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

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

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Michael E. Olsen
Senior Vice President, Legal Regulatory and Legislative Affairs
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-2300

Samuel L. Feder
Luke C. Platzer
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, D.C. 20001
(202) 639-6000

Howard J. Symons
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, D.C. 20004
(202) 434-7300

July 15, 2010

TABLE OF CONTENTS

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

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

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation ("Cablevision"), by its counsel, hereby submits comments on the Notice of Inquiry ("NOI") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned docket.[1]

INTRODUCTION AND SUMMARY

Cablevision strongly supports the Commission's broadband policies of maintaining an open Internet, encouraging nationwide deployment of a fast, efficient broadband network, and ensuring that broadband Internet access is accessible and affordable for every American. Advancing these goals is critical to our nation's education, competitiveness, and ability to innovate in the twenty-first century.

At the same time, Cablevision recognizes that the recent decision by the D.C. Circuit in *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), has created a challenge for the Commission in identifying the proper legal basis to carry out some of those goals and make fast, affordable, universal Internet service a reality. Locating the Commission's authority in the Communications Act to take action with respect to broadband Internet access is no easy or

[1] *In re Framework for Broadband Internet Service*, Notice of Inquiry, 2010 WL 2467985, ___ FCC Rcd ___ (FCC June 17, 2010) (NOI).

obvious task. The architecture powering the Internet has evolved over the years in ways that no one could have anticipated at the time the Commission first created its framework for dividing "basic" from "enhanced" services or when Congress largely codified that framework in the Telecommunications Act of 1996. Indeed, the worldwide web was still a developing phenomenon at the time Congress enacted the 1996 Act; and the technologies behind the networks that power the web are still growing and changing rapidly today, as are the ways in which people use it. The Internet has evolved into a complex, integrated ecosystem in which service providers manage complicated requests, databases, and information in order to present content to users in a fast, efficient manner, with a menagerie of upstream providers and intermediaries playing their own roles in managing the flow of information through the network.

This evolution undermines the suggestion that the Commission might seek to work around the *Comcast* decision by reclassifying retail Internet access (or some subset of Internet access) as a common carrier service subject to the Commission's jurisdiction under Title II. *See* NOI, ¶¶ 52-66. Such a legal framework would be in tension with the text of the 1996 Act – the proverbial case of fitting a square peg into a round hole – and thus would face significant legal obstacles even if the FCC were writing on a blank slate. And, of course, it is not: the Commission has long, and repeatedly, held that broadband Internet access is an "information service" under the 1996 Act and not subject to Title II statutory requirements and regulations. The facts that originally led the Commission to this conclusion are just as true today – in fact, the evolution in the architecture of retail ISP service has only made this conclusion stronger. To reverse nearly a decade of well-reasoned statutory interpretation and treat Internet access services as "telecommunications services," when the relevant facts have not changed, would be

an arbitrary exercise of reasoning backwards from the desired result rather than an honest effort to carry out Congress's instructions.

The legal obstructions to such an approach are only part of the problem. An attempt at Title II reclassification would frustrate the very policy goals the Commission seeks to advance. The Commission's National Broadband Plan recognizes that billions of dollars in private investment are necessary for successful broadband deployment.[2] The Commission has repeatedly, and rightly, found that investment in broadband is advanced by a deregulatory environment and that regulatory uncertainty chills such investment. Reclassification would take broadband backwards on both fronts. The inevitability of years of litigation over the Commission's authority alone would create a climate of regulatory uncertainty whether or not the move were ultimately upheld by the courts. And a successful (after years of litigation) Title II reclassification would only create new regulatory costs for broadband providers and their investors. Complicated questions concerning the tort liabilities of ISPs, the authority of State and local authorities over broadband, and the ability of the FCC to maintain forbearance decisions over time would at best create additional uncertainty; and the constant threat of additional regulation of broadband would cast a cloud over investment for years to come. All of this would occur at a time when there is a critical need for private capital to fulfill the Commission's broadband goals.

Moreover, reclassification would not effectively advance the Commission's goal of ensuring a more "open" Internet. By narrowly limiting itself solely to retail Internet connection

[2] *See* FCC, Omnibus Broadband Initiative, *Connecting America: The National Broadband Plan* at xv, 38 (Mar. 16, 2010), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf (outlining the Plan's reliance on competition and private investment rather than government funding, and noting that, in reaching our current deployment levels, private investment into broadband may have exceeded 40 billion dollars per year) (National Broadband Plan).

service, a Title II framework would likely ensure only that any improper discriminatory practices would move upstream to other participants in the Internet ecosystem, such as content delivery networks ("CDNs") and backbone providers who, unlike ISPs, do not have to answer to end users and are therefore not policed by the market. Indeed, a Title II focus would be so narrow that it might not even meaningfully regulate such practices by ISPs themselves.

The Commission's goal of preserving an open Internet – as well as its other goals of advancing universal service, protecting consumer privacy, and ensuring access to people with disabilities – would be far better served by working with stakeholders on consensus-based solutions, proposing clarifying legislation to Congress, and, where necessary, relying on Title I authority. With respect to Title I, the *Comcast* decision did not rule out the Commission's ability to use this authority, it merely questioned the Commission's reasoning for relying on Title I in that case. Cablevision believes the Commission retains sufficient authority under Title I to advance the important goals of the National Broadband Plan, and that doing so would avoid unnecessarily wasting valuable time, resources, and momentum that could be used to encourage nationwide deployment of a fast, efficient broadband network accessible and affordable for every American.

Finally, any legal framework that Commission adopts in this proceeding must be technologically neutral if it is to be intellectually honest, legally sustainable, and avoid disrupting the market. Irrespective of any forbearance decisions the Commission might reach, as matter of law and policy the Commission should treat wired broadband providers no differently from ISPs that offer Internet access using other technologies, such as terrestrial wireless or satellite.

I. A TITLE II APPROACH TO BROADBAND SUFFERS FROM LEGAL DEFECTS.

It is understandably tempting to believe that the challenges presented by the *Comcast* decision might be addressed in one fell swoop by reclassifying broadband services (or some "connectivity" subset of broadband services) under Title II. But such an approach creates more legal problems than it solves. Whatever the superficial appeal of Title II as a means of working around *Comcast* to advance the Commission's goals for broadband, the notion that the Commission can undo years of precedent and begin treating broadband as a Title II common carrier service suffers from numerous legal flaws.

