broadband providers, regardless of the common-carrier exemption. The FCC's role would be solely an advisory one. In other words, the key pending legislation on privacy recognizes that FCC regulation of a limited portion of the Internet ecosystem is not the answer and looks instead to the FTC for comprehensive leadership in this area.

At the very least, all of this indicates that Title II reclassification is neither a necessary nor a particularly useful way to address legitimate concerns about online privacy. Nor has anything happened that makes it suddenly imperative for the Commission to step in. Again, the

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<sup>59</sup> Notice of Proposed Rulemaking, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 25 FCC Rcd 1501 (2010).

<sup>60</sup> Boucher/Stearns Privacy Bill, Staff Draft (rel. May 4, 2010), [http://www.boucher.house.gov/images/stories/Privacy\\_Draft\\_5-10.pdf](http://www.boucher.house.gov/images/stories/Privacy_Draft_5-10.pdf).

Commission has played essentially no role in online privacy since it first teed up the issue in 2004, and this absence of Commission involvement has not raised any reason for concern. Finally, even if the Commission believes that it *should* play some role in online privacy, in the short term it should defer to the FTC while Congress addresses the appropriate delegation of authority.

**D. Cybersecurity.**

Similarly, although cybersecurity is a pressing issue for this nation, it provides no policy basis for Title II reclassification, notwithstanding the NOI's suggestion to the contrary. *See* NOI ¶ 43. Even if Title II could give the Commission some authority over cybersecurity, the FCC has neither the expertise nor the charge to lead cybersecurity oversight for the nation's critical communications infrastructure. Several expert federal agencies and entities—the Department of Homeland Security, the Department of Defense, the National Security Agency, and many others—are already diligently addressing cybersecurity concerns. While the FCC may have some role to play in this area, it would be counterproductive, and possibly even dangerous, for the Commission to get out in front of those other government entities, many of which have access to threat information and other highly classified data that are not available to most policymakers at the Commission.

Congress is, in fact, considering legislation that would further cement the authority of other agencies and federal entities to lead the way in shaping cybersecurity policies. Notably, the Rockefeller-Snowe Cybersecurity Act of 2010 (S. 773) looks to the President, the Department of Commerce, and the National Institute of Standards and Technology to develop cybersecurity standards and collect threat information. The Commission would have an advisory and information-gathering role to play under the proposed regime, but it would not take the lead. Other pending bills similarly assign responsibilities to DHS (S. 3480), NIST (H.R. 4061), or a



new National Office for Cyberspace, advised by a board composed of representatives from agencies such as the DOD and the Office of Management and Budget (S. 921, H.R. 4900).<sup>61</sup>

Finally, and in any event, Title II oversight of broadband “connectivity” service, standing alone, would not be a particularly effective means of improving cybersecurity. Improving the nation’s cybersecurity will likely require holistic efforts by all providers in the Internet ecosystem, by equipment and software manufacturers, and by others that plainly fall outside the Commission’s jurisdiction. Indeed, IBM has reported that *application* vulnerabilities have made up more than half of the disclosed cybersecurity vulnerabilities since 2006.<sup>62</sup> In particular, IBM points to the vulnerability of application plug-ins and document formats, indicating that “[t]hree of the five most prevalent malicious Web site exploits of 2009 were PDFs, one was a Flash exploit, and the other was an ActiveX control that allows a user to view an office document through Microsoft Internet Explorer.”<sup>63</sup> And one of the top ten security threat trends for 2010 identified by software security expert Symantec was the use of “social engineering as the primary attack vector.”<sup>64</sup> As AT&T has previously explained to the Commission:

[T]he network infrastructure is only one facet of the overall operational dynamic of the Internet, which also includes operating systems, applications, devices and human beings. To be effective, cyber security requires the efforts of entities at every layer of the interconnected and interdependent Internet ecosystem, including the individual consumer. Cyber security requires an end-to-end

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<sup>61</sup> In any event, Title II oversight of broadband “connectivity” service, standing alone, would not be a particularly effective means of improving cybersecurity. Improving the nation’s cybersecurity will likely require holistic efforts by all providers in the Internet ecosystem, by equipment and software manufacturers, and by others that plainly fall outside the Commission’s jurisdiction.

<sup>62</sup> IBM Security Solution, *X-Force 2009 Trend and Risk Report: Annual Review of 2009*, at 5 (Feb. 2010), <http://www-935.ibm.com/services/us/iss/xforce/trendreports/>.

<sup>63</sup> *Id.* at 6.

<sup>64</sup> See Kevin Haley, Symantec “Don’t Read This Blog,” November 17, 2009, <http://www.symantec.com/connect/blogs/don-t-read-blog>.

approach that spans from the physical layer and the core IP network up through the application layer and device interface all the way to the users themselves.”<sup>65</sup>

In sum, Title II classification would do little to enhance the government’s efforts to solve the cybersecurity challenge. Further, given the lead role of other government agencies in cybersecurity, and pending legislation to solidify those roles, cybersecurity provides no basis whatsoever for Title II reclassification, even though it is a critical issue for this country.

## **PART TWO: THE WRONG WAY**

If it follows the path discussed above, the Commission can meet its ambitious broadband agenda for America by maintaining the predictable deregulatory environment needed to encourage roughly \$350 billion in new private investment. *See* pp. 1-2, *supra*. Alternatively, it can take a different path by accommodating the Washington-based interest groups—which invest no capital, deploy no networks, and serve no customers—that call for a proliferation of new regulatory burdens under Title II. But the Commission cannot follow both paths at the same time by invoking some elusive “third” way, which would succeed only in sowing more investment-detering uncertainty than any other modern FCC initiative.

Some have suggested that the “third way” would somehow stimulate investment by “eliminating as much of the current [regulatory] uncertainty as possible.”<sup>66</sup> But this view conflates the *Commission’s* uncertainty about its own litigation risks with *investors’* uncertainty about how the Commission will choose to restrict their business plans. If the Commission could lawfully cram the broadband Internet into Title II, that might indeed decrease the *Commission’s* uncertainty regarding its authority to impose new rules, but only at the cost of increasing investment-detering *economic* uncertainty. On the margin, investors will not sink billions of

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<sup>65</sup> Comments of AT&T Inc., *Cyber Security Certification Program*, PS Docket No. 10-03, at 4 (filed July 12, 2010).

<sup>66</sup> *E.g.*, Genachowski “*Third Way*” *Statement* (emphasis omitted).

dollars into already risky business plans that, years hence, regulators might scuttle through unforeseeable new restrictions. In the words of AT&T CEO Randall Stephenson, the broadband industry reasonably fears that it could be just “a 3-2 vote away from the next guy coming in and saying I disagree with [forbearance], . . . take it away,”<sup>67</sup> and Title II reclassification could force broadband providers “to re-evaluate whether we put shovels in the ground.”<sup>68</sup>

More generally, Title II reclassification would create multiple new dimensions of investment uncertainty by radically expanding the universe of potential regulation. For example:

- The NOI proposes forbearance from all but a handful of Title II provisions. But it is by no means clear that the Commission would succeed in squaring its rationale for forbearance with its rationale for subjecting the broadband industry to Title II regulation in the first place. Just as important, the Commission identifies no credible mechanism for tying itself to the mast and resisting the inevitable calls to “unforbear” from whatever regulations come back into fashion.
- The NOI does not even *propose* to forbear from sections 201 and 202. Those provisions are exceedingly broad in scope, and the Commission has cited them as a legal basis for adopting countless regulations. The NOI does not begin to grapple with that concern by identifying which of those regulations might apply to broadband Internet services and, if so, how. Indeed, the NOI studiously avoids any discussion about whether the “third way” would impose *retail* regulation on the rates and terms of Internet access.

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<sup>67</sup> Niraj Sheth, *AT&T Rethinks U-Verse Spending After FCC Move* (June 2010), <http://online.wsj.com/article/SB1000142405274870400980457530874013715962>.

<sup>68</sup> *Id.* See also SBC, Press Release, *Ameritech Requests ICC Rehearing to Expand Broadband Access in Illinois*, April 13, 2001, <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=3022&mapcode=corporate> (describing SBC’s decision to halt deployment of DSL-capable remote terminals in Illinois after the state commission required SBC to “unbundle” DSL line cards in those terminals: “In a filing today, Ameritech asked the Illinois Commerce Commission (ICC) to reconsider recent decisions that could deprive more than one million Illinois consumers and businesses of a choice in high-speed Internet access. . . . Complying with the ICC’s decisions could cost SBC more than one-half billion dollars, making the DSL product uneconomical for both Ameritech and its competitors. . . . As a result of the decisions, the company ceased all broadband deployment through remote terminals in Illinois. More than one million Illinois consumers and businesses could have had DSL access through the remote terminals. The company plans to proceed with Project Pronto in other states and will continue to offer DSL Internet service through its central offices in Illinois. ‘This is a complex issue,’ said [Ameritech’s Jim] Shelley. ‘We know a lot more now than we did before the ICC’s order, specifically the costs of the new regulations. DSL is extremely important to our customers, and it’s important that all parties involved take the time to understand the issues.’”).

- Sections 201 and 202 impose *self-executing* prohibitions on whatever conduct some future Commission might deem “unjust” or “unreasonable” or “unreasonably discriminatory,” no matter what vague assurances the Commission might give today about its light-touch regulatory inclinations. The threat of such unpredictable liability would mark a destabilizing break from the regulatory status quo, where the Commission must spell out what its rules mean before enforcing them.
- As discussed below, the statutory logic of reclassification would extend not only to the providers that the Commission means to regulate, but also to an indeterminate range of other Internet-based providers as well. It would take many years to identify the precise scope of the collateral damage.

AT&T is hardly alone in raising these concerns. In a letter to OMB Director Peter Orszag, the Business Roundtable and the Business Council included Title II reclassification among “examples of pending legislation and regulations that have a dampening effect on economic growth and job creation” and “government initiatives that will cause slower rather than faster growth.”<sup>69</sup> In particular:

The move to classify broadband Internet access as a common carrier service could have broad implications for the regulatory treatment of all online services and applications that are delivered over the Internet, and subject these services to the same common carrier regulation that [the FCC] proposes to impose on broadband access[.] While the FCC chairman has indicated he does not intend to impose pricing or other burdensome regulations on networks or online services, it is unclear whether the 1934 law permits selective or credible forbearance from its requirements. *Uncertainty could reign for years as the substance, scope and legal basis for this proposed regulatory framework is made clear and before its validity or invalidity is confirmed by the courts.*<sup>70</sup>

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<sup>69</sup> Letter from Ivan G. Seidenberg, Chairman, Business Roundtable, and James W. Owens, Chairman, Business Council, to Peter Orszag, Director, Office of Management and Budget, at 1 (June 21, 2010), <http://www.businessroundtable.org/sites/default/files/2010.06.21%20Letter%20to%20OMB%20Director%20Orszag%20from%20BRT%20and%20BC%20with%20Attachments.pdf> (“*Orszag Letter*”) (emphasis added). The membership of the Business Roundtable includes many of the largest companies from across the U.S. economy, including Alcoa, Allstate, American Express, Bank of America, Boeing, Caterpillar, Chrysler, Dow Chemical, Eli Lilly, FedEx, General Mills, Hasbro, Johnson & Johnson, Macy’s, Office Depot, PepsiCo, State Farm, Texas Instruments, Xerox, and many others. Business Roundtable, About Us, Members, <http://www.businessroundtable.org/about/members>.

<sup>70</sup> *Orszag Letter* at 45 (emphasis added and paragraph break omitted).

Analysts who follow this industry have stressed the same concern. Collins Stewart, a leading independent financial advisory group, warns that “[r]eclassification could act as a Trojan horse for greater regulation . . . . [T]he FCC’s plan would . . . provide the FCC nearly unfettered authority to regulate this segment of the economy, should it decide it is necessary to alter its planned forbearance practice on all other aspects of broadband communications.”<sup>71</sup> UBS analyst John Hodulik expresses concern that Title II regulation could involve “regulators . . . in every facet of providing Internet [service] over time[, including] . . . [h]ow wholesale and [retail] prices are set, how networks are interconnected and requirements that they lease out portions of their network[.]”<sup>72</sup> Hodulik emphasizes that this regulatory overhang could cause “cable companies and carriers . . . [to] accelerate their plans to wind down investment in their broadband networks.”<sup>73</sup> Bank of America/Merrill Lynch likewise warns that “jobs and investment . . . . could be threatened by [the FCC’s Title II] move.”<sup>74</sup> Medley Global Advisors counsels that “the FCC’s attempt to reclassify broadband will create a prolonged period of regulatory uncertainty and invite protracted litigation[.]”<sup>75</sup>

Many other industry analysts agree, including Craig Moffett of Bernstein Research, Jonathan Chaplin of Credit Suisse, Mike McCormack of J.P. Morgan, Anna-Maria Kovacs of Regulatory Source Associates, Stanford tech analyst Larry Downes, PC Magazine commentator and MarketWatch analyst John Dvorak, The Washington Post, and former FCC Chairman

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<sup>71</sup> Collins Stewart, “FCC Moving Closer to Some Title II Regulations?” (May 7, 2010).

<sup>72</sup> Amy Schatz, *New U.S. Push to Regulate Internet Access*, Wall Street Journal, May 5, 2010, <http://online.wsj.com/article/SB10001424052748703961104575226583645448758.html>.

<sup>73</sup> *Id.*

<sup>74</sup> Bank of America/Merrill Lynch, “*Internet regulation back on the front burner*” (May 5, 2010).

<sup>75</sup> Medley Global Advisors LLC, “FCC Poised to Reset Broadband Regulation” (May 5, 2010).

Michael Powell, who is currently a Senior Advisor to Providence Equity Partners. *See* pp. 2-4, *supra*. As they explain, Title II reclassification would produce “a prolonged period of uncertainty and instability,”<sup>76</sup> have a “profoundly negative impact on capital investment,”<sup>77</sup> and “damage innovation in what has been a vibrant and rapidly evolving marketplace.”<sup>78</sup>

The drumbeat of concern from analysts and investors has continued right up to the date of this filing. An investment analysis published earlier this week predicts that the “ongoing uncertainty” from the reclassification debate and the prospect of “single-digit returns” that would result if “broadband business [is] subject to monopoly-era phone rules” has already caused the industry to “reconsider[] billions of dollars of new investment to upgrade infrastructure.”<sup>79</sup> And just yesterday, an NYU panel of one investor and two analysts warned that the FCC’s reclassification proposal could undermine investment incentives for an industry that “ha[s] to know with some certainty that they can price appropriately, be able to make a return.”<sup>80</sup> The panelists—Citigroup Managing Director Mike Rollins, Height Analytics Managing Director Tom Seitz, and Wise Harbor founder Keith Mallinson—observed that, in making investment decisions, the industry must now weigh the risk that “a group could come into the commission at a future date and convince the agency that prices charged are not fair and reasonable” or

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<sup>76</sup> *See* Powell, *My Take on the Appeals Court Decision*.

<sup>77</sup> Moffett, *Quick Take*.

<sup>78</sup> Editorial, *Internet oversight is needed, but not in the form of FCC regulation*, Wash. Post, Apr. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041604610.html>.

<sup>79</sup> Eugene Bukoveczky, *Broadband Providers Face More Regulation* (July 12, 2010), <http://stocks.investopedia.com/stock-analysis/2010/Broadband-Providers-Face-More-Regulation-VZTGOOGMCSA0712.aspx>.

<sup>80</sup> Buskirk, *Regulatory Uncertainty*; *see also* Curran, *Panelists*.

otherwise “limit the number of Title II provisions from which it will forbear[.]”<sup>81</sup> As they explained, [i]nvestors hate uncertainty and clearly what is being created right now is uncertainty in the marketplace[.]”<sup>82</sup> That, they concluded, creates a real “risk of stifling” investment and innovation.<sup>83</sup>

The FCC cannot responsibly ignore these concerns. As Kovacs has warned: “Capital ultimately comes from individual investors who, *now more than ever*, want assurance that they will get their money back in full with an appropriate reward for the risks they take. Without that assurance, they exercise their right to walk away from unappealing propositions.”<sup>84</sup> In particular, they will not “provide hundreds of billions of new capital to upgrade the nation’s broadband network in exchange for grossly-inadequate cash flows[.]”<sup>85</sup> Until the Commission reassures them that they need not fear regulatory impediments to their business plans, “investors will continue to shy away from network infrastructure investments.”<sup>86</sup> In short, as these analysts agree, the Commission’s proposed path is precisely the wrong way to pursue the Administration’s ambitious, \$350 billion broadband deployment goals.

#### **I. THE NOI MISCONCEIVES HOW THE INTERNET WORKS.**

In addition to being legally unsupportable (*see* Part Two, Sections II-V), the Commission’s reclassification proposal is fundamentally incompatible with how the Internet actually operates, how providers offer end users access to the Internet, and how consumers and

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<sup>81</sup> Buskirk, *Regulatory Uncertainty*.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Anna-Maria Kovacs, *FCC: Broadband Update*, Regulatory Source Associates, LLC, at 4 (Dec. 17, 2009) (emphasis added).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

businesses use the Internet. Judging from the NOI, the Commission appears to believe that legacy regulatory categories designed for the pre-Internet world somehow enable it to extend legacy common-carrier regulation only to one discrete corner of the Internet ecosystem—“facilities-based providers” of last-mile transmission—without threatening much of the rest of that ecosystem with Title II regulation as well. The Commission apparently hopes to accomplish this feat by contriving a new term—“broadband Internet connectivity service”—to describe a retail “service” that does not exist, which the NOI inexplicably equates with a real NECA-based offering that is primarily designed for *wholesale* uses and *does not even provide Internet connectivity*. Meanwhile, top Commission officials seek to reassure the public that the proposed regulatory scheme would address only the “on-ramps” to the Internet rather than “the Internet itself,” even though the retail service at issue—what consumers purchase from their ISPs—necessarily encompasses end-to-end, IP-based communication through the Internet backbone to all points on the global Internet.

All of these pronouncements rest on basic misconceptions about how the Internet functions and, in particular, how the Internet’s constituent IP networks interact to enable an end user “to communicate with others who have Internet connections, send and receive content, and run applications online.” NOI ¶ 1 n.1 (proposed definition of “Internet connectivity service”). Accordingly, before addressing the legal and policy defects in the Commission’s “third way” proposal, we begin with an overview of the technological underpinnings of “the Internet.”

**A. “The Internet’s” Constituent IP Networks.**

The “Internet” is not a single network, much less a public utility. It is instead a loose, global confederation of thousands upon thousands of networks, most of them built and operated with private risk capital, with no guaranteed returns. Without government compulsion or intervention, each of these constituent networks has voluntarily adopted a common protocol and



addressing scheme—the Internet Protocol (“IP”) at Layer 3<sup>87</sup>—that enables its customers to communicate with customers connected to other networks in the U.S. and around the world for purposes of exchanging higher-layer applications and content.<sup>88</sup> “The Internet,” as that term is commonly used, is a *conceptual aggregation* of these mostly private IP-based networks spread across the world.<sup>89</sup>

The intertwined private networks of the Internet are all part of an evolving global communications ecosystem. A given network’s role in that ecosystem is complex and dynamic, and the network may play several roles at once. Nonetheless, popular discussions of the Internet tend to describe its constituent networks by reference to three overlapping categories, all of which are implicated in the proposed Title II reclassification:

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<sup>87</sup> “To provide structure to the design of network protocols, network designers organize protocols—and the network hardware and software that implement the protocols—in **layers**.” James F. Kurose & Keith W. Ross, *Computer Networking: A Top-Down Approach* 50 (5th ed. 2010). The Internet Protocol occupies “Layer 3”—the “network layer”—of the Internet under the traditional 7-layer “OSI model.” *See id.* at 50-54. It thus rides on top of the “physical” and “data-link” technologies at Layers 1 and 2, respectively, and beneath Layer 4 (“transport”) protocols such as TCP and UDP. *See id.* For a general overview of the Open Systems Interconnection (OSI) model, see [http://en.wikipedia.org/wiki/OSI\\_model](http://en.wikipedia.org/wiki/OSI_model).

<sup>88</sup> *See* Resolution of the Federal Networking Council, Oct. 24, 1995 (quoted in Barry M. Leiner *et al.*, *A Brief History of the Internet*, ISOC, <http://www.isoc.org/internet/history/brief.shtml>) (“‘Internet’ refers to the global information system that—(i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.”).

<sup>89</sup> Precisely because of the Internet’s global nature, some members of the Administration have expressed concern that this Commission’s efforts to regulate broadband Internet access service could lead foreign governments to begin imposing their own onerous new regulations on the Internet as well. *See* John Eggerton, *FCC’s Net Neutrality Proceeding Means More Work for State Department*, Broadcasting and Cable (March 17, 2010), [http://www.broadcastingcable.com/article/450391-FCC\\_s\\_Net\\_Neutrality\\_Proceeding\\_Means\\_More\\_Work\\_For\\_State\\_Department.php](http://www.broadcastingcable.com/article/450391-FCC_s_Net_Neutrality_Proceeding_Means_More_Work_For_State_Department.php) (discussing speech by Ambassador Philip Verveer, Assistant Secretary of State and U.S. Coordinator for International Communications and Information Policy).

- *Backbone* networks, including the current so-called “Tier 1” networks (such as, in the United States, AT&T, Verizon, Sprint, Level 3, Qwest, Global Crossing, SAVVIS, and Cogent)<sup>90</sup> and hundreds of backbone networks of smaller size and reach, known as “Tier 2” and “Tier 3” networks;
- *Access/aggregation* networks, such as Comcast, Time Warner, Cox, Cablevision, AT&T, Verizon, Qwest, Sprint-Nextel, T-Mobile, Clearwire, HughesNet, WildBlue, EarthLink, and many others; and
- *Edge/overlay* networks, ranging from the very small (*e.g.*, a home Wi-Fi network) to the very large (Google, Akamai, Limelight, eBay, Amazon.com, and others).