As a matter of statutory text, today's broadband providers do not offer their subscribers "telecommunications service" as defined by the 1996 Act. *See* Part I.A *infra*. Today's broadband services are quintessential "information services" under the Act, and the facts that led the Commission to this conclusion in the past are, at minimum, no less true today. *See* Part I.B. *infra*. Moreover, if the Commission were to abandon its prior holdings and reclassify broadband in the manner contemplated by the NOI, it would almost certainly be found to have acted arbitrarily in violation of the Administrative Procedure Act ("APA"). *See* Part I.C., *infra*.

The legal defects in a Title II approach should cause the Commission to reconsider its interest in reclassification. Even if such an approach were effective as a policy matter – which as explained below is not the case, *see* Part II *infra* – a flawed legal framework will not advance the Commission's policy goals. The inevitable years lost to such litigation would do nothing but put the FCC back where it started. And in the meantime, the Commission would lose the opportunity to use its time and resources on more effective and legally defensible paths for advancing its broadband goals.

A. Today's Broadband Services Do Not Offer Users "Telecommunications" Within the Meaning of the Communications Act.

The plain text of the 1996 Act limits the Commission's Title II authority to the regulation of carriers that, among other things, offer "telecommunications" – which the Act defines as "the transmission, *between or among points specified by the user*, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) (emphasis added). The service offered by broadband providers today does not fit this statutory definition, and cannot be classified under Title II consistent with the Act. *See id.* § 153(44) (limiting Title II regulation to carriers "*only* to the extent that [they are] engaged in providing *telecommunications services*") (emphasis added).

Past Commission orders addressing the legal classification of Internet access service have focused primarily on a different question under the 1996 Act: whether a broadband provider is "offering" telecommunications as required by the definition of "telecommunications service." *See In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4821-22, ¶¶ 39-40 (2002) ("*Cable Modem Declaratory Ruling*"); 47 U.S.C. § 153(20) & (46). Those holdings remain persuasive and correct today. *See* Part I.B. *infra*. There is an antecedent problem, however, with classifying Internet access, or any component thereof, under Title II: even the *transmission* functions offered by today's broadband services to their retail customers generally do not meaningfully constitute "telecommunications," at least not in the sense that the term is defined by the 1996 Act.

"Telecommunications" under the 1996 Act involves more than the mere transport or transmission of information of the user's choosing. The transmission must also be "between or among points specified by the user." 47 U.S.C. § 153(43). Telephone calls are the classic case

of transmissions meeting the statutory "telecommunications" definition because the user selects the end point of the communication by identifying the phone number and thereby the end user to which the call will be terminated. The same is true of some forms of information transmission on the Internet. For example, wholesale carriage of Internet traffic on behalf of ISPs, such as by backbone providers, where traffic is carried from and to established locations, meets this definition as well.[3]

This statutory definition does not fit the service offered by broadband providers today, however, in light of how the Internet has evolved and how information is now delivered to retail broadband Internet users. ISPs delivering information to such users undoubtedly engage in the *transmission* of information. The end points from which the information is retrieved however, are increasingly selected by others, and are not "points specified by the user."

The Commission's early decisions envision an Internet in which the contents of webpages reside on servers controlled by the content provider, and users access that stored information by specifying the webpage from which they wish to receive information. The user's ISP then provides Domain Name Service ("DNS") to locate the server, retrieve the information requested, and make it available it to the user. *See*, *e.g.*, *In re Federal-State Joint Board on Universal Service Report to Congress*, 13 FCC Rcd 11,501, 11,531, ¶¶ 62-63 (1998) ("*Stevens Report*") (characterizing "content providers" as those who "make information available on 'servers' connected to the Internet, where it can be accessed by end users" and "[a]ccess providers" as those who "enable users to access Internet content and services").

[3] Such services may or may not be offered "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public" as needed to constitute a telecommunications *service* (*see* 47 U.S.C. § 153(46)), but there is no doubt that transmission of Internet content backbone or wholesale carriers can be, under certain circumstances, "telecommunications."

This model, however, is less and less accurate as a representation of how the Internet has evolved and how much of the content on the Internet is delivered by broadband providers today. As the NOI itself recognizes, many content providers no longer rely exclusively on their own servers to host and distribute Internet content, but instead use third-party content distribution networks (CDNs) to host additional, redundant copies of their content throughout the Internet, thereby speeding access and reliability. *See* NOI, ¶ 107; Declaration of Jonathan Greenfield in Support of Cablevision's Comments, July 15, 2010, attached hereto, at 7 ("Greenfield Declaration"). Thus, much of the content that Internet users retrieve from the worldwide web today does not come from content providers' servers at all, but rather from servers operated by third parties of whose involvement the requesting user is likely completely unaware. *Id*. ¶¶ 8-9, 12-13. In addition, ISPs may themselves operate caching servers to speed their users' access to particular Internet content without the need to always request or retrieve it from third-party systems. *Id*. ¶ 9. And finally, many ISPs, including Cablevision, coordinate co-location with third-party CDNs, whereby CDNs place their servers directly into the ISPs' networks and the ISPs work with the CDNs to redirect users' requests to access a content provider's website to the CDN's servers instead. *Id*. ¶¶ 7-8, 14. As a result, ISPs may often have no need to retrieve information from a web publisher's servers, or even go beyond their own networks at all, in order to display a webpage to the ISP's users. They can access the content within their own networks. *Id*. These arrangements, moreover, are generally unknown and transparent to users. *Id*. ¶ 12.