We discuss these various networks in some detail below, but three points warrant emphasis from the beginning. *First*, the distinctions among these categories are increasingly artificial, because networks in each category increasingly perform tasks that are traditionally associated with networks in the other categories. For example, some of the largest edge networks, known as “content-delivery” (or “overlay”) networks, span the globe with dedicated fiber-optic transmission capacity, perform packet-distribution functions similar to those of backbone networks, and use much the same equipment and architecture as backbone networks. *Second*, “Internet connectivity,” properly understood, requires the full use of all three types of networks throughout the global Internet, and an end user certainly could not obtain such connectivity by purchasing a bare last-mile transmission service over an access network. *Third*, the statutory definitions of “telecommunications service” and “information service” are indifferent to the traditional classification of IP networks into these three categories, just as those definitions are indifferent to whether a traditional telecommunications carrier offers purely “local” or purely “long distance” transmission services. As a result, if the Commission tried to

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<sup>90</sup> Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, 22 FCC Rcd 5662, 5730 ¶ 127 (2007) (“*AT&T-BellSouth Merger Order*”); *see also* Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18356 ¶ 123 (2005) (“*SBC-AT&T Merger Order*”).

reconceptualize those statutory definitions to sweep broadband Internet access providers within the scope of Title II, the logic of that reclassification could easily extend Title II common-carrier regulation to operators of backbone and edge/overlay networks as well.

***Backbone networks.*** In this context, the term “backbone network” denotes the highest-capacity portion of a network operator’s facilities, typically consisting of very-high-speed routers and fiber-optic links stretching across large geographic areas. That backbone network serves two main functions. First, it connects the various access/aggregation networks deployed to reach end-user customers, which may range from residential households to large enterprise businesses, including Internet content and application providers. Second, each provider’s backbone network interconnects with *other* providers’ backbone networks. The conceptual accumulation of all network operators’ individual backbones is sometimes referred to collectively (and somewhat misleadingly) in the singular as “the Internet backbone.” As illustrated below, Internet backbone facilities lie at the heart of the “Internet connectivity service” that the NOI proposes to regulate. That fact belies the Commission’s assurance that it “will not address in this proceeding other Internet facilities or services that currently are lightly regulated or unregulated, such as the Internet backbone[.]” NOI ¶ 10.

The bilateral agreements that enable traffic to travel between two different backbone networks commonly follow one of two general business models: *peering* and *transit*. The choice between these two models turns in part on the relative value that each of the two networks brings to the interconnection arrangement. Under *peering* agreements, each network interconnects for the purpose of terminating packets sent from the other peer to *end points served by the terminating peer’s network*. Such arrangements typically anticipate, among other things, that the traffic exchanged between the two networks will be roughly equal in volume, such that

each backbone network will incur roughly the same costs in handling the traffic originated by the other network. To avoid administrative overhead, parties to these bilateral peering agreements typically forgo the mutual exchange of compensation and peer on a *settlement-free* basis. But in some cases, where the traffic volumes exchanged are unequal, or where one network otherwise falls short of the other's peering criteria, the parties may enter into a *paid peering* arrangement. Under paid peering, the networks still exchange traffic through high-capacity peering links, but the "non-compliant" network makes payments to the other network. Under *transit* arrangements, Network X pays Network Y to arrange delivery of Network X's packets *to any destination on the global Internet* and to accept delivery of packets destined for Network X's customers *from any location on the Internet*.<sup>91</sup> Rather than exchanging traffic through peering links with Network Y, Network X typically buys a robust, enterprise-class Internet access service from Network Y, which supplies the interconnection facilities.

From their inception, these peering and transit relationships have been unregulated because the underlying IP backbone services are unregulated information services. As the Commission explained in the *Stevens Report*, "[t]he technology and market conditions relating to the Internet backbone are unusually fluid and fast-moving, and we are reluctant to impose any regulatory mandate that relies on the persistence of a particular market model or market structure in this area."<sup>92</sup> In this unregulated environment, the market for peering and transit has

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<sup>91</sup> See Michael Kende, *The Digital Handshake: Connecting Internet Backbones*, FCC, Office of Plans and Policy, OPP Working Paper No. 32, at 7 (Sept. 2000), [http://www.fcc.gov/Bureaus/OPP/working\\_papers/oppwp32.pdf](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp32.pdf) ("*Digital Handshake*") ("Transit and peering are differentiated in two main ways. First, in a transit arrangement, one backbone pays another backbone for interconnection, and therefore becomes a wholesale customer of the other backbone. Second, unlike in a peering relationship, with transit, the backbone selling the transit services will route traffic from the transit customer to its peering partners.").

<sup>92</sup> Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11535 ¶ 72 (1998) ("*Stevens Report*"). See also *Digital Handshake* at 1 ("Internet backbone

functioned with great efficiency. A key reason is that the larger backbones “compete for the transit business of smaller backbones in order to increase their revenues,” and this competition has driven transit prices down significantly over the last decade, from approximately \$1200/Mbps in 1998 to less than \$12/Mbps in 2008 and less than \$3/Mbps in 2009.<sup>93</sup> The Commission recently reaffirmed that the Internet backbone market remains competitive and efficient, and that any given backbone has little incentive or ability to engage in anticompetitive conduct.<sup>94</sup> As discussed below, however, the Internet connectivity service described by the Commission would necessarily encompass the Internet backbone, and thus—despite the Commission’s empty assurances to the contrary—reclassifying that service under Title II would subject the backbone to regulation for the first time.

***Access/aggregation networks.*** End users—from residential subscribers to enterprise customers, including content providers—connect to the Internet through the “access” portion of an ISP’s network.<sup>95</sup> Broadband access networks perform two key functions within the Internet ecosystem. First, they provide the last mile (or last several miles) of connectivity to end-user locations through a variety of technologies, ranging from DSL or coaxial cable links to wireless spectrum to OCn-level fiber-optic cables. Some broadband ISPs own these last-mile facilities

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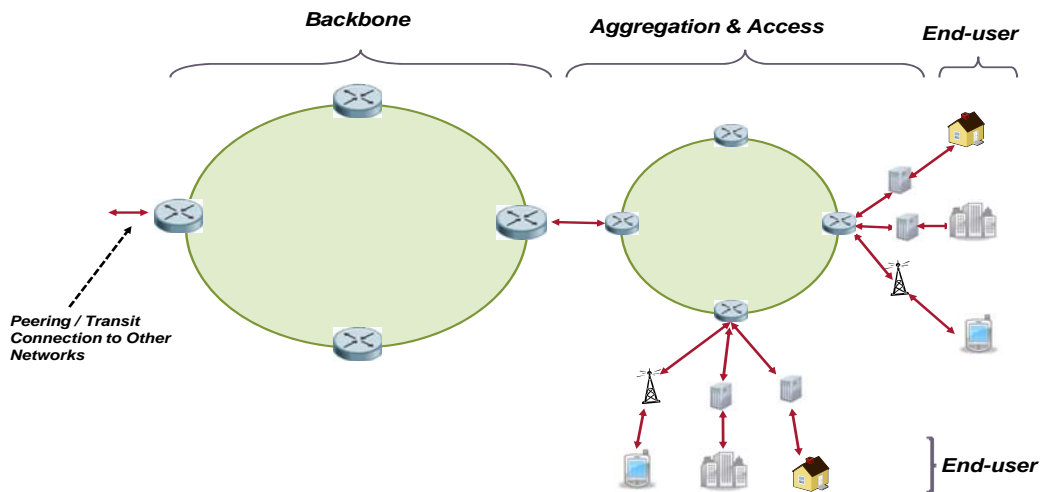
providers are not governed by any industry-specific interconnection regulations, unlike other providers of network services; instead, each backbone provider bases its decisions on whether, how, and where to interconnect by weighing the benefits and costs of each interconnection.”).

<sup>93</sup> See *id.* at 20; DrPeering, Why care about Transit Pricing?, [http://drpeering.net/a/Peering\\_vs\\_Transit\\_\\_\\_The\\_Business\\_Case\\_for\\_Peering.html](http://drpeering.net/a/Peering_vs_Transit___The_Business_Case_for_Peering.html); DrPeering, Transit Prices Race to the Bottom, [http://drpeering.net/a/Ask\\_DrPeering/Entries/2009/4/28\\_Transit\\_Prices\\_Race\\_to\\_the\\_Bottom.html](http://drpeering.net/a/Ask_DrPeering/Entries/2009/4/28_Transit_Prices_Race_to_the_Bottom.html).

<sup>94</sup> *AT&T-BellSouth Merger Order*, 22 FCC Rcd at 5736-38 ¶¶ 144-49; *SBC-AT&T Merger Order*, 20 FCC Rcd at 18354-66 ¶¶ 116-39.

<sup>95</sup> An ISP may also operate a Tier 1 backbone, as described previously, or may operate a Tier 2 or 3 backbone that connects to a Tier 1 backbone. These comments use the terms “broadband Internet access provider” and “broadband ISP” interchangeably.

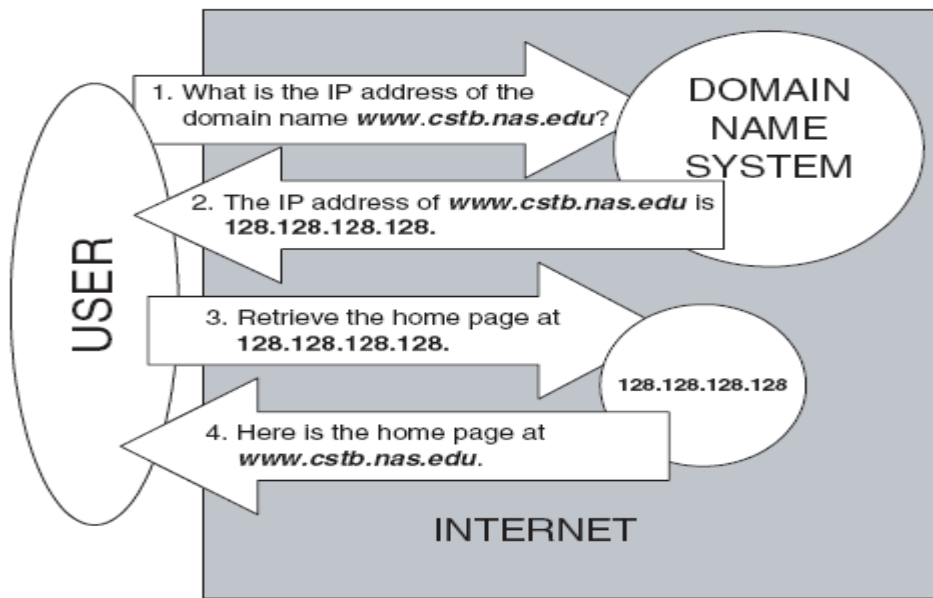
themselves, while others (such as Earthlink and other “independent” ISPs) lease them from third parties, but the functionalities they provide end users over these facilities are the same. Second, at one or more points along the way to the ISP’s backbone network, ISPs *aggregate* the traffic of progressively larger sets of different users and transmit this aggregated traffic over increasingly higher-capacity facilities. This portion of an access network—the bridge between the “last mile” and a backbone network—is sometimes known as an “aggregation” network. The boundaries between access facilities, aggregation facilities, and backbone facilities vary from network to network and are not always easy to identify with precision. But the following diagram provides a general approximation of the three network segments:



**Figure 1: Schematic diagram of ISP network segments**

As discussed below, broadband ISPs provide their customers with a number of information-service functionalities integrated with transmission through access and aggregation networks, including security features and “domain name system” (“DNS”) services. DNS is a highly sophisticated and decentralized mechanism for storing and distributing user- and data-location information throughout the Internet. Because it translates human language (*e.g.*, the

name of a website) into the numerical data (*i.e.*, an IP address) that computers can process, it is indispensable to ordinary users as they navigate the Internet. Moreover, as this simplified diagram (below) from the National Academy of Sciences illustrates, the core “DNS look-up” service provided by all ISPs is part of the “Internet” under any definition of that term.<sup>96</sup>



**Figure 2: Simplified depiction of DNS (from NAS report)**

We address these ISP-offered functionalities, including security features and DNS look-up and related services, in greater detail below.

The Commission has systematically studied Internet access competition for many years. And in report after recent report, the Commission has consistently found the broadband market

<sup>96</sup> This diagram is taken from National Academy of Sciences, *Signposts in Cyberspace: The Domain Name System and Internet Navigation* 25 (2005), <http://www.nap.edu/catalog/11258.html>. As the NAS report indicates, the summary provided in this diagram “is quite simplified,” and “there are many discrete technical processes that are not articulated here.” *Id.* at 45 n.12 (discussing corresponding verbal description). For a more complete description of those processes, see *id.* at 79-151 and Section II.B.1 below (discussing additional “smart” DNS-related functionalities integrated with broadband Internet access service).

for such services to be competitive.<sup>97</sup> Indeed, the broadband Internet access market is considerably more competitive today than it was in 2002, when the Commission first classified cable modem service as an information service. Competition between *fixed* broadband providers alone is strong, as confirmed by annualized churn rates for such providers of approximately 30-35 percent, along with steadily decreasing prices per unit of capacity sold. *See AT&T Net Neutrality Comments* at 83. And according to the Commission’s most recent broadband report, which reflects market developments as of year-end 2008, roughly 92 percent of U.S. census tracts have *at least* two fixed terrestrial broadband services (*i.e.*, not including satellite and wireless broadband).<sup>98</sup>

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<sup>97</sup> See Fifth Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 23 FCC Rcd 9615, 9645 ¶ 59 (2008) (“Based on our analysis in this Report, we conclude that the deployment of advanced telecommunications capability to all Americans is reasonable and timely. The data reflect the industry’s extensive investment in broadband deployment, including at higher speeds, as evidenced by increased subscribership for those higher-speed services. The record also reflects that providers are continuing to make significant investments in broadband facilities going forward. Further, while section 706 does not require the Commission to report on actual broadband subscribership, we believe that subscribership to broadband services continues to increase steadily as new broadband-dependent services and applications emerge in the marketplace, and that subscribership growth is important due to its relationship with deployment.”); *see also* Report and Order, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14880-81 ¶ 50 (2005) (“*Wireline Broadband Order*”), *aff’d* *Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007); *AT&T-BellSouth Merger Order*, 22 FCC Rcd at 5730 ¶ 127; Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors*, 21 FCC Rcd 8203, 8296-97 ¶¶ 217-18 (2006) (finding that “competition among providers of broadband service is vigorous” and “cable modem service and DSL service are facing emerging competition from deployments of cellular, WiFi, and WiMAX-based competitors, and [BPL] providers”). In 2007, the FTC agreed, finding that broadband was “moving in the right direction.” *See FTC Net Neutrality Report* at 155.

<sup>98</sup> Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2008*, at Tbl. 13 (Feb. 2010) (“*FCC February 2010 Broadband Report*”) (confirming that 91.9 percent of U.S. census tracts have at least two fixed broadband providers—specifically, aDSL, cable modem, or FTTP services—and 57.2 percent have at least three).



As the *Broadband Plan* adds, “[n]ew choices—at new, higher speeds—are becoming available, as well”:

Clearwire . . . plans to have its WiMAX service available to about 120 million people by 2011. Two satellite providers plan to launch new satellites in 2011 and 2012, with ViaSat (WildBlue) expecting to advertise download speeds of up to 2-10 Mbps and Hughes Communications planning to advertise download speeds of up to 5-25 Mbps.

*Broadband Plan* at 38 (internal footnotes omitted). Indeed, Clearwire just announced that it now covers 51 million people in 44 cities in the United States, and already serves 971,000 customers, with average data downloads of 3 to 6 Mbps and peaks of 10 Mbps.<sup>99</sup> On top of these fixed broadband options, 89.5 percent of the population is served by at least two *mobile* broadband providers, and 76.1 percent is served by at least three.<sup>100</sup> And within the next two or three years, mobile wireless broadband networks are expected to offer throughput rates—“between 4 and 12 Mbps, with sustained speeds of up to 5 Mbps”—that rival what fixed broadband providers offer consumers today.<sup>101</sup> Like their wireline counterparts, wireless broadband providers have been

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<sup>99</sup> Clearwire, Press Release, *Clearwire Brings CLEAR 4G to Merced and Visalia, California*, July 1, 2010, <http://newsroom.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1443337&highlight=> (“*Clearwire Press Release*”).

<sup>100</sup> Fourteenth Report, *Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, at 7 (rel. May 20, 2010) (“*Fourteenth Wireless Report*”). All told, there are 46 mobile wireless broadband providers offering competitive alternatives across the United States today. *FCC February 2010 Broadband Report* at 23, Tbl. 10.

<sup>101</sup> *Broadband Plan* at 41 (citing Robert C. Atkinson & Ivy E. Schultz, *Broadband in America, Where It Is and Where It Is Going*, at 23, Figure 8 (Columbia Institute for Tele-Information, Nov. 11, 2009), [http://www.broadband.gov/docs/Broadband\\_in\\_America.pdf](http://www.broadband.gov/docs/Broadband_in_America.pdf)); see Phil Goldstein, *T-Mobile upgrades 3G footprint to HSPA 7.2*, FierceWireless, Jan. 5, 2010, <http://www.fiercewireless.com/story/t-mobile-upgrades-3g-footprint-hspa-7-2/2010-01-05> (reporting that T-Mobile has announced that it plans to deploy technology with peak data speeds of 21 Mbps across most of its network this year).

investing billions in 3G, WiMAX, and 4G (LTE) wireless broadband access and aggregation networks.<sup>102</sup>

*Edge/overlay networks and CDNs.* In the Internet’s early years, the stereotypical “edge” network used by an application or content provider consisted of a server or two operated by a small entrepreneur working in a garage or in low-rent office space. Although that stereotype persists among some net neutrality pundits, today’s leading edge networks have evolved into something radically different: transnational facilities-based networks with an unprecedented combination of transmission capacity, processing power, and data storage. Among the largest are the massive “server farms” and caching networks developed by companies as diverse as service providers Akamai and Level 3, online retailers Amazon.com and eBay, Internet portals Yahoo! and MSN, and—largest of them all—Google. These “overlay” or “content-delivery networks” (“CDNs”) use much the same technology and perform many of the same routing and long-haul transmission functions as Internet backbones and allow application and content providers to direct customer requests to the closest cache server that has both the requested content and the capacity to serve the request at the instant it is received.

Google, for example, maintains a sprawling network consisting of hundreds of thousands of servers, many of them clumped in massive data centers or server farms, connected by high-capacity fiber-optic cable.<sup>103</sup> Building and maintaining this network is enormously capital-

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<sup>102</sup> See *AT&T Net Neutrality Comments* at 84-87; Reply Comments of AT&T Inc., *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191 & WC Docket No. 07-52, at 100 (filed Apr. 26, 2010) (“*AT&T Net Neutrality Reply Comments*”).

<sup>103</sup> See George Gilder, *The Information Factories*, *Wired*, Oct. 2006, <http://www.wired.com/wired/archive/14.10/cloudware.html>. In addition to Google, other major Internet companies, including Microsoft and Yahoo!, are likewise constructing enormous networks of their own and, like Google, are revolutionizing the role of these ostensible “edge” networks within the Internet. See, e.g., Blaine Harden, *Tech Firms Go Mining for Megawatts: Companies Rush to Exploit Region’s Cheap Electricity*, *Wash. Post*, July 9, 2006, <http://www.washingtonpost.com/wp-dyn/>

intensive, and it is transforming the manipulation and routing of data on the Internet. As Google CEO Eric Schmidt has explained, Google has “dozens” of data centers in undisclosed locations, some of which are “very large,” and “in a year or two the very large ones will be the small ones because the growth rate is such that we keep building even larger ones, and that’s where a lot of the capital spending in the company is going.”<sup>104</sup> In addition, “we have not only data centers, but *we have fiber that interconnect[s] those data centers, and connect[s] to the ISPs.* At Google, speed is critical. *And part of the way we get that speed is with that fiber.*”<sup>105</sup> Combined with Google’s multi-billion-dollar investment in data storage and processing power, this “overlay” CDN enables Google to outperform its rivals in the delivery of (for example) split-second search results and paid advertisements to end users throughout the world.