These advancements bring tremendous benefits to users by enabling faster, and more reliable, access to the web content of their choosing. Greenfield Declaration ¶ 12. But they also comprise a critical evolution in the architecture of retail Internet access: when consumers today

use their Internet connections to access a web page, it is decreasingly likely, particularly for popular and frequently-requested content, that they are retrieving information from any particular point they may think they have specified (*i.e.*, the content provider). In fact, it is increasingly likely that they are not. Rather, the ISP is analyzing the user's request for particular content, then going out and either (in the case of ISP-level caching) *itself* locating the best source, or sources, for what the user has asked for – or (in the case of colocation agreements) working with a third party, such as a CDN, in doing so. The other end point of the communication could be the content provider's server, the server of a third-party CDN on a different network, or the server of a third-party CDN within the ISP's own network. Id. ¶¶ 8, 9. In fact, the content ultimately displayed to a user could come from a combination of the above sources, with the ISP or CDN determining the most efficient manner of retrieving each different component of a webpage separately and delivering to the user for reassembly. *Id.* ¶ 10. And given the dynamic nature of content hosted locally, the ISP or CDN might respond to a subsequent request for the same webpage by retrieving content from a different combination of locations. *Id.* ¶ 11.

This evolution in the technology and architecture of the Internet has legal significance. Whenever ISPs retrieve Internet content in this manner, it places their provision of Internet access firmly outside of the statutory definition of a "telecommunications service." *Compare* 47 U.S.C. §§ 153(43), (46). It is not just that ISPs now go beyond mere DNS lookups to locate the content sought by the user – although that fact has legal implications as well, *see* Part I.B. *infra*. It is that Internet users can no longer meaningfully be said to be choosing the end points of their online communications. Often, the content that comprises a webpage can be found not on one server, but on several. And the ISP and CDN in collaboration – not the user – choose which information to retrieve from each of the available sources. Greenfield Declaration ¶ 8. This is

not "transmission, between or among points specified by the user, of information." 47 U.S.C. § 153(43). It is transmission of information specified by the user between points selected by others.[4]

Given the ISP's involvement in the selection of the end points of the transmission it both uses and supplies, the ISP may be a supplier of "telecommunications" to itself. *See Stevens Report*, 13 FCC Rcd 11,501, 11,508, ¶ 15 (recognizing that "where an Internet service provider owns transmission facilities, and engages in data transport over those facilities in order to provide an information service . . . . one could argue that in such a case that the Internet service provider is furnishing raw transmission capacity to itself."). But the service ISPs provide to retail end users does not provide them with "telecommunications," as retail end users do not select the end points of their communications. The Commission's suggestion that DNS might be treated as severable from transmission, *see* NOI, ¶ 58, cannot fix this problem. The transmission offered to end users *itself* does not meet the statutory definition of telecommunications.[5]

As the technologies behind Internet access continue to develop, Internet connectivity services will evolve even further away from the statutory definition of "telecommunications." For instance, website optimization technology can today speed Internet access by combining and reconfiguring the different objects that might be present in a cached copy of a particular webpage, thereby reducing the number of "calls" a user's computer needs to make to retrieve the

[4] Content may be affected as well. For example, accessing an object on a particular webpage from one server rather than another can result in receiving older information than that available on a different server. Greenfield Declaration ¶ 11.

[5] The fact that the transmission element of Internet access cannot meaningfully be considered "telecommunications" under the 1996 Act does not affect the service's proper characterization as an "information service," *see* Part I.B *infra*, because it is provided "via telecommunications" – telecommunications provided by the ISP to itself but not to the end user. 47 U.S.C. § 153(20). Moreover, the Commission retains Title I ancillary jurisdiction over Internet access service whether it includes or uses "telecommunications" or not, since the Commission's ancillary authority extends broadly to any "communication by wire and radio." 47 U.S.C. § 151.

content.[6] Greenfield Declaration ¶ 15. This technology will soon be deployable at the ISP level to reconfigure the ISP's cached copies of third-party content for faster access speeds. *Id*. Once such technology is deployed to local caches operated by ISPs, users will still be receiving (as a general proposition) the same content as what the content provider hosts on their own server, but the electronic files that make up the content will have been organized and reconfigured differently by the cache operator before being delivered to the end user. *Id*. Such transformation of the data undoubtedly takes it outside the statutory requirement that "telecommunications" be transmitted "*without change in the form* or content of the information as sent and received," because the "form" of the content is being altered to enhance the effective speed of the user's connection to the Internet. 47 U.S.C. § 153(43) (emphasis added). And as the Internet and the technologies underlying it continue to evolve, ISPs will only continue to incorporate new such advanced features that make the telecommunications classification more and more out-of-place.

These facts highlight that any Title II approach faces an insurmountable obstacle in the statutory text. Even leaving aside the many enhanced functions that are integrated into today's Internet access services, *see* Part I.B *infra*, the core Internet "connectivity" function itself does not meet the statutory requirements for Title II regulation.[7] Where "Congress has directly spoken to the precise question at issue," as it has here, "that is the end of the matter; for the . . . agency[] must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*. 467 U.S. 837, 842-43 (1984); *see also AT&T Inc. v. FCC*,

[6] *See, e.g.*, "How Aptimize Works," *available at* http://www.aptimize.com/how-it-works (last visited July 14, 2010).

[7] The information-locating-and-redirecting features of Internet service may not necessarily be invoked in every communication. But the lack of a consistent connection between the user and the selection of the end points of the communication defeats any suggestion that there is some service called "Internet connectivity" that can satisfy the statutory definition as a whole.

452 F.3d 830, 835 (D.C. Cir. 2006) (court has "no need to consider the reasonableness of the Commission's interpretation" of Communications Act if text of statute is clear).[8]

B. Today's Broadband Services Intertwine Information Storage and Retrieval Even More Than When the Cable Modem Declaratory Ruling Was Issued.

Not only does the service provided by today's ISPs not meet the definition of a "telecommunications service" in the 1996 Act, but the service they do provide is unquestionably an "information service" under the statutory definition. As the D.C. Circuit has held, "[e]ven under the deferential *Chevron* standard of review, an agency cannot, absent strong structural or contextual evidence, exclude from coverage certain items that clearly fall within the plain meaning of a statutory term." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 592 (D.C. Cir. 2004). Internet access services supplied by broadband providers "clearly fall within the plain meaning of [the] statutory term" for "information service[s]," *id.*; *see also* 47 U.S.C. § 153(20), and the Commission cannot classify them otherwise and remain consistent with the Act.

In the *Cable Modem Declaratory Ruling*, the Commission concluded, rightly, that facilities-based broadband is an information service under the 1996 Act – an "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 17 FCC Rcd 4798, 4820, ¶ 34 (quoting 47 U.S.C. § 153(20)). In addition to services such as email accounts, web hosting, and access to

[8] *Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) ("*Brand X*"), which affirmed the Commission's holding in *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*"), is not to the contrary. There, the Supreme Court held that the word "offering" within the "telecommunications service" definition was ambiguous, not the term "telecommunications" itself, which is separately defined in the Act and suffers from no such ambiguity. *See Brand X*, 545 U.S. at 989-92. Moreover, the Court was applying the Act to a record developed in 2002, when the *Cable Modem Declaratory Ruling* on review was issued. As explained *supra*, broadband Internet access has evolved a great deal since 2002, and the service as it exists today does not offer "telecommunications."

newsgroups offered by ISPs, the Commission noted the importance of DNS, as well as caching provided by ISPs, and the functional integration of such services into the Internet service offered by ISPs. *See id.*; *id.* at 4810, ¶ 17. The text of the 1996 Act compels this conclusion; these functions are quintessentially – and literally – "storing . . . information," "retrieving . . . information," and "making available information" within the statutory definition. 47 U.S.C. § 153(20).

The NOI's suggestion that the Commission's thorough and well-reasoned reading of the statute in the *Cable Modem Declaratory Ruling* and its progeny can be circumvented by treating Internet "connectivity" as distinct from its information service components finds no support in the facts. While the NOI notes that some services (such as web hosting, email, caching, and DNS) are now offered separately from Internet connectivity, *see* NOI, ¶ 58, that ignores a more fundamental question. That question is whether Internet connectivity – which the NOI defines as the "service [that] allows users to communicate with others who have Internet connections, send and receive content, and run applications online," *see* NOI, n.1 – itself incorporates any of the information-manipulation functions enumerated in the definition of "information service" under 47 U.S.C. § 153(20). And the answer is that Internet connectivity most certainly does incorporate such functions. As detailed in Part I.A. *supra*, the ISP's role in coordinating where information requested by a user will be retrieved from – and sometimes hosting this information through arrangements with CDNs – is now an integral part of the service provided by Cablevision, and by other ISPs as well. These functions plainly constitute the "retrieving" and "storing" of "information," thus falling squarely within the statutory definition of "information service." *See* 47 U.S.C. § 153(20).

Even if *some* information services offered by ISPs such as email, webhosting, and newsgroup access might be theoretically severable from Internet connectivity (in the sense that voicemail is theoretically severable from the telephone service with which a carrier might offer it), the same *cannot* be said of an ISP's role in optimizing the user's Internet experience by retrieving and storing the information the user wants to access. While a user connected to the Internet without the information retrieval and storage functions offered today by ISPs might retain *some* Internet functionality (such as the ability to retrieve directly information from third-party webservers using third-party DNS), the user experience would be very different – and much diminished – from the user experience, as well as expectations, of Internet access service today. Greenfield Declaration ¶ 5. Indeed, we are unaware of any broadband Internet provider that offers such a service on a stand-alone basis – a factor traditionally critical to the analysis of whether a service should be considered a common carrier service under the Communications Act. *See, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 640-42 (D.C. Cir. 1975); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 609-10 (D.C. Cir. 1976). Internet connectivity *itself* thus must be classified as an information service to comport with the plain text of the 1996 Act.

C. The Commission Lacks a Defensible Basis for Abandoning its Current Classification of Internet Access as an Information Service.

The tension between the 1996 Act's definition of "telecommunications service" and the reality of how Internet connectivity services are provided today would render problematic any attempt at reclassification even if the Commission were addressing the question in the first instance. But the Commission has already carefully considered, and decided, this exact question in the *Cable Modem Declaratory Ruling*, reaffirming its decision in the *Wireline Broadband Order*, *see In re Appropriate Framework for Broadband Access to the Internet over Wireline*

Facilities, Report & Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14,853 (2005) ("*Wireline Broadband Order*"); *aff'd sub nom. Time Warner Telecom., Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007), and subsequent orders extending the same reasoning to wireless broadband and broadband over powerline. *See In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5902 ¶¶ 1-2 (2007); *In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13,281, 13,281 ¶ 1 (2006). There are currently no circumstances that would justify the Commission's departure from this long-held position.

As the Supreme Court held last term, "[s]ometimes" an agency "must" articulate "a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (citing *Smiley v. Citibank*, 517 U.S. 735, 742 (1996)). This heightened standard arises "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," because "[i]t would be arbitrary or capricious to ignore such matters." *Id*. This is not a standard the Commission is likely to be able to meet here.

The facts that underlay the Commission's original classification of broadband Internet access as an information service have not materially changed. While some services provided by ISPs such as email and web hosting may arguably be more readily available as stand-alone service offerings, the importance of information storage and retrieval to basic Internet connectivity itself has grown rather than diminished as the architecture of the Internet has evolved. *See* Part I.A. *supra*.

Moreover, the years since the FCC formally classified facilities-based Internet access service as an information service have witnessed a massive wave of investment in broadband Internet connections and deployment, made at least in part in reliance on the deregulatory treatment promised by the *Cable Modem Declaratory Ruling*. Businesses have structured investments and business plans around the expectation that they were investing in and planning for services that would not face the burdensome requirements of Title II. Cablevision alone has invested over $4 billion in the network it uses to provide broadband services throughout its service area in the eight years since the *Cable Modem Declaratory Ruling*, and has structured those investments, and based its expected returns and planning, around the reasonable expectation that its broadband Internet services would be subject to regulation only under Title I. Indeed, the *Cable Modem Declaratory Ruling* touted as one of the *reasons* for classifying broadband services under Title I that it would promote such investment. *See Cable Modem Declaratory Ruling*, 17 FCC Rcd 4798, 4802 ¶ 5 (holding that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market" and that "regulatory uncertainty . . . in itself may discourage investment and innovation" in technologies Congress intended to promote) (internal quotation marks omitted). For the FCC to reverse the deregulatory classification of the *Cable Modem Declaratory Ruling* now – when it has not merely "engendered serious reliance interests," *Fox Television Stations*, 129 S. Ct. at 1811, but engendering such reliance interests *was itself the original policy* – would operate as an indefensible bait-and-switch.