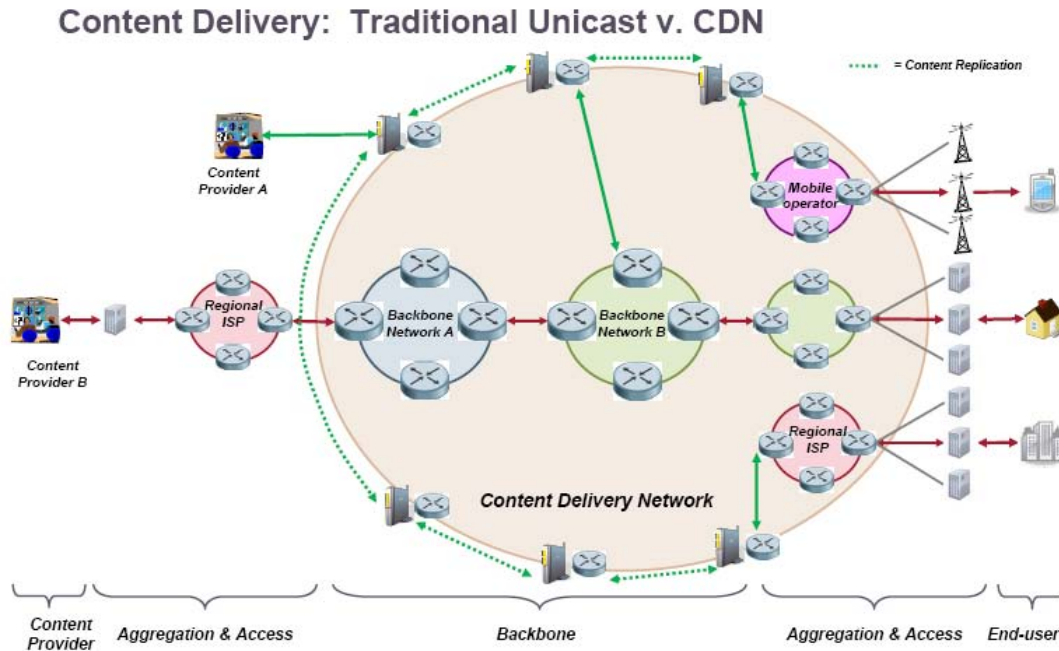
While Google self-provides its own CDN, countless thousands of large and small business customers rely on third-party CDNs such as Akamai and Limelight to distribute and store their Internet data throughout the nation and world. Traditionally known as “caching” networks, CDNs arrange to transmit data throughout the global Internet and store it on servers at multiple locations across the Internet, typically located near ISP backbone networks. This service enables end users to gain access to that content more quickly and reliably than in a conventional “unicast” arrangement, where each end user must communicate directly with a single centralized server. Figure 3 illustrates this function:

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content/article/2006/07/08/AR2006070800973\_pf.html; Rich Miller, *Microsoft Plans \$500M Dublin Data Center*, Data Center Knowledge, May 16, 2007, [http://www.datacenterknowledge.com/archives/2007/May/16/microsoft\\_plans\\_500m\\_dublin\\_data\\_center.html](http://www.datacenterknowledge.com/archives/2007/May/16/microsoft_plans_500m_dublin_data_center.html); Rich Miller, *Yahoo Eyes Washington State for Data Center*, Data Center Knowledge, Nov. 29, 2005, <http://www.datacenterknowledge.com/archives/2005/11/29/yahoo-eyes-washington-state-for-data-center/>.

<sup>104</sup> Fred Vogelstein, *Text of Wired’s Interview with Google CEO Eric Schmidt*, Wired, Apr. 9, 2007, [http://www.wired.com/print/techbiz/people/news/2007/04/mag\\_schmidt\\_trans](http://www.wired.com/print/techbiz/people/news/2007/04/mag_schmidt_trans).

<sup>105</sup> *Id.* (emphasis added).



**Figure 3: The role of CDNs in Internet content distribution**

In this diagram, Content Provider B, which does not make use of a CDN, must send its packets from a centralized server using a long and unpredictable path. The content provider does not know in advance how many router-to-router “hops” each packet will make or whether any of the intermediate points will be congested. In contrast, Content Provider A hires a CDN like Akamai to transmit its content over high-capacity connections to multiple cache (or “proxy”) servers throughout the Internet, thus pre-positioning content close to customers and reducing the distance it must travel when a given customer requests it.

Akamai holds itself out as a provider of this transmission-plus-caching service to the general business community, and stresses that it “helps even the smallest entrepreneurs to expand their presence on the Web by offering a better and faster customer experience.”<sup>106</sup> Although

<sup>106</sup> Comments of Akamai Technologies, Inc., *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191 & WC Docket No. 07-52, at 4 (filed Jan. 14, 2010) (“Akamai Net Neutrality Comments”).

Akamai offers specialized “enterprise” solutions for its largest customers, it sells most of its customers what it calls “Standard Services,” which involve “streamlined implementation of Akamai solutions” and “core services.”<sup>107</sup> Akamai claims that it transmits its customers’ data through facilities that it “lease[s]” rather than owns in fee simple. *Akamai Net Neutrality Comments* at 12. As discussed below, however, that distinction is irrelevant to whether a service constitutes a “telecommunications service.” See Section III.B.1, *infra*.

The drafters of the NOI appear to miss this critical point. According to news reports, the Commission’s General Counsel recently remarked that the NOI’s reclassification proposal would not affect the legal status of content delivery networks because, he believed, “a content delivery network is basically moving a website closer to [the] point where it will be used. It’s a server, *not a transmission*.”<sup>108</sup> That is wrong: transmission is an indispensable component of the service that CDNs like Akamai provide to their customers, which explains why Akamai can boast that it “routinely delivers between ten and twenty percent of all Web traffic, at times reaching more than 650 Gigabits per second.”<sup>109</sup> As discussed in Section III.B.3 below, the Commission’s proposed reclassification of broadband Internet access services would have serious, unintended, and self-executing consequences for a range of other Internet-based services, including CDN services offered broadly to the commercial public, as Akamai’s are.

## **B. Looking Behind the “Cloud.”**

In considering broadband issues, policymakers sometimes focus disproportionately on the role that access/aggregation networks play in serving residential users, and ignore the equally

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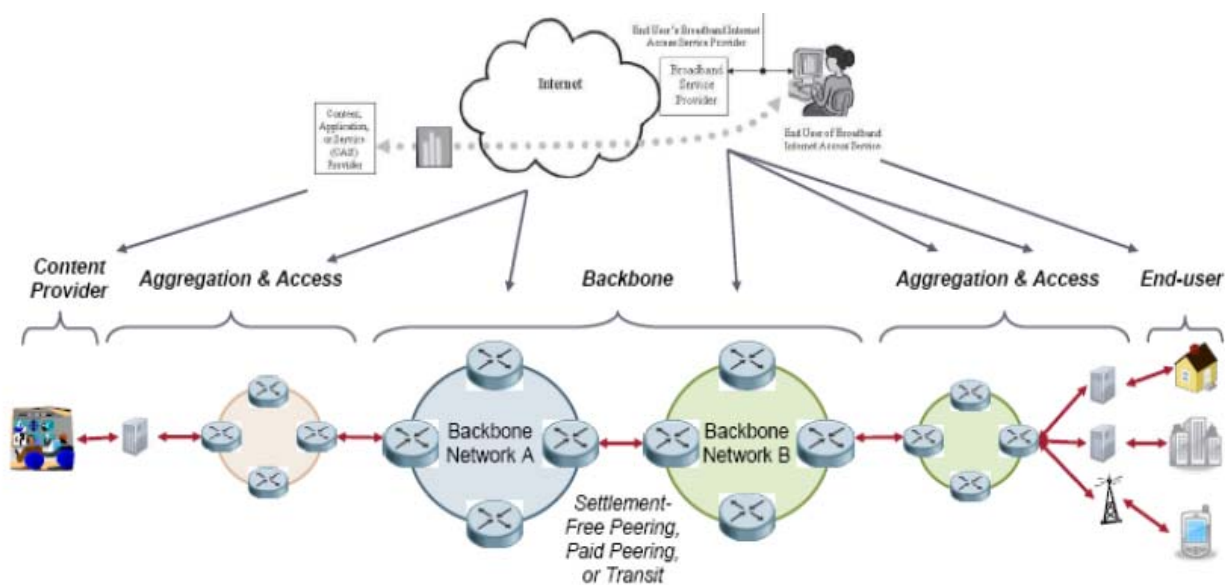
<sup>107</sup> Akamai, Standard Services, [http://www.akamai.com/html/solutions/standard\\_services.html](http://www.akamai.com/html/solutions/standard_services.html).

<sup>108</sup> “Third-Way” Broadband Proposal Won’t Affect Internet Caching, Backbone, FCC’s GC Says, TR Daily, May 13, 2010.

<sup>109</sup> Akamai, Customer Stories, <http://www.akamai.com/html/customers/index.html>.

important role those networks play in serving millions of large and small business customers, including providers of Internet applications and content. Often this confusion arises from the use of a “cloud” in Internet-related diagrams to depict all portions of an Internet communication other than within a residential end user’s access/aggregation network.

One example is the diagram accompanying paragraph 106 of the Commission’s recent net neutrality NPRM, reproduced as the top of Figure 4 immediately below. To understand how Title II reclassification could affect the Internet as a whole, it is important to look behind the “cloud,” which, in the Commission’s diagram, appears intended to represent an IP network operator such as Level 3, AT&T, Sprint, Akamai, or Limelight:



**Figure 4: End-to-end communications over the Internet’s constituent IP networks**

As this diagram illustrates, Internet access service is offered not just to residential consumers, but also to applications and content providers, such as the entity depicted on the far left side of the diagram. And in any given Internet communication, the user on each end—whether a content provider or recipient—typically hires an ISP to transmit data on an end-to-end basis from itself, through the ISP’s access/aggregation and backbone networks, to the ISP

serving the entity user on the other end of the communication, all by means of the Layer 3 IP routing and addressing scheme and various Layer 4 protocols (such as TCP or UDP). For example, the content provider on the left hires an ISP to send its data to *all points on the Internet* where the recipients of its content obtain access to the Internet. Even though the ISP may well subcontract out a portion of that task to other networks (*e.g.*, through peering and transit arrangements), it still assumes responsibility to make sure that task is completed successfully; indeed, that is the very definition of the service it offers.

The Commission’s proposal to regulate so-called “Internet connectivity” would thus necessarily regulate, for the first time, the guts of the Internet: communications across the *Internet backbone* by means of the Layer 3 Internet Protocol (and often higher-layer functionality as well). The notion that “Internet connectivity” could encompass only the “on-ramps” to the Internet, rather than “the Internet itself,” is nonsensical. To obtain such functionality, users do *not* purchase an “on-ramp” service that “stops” a few miles away from them, at a central office, cable head-end, wireless antenna, or satellite transponder, because such a service would not connect them to the Internet (or anything else of value).

For the same reason, there is no merit to the Commission’s contrived effort to define “the Internet” narrowly to exclude Internet access services for the first time—and thereby evade political criticism of its proposal to regulate the Internet. As Vint Cerf and Robert Kahn explained in 1999, the Internet is much “[l]ike the federal highway system, whose underpinnings include not only concrete lanes and *on/off ramps*, but also a supporting infrastructure both *physical and informational*, including signs, maps, regulations, and such related services and products as filling stations and gasoline, the Internet has its own layers of *ingress and egress*, and

its own multi-tiered levels of service.”<sup>110</sup> Similarly, the Commission has always justified its opposition to “classifying *Internet access services* as telecommunications services” because “we recognize the unique qualities of *the Internet*, and do not presume that legacy regulatory frameworks are appropriately applied to it.”<sup>111</sup> And former Chairman William Kennard forthright explained his opposition to “open access” regulation for cable-based Internet access services on the ground that, “[i]f we’ve learned anything about *the Internet* in government over the last 15 years, it’s that it thrived quite nicely without the intervention of government.”<sup>112</sup> The Commission rightly perceives that any move to “regulate the Internet” would be unprecedented, worrisome, and unpopular.<sup>113</sup> But there are no more accurate terms to describe what the Commission is proposing here.

Finally, as the preceding two diagrams reveal, a content provider may hire more than one IP network to ensure the successful delivery of its data to the many recipients of its content. For example, it may hire an ISP for general-purpose access to the Internet, and it may also hire a CDN like Akamai to arrange for the distribution of its most popular or performance-sensitive data. Although it may use the ISP’s facilities to reach the CDN’s network (just as an ordinary telephone caller uses local exchange facilities to reach its designated long-distance carrier’s network), the content provider purchases a retail service from both the ISP *and* the CDN (just as the telephone customer purchases separate retail services from the local exchange carrier and the

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<sup>110</sup> Robert E. Kahn & Vinton G. Cerf, “What Is The Internet (And What Makes It Work)” (Dec. 1999), [http://www.cnri.reston.va.us/what\\_is\\_internet.html](http://www.cnri.reston.va.us/what_is_internet.html) (emphasis added).

<sup>111</sup> *Stevens Report*, 13 FCC Rcd at 11540 ¶ 82 (emphasis added; footnote omitted).

<sup>112</sup> Remarks of William E. Kennard, Chairman, Federal Communications Commission before the National Cable Television Association, Chicago, Illinois, “The Road Not Taken: Building a Broadband Future for America” (June 15, 1999), <http://www.fcc.gov/Speeches/Kennard/spwek921.html>

<sup>113</sup> See NOI ¶ 10; *Genachowski “Third Way” Statement*.



long-distance carrier). One of the key questions in this proceeding is whether, if the Commission reconceptualizes Title II to encompass *ISPs*, it could somehow leave *CDNs* and other Internet transport providers outside the scope of Title II. As discussed below, the answer is no.

**C. The Arbitrariness of the Newly Created “Internet Connectivity” Definition and the Irrelevance of the NECA Tariff to “Internet Connectivity.”**

The NOI invents a new term, not found in the Communications Act, to describe a putative “service that may constitute a telecommunications service” within a larger “bundle of services” known as “broadband Internet service.” NOI ¶ 1 n.1. It calls this contrived sub-service an “Internet connectivity service” and defines it as something that “allows users to communicate with others who have Internet connections, send and receive content, and run applications online.” NOI ¶ 1 n.1. This is problematic on several levels.

First, any use of this definitional contrivance to set national broadband policy would raise a host of unsettling implementation questions. For example, if the Commission concludes (erroneously) that consumers perceive this supposed “service” as separate from the other functionalities in broadband Internet access service, would providers have to begin identifying these functionalities separately in their marketing and billing materials? Would consumers have to receive two separate bills or perhaps two separate line items on the same bill, even though they have always purchased broadband Internet access as a single service? If not, then how could the Commission plausibly claim that broadband Internet access providers offer—and consumers perceive that they obtain—two separate and discrete services rather than a single, integrated Internet access service? Reclassification would also require substantial and costly changes to the IT systems that Internet access providers currently use for billing, accounting, ordering, and maintenance—changes that would be extremely time consuming and expensive to

implement.<sup>114</sup> The NOI does not recognize any of these concerns, let alone confront them, but they exemplify the unpredictable and anti-consumer consequences any Title II regime could have for how Internet access services are engineered, marketed, and provided to consumers.

Second, the definition of “Internet connectivity service” that the Commission has proposed here is not simply contrived, but also patently overbroad. It would encompass many services other than Internet access, including special-purpose IP services and products such as e-readers like the Kindle, remote heart monitors, Internet-connected GPS devices (such as the Garmin and TomTom<sup>115</sup>), and smart-grid meters. All of these allow the “user” to communicate with “others who have Internet connections, send and receive content, and run applications,” however limited. For example, a remote heart monitor enables a user (the patient) to communicate with others who have Internet connections (*e.g.*, a hospital, clinic, or doctor’s office), send and receive content (*e.g.*, telemetry sent from the heart monitor and commands sent

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<sup>114</sup> If the Commission determines that “Internet connectivity service” is a Title II service, revenues for that regulated functionality would have to be booked separately from revenues for the unregulated information-service functionality. And reconfiguring the accounting systems used by various telco, Internet, and wireless affiliates so that those systems are capable of separately tracking and booking such revenues would be a monumental task. Similarly, if providers are required to display separate charges on their bills for Title I and Title II functionalities, billing systems will need to be reconfigured as well. Further, if the Commission were to entitle consumers to order the broadband transmission component separately from the information-service component, providers would also need to adopt new ordering and provisioning processes. Finally, because maintenance and trouble tickets for regulated and unregulated services would in many cases have to be handled by different personnel for accounting purposes, changes to the customer service and maintenance systems would also be required. Reconfiguring providers’ existing systems to accommodate these many changes would exert upward pressure on rates and would consume considerable time, labor, and capital that could be much better spent on deployment of broadband services to unserved consumers. In addition, given the time that the industry would need to address these and the other practical challenges that would arise in connection with reconfiguring broadband services to comply with Title II, it is quite possible that Congress could act, reverse the Commission, and obviate the need for those extensive modifications, even before they have been fully implemented.

<sup>115</sup> See Garmin, nüLink! Services for nüvi 1690, [http://www.garmin.com/garmin/cms/cache/offonce/us/ontheroad/nulink/nulink\\_1690;jsessionid=2079C7E03594DFCBC423656F721E6103](http://www.garmin.com/garmin/cms/cache/offonce/us/ontheroad/nulink/nulink_1690;jsessionid=2079C7E03594DFCBC423656F721E6103); TomTom, TomTom LIVE Services, <http://www.tomtom.com/services/service.php?id=14>.

by the medical providers), and run applications (*e.g.*, monitoring and diagnostics software in the heart monitor and/or in servers operated by the medical provider or its contractors). This proposed definition thus presents overbreadth concerns similar to those resulting from the corresponding definition of “broadband Internet access service” in last year’s *Net Neutrality NPRM*—concerns that AT&T addressed at length in its January 2010 comments in that docket. *See AT&T Net Neutrality Comments* at 96-102.

Third, and most important, this supposed “Internet connectivity service”—at least as the Commission describes it in one key portion of the NOI—would not *even connect end users to the Internet*. The Commission reveals its confusion on this point when it cites “the [service] definition in NECA’s DSL Access Service Tariff” as a potential formulation of “the functionality of an Internet connectivity service.” NOI ¶ 65.<sup>116</sup> As a preliminary matter, the service described in the NECA DSL Access Service Tariff (NDAST) is primarily designed to allow an *Internet service provider* (such as AOL and Earthlink) to connect its retail end users to the ISP’s service, using the telephone company’s local exchange facilities. Although retail end users are free to purchase out of the tariff (just as anyone is generally free to purchase out of any tariff), the NDAST is not presented in the tariff as a consumer-focused, mass-market service for retail use by individual end users.<sup>117</sup> More important still, the NDAST does not provide “Internet connectivity,” and thus has no discernible relevance to the issues in this proceeding.

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<sup>116</sup> As the Commission notes (NOI ¶ 21 n.53), the overwhelming majority of telcos that offer unbundled DSL transmission service do so through the auspices of the National Exchange Carrier Association, which files tariffs on behalf of small, mostly rural carriers.

<sup>117</sup> For example, the Tariff assumes that the customer using the service has a relationship with a second telecommunications service provider (the “customer’s TSP”), as an ISP might have with Level 3. *See* NECA 8.1.1, 8.2.1 (also referring to “interconnect[ing the service] with a TSP’s network”). The Tariff also provides that the “customer” must supply the telephone company with the customer’s IP address—which an ISP typically would already have, but which an individual end user would typically receive only from an ISP. NECA 8.1.4(A), 8.2.4(A).

Rather than connect end users to the Internet, the service offered in the NDAST consists only of a transmission link (ADSL transport) running from an end user's premises to a network node in the neighborhood (a DSLAM), combined with a transmission link (special access transport) running from the DSLAM to an ISP's (or TSP's) facilities (point of presence). The service stops there. As with dial-up Internet access, it is the unregulated Title I ISP that provides the end user with an IP address and handles all of the routing and other functions necessary for the end user to communicate with other users of the Internet. *See* NECA 8.1.4 at 8-4; 8.2.4 at 8-11. By itself, therefore, the NDAST offering would not allow an end user to communicate with other Internet users, send and receive content, and run applications online. Instead, the *ISP* provides Internet connectivity to end users by arranging to transport their traffic to various destinations on the Internet by means of, among other things, (1) DNS look-up and other information-service functionalities and (2) peering and transit arrangements with various Internet backbones.

In short, contrary to the NOI's suggestion, the NDAST service is *not* an offering of "Internet connectivity." As a result, the tariff cannot support any notion that some broadband providers are providing "Internet connectivity" to end users separate and apart from the "information service" components of broadband Internet access. Rather, the tariffed service is a telecommunications service used mainly by ISPs as a wholesale input, and it does not connect anyone to the Internet.

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Indeed, one portion of the NDAST specifically provides that "[t]he customer"—*i.e.*, the ISP purchaser of this service—"purchases ADSL and/or SDSL Access Service . . . for the purpose of combining these telecommunications services with its own information service(s) *to create a new retail service for sale to its end user customer(s).*" NECA 8.4.1 at 8-19; 8.5.1 at 8-28 (emphasis added).

More generally, far from supporting the Commission’s Title II reclassification proposal, the service described in the NECA tariff underscores the impossibility of defining “Internet connectivity” by focusing solely on the last mile, as the NOI appears at times to do. To provide “Internet connectivity,” a communications service must encompass not only DNS look-up and other Layer 3 (and higher-layer) information-service functionalities, but also Internet backbone transmissions as well as peering and transit arrangements. And this is why, as noted above, the Commission cannot seriously argue that its new regulatory scheme would somehow exclude Internet backbone networks.

Finally, when a “non-facilities-based” ISP purchases the tariffed NECA service, it provides its customers with precisely the same type of service that the underlying “facilities-based” telco would offer that same customer if it decided to act as the broadband ISP. The main distinction is that the “facilities-based” provider owns the last-mile facilities, whereas the “non-facilities-based” provider leases them or resells other providers’ wholesale services. As discussed below, however, that is a distinction without any significance for Title II classification purposes. *See* Section III.B.1, *infra*. Thus, if the Commission were to reverse course and conclude that the integrated offering of broadband Internet access includes a stand-alone, Title II “connectivity” offering, it could not limit that conclusion to “facilities-based” ISPs; it would have to extend the conclusion as well to Earthlink and similar “non-facilities-based” ISPs.<sup>118</sup> Indeed, as further discussed below, the same conclusion would logically apply to a range of other Internet-based providers that hold themselves out as arranging for transmission of data across the Internet. *See id.*

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<sup>118</sup> In addition, even the category of “facilities-based ISPs” would have to include hundreds if not thousands of providers of commercial Wi-Fi services, ranging from Boingo to hotels and coffee shops. The proposed reclassification could subject all of those providers for the first time to Title II regulation as “common carriers.”

**II. THE COMMISSION LACKS LEGAL AUTHORITY TO RECLASSIFY BROADBAND INTERNET ACCESS WITHIN TITLE II BECAUSE INFORMATION-SERVICE FUNCTIONALITIES REMAIN TIGHTLY INTEGRATED WITH BROADBAND TRANSMISSION.**

On February 22 and April 29, 2010, AT&T, several other companies, and five major trade associations representing the entire broadband industry filed extensive analyses of this reclassification proposal.<sup>119</sup> For the reasons explained in that analysis and below, the proposed reclassification would be not only unwise, but unlawful.

**A. Twelve Years of Unbroken Commission and Judicial Precedent Support the Title I Characterization.**

A long line of Commission decisions from 1998 to 2007, along with a Supreme Court decision from 2005 and a Third Circuit decision from 2007, confirm that Internet access service is a Title I “information service” with no Title II “telecommunications service” component. Nothing has changed in the meantime to justify the opposite outcome. And if the Commission sought to scuttle twelve years of bedrock regulatory precedent anyway, a reviewing court would view that about-face not as a reasoned response to changed circumstances, but as a purely political effort—as, indeed, the NOI confirms this is—to reverse judicial constraints on the Commission’s Title I authority to regulate the Internet. That type of sea-change in this area of law would have to come from Congress, not the Commission.<sup>120</sup>

A “telecommunications service” subject to Title II common-carrier regulation is defined, in relevant part, as “the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used,” and “telecommunications” in turn is defined as “the transmission . . . of information of the user’s choosing, *without change in the form or content of*

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<sup>119</sup> *First Industry Title II Letter* (attached as Exh. A); *Second Industry Title II Letter* (attached as Exh. C).

<sup>120</sup> *See* Introduction and Executive Summary, *supra* (discussing congressional opposition to reclassification proposal).

*the information as sent and received.*” 47 U.S.C. §§ 153(43), (46) (emphasis added). In contrast, an “information service,” which lies outside the scope of Title II, is the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications.*” *Id.* § 153(20) (emphasis added). In the *Stevens Report*, the Commission confirmed that these two statutory categories are “mutually exclusive.”<sup>121</sup> This “mutual exclusivity position” means that a service offered to consumers on a functionally unified basis cannot be said to consist of both a “telecommunications service” and an “information service.” It must be one or the other, and if it contains data-processing or data-storage/retrieval functionalities, it is a unified “information service.”

Starting in 2002 and continuing through 2007, the Commission applied this statutory interpretation to various broadband Internet access services and concluded that they are all properly construed as integrated “information services” without “telecommunications service” components.<sup>122</sup> That is so, the Commission found, because the service offered to consumers inherently includes a range of integrated data-processing functions, including email, web-hosting, DNS look-up, and often caching.<sup>123</sup> These findings all involved a straightforward application of the “mutual exclusivity” position the Clinton FCC had adopted in 1998. Although many (but not all) ISPs in 1998 were “non-facilities-based” in that they owned no last-mile

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<sup>121</sup> *Stevens Report*, 13 FCC Rcd at 11507 ¶ 13. The *Stevens Report* thereby reaffirmed the Commission’s similar finding in Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9179-80 ¶¶ 788-89 (1997).

<sup>122</sup> See, e.g., Declaratory Ruling, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4822-23 ¶¶ 38-40 (2002) (“*Cable Modem Order*”), *aff’d* *Brand X*, 545 U.S. 967 (intermediate history omitted); *Wireline Broadband Order*, 20 FCC Rcd at 14855-56 ¶¶ 1-3; Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901, 5902 ¶ 2 (2007) (“*Wireless Broadband Order*”); see also *Stevens Report*, 13 FCC Rcd at 11537-39 ¶¶ 76-80.

<sup>123</sup> See *Cable Modem Order*, 17 FCC Rcd at 4822-23 ¶ 38; *Wireless Broadband Order*, 22 FCC Rcd at 5910-11 ¶¶ 25-26.

transmission facilities connecting them to their end users, the emergence of broadband ISPs did not alter the statutory analysis because, again, “the relevant definitions *do not distinguish facilities-based and non-facilities-based carriers.*” *Brand X*, 545 U.S. at 997 (emphasis added). The definitions also do not turn on the degree of competition in any market, as some have suggested.<sup>124</sup> Market competitiveness standing alone *may* affect whether a telecommunications carrier is subject to dominant carrier regulation, with the full suite of tariffing and other obligations,<sup>125</sup> but not the antecedent question of whether a provider is a “telecommunications carrier” in the first place. In any event, even if the degree of competition were a relevant criterion, the broadband Internet access market is dramatically more competitive today than it was in 2002, 2005, or 2007, given the proliferation of fixed and mobile wireless broadband services and churn rates in the neighborhood of 30%-35% per year, as described above. *See* Part Two, Section I.A, *supra*.

The Supreme Court affirmed the Commission’s statutory classification decisions in its 2005 *Brand X* decision. As the Court explained, “[i]t is common usage to describe what a company ‘offers’ to a consumer as what *the consumer perceives to be the integrated finished product*, even to the exclusion of discrete components that compose the product[.]” *Brand X*, 545 U.S. at 990 (emphasis added). In fact, the Court added, it would be “odd” to construe the statutory language any other way. The NOI accepts this approach to the statutory term “offer,” *see* NOI ¶ 53, as indeed it must, since this was a Supreme Court holding.

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<sup>124</sup> *See, e.g.*, Reply Comments of Public Knowledge on NBP Public Notice No. 30, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 10-11 (filed Jan. 26, 2010) (“*Public Knowledge NBP PN #30 Reply Comments*”).

<sup>125</sup> *See, e.g.*, Memorandum Opinion and Order, *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, 23 FCC Rcd 12260, 12262-64, ¶¶ 3-7 (2008).



The Court then held that “[t]he entire question is whether the [broadband Internet access] products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes). That question turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided[.]” *Brand X*, 545 U.S. at 991. In *Brand X*, the Court found that the Commission had properly answered that question by concluding that ISPs offer consumers a unified service consisting of functionally integrated telecommunications and data-processing components, including the DNS look-up and caching services mentioned above.

The Commission could not reasonably reverse course now unless it could somehow find that, in the three years since its last order on this topic, broadband Internet access providers have suddenly stopped providing a functionally integrated combination of transmission and data-processing functions when they offer broadband Internet access to consumers. But the Commission could not credibly make such a finding because there has been, in fact, no such change in the way such services are offered to consumers; as discussed below, the data-processing functions of this service are now, if anything, *more* functionally integrated with broadband transmission than they were in 2002. In short, the Commission was right in 2002, 2005, and 2007, and it would be wrong if it abruptly reversed course now.

**B. Even More Than in 2002, 2005, and 2007, the Data-Processing and Transmission Components of Broadband Internet Access Are Tightly Integrated Components of a Unified Service Offering.**

As the NOI notes, some have argued that the data-processing and transmission components of broadband Internet access service are no longer “integrated” on the theory that consumers no longer rely on their ISPs for email and certain other functionalities.<sup>126</sup> That is

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<sup>126</sup> *Public Knowledge NBP PN #30 Reply Comments* at 8.

untenable for two main reasons. First, these arguments almost invariably ignore the core information-service functionalities, including DNS lookup, that the *Brand X* Court deemed dispositive to its analysis and sufficient to justify characterizing broadband Internet access as a unified “information service.” Second, the transmission component of broadband Internet access is, if anything, even more tightly integrated today than several years ago with indispensable enhanced functionalities, including next-generation security protections.

### **1. DNS Functionality.**

As the Commission explained in 2002 and the Supreme Court affirmed in *Brand X*, Internet access services are integrated information services “*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.” *Cable Modem Order*, 17 FCC Rcd at 4822-23 ¶ 38 (emphasis added). And the *Brand X* Court indicated that the functional integration of broadband transmission with DNS look-up is sufficient by itself (though not necessary) to make the ensuing service a unitary “information service”:

*A user cannot reach a third-party’s Web site without DNS, which (among other things) matches the Web site address the end user types into his browser . . . with the IP address of the Web page’s host server. See P. Albitz & C. Liu, DNS and BIND 10 (4th ed. 2001) (For an Internet user, “DNS is a must. . . . [N]early all of the Internet’s network services use DNS. That includes the World Wide Web, electronic mail, remote terminal access, and file transfer”). . . . Similarly, the Internet service provided by cable companies facilitates access to third-party Web pages by offering consumers the ability to store, or “cache,” popular content on local computer servers. . . . In other words, subscribers can reach third-party Web sites via “the World Wide Web, and browse their contents, [only] because their service provider offers the ‘capability for . . . acquiring, [storing] . . . retrieving [and] utilizing . . . information.’” “The service that Internet access providers offer to members of the public is Internet access,” “not a transparent ability (from the end user’s perspective) to transmit information.”*

*Brand X*, 545 U.S. at 999-1000 (emphasis added) (citations omitted); *Cable Modem Order*, 17 FCC Rcd at 4822 ¶ 38 n.153.

The NOI notes (at ¶ 66) that unusually tech-savvy consumers can obtain access to third-party DNS look-up services. But that is irrelevant to the statutory characterization issue. Again, the relevant question is “what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product[.]” *Brand X*, 545 U.S. at 990. And virtually all consumers today rely on their broadband ISPs to include DNS look-up functionality as an integral part of broadband Internet access service; indeed, we are not aware of any ISP that provides broadband Internet access service *without* DNS look-up. In short, no less today than a few years ago, broadband transmission and DNS look-up capability “are functionally integrated (like the components of a car),” not “functionally separate (like pets and leashes).” *Id.* at 991. Indeed, as the *First Industry Title II Letter* explained (at 8 n.27), “if broadband Internet access providers suddenly chose to disable DNS functionality, Internet access services would be essentially useless to virtually all of the tens of millions of broadband Internet access customers in the U.S. today.”

In any event, the fact that competitors offer a rival service says nothing about the appropriate classification of integrated services offered to consumers. For purposes of determining what a purchaser is “offered,” it makes no difference that some users could theoretically seek out third-party DNS look-up services in addition to those combined with their broadband services, just as it makes no difference that a consumer could buy a car at a car dealership and then replace the wheels or install custom seats. Just as a car dealer is not properly viewed “as ‘offering’ consumers the car’s components in addition to the car itself,” *Brand X*, 545 U.S. at 990, a broadband provider is not properly viewed as offering consumers the individual

components of broadband Internet access; it is properly viewed as offering them a single integrated service. And because that service includes DNS look-up and other enhanced functionalities, it is properly classified as an information service.

## **2. ISP Functions Other Than DNS, Including Security Functions.**

Quite apart from DNS functionality, broadband Internet access providers offer a host of non-transmission-related ISP functions and offerings as integral components of their broadband Internet access services, and consumers expect those services at no extra charge. AT&T, for example, includes the following as part and parcel of its residential Internet access service: security screening, spam protection, pop-up blockers, parental controls, online email and photo storage, instant messaging, and the ability to create a customized browser and personalized home page that automatically retrieves games, weather, news, and other information selected by the user. The NOI does not deny that these are classic “information services,” but it nonetheless proposes to exclude them from the analysis simply by defining them away—as within the scope of “broadband Internet service” but not “broadband Internet connectivity service.” NOI ¶ 1 n.1. But these definitional games are entirely beside the point if *consumers view* these functionalities as part of an “integrated finished product, even to the exclusion of discrete components that compose the product[.]” *Brand X*, 545 U.S. at 990.

They do. As the NOI recognizes, the way in which broadband service is marketed may be relevant in assessing the degree to which broadband Internet access is offered (and perceived by consumers) as a functionally integrated “transmission plus information service.” NOI ¶ 57. And in fact, AT&T’s marketing materials illustrate that Internet access service is perceived and offered as far more than a pure “connectivity” service. If anything, the data-processing functions of broadband Internet access service that the Commission found relevant in the *Cable Modem*

*Order* have become more complex and more essential to the overall offering than they were in 2002.

On its website, for example, AT&T touts a variety of non-“connectivity” features as essential selling points of its broadband service. Indeed, AT&T describes its high-speed broadband offering as an integrated “combination of broadband access, services and content that provides a unique broadband experience, with speed options up to 18 Mbps” and “virtually unlimited photo and e-mail storage, instant messaging with webcam capabilities, Internet radio and a powerful suite of safety and security tools through our AT&T Internet Security Suite[.]” AT&T, Consumer Services – Bundle up, <http://www.att.com/gen/general?pid=7456>. Each of these capabilities is stressed throughout AT&T’s U-verse marketing and customer information.

For example:

- AT&T promotes the fact that it offers U-verse Internet customers “AT&T Messenger with high-quality video and Enhanced Voice Communication that allows new voice-centric features such as call logs and voice mail.” AT&T U-verse High Speed Internet, <http://www.att.com/u-verse/explore/internet-landing.jsp>.
- AT&T also markets U-verse as empowering customers to “[k]eep annoying ads at bay with pop-up blocker.” *Id.* Similarly, it provides “SpamGuard Plus to separate unsolicited junk email from genuine messages.” AT&T U-verse Online Safety and Security, <http://www.att.com/u-verse/explore/safety-security.jsp>.
- Parental controls have become so important to so many customers today that AT&T stresses this feature as a core advantage of its service. The AT&T U-verse website encourages parents to “[c]ustomize your preferences with Parental Controls,” AT&T U-verse High Speed Internet, <http://www.att.com/u-verse/explore/internet-landing.jsp>, which “let you control and limit what your children see or do on the Web.” AT&T U-verse Online Safety and Security, <http://www.att.com/u-verse/explore/safety-security.jsp>.
- With respect to email, AT&T offers “AT&T Mail Plus at no extra cost with virtually unlimited storage, 10 additional email accounts, POP access, and email forwarding.” AT&T U-verse High Speed Internet, <http://www.att.com/u-verse/explore/internet-landing.jsp>. This service includes “[e]-mail Storage with 2 GB capacity for a main account and 250 MB for each of 10 sub-accounts.” AT&T U-verse Email Storage, <http://www.att.com/u-verse/explore/storage-convenience.jsp>.

- AT&T also offers customers a “[p]ersonalized AT&T home page and customized browser.” AT&T U-verse High Speed Internet, <http://www.att.com/u-verse/explore/internet-landing.jsp>.
- On the security front, AT&T offers its customers numerous data-processing services. Among them is the ability to “[p]rotect your email account with anti-virus software, . . . and Address Guard™.” *Id.* Specifically, AddressGuard uses “Disposable E-mail Addresses (DEA) to protect your privacy and protect your e-mail account from abuse such as junk mail and offensive e-mail content.” AT&T U-verse Online Safety and Security, <http://www.att.com/u-verse/explore/safety-security.jsp>. U-verse customers are also offered the ability to “[s]hield your computer from unauthorized access with Firewall software.” AT&T U-verse High Speed Internet, <http://www.att.com/u-verse/explore/internet-landing.jsp>.
- AT&T’s marketing materials also feature its “Residential Gateway,” which, when paired with “encryption security, safeguard[s] against outside access of your Internet connection” and “[d]efends your home network against common Internet threats such as Distributed Denial of Service attacks.” AT&T U-verse Residential Gateway, <http://www.att.com/u-verse/explore/residential-gateway.jsp>.

All of these various service components involve investment, ongoing expense, and customer support requirements; yet, notably, they are provided to AT&T U-verse customers at *no extra charge*. This is because consumers view these as core components of their broadband service offering. The market compels broadband providers to supply these applications and capabilities, and the resulting offer is an integrated whole that responds to that consumer demand.<sup>127</sup>

In the years since *Brand X*, broadband Internet access services have become increasingly more integrated with another core information service offering: access to programming

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<sup>127</sup> See, e.g., Verizon, High Speed Internet: Features & Services, <http://www22.verizon.com/Residential/HighSpeedInternet/Features/Features.htm>; Comcast High Speed Internet, Home & Residential Internet Service Provider (ISP), <http://www.comcast.com/Corporate/Learn/HighSpeedInternet/highspeedinternet.html?INTCMP=ILCCOMCOMHS20906>; Time Warner Cable, High-Speed Online, East, <http://www.timewarnercable.com/East/learn/hso/>; Cox, Ultimate Internet Overview, High Speed Wideband Internet serving Northern Virginia, <http://ww2.cox.com/residential/northernvirginia/internet/ultimate-internet.cox>; Optimum - Optimum Online - Faster Internet, <http://www.optimum.com/online/features/index.jsp>; Charter Communications, <http://www.charter.com/Visitors/Products.aspx?MenuItem=39>.

content.<sup>128</sup> For example, AT&T’s broadband Internet access service includes access to a selection of content offerings—at no additional charge.<sup>129</sup> As part of subscribing to AT&T’s service, a customer receives access to ESPN360.com (recently re-branded as ESPN3.com), which contains a wide range of premium sports-related content from ESPN. This content from ESPN, and certain other forms of premium Internet content, are *only* available to broadband Internet access service customers whose ISPs have agreed to purchase the content from the relevant content provider. Thus, the content is necessarily “integrated” with the broadband Internet access service. Indeed, AT&T touts such content as one of the features of its service, calling it an “amazing Broadband Extra[], at no cost.” *Id.*

The development of complex security functionalities also shows that broadband Internet access service has become even more integrated with enhanced functionalities today than it was when the Commission deemed Internet access services all unified “information services.” A significant and growing number of providers now offer broadband Internet access services with various network-oriented, security-related information-processing capabilities that are used to address threats against their networks and their customers. These include processing Internet access traffic flows to check for telltale patterns of worms, viruses, botnets, denial-of-service attacks, and the like; scrubbing email traffic to remove spam; and other techniques that involve interaction with stored information (*e.g.*, databases of known computer threats) to address security and other concerns. In many cases, a consumer cannot even use the Internet access service of her choice *without* receiving the enhanced functionality provided by these security

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<sup>128</sup> See *Wireline Broadband Order*, 20 FCC Rcd at 14868 ¶ 23 n.61 (information or “enhanced” services included “applications that . . . provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.”).

<sup>129</sup> See AT&T, AT&T Broadband Extras, <http://www.att.com/gen/general?pid=8831>.

features. And all of these offerings fall squarely within the definition of an “information service”: “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(20).

For example, AT&T employs an Internet security analysis platform (known as “FLOOD”) that processes detailed network flow data sent to and received by AT&T’s wireline and wireless users (including source, destination, IP protocol, source port, designation TCP flags, packet count, byte count, start/end time for activity) in an effort to detect anomalies and track changes in network activity over time. AT&T uses this platform not only to secure its network as a whole, but also to help individual end users address specific security problems with their computers, personal data, and software. When AT&T’s network analysis detects that a given user’s system is behaving oddly and may be infected by malware, for example, AT&T may directly inform that user by email and, when appropriate, instruct the user on how to download the anti-virus software, provided by AT&T, needed to eliminate the infection. AT&T also forwards system-side threat information to a leading Internet security company, whose services AT&T brands in its own name (“AT&T Security Suite—powered by McAfee”) and includes at no extra charge in many of its most popular broadband Internet access packages. The security company incorporates the new information into its own security measures and then—on AT&T’s behalf—sends security updates to AT&T customers that use its service.<sup>130</sup>

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<sup>130</sup> AT&T complements FLOOD with many additional activities that are not used to help with ongoing real-time communications, but are critical to the overall service AT&T offers its subscribers. These include malware analysis (the process of executing malware in a safe environment to observe its behavior to determine a means by which malware can be identified to prevent further distribution), forensics analysis (determining the root cause—what, when, how and who—of attacks), exploit research (researching the latest exploits and attack techniques used by attackers), vulnerability assessment (determining the susceptibility of networks to attacks through testing and source code analysis), algorithmic research, and general security research.



AT&T is not alone in providing integrated network security features that are readily apparent and highly valuable to individual end users. For example, Comcast has begun introducing a “Constant Guard” security program, under which it notifies end users (via their web browsers) of potential malware infection.<sup>131</sup> It also employs a Customer Security Assurance (CSA) program that contacts customers to respond to issues relating to bots, spam, and virus-infected PCs, as well as other security-related issues. And it provides free, integrated software that aids in spyware detection and removal, as well as a pop-up ad blocker and anti-phishing software. In addition, Comcast’s online security education web portal includes real-time security alerts, tips, tools, and other resources, like Internet safety games, that help educate and protect consumers. And Comcast’s network actively monitors traffic to help fight spam, phishing attacks, and viruses—all to the direct benefit of consumers.

**C. The Commission May Not “Change Its Mind” About Inconvenient Empirical Facts That Limit Its Authority to Regulate Internet Services.**

As discussed, the Commission could not reasonably find that facts have *changed* since its 2002, 2005, and 2007 determinations in ways that could possibly make it easier, rather than harder, to classify broadband Internet access as containing a discrete “telecommunications service” component. The Commission might thus wish to posit that it was somehow “wrong” in the factual determinations that it made in those earlier rulings and that the judiciary subsequently affirmed. But this rationale is unavailable as well. To begin with, the Commission’s factual determinations in 2002, 2005, and 2007 were correct then, for the same reasons they are correct today, as explained above.