Moreover, the particular circumstances of this NOI, as well as the FCC's articulation of its goals in this proceeding, further add to the risk that a court will reverse any new Title II framework for Internet connectivity services as arbitrary and capricious under the APA.

Coming, as the NOI does, in clear response to an unfavorable result in the D.C. Circuit, a reviewing court is likely to view a reversal of the Commission's reasoning in the *Cable Modem Declaratory Ruling* as driven solely by the desire to accomplish a particular outcome – *i.e.*, to justify specific policies already decided upon in advance of the legal framework itself – rather than as an honest attempt to implement the intent of Congress in the 1996 Act. The Commission's NOI openly states that purpose of potential reclassification would be to align Commission's statutory responsibilities with its "previously stated policy goals for broadband." NOI, ¶ 28. While those policy goals are admirable, and many are in fact shared by Cablevision, the Commission is starting with the conclusion and then reasoning backwards to an interpretation of the 1996 Act that furthers it. Such an approach is the epitome of arbitrary decision making. *See, e.g., Independent U. S. Tanker Owners Committee v. Lewis*, 690 F.2d 908, 920 (D.C. Cir. 1982).

II. TITLE II RECLASSIFICATION WOULD IMPEDE, RATHER THAN FURTHER, THE COMMISSION'S BROADBAND POLICY OBJECTIVES.

Aside from the obvious risk that such an approach will not work legally, the proposed Title II reclassification would not even accomplish the goals for which the Commission is considering adopting it. The Commission's core goals of encouraging broadband deployment and affordability would be undermined by the threat of potentially vast expansion of liability and state and local regulatory obligations to which a Title II regime might subject broadband carriers – consequences of reclassification that forbearance may be inadequate to prevent. Such risks raise the costs of doing business and deter badly-needed capital investment. Moreover, common carrier regulation at the "last mile" only, as the NOI proposes, will not meaningfully advance the FCC's open Internet objectives, while possibly even setting them back. Reclassification would move the Commission's goals backward.

A. Broadband Reclassification Would Immediately Extend the Threat of Potential Legal Liabilities to ISPs.

One of the most dramatic effects of classifying Internet connectivity under Title II would be the threat of an immediate expansion of potential legal liabilities for ISPs. If the Commission decides that ISPs truly are "telecommunications" carriers, they would for the first time be presumptively subject to damages actions under sections 206 and 207 of the Communications Act. The costs of defending against such actions – not to mention the chilling effect such potential liability is likely to have on ISPs' willingness to innovate in the provision of their services – would impair the Commission's goals of extending deployment and improving the affordability of broadband. While the Commission may anticipate using its forbearance authority to prevent the application of Title II requirements in a manner that frustrates its policy objectives in such an obvious way, such a forbearance approach is wholly untested with respect to sections 206 and 207, and the efficacy of such an approach is at best unclear.

The liability of carriers under section 206 of the Act is very broad. For example, damages are available for practices and charges that are deemed "unjust or unreasonable." 47 U.S.C. § 201(b). And not only can carriers be sued over perceived violations of the Act itself, but litigants can in some instances state a claim merely by alleging violation of the Commission's regulations. *See Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 54 (2007). Moreover, the Commission has little control over the disposition of such actions, because they can be filed in federal court (rather than at the Commission) if a plaintiff so chooses. *See* 47 U.S.C. § 207. Plaintiffs bringing such actions are also entitled to attorneys' fees where their suits are successful. *See id.* § 206.

It is thus unsurprising that federal court claims under sections 206 and 207 against telecommunications carriers are common. Hundreds of cases against carriers have resulted in

reported decisions by the federal courts.[9] And this is only the tip of the iceberg, as only a fraction of complaints ultimately result in published decisions. The rest still must be defended, whether they are settled, dismissed, or decided in unpublished decisions.

Extension of the private right of action to ISPs would therefore work a sea change. Creative litigants would likely argue that the Commission's years of past regulations governing Internet service providers – which were not intended to create private causes of action at the time – now form a basis for damages lawsuits the FCC likely never intended to authorize.

The costs of such potential liability are well documented. Vulnerability to numerous private lawsuits, along with over-regulation more generally, has likely contributed to economic problems in the traditional telecommunications sector, which has resulted in job losses, declines in service quality, and a shortage in private capital investment.[10] Moreover, the possibility of such liability discourages innovation and over-encourages litigation-avoidance tactics that produce no other appreciable benefits.[11]

---

[9] *See, e.g., Bowers v. Windstream Ky. East LLC*, Civ. A. No. 3:09-cv-440-H, ---F. Supp. 2d---, 2010 WL 1757938 (W.D. Ky. Apr. 30, 2010) (claim regarding service pricing); *Higdon v. Pacific Bell Tel. Co.*, No. C. 08-03526 RS, 2010 WL 1337712 (N.D. Cal. Apr. 2, 2010) (same); *Ramirez v. Dollar Phone Corp.*, 668 F. Supp. 2d 448 (E.D.N.Y. 2009) (claimed based on alleged deceptive sales practices); *McMickle v. Ark. Tel. Co.*, No. 4:08CV00324 SWW, 2009 WL 928895 (E.D. Ark. Apr. 3, 2009) (claim based on alleged unfair rates); *Jasso v. Citizens Telecomms. Co. of Cal., Inc.*, No. Civ. S.-05-2649, 2009 WL 635249 (E.D. Cal. Mar. 11, 2009) (claim based on employment-related injuries); *Waudby v. Verizon Wireless Servs. LLC*, 248 F.R.D. 173 (D.N.J. 2008) (challenge to certain fees); *Weinstein v. AT&T Mobility, LLC*, 553 F. Supp. 2d 637 (W.D. Va. 2008) (claim based on alleged misuse of telephone records); *Beattie v. CenturyTel, Inc.*, 234 F.R.D. 160 (E.D. Mich. 2006) (challenge to billing practices), *aff'd in part, remanded in part*, 511 F.3d 554 (6th Cir. 2007).

[10] *See generally* Thomas W. Hazlett, et al., *Sending the Right Signals: Promoting Competition through Telecommunications Report: A Report to the U.S. Chamber of Commerce* 33-45 (2004); *see also infra* Part II.D.