Just as important, the *factual* issues central to these statutory definitions are not amenable to a *policy*-based “change of mind.” When Congress directs the Commission to exercise policy

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<sup>131</sup> Comcast.net Security – Constant Guard, <http://security.comcast.net/constantguard/>.

discretion on a particular topic—such as the appropriate beneficiaries of universal service support or the “public interest” standard for broadcasting licenses, the Commission does indeed have broad authority to reverse course to reflect a change in policy priorities or even political orientation.<sup>132</sup> But no agency may “change its mind” about *empirical facts*—in this case, the functional integration of DNS look-up and similar functionalities within broadband Internet access—simply because, under the governing statute, those facts happen to impede whatever policy choices the agency might like to make. Here, if the Commission were to “change its mind” about the integration of broadband transmission services with core information-service functionalities such as DNS look-up, it would rightly be perceived as making up facts in order to justify what the Washington Post aptly describes as a “naked power grab.”<sup>133</sup> But an agency’s desire to expand its own power, in the wake of a judicial defeat that draws its jurisdiction in doubt, is not a legitimate reason for the agency to change its mind about inconvenient facts obstructing that jurisdiction.<sup>134</sup>

Similarly, *Brand X* does not grant the Commission carte blanche to change course on this statutory characterization question, as the Commission assumes it does.<sup>135</sup> The *Brand X* Court held that the statute did not dispositively establish the status of Internet access because that status rests on a factual question: what end users perceive they are offered. The FCC receives some

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<sup>132</sup> See 47 U.S.C. § 303; 47 U.S.C. § 254(b).

<sup>133</sup> Editorial, *Internet oversight is needed, but not in the form of FCC regulation*, Wash. Post, Apr. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041604610.html>.

<sup>134</sup> Cf. Prepared Remarks of Commissioner Mignon L. Clyburn at Media Institute Luncheon, *Broadband Authority and the Illusion of Regulatory Certainty*, June 3, 2010, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-298599A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298599A1.pdf).

<sup>135</sup> See, e.g., Austin Schlick, General Counsel, Federal Communications Commission, *A Third-Way Legal Framework For Addressing The Comcast Dilemma*, May 6, 2010 (section entitled “The Commission’s Options”), <http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html#book-3> (“Schlick “Third Way” Statement”).

deference in resolving that factual issue, not in classifying services simply to suit its policy preferences. And the answer to that factual question is unavoidably the same today as it was in 2002, 2005, and 2007.

In any event, even where a change in policy would not require an agency to make up (or ignore) controlling facts, an agency still faces important constraints on its ability to trigger a sea change in regulatory policy without congressional approval. As the Supreme Court explained in its recent *Fox* decision, an agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate” when “its new policy rests upon *factual findings that contradict those which underlay its prior policy*” or “when its prior policy has engendered *serious reliance interests* that must be taken into account.”<sup>136</sup> Here, the Commission could not reclassify broadband Internet access services without both (1) “contradict[ing]” the still-unchanged facts (such as the integrated and pervasive use of DNS look-up) that it and the Supreme Court have correctly deemed sufficient to characterize broadband Internet access as a unitary “information service,” and (2) defeating the “serious reliance interests” that broadband Internet access providers have developed in the maintenance of the existing investment-friendly regime for the past decade—a regime that has fostered multi-billion-dollar investments in broadband networks and services.

Indeed, the Internet has succeeded largely because broadband providers invested scores of billions of dollars into broadband network infrastructure, all on the assumption that the Commission would keep its word. *See AT&T Net Neutrality Comments* at 82. In 2009 alone, AT&T devoted approximately two-thirds of its *roughly 18 billion dollar* capital expenditure

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<sup>136</sup> *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-11 (2009) (emphasis added); *see also id.* at 1824 (Kennedy, J., concurring in part and concurring in the judgment) (an “agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past”).

budget to extending and enhancing its wireline and wireless broadband networks. *Id.* at 5. Wireless providers have been investing billions more in 3G, WiMAX, and 4G (LTE) wireless broadband networks. *Id.* at 84-85. For the twelve months ending June 2009, wireless providers reported capital investments of \$19.5 billion (not including spectrum). *Id.* at 147. Cable companies, too, have invested billions upon billions of dollars to upgrade their best-effort Internet access platforms to DOCSIS 3.0 so that their end users can enjoy download and upload speeds 10-50 times faster than in 2005. *Id.* at 115.<sup>137</sup> Again, an agency’s desire to expand its authority is not an adequate justification for thwarting these reliance interests.

Finally, if the Communications Act were so elastic as to authorize the Commission to decide one day to maintain a deregulatory regime under Title I and the next day to completely transform Internet policy by “reclassifying” the industry under Title II, it would raise serious constitutional concerns under the nondelegation doctrine.<sup>138</sup> The Act should be construed to avoid those concerns.<sup>139</sup> As in other contexts, “such broad and unusual authority through an implicit delegation . . . is not sustainable” because “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say,

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<sup>137</sup> See also Robert E. Atkinson & Ivy E. Schultz, Columbia Institute for Tele-Information, *Broadband in America: Where It Is and It Is Going (According to Broadband Service Providers)*, at 11 (Nov. 11, 2009), [http://www4.gsb.columbia.edu/null/download?&exclusive=filemgr.download&file\\_id=7212786](http://www4.gsb.columbia.edu/null/download?&exclusive=filemgr.download&file_id=7212786) (discussing tens of billions of dollars invested annually in broadband infrastructure).

<sup>138</sup> See, e.g., *Whitman v. American Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001) (“[W]hen Congress confers decisionmaking authority upon agencies, Congress must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.”) (internal quotations and emphasis omitted); see generally *USTA Letter* (attached as Exh. B).

<sup>139</sup> See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1968); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002) (the “constitutional avoidance canon of statutory interpretation trumps *Chevron* deference”).

hide elephants in mouseholes.”<sup>140</sup> For that reason alone, the Commission could not properly regulate broadband Internet access for the first time on the pretext of “filling [statutory] gaps.”

NOI ¶ 18.

**D. The Commission May Not—and Should Not Try To—Overcome These Factual Impediments to Reclassification by Invoking High-Risk Doctrinal Shortcuts Such as Revocation of the “Mutual Exclusivity” Principle or an Overbroad Interpretation of the “Adjunct-to-Basic” Doctrine.**

Faced with the difficulty of changing its mind about the relevant *factual* issue—functional integration of broadband transmission with information-service functionalities such as DNS look-up—the Commission might be tempted to alter the deep structure of American Internet policy by changing its view of the *law* in one of two closely related ways: either by revoking the “mutual exclusivity” position embraced in the *Stevens Report* (see above) or by broadly construing the “adjunct-to-basic” doctrine, mentioned in paragraph 59 of the NOI. These doctrinal shortcuts would themselves be unlawful. Just as important, even if they were upheld in court, they would greatly expand the unintended application of the Commission’s reclassification logic to Internet services other than broadband Internet access.

***Mutual exclusivity.*** As discussed, the Commission concluded shortly after passage of the 1996 Act that “Congress intended the categories of ‘telecommunications service’ and ‘information service’ to be mutually exclusive,” such that an integrated service must be either an “information service” or a “telecommunications service” but not both. *Stevens Report*, 13 FCC Rcd at 11508 ¶ 13. That “mutual exclusivity” conclusion is not only reasonable, but compelled by the plain statutory language, which focuses on what the provider is “*offering*” to consumers. If a provider offers transmission integrated with data-processing, storage, or retrieval functionalities, it is by definition *not* offering the *sine qua non* of a “telecommunications

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<sup>140</sup> *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006) (quoting *Whitman*, 531 U.S. at 468).

service”—“transmission . . . *without* change in the form or content of the information as sent and received.”<sup>141</sup> In passage after passage, the *Stevens Report* found—correctly—that the statutory language, structure, and history all compel that conclusion.<sup>142</sup>

In short, Congress has spoken to this precise issue and confirmed that the concepts of “telecommunications service” and “information service” are mutually exclusive. The *Brand X* Court did not hold otherwise. Instead, the Court held: “*Even if* it is linguistically permissible to say that the car dealership ‘offers’ engines when it offers cars, that shows, *at most*, that the term ‘offer,’ when applied to a commercial transaction, is ambiguous about whether it describes only the offered finished product, or the product’s discrete components as well.” *Brand X*, 545 U.S. at 990 (emphasis added). In other words, the Court upheld an interpretation of the statute that was consistent with the Commission’s “mutual exclusivity” position on the ground that the statute was “at most” ambiguous. The Court did not—and, to affirm the Commission, did not need to—exclude the possibility that the statute *required* that reading. And as discussed, both the statutory text and the broader statutory framework do, in fact, compel that reading, as the Commission has rightly found in order after order since passage of the 1996 Act.

Other passages in *Brand X* strongly support the same conclusion. The parties advocating a broader scope for Title II had urged the Court to reject the Commission’s mutual-exclusivity

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<sup>141</sup> 47 U.S.C. § 153(43) (definition of “telecommunications”; emphasis added); *see id.* § 153(46) (defining “telecommunications service” as “the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used”).

<sup>142</sup> *E.g.*, *Stevens Report*, 13 FCC Rcd at 11520-25, 11529-30, 11534 ¶¶ 39, 41 n.79, 43-45, 57-59, 69 n.138. For example, the *Stevens Report* explained that the “language and legislative history of both the House and Senate bills indicate that the drafters of each bill regarded telecommunications services and information services as mutually exclusive categories,” *id.* at 11522-23 ¶ 43, and concluded that “[a]n approach in which a broad range of information service providers are simultaneously classed as telecommunications carriers, and thus presumptively subject to the broad range of Title II constraints, could seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry,” *id.* at 11524 ¶ 46.

position because they wished to impose Title II regulation on broadband Internet access providers. The Supreme Court rejected their argument. As it explained, if the Communications Act were construed to “classif[y] as telecommunications carriers all entities that use telecommunications inputs to provide information service,” as these parties urged, the Act “would subject to mandatory common-carrier regulation *all information-service providers that use telecommunications as an input to provide information service to the public.*” *Brand X*, 545 U.S. at 994.<sup>143</sup> As the Court suggested, Congress did not intend that absurd result. Similarly, as the Commission previously explained in the *Stevens Report*, “the statute and the legislative history” preclude any conclusion that Congress ever intended to “subject [information] services to regulatory constraints by creating an expanded ‘telecommunications service’ category incorporating enhanced services,” thereby “effect[ing] a major change in the regulatory treatment of those services.” *Stevens Report*, 13 FCC Rcd at 11524 ¶ 45.

***Adjunct-to-basic.*** In the same vein, the NOI asks (at ¶ 59) whether the Commission should recharacterize the core characteristics of broadband Internet access—presumably including DNS look-up—as falling within the scope of the “adjunct-to-basic” doctrine, such that the service as a whole would be characterized as a Title II “telecommunications service” even though it contains integrated “information service” components. This doctrinal approach would contradict the statutory scheme for largely the same reasons as any repudiation of the mutual-exclusivity principle.

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<sup>143</sup> See also Brief for Petitioner Federal Communications Commission, *National Cable & Telecomm’s Ass’n v. Brand X Internet Servs.*, Nos. 04-277 & 04-281, 2005 WL 122088, at \*26 (U.S. Sup. Ct. filed Jan. 19, 2005) (“Given that the Act’s definition of ‘information service’ expressly contemplates a ‘telecommunications’ component, whereas the definition of ‘telecommunications service’ does not similarly contemplate an information service component, the regulatory necessity of placing ‘offering[s]’ in one mutually exclusive category or the other amply justifies the FCC’s decision to place ‘mixed’ or ‘hybrid’ services like cable modem service on the information services side of the line.”).

Under the adjunct-to-basic doctrine, defined long before the rise of the commercial Internet, an enhanced-service functionality integrated with a transmission service may not convert that service into an “information service” if it merely “facilitate[s] establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service.”<sup>144</sup> The Commission has suggested that this doctrine is now embodied in the “telecommunications management exception” in the final clause of 47 U.S.C. § 153(20), which defines “information service.” *Non-Accounting Safeguards Order*, 20 FCC Rcd at 21958 ¶ 107.

As this description suggests, the Commission has exclusively employed the adjunct-to-basic doctrine to exercise Title II jurisdiction over legacy telephone (“basic”) services, and never to Internet-based services. Internet access services, unlike PSTN calls, do not typically involve “the establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service.”<sup>145</sup> And, unlike legacy voice telephone services, they are inherently designed as information services that enable end users to make use of innumerable other information services.

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<sup>144</sup> First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, 11 FCC Rcd 21905, 21958 ¶ 107 (1996) (“*Non-Accounting Safeguards Order*”); see also Order and Notice of Proposed Rulemaking, *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd 4826, 4831 ¶ 16 (2005) (“*Calling Card Order*”) (adjunct-to-basic services are “incidental” to the underlying communications service, do not change the “fundamental character” of the communications service, and, from the consumer’s perspective, either have only a “trivial impact” on the service or are simply “a necessary precondition to placing a telephone call”); see also Declaratory Ruling and Report and Order, *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290, 7295 ¶ 14-15 (2006) (finding that playing an advertisement had at most a trivial effect on the calling capability).

<sup>145</sup> *Non-Accounting Safeguards Order*, 20 FCC Rcd at 21958 ¶ 107; see John Naughton, A BRIEF HISTORY OF THE FUTURE 102 (2001) (noting that Internet communications are generally broken down into individual packets that are routed separately, often through different routes from source to destination).



DNS functionality, for example, certainly cannot be characterized as “adjunct-to-basic.” In the *Brand X* litigation, the Commission characterized DNS, like caching, as a sufficient (but not necessary) feature warranting an “information service” classification for broadband Internet access service as a whole. And the Court thus deemed DNS look-up, like caching, as a full information-service functionality that, when integrated with broadband transmission, produced an integrated information service. *Brand X*, 545 U.S. at 999-1000. The courts would react with deep and well-justified skepticism if the Commission were suddenly to recharacterize DNS look-up in a transparent attempt to assert Title II jurisdiction over broadband Internet access services.

In all events, DNS could not plausibly qualify as “adjunct-to-basic”—or fall within the “management” exception of 47 U.S.C. § 153(20)—even as an original matter. DNS involves highly complex interactions among computers dispersed throughout the Internet and exemplifies the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications.” 47 U.S.C. § 153(20). In addition, DNS uses stored and constantly updated information to convert human language (such as website names) into numerical data (IP addresses). Absent that conversion, subscribers would have to discover, and then type in, a purely numerical IP address whenever they wanted to access any website on the Internet. Thus, broadband Internet access providers use DNS functionality not merely (or even primarily) to run their networks more efficiently, but to make the Internet as a whole easily accessible and convenient *for their subscribers*. By itself, that feature—“useful[ness] to end users” rather than simply providers—excludes DNS functionality from the telecommunications-management category.<sup>146</sup>

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<sup>146</sup> Memorandum Opinion and Order, *Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, Bell Operating Companies*, 13 FCC Rcd 2627, 2639 ¶ 18 (Com. Carr. Bur. 1998) (“1998 272

The DNS functionality that ISPs offer end users does not fit within the adjunct-to-basic category for the independent reason that it is associated with a variety of additional “smart” features. For example, DNS enables users to perform “reverse look-ups”: it enables a user to access stored information to convert a *numeric* IP address into a domain name (*e.g.*, the name of a website), which, among other things, facilitates a user’s ability to perform troubleshooting tasks and to obtain the identity of other users or destinations on the Internet. DNS functionality also enables other similarly “smart” features, like DNS “assist” capabilities. For example, if a user types a URL that does not properly identify an accessible webpage, the ISP’s DNS functionality may respond with a “URL redirect,” which reflects the ISP’s judgment about which webpage the user meant to reach, or may instead present the user with a full-blown menu of alternatives to the original query, based on educated guesses about the type of information the user seeks.<sup>147</sup>

Both of these DNS capabilities (reverse look-up and assist) are analogous to (though far more sophisticated than) “reverse directory assistance” service in the POTS environment, which

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*Forbearance Order*”) (“Although the ‘telecommunications management exception’ encompasses adjunct services, the storage and retrieval functions associated with the BOCs’ automatic location identification databases provide information that is *useful to end users, rather than carriers*. As a consequence, those functions are not adjunct services and cannot be classified as telecommunications services on that basis[.]”) (emphasis added); *see also* Memorandum Opinion & Order, *North American Telecommunications Association Petition for Declaratory Ruling under Section 64.702 of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, 101 FCC 2d 349 (1985) (“NATA Centrex Order”), on recon., 3 FCC Rcd 4385, 4391 ¶¶ 45-46 (1988).

<sup>147</sup> *See, e.g.*, Comcast, *Domain Helper National Rollout Begins*, Comcast Voices – The Official Comcast Blog, Aug. 4, 2009, <http://blog.comcast.com/2009/08/domain-helper-national-rollout-begins.html>; Optimum, *DNS Assistance*, <http://www.optimum.net/Article/DNS>; Verizon, *Help & Support - Opting out of DNS Assistance*, [http://www.verizon.net/central/vzc.portal?\\_nfpb=true&\\_pageLabel=vzc\\_help\\_contentDisplay&case=dns\\_assist](http://www.verizon.net/central/vzc.portal?_nfpb=true&_pageLabel=vzc_help_contentDisplay&case=dns_assist).

the Commission has long held to be an information service,<sup>148</sup> in that they are designed to be “useful to end users, rather than carriers,”<sup>149</sup> and they provide consumers with features and information “far beyond what the [provider] need[s] to ensure the proper transmission of the” user’s original communication.<sup>150</sup> Indeed, DNS and its many capabilities are core information-service functionalities at the heart of broadband Internet access service because, again, they involve “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(20). They therefore fall well outside the “adjunct-to-basic” and “telecommunications management” categories.

The same conclusion follows for the newer security features that are increasingly integrated within Internet access service. In key respects, these features resemble (but are far more sophisticated than) E911 services, which have been deemed *not* “adjunct-to-basic” because they involve the “retriev[al] of information from the [telcos’] automatic location identification databases” and allow third parties (*i.e.*, the public safety organizations) “to store information regarding PSAP assignments and, in some instances, individual telephone subscribers in these databases.”<sup>151</sup> Similarly here, AT&T and other broadband ISPs provide integrated security services that involve complex storage, retrieval, and analysis of information concerning malware and website security, and they share the data with security software companies, which, in turn,

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<sup>148</sup> See, e.g., *Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, As Amended, and Request for Relief to Provide International Directory Assistance Services*, 19 FCC Rcd 5211, 5225 ¶ 23 (2004) (“Electronic and operator-assisted reverse directory assistance services are information services.”).

<sup>149</sup> *1998 272 Forbearance Order*, 13 FCC Rcd at 2639 ¶ 18.

<sup>150</sup> *Id.* at 2638 ¶ 17.

<sup>151</sup> *Id.*

incorporate this information into Internet security software updates and mechanisms that are distributed to consumers. AT&T also identifies users whose computers or software may be infected by malware, individually notifies them of that fact, and sends them downloadable software to help them remedy the problem. These security features help protect consumers' computers, their software, and their confidential data—all of which create benefits for individual end users unrelated to the transmission of any individual Internet-based communication. In that respect, too, these integrated functionalities fall outside the adjunct-to-basic (and “telecommunications management”) doctrine.<sup>152</sup>

Finally, even if the Commission *could* lawfully repudiate the “mutual exclusivity” principle or expand the “adjunct-to-basic” doctrine in an effort to classify broadband Internet access as a Title II service, it *should not* do so, given the larger negative consequences for the Internet as a whole. If DNS look-up or security features were insufficient to maintain a Title I information-service classification for *broadband Internet access* providers even when those features are integrated with transmission functionality, there would be no limiting principle that would prevent Title II regulation from encompassing much of the rest of the Internet ecosystem. The Commission would face some version of that slippery slope problem no matter what rationale it invoked to “reclassify” broadband Internet access providers. To take the most obvious example, any such rationale would automatically impose Title II regulation, for the first time, on so-called “independent” ISPs like Earthlink and AOL that offer functionally the same service to the public even though they lease, rather than own, last-mile transmission facilities. But the sheer breadth of the collateral damage the Commission would inflict on the Internet as a whole would increase with any effort to expand the statutory category of “telecommunications

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<sup>152</sup> See *id.* at 2639 ¶ 18.

service” (or limit the category of “information service”)—as, again, the Supreme Court made abundantly clear in *Brand X*.

**E. Section 230 Further Confirms the Unlawfulness of Title II Reclassification.**

Any Title II reclassification of broadband Internet access service would also conflict with section 230 of the Communications Act—a problem the NOI does not mention, let alone try to resolve. First, section 230(c) states:

Protection for “good samaritan” blocking and screening of offensive material . . .  
(2) Civil liability. No provider . . . of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to *restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable*, whether or not such material is constitutionally protected[.]

47 U.S.C. § 230(c) (emphasis added). Section 230(c) thus authorizes—indeed, encourages—broadband ISPs to eliminate or block “objectionable” content from their services.<sup>153</sup> For example, section 230(c) protects (1) a broadband provider’s right to offer a pornography-free or racism-free Internet access service; (2) a wireless provider’s right to provide a child-friendly service with controlled access to the Internet; and (3) a wireless provider’s right not to include “offensive” applications, such as the notorious “Baby Shaker” application, in the provider’s application store.<sup>154</sup> This statutory provision thus precludes any interpretation of the Communications Act that would create a common-carrier regime at odds with such editorial discretion. And that conflict by itself precludes the proposed Title II reclassification to the extent it would require broadband ISPs to carry any and all Internet applications and content indiscriminately.

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<sup>153</sup> Section 230 defines “interactive computer services” to include, *inter alia*, any “system . . . that provides or enables computer access by multiple users to a computer server, including specifically a . . . system that provides access to the Internet[.]” 47 U.S.C. § 230(f)(2). Broadband ISPs inarguably fall into that category.

<sup>154</sup> See *AT&T Net Neutrality Reply Comments* at 82 n.169, 142-43.

Second, and more generally, section 230 embodies a congressional policy judgment that broadband providers may and sometimes *should* exercise editorial discretion over the content and applications that reach their end users. Indeed, section 230 encourages the exercise of such editorial discretion not only by prohibiting government interference with it, but by categorically preempting any *private* liability that ISPs might otherwise incur. As explained by a sponsor of what ultimately became section 230, Congress enacted that provision to “establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that *we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet* because frankly the Internet has grown up to be what it is without that kind of help from the Government.”<sup>155</sup> Section 230(b)(2) embraces this sentiment in establishing that “the policy of the United States” is for the Internet to develop “unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). That congressional policy judgment forecloses any Commission decision to subject broadband ISPs to common-carrier regulation under Title II.

### **III. TITLE II RECLASSIFICATION FOR ANY BROADBAND INTERNET ACCESS SERVICE WOULD BE ARBITRARY AND CAPRICIOUS.**

Even if the Commission could somehow square its reclassification proposal with the *definitional provisions* of the Communications Act, it still should not adopt that proposal, because doing so would cause enormous industry and consumer harms without any countervailing consumer or other benefit—except for enlargement of the Commission’s own regulatory power, which cannot itself justify this change in course. Any Title II reclassification would thus be invalidated as arbitrary and capricious.

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<sup>155</sup> 141 Cong. Rec. H8460-01, H8470 (1995) (statement of Rep. Cox) (emphasis added).

**A. Reclassification Would Cause Substantial Harms with No Commensurate Benefits.**

In the *Wireline Broadband Order*, the Commission rejected common-carrier regulation in the broadband Internet access context by confirming the “information service” classification of wireline broadband Internet access and by eliminating the unbundling requirement of the *Computer Inquiry* rules. As the Commission explained, such regulation does far more harm than good, given the dynamic and competitive nature of the broadband industry.<sup>156</sup> That determination was not new; it built on the main conclusion drawn by Congress and the Commission itself over its multi-decade history of unregulation: the Internet serves consumers best when the government leaves it alone.<sup>157</sup>

The Commission would have no legal or empirical basis for reversing those findings now. Indeed, even if the Commission were addressing the issue for the first time, any fair reading of the facts would still lead it to conclude that common-carriage regulation would harm the Internet. Common-carrier regulation might have made sense for static, highly regulated industries such as the railroad industry of 1887, for which Congress wrote the Interstate Commerce Act—the eventual model for the Communications Act of 1934. And it might have made sense for the highly static telephone business of 1934. In those days, the Bell System had a vertically integrated, state-sanctioned monopoly over local and long-distance services and telephone equipment manufacturing. Even fifty years later, at the time of its break-up, the Bell

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<sup>156</sup> *Wireline Broadband Order*, 20 FCC Rcd at 14865, 14877-88 ¶¶ 19, 44.

<sup>157</sup> See 47 U.S.C. § 230; Jason Oxman, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31, Office of Plans and Policy, FCC (July 1999); Remarks of William E. Kennard, Chairman, Federal Communications Commission before the National Cable Television Association, Chicago, Illinois, “The Road Not Taken: Building a Broadband Future for America” (June 15, 1999), <http://www.fcc.gov/Speeches/Kennard/spwek921.html> (declining to subject cable modem services to common carrier regulation because, “[i]f we’ve learned anything about the Internet in government over the last 15 years, it’s that it thrived quite nicely without the intervention of government”).

System still owned the overwhelming majority of the nation’s telephone lines, faced essentially no competition in its local exchange markets (often because it held de jure exclusive franchises), dominated the national long-distance market, and ran almost the entire equipment manufacturing industry as well.

Since then, however, “the telecoms industry has changed out of all recognition, transformed by a cornucopia of new technologies beyond mere telephone calls, and a herd of robust new competitors.”<sup>158</sup> In the Internet ecosystem, technological change is rapid and unpredictable, competitive entry is the reality, and new alliances continuously arise to satisfy evolving customer needs. As a result, competition is burgeoning. Clearwire already offers 51 million Americans a third fixed broadband option,<sup>159</sup> and two, three, and sometimes four or more mobile broadband operators offer service in the overwhelming majority of U.S. census tracts. It would make no more sense to apply Title II “nondiscrimination” rules and other common-carrier obligations in this competitive environment than to apply such rules to, say, the relationships between computer chip manufacturers and the developers of operating systems, or between those operating system developers and the developers of applications software; or between supermarket chains and their suppliers. In all of these contexts, regulatory intervention is inappropriate because market forces are the best guardians of consumer welfare, and the antitrust laws are available to correct any market failures if and when they arise.<sup>160</sup>

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<sup>158</sup> *Telecoms mergers: Healthy network effects*, The Economist, May 7, 2005, at 53.

<sup>159</sup> *Clearwire Press Release*.

<sup>160</sup> The NOI badly misrepresents AT&T’s position on these issues, suggesting that AT&T “expressed [its] acceptance of the basic standards articulated in sections 201 and 202” for Internet access services. NOI ¶ 76 n.200. That is false. In its *Net Neutrality Reply Comments* (at 33-34), AT&T argued that *if* the Commission adopted a “nondiscrimination” rule to govern business-to-business QoS arrangements, that rule would contradict section 202 unless it contained the “unreasonable” qualifier applicable even to legacy Title II telephone services. And AT&T observed that this “unreasonable” qualifier was both administrable and indispensable to



The Internet has thrived precisely because the absence of government intervention has encouraged a climate of free-wheeling experimentation with new services and one-off business alliances. Common-carrier rules would deter such experimentation by exacerbating its downside risks. Each provider would have reason to fear that, whenever an experimental service or business relationship turns out to be unprofitable, common-carrier rules may nonetheless require the carrier to keep offering the same unprofitable service to additional customers or enter into similar unpromising business relationships with additional partners. This “in for a penny, in for a pound” principle of common carriage is thus inimical to the creative customization integral to the Internet’s success.

Common-carrier rules in this context would also cause unprecedented regulatory uncertainty. As Princeton professor Edward Felten explains, “[a]nti-discrimination rules can be hard to write, and hard to enforce.”<sup>161</sup> As a result, such rules would spawn a new, highly destabilizing round of implementation controversies that could dwarf post-1996 Act litigation in scope and intensity. Even in the most settled industry environments, a ban on “unreasonable discrimination” is inherently indeterminate. “Discrimination” is not a self-defining concept, and there is often room for disagreement about (for example) whether two services are “like” or whether the complainant is “similarly situated” to the customer whose existing business deal it wants the defendant to replicate for the complainant’s benefit.<sup>162</sup> And in part because price discrimination is welfare-maximizing in many contexts, the case law abounds with disputes

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the application of the section 202 “nondiscrimination” rule to those legacy services. AT&T did *not* say that the underlying nondiscrimination rule, even if accompanied by an “unreasonable” qualifier, would be appropriate for *broadband Internet access services*.

<sup>161</sup> Edward Felten, *Nuts and Bolts of Network Neutrality*, at 5-6 (July 6, 2006), <http://itpolicy.princeton.edu/pub/neutrality.pdf> (formatting altered).

<sup>162</sup> See generally *MCI Telecomm’ns Corp. v. FCC*, 917 F.2d 30, 37-46 (D.C. Cir. 1990).

about whether specific instances of discrimination are justified as “reasonable.”<sup>163</sup> Finally, although the indeterminacy of common-carrier rules makes for regulatory uncertainty in any industry, the problem would be particularly intense in the Internet environment, where the rapid evolution of services and business models would defy the efforts of any regulatory body to keep up.<sup>164</sup> The NOI makes no serious effort to address any of these concerns.

Reclassification under Title II would also expose broadband providers, for the first time, to *self-executing* prohibitions that could render them liable for a range of conduct that some future Commission finds “unjust” or “unreasonable,” no matter what abstract assurances this Commission might now try to give about the narrow scope of those prohibitions. This stands in stark contrast to the pre-*Comcast* Title I regime, where providers could not be held liable for any conduct that the Commission had not affirmatively proscribed. Under the proposed reclassification, therefore, even if the Commission forbore from all substantive provisions of Title II besides sections 201 and 202, broadband providers could still face potential and uncertain liability whenever they engage in anti-piracy measures, network-management techniques, or various commercial arrangements with particular applications and content providers. That fear could chill such initiatives, to the detriment of broadband providers, application and content providers, and ultimately consumers.

Nor does the NOI even mention an entire set of regulatory consequences that would flow from a Title II reclassification: potential retail pricing constraints. The Commission has taken pains to assure the industry that its reclassification decision would merely restore the regulatory status quo before *Comcast*. Those assurances are hollow in many respects, but they are particularly oblivious to the predominant role that sections 201 and 202 play in the legacy

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<sup>163</sup> See generally *id.*; *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

<sup>164</sup> *Wireline Broadband Order*, 20 FCC Rcd at 14865 ¶ 19.

telephone world: regulating the relationship between telephone companies and retail end users. Again, the prohibitions of sections 201 and 202 are self-executing, and any reclassification decision might thus expose broadband providers for the first time to the threat of liability when they engage in (for example) creative retail pricing arrangements. That threat, too, could cause broadband providers to err on the side of extreme conservatism and uniformity in their retail offerings, again to the detriment of consumers. The Commission has identified *no* market failure or other problem that could possibly justify this new intervention in retail broadband relationships, *see* Part One, *supra*, but it would impose all the costs and uncertainties of that intervention nonetheless. That, too, would be arbitrary and capricious.

**B. The Commission May Not Reclassify Broadband Internet Access Services Without Facing Up to the Logical Implications for the Internet as a Whole.**

As AT&T explained in its *Net Neutrality Reply Comments* (at 162-64), Title II reclassification would be a clumsy tool for achieving the Commission's policy objectives because it would inflict needless burdens not only on broadband providers, but on many other Internet-based providers as well. The Commission now perversely encourages commenters to *avoid talking about that concern* in their comments here, on the theory that these services are somehow "outside the scope of this proceeding." NOI ¶ 107. This is arbitrary and irresponsible. The Commission is proposing to open a Pandora's Box by altering the legal test for determining whether a provider falls within the scope of Title II. That determination would have self-executing, logical consequences for the rest of the Internet ecosystem, consequences that even some supporters of net regulation now candidly acknowledge.<sup>165</sup> The Commission must face up

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<sup>165</sup> See Letter from Matthew Friendly, Data Foundry, to Marlene Dortch, FCC, GN Docket No. 09-51 (filed June 11, 2010), Attachment at 3 (arguing that, to be effective, reclassification "would sweep in a far larger class of regulated entities" and would "subject[] to potential regulation . . . the non facilities based information service providers that previously were not subject to regulation under Title II").

to those logical consequences before triggering them, not after.<sup>166</sup> “When the government regulates in a way that” adversely affects the public, “it owes them reasonable candor. If it provides that, the affected citizens at least know that the government has faced up to the meaning of its choice. The requirement of reasoned decisionmaking ensures this result and prevents officials from cowering behind bureaucratic mumbo-jumbo.”<sup>167</sup>

**1. A Provider’s Ownership of Facilities Is Irrelevant to the Statutory Classification of the Services It Offers the Public.**

The NOI appears to embrace two regulatory distinctions as a basis for broadband policy: (1) a distinction between “facilities-based” and “non-facilities-based” providers and (2) a distinction between last-mile and non-last-mile Internet providers. *See, e.g.*, NOI ¶¶ 1 n.1, 13, 106. But those *policy-driven* distinctions are entirely irrelevant to the *statutory provisions* that define whether a service is a “telecommunications service” or an “information service”—as the Supreme Court confirmed in *Brand X* (see below). Title II reclassification therefore could not be limited to “facilities-based” providers of “last-mile” broadband services. The proposed reclassification would necessarily threaten to impose common-carrier regulation (whether “light-style” or not) on a broad range of providers that offer to arrange for transmission of data over the Internet as part of the information services they offer, whether over facilities that they own in fee simple or circuits that they lease from others.

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<sup>166</sup> An agency decision is arbitrary and capricious whenever an agency “entirely fail[s] to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *AEP Texas North Co. v. Surface Transp. Bd.*, No. 09-1202, 2010 WL 2431918, at \*7, \*11 (D.C. Cir. June 18, 2010) (vacating and remanding agency decision for failure to consider an important aspect of the problem). Indeed, the D.C. Circuit has cited this rationale in remanding an agency action despite the agency’s protestation that the issue in question was “beyond the scope of th[e] rulemaking.” *Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1367 (D.C. Cir. 1999).

<sup>167</sup> *Competitive Enterprise Inst. v. NHTSA*, 956 F.2d 321, 327 (D.C. Cir. 1992).

First it is important to clear up some threshold semantic confusion. The NOI uses the term “facilities-based” pervasively in an effort to distinguish the providers the Commission proposes to regulate from those it presumably does not. *See, e.g.*, NOI ¶ 1 n.1. But the NOI never defines this term. A great many Internet-based providers other than the ostensible subjects of this proceeding own many of the transmission facilities they use to transmit data on behalf of their customers. For example, Google owns the multi-billion-dollar content delivery network that it uses to transmit (among other things) paid advertisements from its many business customers to end users around the globe. And although the Commission refers to traditional dial-up ISPs such as AOL and Earthlink as “non-facilities-based,” many of them own network facilities indispensable to Internet access, including fiber-optic links connecting their local access equipment to cache servers and Internet backbone networks.<sup>168</sup> The Commission, however, purports to exclude these providers of Internet services from this proceeding by advancing a brand new conception of the term “facilities based provider” that would encompass only the subcategory of providers that own transmission facilities extending all the way to customer premises.

Ultimately, however, it does not matter precisely how the Commission tries to define the category of “facilities-based” providers—because facilities ownership has never been either a necessary or a sufficient condition for Title II classification. Indeed, it is completely irrelevant to that classification. The statutory definitions of “telecommunications service” and “information service” each turn on what functionalities the *customer* receives, not how the *service provider* arranges behind the scenes for the provision of those functionalities. *See* 47 U.S.C. § 153(20), (46). As the *Brand X* majority held, therefore, “the relevant [statutory] definitions do not

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<sup>168</sup> *See Stevens Report*, 13 FCC Rcd at 11534, 11536 ¶¶ 69, 73, & n.138.

distinguish facilities-based and non-facilities-based carriers.” *Brand X*, 545 U.S. at 997. That holding was essential to the Court’s larger decision to affirm the Commission’s classification of broadband Internet access as an “information service.” MCI and the other parties challenging that classification had argued that broadband Internet access should be deemed a “telecommunications service” simply because any broadband provider offers telecommunications to the public as a key component of its service. The Court properly rejected that argument because, as it observed, it would swallow up much of the Internet—and, specifically, would automatically “subject to common-carrier regulation non-facilities-based ISPs that *own no transmission facilities.*” *See id.* at 994 (emphasis added).

Examples outside the broadband context drive this point home. Calling-card providers and other resellers of long-distance services are “telecommunications carriers” subject to Title II even though they (1) may not own or even lease facilities and (2) provide no “local” connectivity.<sup>169</sup> Similarly, standalone long-distance companies (like the legacy AT&T Corp., MCI, and Sprint) are also Title II providers when they sell interexchange services even though they rely on local exchange carriers to bridge the last few miles between their long-haul networks and their subscribers. In the *Brand X* dissent that the NOI appears to cite approvingly (*see* NOI ¶ 106), Justice Scalia missed this point, suggesting that it is indeed appropriate to

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<sup>169</sup> *See, e.g.*, Declaratory Ruling and Report and Order, *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290, 7293-94, 7312 ¶¶ 10, 65 (2006) (“all prepaid calling card providers” “are subject to regulation as telecommunications carriers”), *vacated in part on other grounds by Qwest Servs. Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007); Order to Show Cause and Notice of Opportunity for Hearing, *Nos Communications, Inc., Affinity Network Incorporated and Nosva Limited Partnership*, 18 FCC Rcd 6952, 6953-54 ¶ 3 (2003) (switchless long-distance reseller is subject to regulation under Title II); Report and Order, *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 ¶ 8 (1976) (“[A]n entity engaged in the resale of communications service is a common carrier, and is fully subject to the provisions of Title II.”), *aff’d sub nom, AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978); *see also Trans Nat’l Commc’ns, Inc. v. Overlooked Opinions, Inc.*, 877 F. Supp. 35, 38 (D. Mass. 1994) (discussing 1976 order).

distinguish, for classification purposes, between ISPs that own last-mile facilities and those that lease them. *See* 545 U.S. at 1010-11. That dissenting position is unavailable to the Commission here, both because the *Brand X* majority decisively rejected it, *see id.* at 994, 996-997, and because it was mistaken even as an original matter. Indeed, if Justice Scalia’s analysis had been correct, legacy AT&T Corp., MCI, and Sprint should never have been regulated as Title II common carriers because those long distance providers did not own last-mile facilities.

That point has critical significance for this proceeding. From a statutory-classification perspective, “non-facilities-based” ISPs such as Earthlink are analogous to legacy long-distance carriers: they assume responsibility for transporting an end user’s data traffic throughout the Internet, even though they purchase, as an input, transmission supplied by another provider’s last-mile facilities. Such ISPs are today considered “information service” providers rather than “telecommunications service” providers. That is *not* because they own no last-mile facilities, but because they provide classic information-service functionalities with their services, including DNS lookup, email, and often caching. If the Commission reversed course and deemed those functionalities insufficient to keep “facilities-based” ISPs from Title II regulation, “non-facilities-based” ISPs would necessarily become Title II telecommunications carriers as well. As discussed below, the same conclusion would apply to a range of other providers that assume responsibility for transporting data throughout the Internet, ranging from Akamai to Amazon to Level 3 to Netflix.

These considerations underscore the importance of the *Stevens Report* to the Commission’s analysis here. The NOI mistakenly implies that the *Report*’s analysis can be logically confined to “non-facilities-based” dial-up ISPs: *i.e.*, ISPs like AOL or Earthlink that may own extensive transmission facilities but not the last-mile facilities connecting their

networks to individual customer premises. *See* NOI ¶ 13. The *Stevens Report* was indeed written at a time when most Americans relied on dial-up services for Internet access and most ISPs did not provide last-mile transmission functionality. But the Commission did not purport to limit the conclusions of the *Report* to “non-facilities-based ISPs.”<sup>170</sup> Nor, logically, could it have done so, since facilities ownership is irrelevant for statutory classification purposes. Again, whether these providers owned last-mile transmission facilities had nothing to do with whether they fell inside or outside the “telecommunications carrier” definition. The Commission deemed them “information service” providers not because they relied on other networks to reach end users—as discussed, the same has always been true of independent long-distance carriers, which are all regulated under Title II—but because their services contained integrated information-service functionalities.<sup>171</sup> As a matter of logic, that designation did not change when ISPs provided last-mile broadband transmission to end users in combination with the other services they had always offered them. Thus, although the Commission did not specifically draw that logical conclusion until 2002, the *Stevens Report* had already laid the essential groundwork for the proper classification of broadband ISPs as early as 1998.

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<sup>170</sup> *Stevens Report*, 13 FCC Rcd at 11534 ¶ 69 (observing that even “where an Internet service provider owns transmission facilities, and engages in data transport over those facilities in order to provide an information service, we do not currently require it to contribute to universal service mechanisms”).

<sup>171</sup> *See id.* at 11539-40 ¶ 80 (“The provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers’ own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an ‘information service.’”) (footnotes omitted).



**2. The *Computer Inquiry* Rules Have No Relevance to This Proceeding, and the Commission Could Not Lawfully Resurrect Any Version of Them for Broadband Internet Access.**

In focusing on “facilities-based providers” (*e.g.*, NOI ¶ 1 n.1), the Commission appears to have confused the *statutory classification* issue presented here with the separate regulatory distinctions—between facilities-based and non-facilities-based providers—that the Commission drew in connection with the “unbundling” obligation of the *Computer Inquiry* regime. That obligation required any “facilities-based” wireline telco that offered a retail information service to offer the transmission components of that service as a wholesale “telecommunications service.” As the *Brand X* Court explained, however, that *regulatory* obligation did not alter the characterization of the underlying retail services that triggered the obligation, which were always considered “information services” (known as “enhanced services” before the 1996 Act). In the Court’s words, “[t]he differential treatment of facilities-based carriers was . . . a function not of the definitions of ‘enhanced-service’ and ‘basic service,’ but instead of a choice by the Commission to regulate more stringently, in its discretion, certain entities that provided enhanced service. *The Act’s definitions, however, parallel the definitions of enhanced and basic service, not the facilities-based grounds on which that policy choice was based[.]*” *Brand X*, 545 U.S. at 996 (emphasis added).

In short, the facilities-based/non-facilities-based distinction inherent to the *Computer Inquiry* rules assumed significance only *after* the Commission concluded that a particular service was properly characterized as an “information service.” The distinction had (and has) no logical bearing on the antecedent question of whether a service should be so characterized in the first place. And the Commission has *never* found that the *retail* broadband Internet access services that wireline providers sell to end users are Title II “telecommunications services” or that, in selling those retail services, those providers should be regulated as common carriers. Those

retail services are unitary information services and always have been, and they have always fallen outside the scope of Title II.<sup>172</sup>

In one passage, the NOI, while quite vague on this point, might be construed as asking whether the Commission could or should require providers, as under the *Computer Inquiry* regime, to “unbundle” some component of their now-integrated broadband Internet access services and sell it on a standalone common-carrier basis. *See* NOI ¶ 54. If so, any such requirement would contradict assurances by Commission officials that they have no intent to revive the *Computer Inquiry* unbundling requirement and wish merely to find a new legal rationale for preserving the status quo.<sup>173</sup> And as discussed above, the Commission would severely disrupt the industry—imposing massive new costs and creating widespread consumer confusion—if it imposed new requirements changing how broadband Internet access services are offered and purchased. *See* Part Two, Section III.A, *supra*. Indeed, it is altogether unclear how, simply as an engineering matter, the Commission could force all broadband Internet access providers—including the cable modem systems and wireless networks that have *never* been subject to the *Computer Inquiry* rules—to “unbundle” the transmission components of shared network infrastructure. The NOI does not even begin to grapple with that complex issue.