[11] *E.g.*, Council of Economic Advisors, *Who Pays for Tort Liability Claims: An Economic Analysis of the U.S. Tort Liability System* 7-8 (2002). The CEA estimated that "excessive" tort costs (*i.e.*, not corresponding to actual damages suffered by litigants or reasonable administration costs) amounted to 45 cents for every dollar spent on the tort system. *Id.* at 10. The CEA also

For ISPs, the costs of defending against such lawsuits – and the chilling effect such threats are likely to have on ISPs' willingness to innovate in the provision of their services, lest their business models be deemed "unreasonable" in tort litigation brought by creative plaintiffs' lawyers – would deter creativity in the broadband business and raise the cost of doing business, including the ultimate cost of broadband access to consumers.

Cablevision recognizes that the Commission has proposed avoiding this consequence of reclassification through the use of its forbearance authority. *See generally* NOI, ¶¶ 69-70; *id*. at ¶ 77. There are serious risks, however, to such an approach. At the outset, the Commission's ability to forbear from sections 206 and 207 is wholly untested, and it is inevitable that such a move would face legal challenges by plaintiffs who would contend that the statutory criteria for forbearance are not adequately satisfied.

Moreover, even if a grant of such forbearance were successfully defended on direct review in the court of appeals, plaintiffs can be expected routinely to bring collateral attacks in individual lawsuits seeking damages in district court. This would necessarily result in an extended period of legal uncertainty during which the cloud of potential liability would hang over investment and business decisions. Additionally, forbearance determinations are not irreversible, as the NOI acknowledges. Thus, forbearance provides the broadband sector with little long-term security and significant uncertainty.

Finally, if the Commission chooses not to or is unable to use its forbearance authority to relieve broadband carriers of their liability for damages under Sections 206 and 207, it could potentially undermine the Commission's entire "light touch" approach to forbearance. Even if the Commission were to forbear from enforcing other statutory or regulatory requirements

---

noted that the U.S. tort system accounts for a far greater share of GDP than the tort systems of many other developed countries. *Id.* at 10-11.

against broadband providers, it is at best unclear whether such forbearance would bar private suits under those requirements. The Commission itself told the Court of Appeals of the D.C. Circuit that "[f]orbearance does not rescind the relevant portions of the Act and FCC regulations; instead, the agency '*forbear[s]*' from '*applying*' or '*enforc[ing]*' them." Brief of the FCC, *Sprint Nextel v. FCC*, No. 06-1111 (July 9, 2007) (emphasis in original). The Commission made this argument in a very different context – to rebut a claim that the forbearance statute improperly delegates legislative functions to the Commission. But the implication for the effect of forbearance on private litigants is not encouraging. If a court were to interpret the Commission's forbearance authority as limited only to the Commission's own enforcement, complaints under Sections 206 and 207 could bypass and render meaningless the Commission's attempts to relieve broadband providers of other regulatory burdens.

B. The Title II Approach Would Potentially Subject ISPs to Extensive State and Local Regulation, Leading to Constant and Protracted Litigation.

As the extension of potential damages liability to ISPs illustrates, the Commission's goal of maintaining its "Deregulatory Status Quo" through reclassification combined with forbearance, NOI, ¶¶ 69-70, faces potentially insurmountable obstacles. An equally significant obstacle is the impact of state and local regulation. A Title II approach to broadband would remove what is generally recognized as blanket federal preemption of state and local regulation of information services and would lead immediately to attempts to apply numerous regulatory requirements and fees to broadband services. The Commission's suggestion that it could mitigate this damage by exercising its authority to preempt requirements "that are contrary to a Commission decision not to apply similar requirements," NOI, ¶ 110, provides little comfort. Such an approach would lead, at the very least, to constant and protracted battles before state and local authorities, this Commission, and the federal courts about what specific requirements

should or should not be preempted. The result would eviscerate the Commission's successful, decades-long policy of promoting broadband deployment through deregulation.

As the federal courts have recognized, "[t]he FCC has promoted a market-oriented policy of allowing providers of information services to 'burgeon and flourish in an environment of free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements.'" *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (affirming, and citing, *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22416, ¶ 21 (2004) ("*Vonage Preemption Order*")). Limitations on the ability of states to impose regulations on information services are thus longstanding. *See, e.g., In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 FCC 2d 512, ¶ 83 n.34 (1981) (finding that "the provision of enhanced service is not a common carrier public offering and that efficient utilization and full exploitation of the interstate telecommunications network would be best achieved if these services are free from public utility-type regulation," and accordingly "preempt[ing] the states" from "impos[ing] common carrier tariff regulation on a carrier's provision of enhanced services"), *aff'd sub nom. Computer and Computer Indus. Ass'n v. FCC*, 693 F.2d 198, 216 (D.C. Cir. 1982); *see also California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994) ("*California v. FCC*") (finding that the FCC had demonstrated that legitimate "regulatory goals . . . would be negated" by conflicting state regulation of information services).

Broadly insulating information services from state regulation has protected broadband services from the burdens of state-by-state and locality-by-locality regulations. Even state or local regulations that might appear innocuous in isolation become cumbersome when they evolve

into a nationwide patchwork of overlapping and potentially contradictory requirements. As the Commission has recognized, requiring "Internet-based services" to "submit to more than 50 different regulatory regimes . . . would eliminate th[e] fundamental advantage of Internet-based communication." *See Vonage Preemption Order*, 19 FCC Rcd 22,404, 22,429-30, ¶ 41.[12] The current federal deregulatory policy, implemented through the FCC's designation of broadband Internet providers as information service providers, has thus ensured that broadband ISP services have been able to flexibly deploy nationwide, under a simple, uniform set of national regulations, without having to navigate a web of local obstacles.