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<sup>172</sup> *See also Stevens Report*, 13 FCC Rcd at ¶ 69 n.138 (“Under Computer II, and under our understanding of the 1996 Act, we do not treat an information service provider as providing a telecommunications service to its subscribers. *The service it provides to its subscribers is not subject to Title II, and is categorized as an information service. . . . [I]n every case, some entity must provide telecommunications to the information service provider. When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications. That conclusion, however, speaks only to the relationship between the facilities owner and the information service provider (in some cases, the same entity); it does not affect the relationship between the information service provider and its subscribers.*”) (emphasis added).

<sup>173</sup> *See, e.g., Schlick “Third Way” Statement* (section entitled “No New Unbundling Authority”), <http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html#book-9>.

In any event, for several independent reasons, the Commission could not lawfully impose any such requirement in the first place.

First, the *Computer Inquiry* rules were designed in and for the one-wire monopoly environment of the 1980s, and the Commission could articulate no defensible policy rationale for inflicting them on any class of providers in the competitive broadband Internet access market of today.<sup>174</sup> Indeed, longstanding Commission precedent precludes *any* compulsion to provide a service on a common-carrier basis—in the absence of demonstrated market power.<sup>175</sup> The Commission has made no finding that this test is met for any individual broadband Internet access provider or for the industry collectively, and it could not lawfully do so on the record in this proceeding.<sup>176</sup>

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<sup>174</sup> *Cable Modem Order*, 17 FCC Rcd at 4802, 4825 ¶¶ 6, 43-44 (discussing competitiveness of broadband marketplace and explaining why it would be inappropriate to apply the *Computer Inquiry* rules); *Wireline Broadband Order*, 20 FCC Rcd at 14876-98 ¶¶ 42-85 (offering numerous reasons for eliminating the *Computer Inquiry* rules, including the competitiveness of the market); *id.* at 14876 ¶ 42 (“[T]he *Computer Inquiry* obligations are inappropriate and unnecessary for today’s wireline broadband Internet access market. . . . [T]he *Computer Inquiry* rules were developed before separate and different broadband technologies began to emerge and compete for the same customers. Further, these rules were adopted based on assumptions associated with narrowband services, single purpose network platforms, and circuit-switched technology.”) (internal footnotes omitted).

<sup>175</sup> *See Norlight Private Carriage Order*, 2 FCC Rcd 132, 134 ¶¶ 19-20 (1987) (common carriage cannot be required unless the provider “possess[es] sufficient market power to justify such treatment”); *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999) (test involves assessing whether the provider “has sufficient market power to warrant regulatory treatment as a common carrier”); *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21589 ¶ 9 (1998) (“*AT&T Submarine Systems*”) (“[T]he focus of our inquiry here is whether the license applicant has sufficient market power to warrant regulatory treatment as a common carrier.”).

<sup>176</sup> *See State Farm*, 463 U.S. at 43 (Commission must demonstrate a “rational connection between the facts found and the choices made”) (citations omitted). In particular, the Commission has consistently found that there is no “compelling reason” for service to be provided on a common-carrier basis when there are “alternative methods of providing similar service.” *Communications, Inc., Commline, Inc. and Cox DTS, Inc.*, 102 F.C.C.2d 110, ¶ 27 (1985), *vacated as moot*, 1 FCC Rcd 561, ¶ 5 (1986); *see also AT&T Submarine Systems*, 13 FCC Rcd at 21589 ¶ 9 (for purposes of the common-carriage test, “we have found that if sufficient alternative facilities . . . are available an applicant would be unable to charge

Second, and just as important, the Commission would lack even the threshold statutory authority to subject broadband Internet access providers to *Computer Inquiry*-type rules or any other compulsion to provide a new common carrier service. As the *Comcast* court recently explained, the Commission derived its Title I authority to impose the *Computer Inquiry* rules in the first place from a regulatory fixture of the 1980s: rate-of-return regulation. The Commission feared that, without the unbundling rules, LECs could more easily cross-subsidize their unregulated and competitive Title I services by misallocating an excessive share of joint and common costs to the rate base for their monopoly, rate-regulated telephone services—thereby harming the consumers of the telephone services by raising their rates.<sup>177</sup> That policy concern made the unbundling rules “ancillary” to a specific statutory responsibility of the Commission: maintenance of just and reasonable rates for those Title II telephone services.<sup>178</sup> Today, however, few major broadband Internet access providers are subject to rate-of-return regulation for any of their services, and thus no cross-subsidization concerns could arise as to them.<sup>179</sup> The

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monopoly rents and hence would not have market power”); *Cable & Wireless, PLC*, 12 FCC Rcd 8516, 8522-23 ¶¶ 15-16 (1997) (noting that whether or not “the public interest requires common carrier operation of the proposed facility” generally rests on an assessment whether alternative facilities are available). The Commission has not even solicited evidence with respect to this test in this proceeding. And in all events, the Commission itself already has found that the overwhelming majority of consumers across the United States have a choice of at least two wireline providers, and consumers increasingly have a choice of at least one fixed wireless provider, not to mention several wireless broadband providers. See Part Two, Sections I.A & III.A, *supra*.

<sup>177</sup> *Computer and Communications Industry Ass’n v. FCC*, 693 F.2d 198, 205 (D.C. Cir. 1982) (“CCIA”).

<sup>178</sup> *Comcast*, 600 F.3d at 656; see also *CCIA*, 693 F.2d at 211.

<sup>179</sup> See *Wireline Broadband Order*, 20 FCC Rcd at 14897 ¶ 83 (finding “no need to retain either the *Computer II* structural separation requirement or the *Computer III* nonstructural safeguards to keep the BOCs from cross-subsidizing their broadband Internet access service operations with revenues from the telecommunications services operations”); Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory*

Commission would therefore have no statutory basis for seeking to reimpose the *Computer Inquiry* rules in this context.

Finally, the Commission could not, on the record in this proceeding, justify the public-interest *costs* of requiring the provision of some new constituent common-carrier service. Those include the risk of decreased innovation and investment and higher prices for consumers—concerns the Commission found relevant in its prior determination that *abandoning* the compulsory common-carriage unbundling requirements in the *Wireline Broadband Order* was in the public interest.<sup>180</sup> The Commission cannot lawfully avoid considering these policy harms when proposing to reverse itself.<sup>181</sup> Yet the Commission has not even solicited comment on these issues.

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*Review -- Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, 16 FCC Rcd 7418, 7441 ¶ 38 (2001) (explaining that “incumbent LECs that are subject to price cap regulation . . . do not have an incentive to [engage in cross-subsidization] because absent a guaranteed rate-of-return on their local exchange investment these carriers cannot expect to recover [their] discounts [on unregulated services] by including them in their regulated rate base”).

<sup>180</sup> *Wireline Broadband Order*, 20 FCC Rcd at 14905 ¶ 97 (rejecting proposals to maintain even a modified compulsory common-carriage requirement on the basis that “continuing to impose such requirements would only perpetuate wireline broadband Internet access providers’ inability to make better use of the latest integrated broadband equipment and would deprive consumers of more efficient and innovative enhanced services. Similarly, a continued obligation to provide any new broadband transmission capability to all ISPs indiscriminately, and provide advance notice thereof, would reduce incentives to develop innovative wireline broadband capabilities and places wireline broadband at a substantial competitive disadvantage vis-à-vis cable modem and other broadband Internet access service providers.”).

<sup>181</sup> *See Competitive Enterprise Inst.*, 956 F.2d at 325 (the agency must “negate or justify” the policy harms of its intended action); *see also, e.g., Verizon Telephone Companies v. FCC*, 570 F.3d 294, 304 (D.C. Cir. 2009) (holding that it was “arbitrary and capricious for the FCC to apply [new competition analysis methodologies] . . . without providing a satisfactory explanation [about why] it has not followed such approaches in the past”).

### 3. The Logic of Reclassification Would Encompass Much of the Internet Ecosystem.

As explained in the previous subsection, any reclassification decision would have to extend, simply as a matter of logic, to so-called “non-facilities-based” ISPs such as Earthlink and AOL, which offer the public the same broadband Internet access services as “facilities-based” ISPs. The same fate would also logically befall a substantial category of other Internet-based providers.

First, the logic of reclassification would extend to CDNs such as Akamai that hold themselves out to countless thousands of large and small business customers to transport data around the globe to cache servers near individual recipients. *See* Part Two, Section I.A, *supra* (describing Akamai’s service). As discussed, it is irrelevant for purposes of Title II classification that Akamai leases, rather than owns, the facilities it uses to discharge its responsibility for data transmission. Public Knowledge’s Harold Feld correctly acknowledges in a recent blog post that Akamai is “moving information from one place to another” and is “offering telecom” when it provides CDN services.<sup>182</sup> Feld is incorrect, however, in suggesting that Akamai could nonetheless avoid Title II regulation on the ground that it enters only into one-off business negotiations and does not hold itself out as a common carrier. As discussed above, Akamai itself has made clear both in its net neutrality comments and on its website that it does indeed offer its services on a standardized basis to many thousands of end-user business customers. *See* Part Two, Section I.A, *supra*. That is more than sufficient to qualify it as a common carrier if the

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<sup>182</sup> Harold Feld, *Want to Play FCC Fantasy Baseball? Follow the Title II Debate*, Wetmachine.com, May 16, 2010, <http://tales-of-the-sausage-factory.wetmachine.com/content/want-to-play-fcc-fantasy-baseball-follow-the-title-ii-debate> (“Akamai is moving information from one place to another. That’s plainly ‘telecommunications.’ But . . . Akamai does not offer its service to ‘the general public’ or even a distinct class of the general public. Any entity that wants to use Akamai’s CDN negotiates its own special deal with Akamai. So while Akamai offers telecom, they do not offer a ‘telecommunications service[.]’”).

Commission determines, for example, that caching services are “adjunct-to-basic” and thus do not prevent an Internet-based transmission provider from falling within the scope of Title II.<sup>183</sup>

In this regard, Earthlink, AOL, and Akamai would hardly be alone. The *First Industry Title II Letter* describes the broad variety of Internet-based service providers that would be swept into this Title II regime as the logical result of this statutory reinterpretation, including:

- Providers of e-readers like Amazon.com (the Kindle) that include integrated 3G connectivity—and, in the Kindle’s case, web-browsing functionality—in the purchase price of their devices.<sup>184</sup>
- VoIP and VoIP-related providers such as Vonage, Skype, and Google Voice, which would suddenly be treated identically to traditional long-distance carriers.
- Internet transport companies like Level 3, Savvis, Cogent, and Limelight, which offer backbone, Internet access, and content-delivery services to thousands of large and small business customers by means of facilities they either own or lease. In a single stroke, the Commission could subject the core of the Internet ecosystem, including all traditionally unregulated peering and transit arrangements, to common-carrier regulation designed for the legacy telephone network.
- Providers of online video services like Netflix and Hulu that self-provide or lease transmission capacity to offer content over the Internet. For example, Hulu has announced the creation of a “Hulu Plus” service that, for a monthly fee of \$9.99, will transmit video to end users in high-definition. See <http://www.hulu.com/plus>. Under

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<sup>183</sup> See Memorandum Opinion and Order, *Salsgiver Telecom, Inc., Complainant, v. North Pittsburgh Telephone Company, Respondent*, 22 FCC Rcd 9285, 9291-92 ¶ 14 (Enforc. Bur. 2007) (explaining that “the Commission has long regulated as common carrier services the provision of ‘private line’ [business-customer-only] services, which the Commission defines as ‘facilities or network transmission capacity dedicated to the use of an individual customer’”) (citations and internal quotations omitted) (citing Memorandum Opinion and Order, *Investigation of Special Access Tariffs of Local Exchange Carriers*, 8 FCC Rcd 4712, 4712 ¶ 2 (1993)); Third Report and Order, *MTS and WATS Market Structure, Phase I*, 93 FCC 2d 241, 249-50 ¶¶ 20-23 (1983); Notice of Inquiry and Proposed Rulemaking, *American Telephone & Telegraph Company; Private Line Rate Structure and Volume Discount Practices*, 74 FCC 2d 226 (1979) (investigating whether the pricing of AT&T’s competitive private line services was consistent with 47 U.S.C § 202, which prohibits unjust discrimination by common carriers).

<sup>184</sup> See Joanna Stern, *Among E-Readers, Competition Heats Up – Comparing the iPad, Kindle, Nook and Alex E-Readers*, N.Y. Times, June 9, 2010, <http://www.nytimes.com/2010/06/10/technology/personaltech/10TAB.html> (also mentioning that AsusTek, Dell, and Hewlett-Packard will soon be introducing their own e-readers that function as multipurpose devices providing access to the Web and other applications).

the proposed reclassification, that transmission functionality would become a Title II telecommunications service.

- Companies like Google that provide advertising-supported Internet search services and arrange for the transmission of search results and advertising messages to end users. Google charges fees to countless businesses in exchange for a critical service that Google dominates: the paid transmission of advertisements and other content chosen by those businesses to end users who use Internet search engines. Any statutory reinterpretation that rejects the 1998 “mutual exclusivity” conclusion would necessarily convert Google into one of the world’s largest common carriers—indeed, the most globally dominant provider of telecommunications services in history.
- For similar reasons, providers of cloud-computing services, like Amazon.com’s EC2, that enable the transmission of customer data to and from cloud computing server farms.

Of course, there would be room for debate about just *how* expansive a swath the Commission has cut through the Internet with its “third way” proposal, but there is no debating this: if a broadband Internet access provider is deemed to be offering a telecommunications service, there is no principled basis on which the Commission could avoid the conclusion that a very substantial portion of providers in the Internet ecosystem are doing the same. Arbitrary distinctions between facilities-based and non-facilities-based providers or last-mile and other providers will not alter this inexorable result of statutory reclassification. That is an issue the Commission must face up to now, before it lets the genie out of the bottle, not later, after the harm is done.

**IV. RECLASSIFICATION WOULD VIOLATE THE TAKINGS CLAUSE AND, AT A MINIMUM, EXCEED THE COMMISSION’S AUTHORITY BY EXPOSING THE PUBLIC FISC TO A SUBSTANTIAL RISK OF JUST-COMPENSATION LIABILITY.**

Reclassifying broadband Internet access under Title II would also raise serious Takings Clause concerns. The Commission may not adopt policies that expose the public fisc to the risk of just-compensation liability unless Congress has explicitly authorized it to adopt those



policies.<sup>185</sup> For that reason alone, the Commission lacks authority to adopt such a reclassification in the absence of a clearer statement from Congress.

A regulatory taking occurs when government action causes significant economic harm that interferes with settled, investment-backed expectations, particularly where the action is extreme and unjustified.<sup>186</sup> All of the factors for a regulatory taking are met here.<sup>187</sup> First, the proposed reclassification would plainly interfere with substantial investment-backed expectations. As discussed, the industry has long operated on the explicit understanding that the Commission meant what it said when it classified broadband Internet access as an integrated information service. And based on such assumptions, broadband providers have invested hundreds of billions of dollars of private capital in expanding their networks and deploying technology and new services. Indeed, private enterprise is expected to invest some \$23 billion in 2010 *alone* just to build out America’s wireless broadband infrastructure.<sup>188</sup> Changing the rules

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<sup>185</sup> See *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445-47 (D.C. Cir. 1994) (explaining that the constitutional avoidance doctrine, and not *Chevron* deference, should be applied in reviewing the FCC’s decision to require physical collocation, and holding: “Applying the strict test of statutory authority made necessary by the constitutional implications of the Commission’s action, we hold that the Act does not expressly authorize an order of physical co-location, and thus the Commission may not impose it.”). The doctrine of constitutional avoidance limits the Commission’s ability to adopt rules that would raise takings issues in an “identifiable class of cases,” as the proposed rules would. *Id.* at 1445 (“Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions.”). See also *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (doctrine of constitutional avoidance).

<sup>186</sup> See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984).

<sup>187</sup> Title II regulation would constitute a physical taking, as well, to the extent it required providers to support services they would otherwise have excluded—as could be the case, for example, if AT&T were prohibited from exercising discretion concerning the applications that are supported on its IP platform. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982); *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

<sup>188</sup> See Ralph de la Vega, President/CEO, AT&T Mobility and Consumer Markets, Chairman of the Board, CTIA, *United States: Leading the Mobile Broadband Revolution*, CTIA

now would disrupt these expectations and seriously devalue those investments, especially to the extent that Title II regulation prohibits business ventures that providers had every reason to believe were legitimate.

This concern is particularly severe in the context of wireless broadband services. Since classifying wireless broadband as an information service in 2007, the Commission has conducted spectrum auctions—and providers have bid and invested billions—based on the explicit understanding that wireless providers could use their spectrum to provide mobile broadband Internet access services as unregulated information services. Indeed, in the 700 MHz auction, in particular, the Commission rejected proposals to impose common-carrier-like “open platform” rules on wireless broadband providers generally, and it adopted such rules only on a “limited basis,” for the 700 MHz C Block.<sup>189</sup> The Commission—after obtaining the billions of dollars in bids that subsequently followed for the 700 MHz spectrum—cannot now claim that providers had only a “unilateral expectation” that they could provide mobile broadband on a non-common-carrier basis. *Ruckelshaus*, 467 U.S. at 1005.

Imposing such requirements radically affected the value of the C Block spectrum as compared to all other, unencumbered 700 MHz spectrum.<sup>190</sup> And imposing Title II regulation—

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Conference, at 7 (Mar. 23, 2010), [http://www.att.com/Common/merger/files/pdf/RDLV\\_CTIA.pdf](http://www.att.com/Common/merger/files/pdf/RDLV_CTIA.pdf). See also page 81, *supra*, discussing the billions of dollars of infrastructure investment by wireline and wireless broadband providers.

<sup>189</sup> Second Report and Order, *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, 700 MHz Order*, 22 FCC Rcd at 15289, 15364 ¶ 205 (2007).

<sup>190</sup> See, e.g., George S. Ford, Thomas M. Koutsky, & Lawrence J. Spivak, *Using Auction Results to Forecast the Impact of Wireless Carterfone Regulation on Wireless Networks*, Phoenix Center Policy Bulletin No. 20, at 13 (May 2008) (“[W]e predict the Upper C block should have sold for approximately \$7.9 billion . . . . The actual price for the block was about \$4.75 billion, which suggests that the open access regulations trimmed \$3.1 billion from the winning bids, or nearly a 40% loss in revenues. These calculations imply that because of the open platform mandate, the Upper C block licenses were nearly 40% less valuable than they would have been if those regulations had not been in place.”).

and with it, undoubtedly, some new form of “open platform” requirements—would have the same effect on the rest of the 700 MHz spectrum today and on other spectrum more generally. Further, even more than wireline broadband providers, wireless providers have invested in business ventures with application, search, and content providers and various targeted machine-to-machine (M2M) operations that could be found to be legally or practically incompatible with Title II requirements.

Finally, the Commission’s proposed course of action here is suspect not only because it would radically interfere with settled expectations, but also because it is highly questionable. The Title II reclassification cannot be defended as “aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Penn Central*, 438 U.S. at 124. To the contrary, the NOI acknowledges that any reclassification would be motivated by a self-serving desire to expand its jurisdiction in response to the *Comcast* decision. And as the Supreme Court has observed, a governmental “decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions”—particularly where the government’s action is “arbitrary, opportunistic, or undertaken with a confiscatory purpose.”<sup>191</sup>

**V. SECTION 332(C) INDEPENDENTLY FORECLOSES TITLE II RECLASSIFICATION OF WIRELESS BROADBAND INTERNET ACCESS SERVICES.**

The Commission may not reclassify *wireless* broadband services as “telecommunications services” subject to Title II common-carrier regulation for an additional reason, separate and apart from the considerations set forth above. *Whether or not* such services are “information

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<sup>191</sup> *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 527-28 (2002) (citing *Duquesne Light Co. v. Barasch*, 488 U.S. 200, 315 (1989)).

services,” they are not “commercial mobile radio services” (“CMRS”) within the Act’s definition, and therefore section 332(c)(2) precludes treating them “as a common carrier service for any purpose under this [Act].” 47 U.S.C. § 332(c)(2).

Section 332(c)(2) expressly *bars* the Commission from regulating mobile broadband Internet access on a common-carrier basis because, as the Commission has ruled, it is not a “commercial mobile radio service.” By enacting section 332(c), Congress “replaced traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework.”<sup>192</sup> Within that framework, mobile services can be treated as common-carrier services *only* if they qualify as “commercial mobile radio service,” whereas a provider engaged in any non-“commercial” (*i.e.*, “private”) mobile radio service “shall *not*, insofar as such person is so engaged, be treated as a common carrier for any purpose under this [Act].” 47 U.S.C. § 332(c)(2) (emphasis added).<sup>193</sup> And to qualify as CMRS, a service must offer “interconnection with the public switched network.” *Id.* § 332(c)(1), (d)(1)-(2).

Mobile broadband is not CMRS because it is *not* “interconnect[ed] with the public switched network.” Indeed, the Commission has made this precise finding. *See Wireless Broadband Order*, 22 FCC Rcd at 5917-18 ¶ 45. In the Commission’s words, wireless Internet access “in and of itself does not provide th[e] capability to communicate with all users of the public switched network.” *Id.* Further, the Commission has found that mobile broadband is not

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<sup>192</sup> Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1417, ¶ 12 (1994).

<sup>193</sup> All mobile services that do not qualify as CMRS are, by definition, “private mobile radio services.” 47 U.S.C. § 332(d)(3); *see, e.g., Cellnet Commc’ns, Inc. v. FCC*, 149 F.3d 429, 433 (6th Cir. 1998) (“CMRS includes all mobile services operated for profit that solicit for subscribers and are *interconnected with the public switched network, which is the traditional land-line telephone service. . . .* PMRS includes all wireless services that do not meet the definition for CMRS.”) (emphasis added).

“interconnected” even though VoIP and other applications *use* mobile broadband access to offer customers an interconnected service; in its words, wireless Internet access “*itself* is not an ‘interconnected service[.]’” *Id.* That finding, and more broadly the plain language of the Act, preclude the Commission from treating mobile broadband as a Title II telecommunications service. Under section 332(c)(2), whether or not non-CMRS services are “information services,” they “shall not . . . be treated as a common carrier [service] for any purpose under this Act.”

The Commission cannot avoid this express statutory prohibition by invoking the various Title III provisions cited in the NOI (*see* ¶ 103). Those Title III provisions—statements of general purpose (§ 301), provisions that govern initial license conditions or the modification of those conditions with respect to individual licenses (§§ 307(a), 316), provisions that authorize the Commission to limit the uses of spectrum (§ 303(b)), and the general “housekeeping” authority to make rules to implement other expressly delegated powers (§§ 303, 303(r))—are simply general grants of authority that must be read consistently with section 332(c)(2). The Commission cannot plausibly argue that these provisions implicitly authorize it to override an explicit prohibition Congress chose to include in the Act.

## **VI. FORBEARANCE COULD NOT ELIMINATE THE TREMENDOUS REGULATORY UNCERTAINTY THAT TITLE II RECLASSIFICATION WOULD CAUSE.**

The Commission has sought to reassure Internet service providers by proposing to forbear from “all but a handful of core statutory provisions” in Title II. NOI ¶ 68. But this is small comfort to the broadband industry and its investors, as the analyst reports quoted above reveal. *See* pp. 2-4 and 42-44, *supra*. Even if the Commission were to successfully exercise its forbearance authority, the new Title II regime would still be far more regulatory, and create far more regulatory uncertainty, than the pre-*Comcast* Title I regime—as the Commission itself recognized twelve years ago.

In the 1998 *Stevens Report*, the Commission rejected a Title II classification for ISPs and, in the process, rejected claims that forbearance would eliminate the policy harms of such a classification. It explained:

Notwithstanding the possibility of forbearance, we are concerned that including information service providers within the “telecommunications carrier” classification would effectively impose a presumption in favor of Title II regulation of such providers. Such a presumption would be inconsistent with the deregulatory and precompetitive goals of the 1996 Act. In addition, uncertainty about whether the Commission would forbear from applying specific provisions could chill innovation.

*Stevens Report*, 13 FCC Rcd at 11525 ¶ 47.

The Commission has now reinforced these concerns by proposing *not* to forbear from sections 201 and 202. *See* NOI ¶¶ 75-76. As discussed, those sections contain vague and self-executing prohibitions that could make Internet service providers liable for any conduct that some future Commission ultimately deems “unjust,” “unreasonable,” or “discriminatory.” Countless recordkeeping, billing-related, interconnection, and other rules, scattered throughout the Code of Federal Regulations, are based in whole or part on sections 201 and 202, provisions that the Commission routinely cites as grounds for almost all of its Title II orders.<sup>194</sup> The applicability of those sections would create enormous uncertainty for broadband providers, who could be subject to complaints alleging that any number of Commission rules apply to them by virtue of those statutory provisions. In addition, application of sections 201 and 202 to broadband services would appear to require, for the first time, substantive regulation of retail prices and the other terms and conditions of retail services, as discussed above. The NOI does not even discuss that apparent consequence, let alone propose to forbear from retail regulation

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<sup>194</sup> *See, e.g.*, Notice of Proposed Rulemaking, *Schools and Libraries Universal Service Support Mechanism*, 25 FCC Rcd 6872 (2010); Report and Order, *Local Number Portability Porting Interval and Validation Requirements*, 25 FCC Rcd 6953 (2010).

under sections 201 and 202. The Commission also does not propose to forbear from section 208. NOI ¶ 77. Thus, Internet service providers would inevitably face numerous complaints brought by retail and wholesale complainants alleging that those providers have engaged in “unjust,” “unreasonable,” or “discriminatory” behavior in violation of sections 201 and 202.

Even if the Commission were to make the requisite findings to forbear from the application of particular rules to particular Internet service providers, the Commission’s decisions would be context-specific and highly subjective. Accordingly, forbearance would be prone to judicial challenge and attempted reversal by future Commissions making equally context-specific and subjective determinations. No issue would ever be settled, and the Internet ecosystem would be subject to a state of perpetual regulatory uncertainty. As Commissioner McDowell has noted, this would hardly be the “environment needed to attract up to \$350 billion in private risk capital to build out America’s broadband infrastructure.”<sup>195</sup>

Although the Commission suggests that any forbearance decision would likely endure, NOI ¶ 98, that is far from certain. Fueling this concern is the recent spate of petitions to overturn the Commission’s past forbearance decisions—and the Commission’s conspicuous failure to dismiss those petitions promptly. For example, tw telecom and others have urged the Commission to reverse its grant of forbearance with respect to enterprise broadband services such as Ethernet.<sup>196</sup> The *Broadband Plan* likewise expressly contemplates revisiting whether it was appropriate to deregulate those services.<sup>197</sup> Similarly, a number of parties have filed

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<sup>195</sup> Commissioner Robert McDowell, “The Best Broadband Plan for America: First, Do No Harm,” Free State Foundation Keynote Address, at 13 (Jan. 29, 2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296081A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296081A1.pdf).

<sup>196</sup> See, e.g., Letter from Thomas Jones, Counsel, tw telecom inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51 (Oct. 14, 2009), Attach. at 11, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020141918>.

<sup>197</sup> See *Broadband Plan* at 47 (discussing criticisms of broadband forbearance decisions).

petitions requesting that the Commission reverse its grant of forbearance to Qwest in the Omaha MSA.<sup>198</sup> The Commission’s decision to seek comment on these “unforbearance” requests casts doubt on how seriously it takes the permanency of its forbearance decisions.<sup>199</sup>

There is yet another reason to doubt the permanence of the Commission’s forbearance decisions. If the Commission is determined to exercise Title II jurisdiction over all broadband Internet access services, it would as a logical matter have to reverse the broadband forbearance that was granted to Verizon in 2006, since that relief bars the Commission from applying Title II and the *Computer Inquiry* rules to Verizon’s broadband transmission services—even if the latter are used to provide the “connectivity” component of a broadband Internet access service.<sup>200</sup>

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<sup>198</sup> See, e.g., Public Notice, *Pleading Cycle Established for Comments on McLeodUSA Telecommunications Services, Inc.’s Petition for Modification of the Qwest Omaha Order*, DA 07-3467 (July 30, 2007), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3467A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3467A1.doc) (establishing pleading cycle for petition of McLeodUSA to “reinstate[e] Qwest’s section 251(c)(3) unbundling obligations in the Omaha MSA”).

<sup>199</sup> See Paul Mancini, AT&T Senior Vice President and Assistant General Counsel, *The FCC: Having Its Forbearance Cake and Eating It Too*, AT&T Public Policy Blog (June 16, 2010), <http://attpublicpolicy.com/government-policy/the-fcc-having-its-forbearance-cake-and-eating-it-too/> (“If the FCC were really serious about forbearance being a one-way street, it would never have cast doubt on these forbearance decisions in the National Broadband Plan and it would immediately terminate the special access proceeding with respect to optical and packet-switched broadband transmission services so that the communications industry doesn’t need to waste time debating an outcome—“unforbearance”—that the FCC apparently has no intention of pursuing. . . . Unless, of course, the FCC really thinks forbearance isn’t so permanent after all.”).

<sup>200</sup> See *Petition of the Verizon Telephone Companies for Forbearance*, WC Docket No. 04-440 (filed Dec. 20, 2004); News Release, *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, WC Docket No. 04-440 (rel. Mar. 20, 2006); Memorandum Opinion and Order, *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, 22 FCC Rcd 18705, 18712 ¶ 11 (2007) (“*AT&T Forbearance Order*”). See also Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-440 (filed Feb. 7, 2006) (detailing the scope of Verizon’s request for forbearance). Notably, the Commission has refused to grant the same degree of forbearance to other broadband providers. See *AT&T Forbearance Order*, 22 FCC Rcd at 18739-41 ¶¶ 71-75 (refusing to grant AT&T the same extensive forbearance from Title II obligations that Verizon enjoys by virtue of its forbearance grant).



Indeed, this is probably just one of many prior decisions that the Commission would conclude it must reverse in order to achieve its Title II vision. The way “forward” seems to open one door after another for revisitation and amendment of long-settled decisions. And that prospect makes the permanence of any new Commission decisions seem extremely dubious.

The Commission has further sought to justify its pairing of Title II reclassification with forbearance by noting that the end result will resemble the “tried and true” regulatory framework for mobile wireless services.<sup>201</sup> But this comparison offers more cause for concern than comfort. To be sure, wireless forbearance produced one of the Commission’s most successful deregulatory experiments of all time. Today, as the Commission recently found, 98.6 percent of the U.S. population is served by at least two mobile voice providers, and 95.8 percent of the population, or approximately 273 million people, is served by at least three.<sup>202</sup> Moreover, as noted, 89.5 percent of the population is served by two or more mobile broadband providers, and 76.1 percent is served by at least three. *Id.* Despite this highly competitive backdrop, however, regulatory creep is threatening to transform the wireless marketplace into a far more regulated industry than Congress could have ever intended. To begin with, despite the significant number of competitors offering CMRS and mobile broadband in nearly all regions of the United States, the Commission recently refused, for the first time since 2002, to deem the commercial mobile

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<sup>201</sup> *Genachowski “Third Way” Statement; see also NOI ¶ 75* (pairing reclassification with a decision to forbear from all but a handful of “core provisions would comport with Congress’s approach to commercial mobile radio services (CMRS)”). In the official blogs supporting the Commission’s reclassification proposal and the PowerPoint accompanying it, the Commission calls the approach to CMRS a “proven success for wireless communications,” and points to the tremendous growth in wireless services since Congress first mandated that deregulatory approach. *See Schlick “Third Way” Statement; Legal Framework for Broadband Internet Access, PowerPoint Presentation, at slides 24-26* (June 17, 2010).

<sup>202</sup> *Fourteenth Wireless Report at 7.*

marketplace “effectively competitive”—a move widely understood as an effort to set the predicate for more intrusive regulation.<sup>203</sup>

Meanwhile, in just the past year, the Commission has—despite its supposedly deregulatory framework—proposed net neutrality rules for the wireless industry without specifying accommodations to account for spectrum shortages or the unique business models in the wireless broadband marketplace.<sup>204</sup> The Commission also has proposed to adopt, for the first time ever, wireless data roaming obligations.<sup>205</sup> In the *SkyTerra Order*, the Commission effectively reimposed spectrum caps on particular wireless providers.<sup>206</sup> The Commission has also questioned whether to regulate or prohibit exclusive handset deals, even in the face of a huge array of existing devices and the proliferation of new smartphones that are announced almost monthly.<sup>207</sup> And in the “bill shock” proceeding (CG Docket No. 09-158), the

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<sup>203</sup> See, e.g., Miaisie Ramsay, *FCC Issues Mixed Reports on Industry Competition*, *Wireless Week*, May 20, 2010, <http://www.wirelessweek.com/News/2010/05/policy-and-industry-FCC-Issues-Mixed-Report-on-Industry-Competition.aspx>; John Poirier, *U.S. Fails to Describe Wireless Industry as Competitive*, *Reuters*, May 20, 2010, <http://www.reuters.com/article/idUSTRE64J4P820100520> (“The lack of the key phrase could set the stage for U.S. regulators to impose policies and regulations . . . .”); Jeanine Poltronieri, AT&T Assistant Vice President-Federal Regulatory, *Investment: Compared to What?*, *AT&T Public Policy Blog*, June 24, 2010, <http://attpublicpolicy.com/government-policy/investment-compared-to-what/>.

<sup>204</sup> Notice of Proposed Rulemaking, *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191 & WC Docket No. 07-52, FCC No. 09-93 (rel. Oct. 22, 2009).

<sup>205</sup> Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, FCC 10-59 (rel. April 21, 2010).

<sup>206</sup> Memorandum Opinion and Order and Declaratory Ruling, *SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC*, IB Docket No. 08-184, DA 10-535 (rel. Mar. 26, 2010).

<sup>207</sup> See Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, 23 FCC Rcd 14873 (rel. Oct. 10, 2008).

Commission is seeking—in CTIA’s words—“to micromanage what is an incredible array of choices for consumers,” including “prepaid to postpaid, subsidized handsets to unsubsidized, contracts with ETFs to those without, large, medium or small buckets of minutes and ‘all-you-can-use’ plans,” notwithstanding that the industry “does provide ‘simple and easy to understand’ plans for every type of American consumer.”<sup>208</sup> The Commission also has launched inquiries regarding wireless early termination fees and even the rejection of a *single* application (the 3G Google Voice application) on a *single* device (the iPhone).<sup>209</sup>

In other words, even against a backdrop of competition and nearly total forbearance, the Commission is doing—or sending strong signals that it plans to do—precisely what it promises it will *not* do in the context of broadband Internet access: reassert regulatory oversight over myriad basic features of the marketplace, including wholesale and retail customer relationships. Rather than providing reassurance, the comparison to wireless reaffirms that promises of a regulatory “light touch” under Title II are tenuous and easily reversed.

There is also disagreement within the Commission itself concerning just how far forbearance should go. Commissioner Copps condemns what he describes as a “forbearance

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<sup>208</sup> Matthew Lasar, *One Out of Six Cell Phone Users Suffers from “Bill Shock”*, Ars Technica, <http://arstechnica.com/telecom/news/2010/05/new-shocking-statistics-on-bill-shock.ars> (quoting Steve Largent, President of CTIA).

<sup>209</sup> Letter from James D. Schlichting, Acting Chief, Wireless Telecommunications Bureau, Federal Communications Commission to James W. Cicconi, Senior Executive Vice President-External and Legislative Affairs, AT&T Services, Inc., 24 FCC Rcd 10169 (July 31, 2009); Letter from James D. Schlichting, Acting Chief, Wireless Telecommunications Bureau, Federal Communications Commission to Richard S. Whitt, Esq., Washington Telecom and Media Counsel, Google Inc., 24 FCC Rcd 10171 (July 31, 2009); Letter from James D. Schlichting, Acting Chief, Wireless Telecommunications Bureau, Federal Communications Commission to Catherine A. Novelli, Vice President, Worldwide Government Affairs, Apple Inc., 24 FCC Rcd 10167 (July 31, 2009).

binge,”<sup>210</sup> and has made clear his preference for “plain and simple Title II reclassification through an immediate declaratory ruling,” with only very “limited, targeted forbearance from certain provisions.”<sup>211</sup> Further, some interest groups have already begun to call for sharply reducing the scope of the forbearance proposed in the NOI.<sup>212</sup> Thus, as this proceeding develops, there appears to be fertile ground for opponents of deregulation to achieve a far more heavily regulated Internet ecosystem than the NOI proposes.

In all events, forbearance addresses only *federal* regulation under Title II. Providers would still face the prospect of *state* efforts to regulate their new “Internet connectivity” common-carrier services. Wireless providers have already experienced firsthand the way in which state regulation and litigation can undermine the Commission’s national “deregulatory” regime. Although the Commission can preempt state regulation of broadband providers, *see* NOI ¶ 110, the states have made it clear that they will vigorously oppose such limitations on their authority. In a proposed pending resolution, for example, the Board of Directors of the National Association of Regulatory Utility Commissioners advocates a “fourth way” that would include “bi-jurisdictional regulatory oversight for broadband Internet connectivity service and

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<sup>210</sup> FCC News, *Statement of Commissioner Michael J. Copps on Chairman Genachowski’s Announcement to Reclassify Broadband* (May 6, 2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-297946A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297946A1.pdf).

<sup>211</sup> Remarks of FCC Commissioner Michael J. Copps, *Openness and Innovation in the Digital World?*, Stanford Law School, at 4 (June 9, 2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-298708A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298708A1.doc).

<sup>212</sup> *See, e.g.*, Letter from Chris Riley, Policy Counsel, Free Press, to Marlene H. Dortch, Secretary, FCC, *Framework for Broadband Internet Service*, GN Docket No. 10-127 (filed July 2, 2010), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020514730> (“We stated our position that numerous provisions of Title II are critical to implement Congress’s balanced framework for protecting consumers and promoting competition in the market for telecommunications services, and that the Commission should consider forbearance narrowly, within the framework of section 10 of the Act, and should not lightly set aside statutory provisions that may prove essential for future policymaking.”).

broadband Internet service,” and urges the FCC not to preempt State authority under section 253 of the Act (interpreted broadly) or to “preempt any States’ jurisdiction which would limit the ability of States to influence the advancement of the broadband ecosystem as set forth in the National Broadband Plan.”<sup>213</sup>

In short, the industry has good reason to be concerned that the expansive regulatory regime proposed here would not be nearly as “deregulatory” as the Commission suggests. And in any event, the uncertainty resulting from the Commission’s coupling of Title II reclassification with non-comprehensive forbearance would almost certainly discourage innovation and investment and lead to widespread litigation. At the very least, broadband providers subject to sections 201 and 202 would face potential liability any time they implemented new services, including anti-piracy measures, network-management techniques, or commercial arrangements with particular application and content providers. Again, that potential liability could deter such initiatives, to the detriment of broadband providers, application and content providers, and ultimately consumers. Investment would also be deterred along with innovation. Investors would be less willing to sink risk capital into broadband investments in an environment where the Commission could find—without providing significant guidance, and without precedent to limit its discretion—that the service in question is “discriminatory” or subject to rate regulation under sections 201 and 202.<sup>214</sup>

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<sup>213</sup> NARUC Proposed Resolution before the Committee on Telecommunications: *Resolution Opposing Federal Preemption of States’ Jurisdiction over Broadband Internet Connectivity Services*, Sponsored by Chairman Betty Ann Kane, D.C. Public Service Commission and Co-Sponsored by Commissioner Geoffrey G. Why, Massachusetts Department of Telecommunications and Cable.

<sup>214</sup> See Executive Summary and Part Two introduction, *supra* (discussing investment analyst reports).

Finally, protracted litigation would confront any Commission effort to use forbearance to mitigate the impact of the Title II regime. Forbearance proceedings before the Commission would be fiercely contested, and the resulting orders would inevitably be appealed to various courts. Indeed, forbearance opponents are certain to challenge any new grant of forbearance on the ground that the recent *Qwest Phoenix Order*<sup>215</sup> sets the bar under section 10 extremely high (and in fact the Commission set that bar unreasonably high). While the Commission has found that a “different analysis” should apply in the case of broadband-related forbearance,<sup>216</sup> litigants will surely challenge that assertion as well. As discussed, preemption would likewise be the focus of intense dispute. Litigation at the agency and appellate levels would create huge transaction costs and would waste resources that could be much better spent on broadband adoption programs and deployment of service to unserved areas. And regardless of the eventual outcome in the courts, this prolonged legal uncertainty would stifle innovation and investment.

For these reasons, the notion that the Commission’s ill-defined “third way” regulatory approach somehow reduces uncertainty is sheer folly. Nonetheless, in the event that the Commission proceeds to reclassify broadband Internet access service such that it contains a Title II telecommunications service, the Commission should forbear from applying *all common-carrier* provisions of Title II to that service, as AT&T argued six years ago in a forbearance

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<sup>215</sup> Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, FCC 10-113 (rel. June 22, 2010).

<sup>216</sup> *See id.* ¶ 39 (“Indeed, a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities, such as Qwest’s petition in this proceeding. For advanced services, not only must we take into consideration the direction of section 706, but we must take into consideration that this newer market continues to evolve and develop in the absence of Title II regulation.”).

petition still pending before the Commission on remand from the D.C. Circuit.<sup>217</sup> Only that type of forbearance approach could at least mitigate the investment-chilling, job reducing effects of reclassification. And finally, the Commission should pair such forbearance with broad preemption of state and local regulation of broadband Internet access service, in order to avoid a patchwork quilt of inconsistent, investment-detering rules at the state and local levels as well.<sup>218</sup>

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<sup>217</sup> See *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006). AT&T incorporates by reference the arguments it has made in that proceeding (WC Docket No. 04-29).

<sup>218</sup> See NOI ¶ 110. The NOI suggests that the Commission would preempt state “requirements on broadband Internet connectivity service or broadband Internet service that are contrary to a Commission decision not to apply *similar requirements*.” *Id.* (emphasis added). This vision of preemption is far too limited, as it would appear to permit states and localities to impose their own price regulations and other requirements related to the rates, terms, and conditions of broadband Internet connectivity service, provided that such regulations parallel the language found in sections 201 and 202 of the Act. See NOI ¶ 75. While such preemption should be applied broadly to state and local regulations directed at broadband Internet connectivity service or broadband Internet service, it need not apply to state and local laws of general applicability.

## CONCLUSION

For the foregoing reasons, the Commission should maintain the current regulatory classification for broadband Internet access services.

Respectfully submitted,

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