The risk of disruptive state and local regulations is hardly hypothetical. A number of legislative proposals are pending in Cablevision's service area right now, and could become a reality in short order in the absence of the information service designation that has deterred such actions. Legislation pending in the New York Assembly, for instance, would impose "neutral internet and broadband network" requirements on ISPs and would require ISPs operated by cable companies to file annual "neutrality reports" detailing "every instance" in which they managed their networks in a manner to restrict or block access to any content or category of content. *See* N.Y. Assembly Bill A1875 at Sections 6, 243.[13] Others purport to regulate the uses of personally identifying information by content and services providers. *See* N.Y. Assembly Bills A1393[14]

[12] Federal courts have reached similar conclusions in the commerce clause context. *See, e.g., American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 182 (S.D.N.Y. 1997) ("The Internet . . . requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations.").

[13] *Available at* http://assembly.state.ny.us/leg/?default_fld=&bn=+A01875%09%09&Summary=Y&Text=Y (last visited July 14, 2010).

[14] *Available at* http://assembly.state.ny.us/leg/?default_fld=&bn=+A01393%09%09&Summary=Y&Text=Y (last visited July 14, 2010).

and A5152.[15] While these bills may have admirable goals, the prospect of ISPs' facing a collage of legal requirements from hundreds of different state and local jurisdictions is a regulatory nightmare.

States and localities are also constantly seeking to assess taxes and fees on broadband providers, and these efforts have greatly intensified since the country entered the current economic downturn. Franchise fees, rights-of-way fees, and taxes on "telecommunications services" are common in states and localities. For example, Connecticut imposes a 6% sales tax generally on "telecommunications service." Conn. Gen. Stat. §§12-408(1), 12-407(a)(2)(K) and 12-407a. The classification of broadband as an "information service" has enabled broadband providers to resist the application of such fees on broadband. Reclassifying broadband as a "telecommunications service" would eliminate this protection, potentially exposing broadband to numerous taxes and fees.[16] Such a "broadband tax" would result in higher costs that both inhibit deployment of broadband and may be in part passed through to consumers, making Internet access less affordable and potentially placing it out of reach for many.

Removing the blanket protection offered by the current information service designation would, at best, make combating these kinds of state and local regulations and fees into a constant series of protracted battles. It is true that state and local governments face legal limitations on their ability to regulate Internet access – under the Commerce Clause, *see American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 183-84 (S.D.N.Y. 1997), as well as under general doctrines of conflict preemption where they contradict federal policy, *see, e.g., Qwest Corp. v. Arizona Corp. Comm'n*, 567 F.3d 1109, 1118 (9th Cir. 2009) (invalidating state unbundling requirements on

[15] *Available at* http://assembly.state.ny.us/leg/?default_fld=&bn=+a5152%09%09&Summary=Y&Text=Y (last visited July 14, 2010).

[16] *Cf.* 47 U.S.C. § 151 note § 1104(a)(2)(B) (limiting moratorium on application of general "State telecommunications service tax[es]" to Internet access).

conflict preemption grounds). And the Commission has proposed to preempt particular decisions by states and localities to "impose requirements on broadband . . . . that are contrary to a Commission decision not to apply similar requirements." NOI, ¶ 110. But determining the boundaries of regulations that fail those requirements requires extended litigation and proceedings before state and local governments, in court, and in this Commission. *See, e.g.*, *Time Warner Entm't Co., L.P. v. FCC*, 56 F.3d 151, 195 (D.C. Cir. 1995) (holding that whether federal law preempted particular category of state communications regulations "involves a host of factual questions peculiar to the state law at issue in each case."); *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1220 (D.C. Cir. 1984) ("[W]hether a state regulation unavoidably conflicts with national interests is an issue incapable of resolution in the abstract."). Moreover, these doctrines may not effectively address the problem of state and local regulations that conflict with the federal deregulatory scheme not in isolation, but rather as a result of the cumulative regulatory complication they engender when implemented across hundreds of different jurisdictions.[17]

Accordingly, despite the Commission's desire to achieve a deregulatory landscape like that existing today through reclassification, such an approach faces practical limitations that make success impossible. The Commission should not risk undoing its decades-long policy of promoting broadband deployment through deregulation in this manner.

C. Reclassification Would Merely Move Discrimination to Other Parts of the Internet Ecosystem.

As detailed above, a Title II approach would subject broadband Internet providers, and broadband investment, to serious risks and regulatory uncertainty. At the same time, the

[17] To be clear, Cablevision believes it would have arguments against state and local regulation of and assessment of fees on broadband even if the Commission were to reclassify broadband Internet access as a "telecommunications service." The point is that, if the Commission were to take that approach, Cablevision and other ISPs would almost certainly have to fight numerous battles on preemption, which necessarily raises costs and drains resources.

approach would not accomplish one of the Commission's primary goals – addressing unreasonable discrimination in the provision and availability of content online. Classifying Internet "connectivity" alone under Title II, while leaving the rest of the Internet ecosystem unregulated, would do little to advance this goal.

A major driving force behind the Commission's consideration of a Title II framework for broadband Internet providers is plainly its desire to prevent practices by ISPs that might be deemed unreasonable discrimination or unreasonable network management. *See, e.g.*, NOI, ¶¶ 44-50; *In re Preserving the Open Internet*, Notice of Proposed Rulemaking, 24 FCC Rcd 13,064 (2009). The FCC's concerns appear to arise out of two incidents in which it found that ISPs were not delivering Internet traffic in the manner requested by the customer and failed to disclose this practice to subscribers. *See In re Madison River Communications, LLC, and Affiliated Companies*, Order, 20 FCC Rcd 4295 (2005); *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008), *vacated by Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). At the outset, Cablevision does not believe that two such isolated incidents – out of a nationwide industry serving over a hundred million Americans – warrant such a wholesale revisiting of a successful and decade-old legal framework. The allegations underlying the *Comcast* and *Madison River* orders, however, highlight the limits of a Title II "fix" to the *Comcast* decision.

Comcast and *Madison River* both involved the very narrow allegation that an ISP was refusing to *transmit* information their users had requested. If the legal problems with a Title II reclassification of broadband Internet services could be overcome, and facilities-based broadband providers were treated as "common carriers," the Commission might be in a position

more easily to specify the exact circumstances under which ISPs may and may not decline to transport information as requested by a user. But such a policy would do very little to ensure the Commission's broader goals that the Internet be "neutral" and "open."

The accessibility of online content depends on a chain of actions by numerous operators in the Internet ecosystem, of which transmission by an ISP (over the "last mile" to an end user) is only one of many steps in the chain. As Cablevision has previously explained, application providers play a key role by serving as "gatekeepers" that locate content for users in the first place. *See* Reply Comments of Cablevision Systems Corp., *In re Preserving the Open Internet*; *Broadband Industry Practices*, GN Docket No. 09-191, at 20-21 (April 26, 2010). Search engines and online networks with dominant market share, such as Google and Amazon.com, possess tremendous power to decide what content is even indexed and displayed to users. *See id.* at 20-21 & n.58 (citing submissions by various commenters in response to *Open Internet NPRM*).[18] Moreover, information on the Internet is stored, retrieved, manipulated, and influenced by CDNs, backbone providers, and other players. Greenfield Declaration ¶¶ 6-8. These arrangements ultimately benefit consumers by enhancing the speed and reliability of popular content. Indeed, by allowing finite Internet infrastructure to be used more efficiently, such arrangements may also benefit consumers accessing content not subject to such preferred arrangements, because they free up scarce resources by reducing the amount of traffic that needs

[18] *See, e.g.*., SearchNeutrality.org, *Foundem's Google Story*, Aug. 18, 2009, *at* http://www.searchneutrality.org/foundem-google-story; Adam Raff, *Search, but You May Not Find*, N.Y. TIMES, Dec. 27, 2009, at http://www.nytimes.com/2009/12/28/opinion/28raff.hmtl ("Google's dominance of both search and search advertising gives it overwhelming control. Google's revenues exceeded $21 billion last year, but this pales next to the hundreds of billions of dollars of other companies' revenues that Google controls indirectly through its search results and sponsored links.").

to be exchanged among different networks, making ISPs' services more efficient overall and lowering infrastructure costs. *Id*. ¶¶ 5, 12.

Under the Commission's own proposal, none of the activities of these players would constitute telecommunications services. Indeed, the NOI expressly proposes to exempt service providers "upstream" from retail, in particular entities operating "content delivery networks" and "Internet backbone connectivity arrangements." NOI, ¶ 107. Reclassifying Internet connectivity under Title II, then, would do nothing to limit the ability of these players – some of which are dominant providers – to treat content preferentially or decline to make it available altogether, whether for valid reasons pertaining to the management of their systems, "bad" reasons that would be considered unreasonable or anticompetitive in a regulated environment, or for no reason at all. *See* Reply Comments of Cablevision Systems Corp., *In re Preserving the Open Internet; Broadband Industry Practices*, at 20-21. Content might already be blocked, degraded, or afforded preferential treatment *before* it even reaches the network of an ISP providing Internet access to a retail customer. Imposing regulations on retail carriers to prevent preferential treatment of Internet traffic over the "last mile" does nothing to prevent unreasonable conduct taking place before traffic even reaches the ISP.

For these reasons, Title II regulation of the last mile may merely move undesirable discrimination to other places in the Internet ecosystem – and to entities that have weaker incentives to act responsibly. ISPs have direct relationships with their end user subscribers, and the market can be expected to play a role in policing their behavior, given the widespread consumer expectation that they should be able to use their Internet connections to access any content of their choosing. Competition in the market for broadband Internet access, therefore, functions as a check on such conduct by retail ISPs. And as the comments of the NCTA and

others show, the broadband market is highly competitive. Other participants in the Internet ecosystem, however, do not have such direct relationships with consumers, do not compete for business from subscribers, and do not face the same market incentives to be responsive to consumer expectations.

The proposed Title II approach would not necessarily even do much to regulate the practices of retail ISPs. In order to define "Internet connectivity" as a telecommunications service – if such a move were legally defensible at all, which it is not, *see* Section I.A. *supra* – the FCC would need to exclude the ISPs' role in locating the Internet content requested by the user, including not only DNS, but also in redirecting users' requests to more efficient sources, such as co-located CDNs. *See* Parts I.A. & I.B, *supra*. Any such rule would also need to exclude CDN-like services such as caching performed by the ISPs themselves. *See id.* As a consequence, ISPs would remain free to engage in preferential treatment of particular content in the provision of caching, DNS, and information-location and redirection services free from Title II regulation.

D. Reclassification Would Chill Investment by Threatening Significant Regulatory Burdens and Creating Legal Uncertainty.

The Commission has repeatedly – and rightly – held that minimal regulation is essential for broadband innovation and investment. And America has enjoyed unprecedented broadband growth under the Commission's settled commitment to deregulation. Even as the FCC considers Title II reclassification, market facts are already confirming its insights, as well as its fears. Analysts are downgrading broadband stocks, and market experts are painting a bleak picture of future industry investment. Unfortunately, this comes at a time when broadband has critical need for private capital. The Commission's Broadband Plan recognizes that billions of dollars in private investment and innovation are necessary for realizing the country's goals of successful

broadband deployment.[19] Despite its best intentions, Title II reclassification would inevitably undermine the Commission's goals to promote "innovation, investment, and competition in the broadband context." NOI ¶ 29. Cablevision thus urges the Commission to reconsider reclassification, and instead work in partnership with ISPs like Cablevision to accomplish its goals under its time-tested Title I framework.

The Commission has long recognized that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market." *Cable Modem Declaratory Ruling* at 17 FCC Rcd 4798, 4802, ¶ 5 (quotation marks omitted); *accord Wireline Broadband Order*, 20 FCC Rcd 14,853, 14,877-78, ¶ 44. The Commission has acknowledged that "substantial investment is required to build out the networks that will support future broadband capabilities and applications." *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Provider*s, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3022-23, ¶ 5 (2002).[20] It has thus has sought to avoid "unnecessary or unduly burdensome regulatory costs," as well as "regulatory uncertainty that in itself may discourage investment and innovation." *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4802, ¶ 5. Precisely for these reasons, the Commission has sought to maintain a consistent Title I approach to broadband services, which has provided a stable, minimally regulated environment for almost a decade.

---

[19] *See* FCC, Omnibus Broadband Initiative, *Connecting America: The National Broadband Plan* at xv, 38 (Mar. 16, 2010) (outlining the Plan's reliance on competition and private investment rather than government funding, and noting that, in reaching our current deployment levels, private investment into broadband may have exceeded 40 billion dollars per year) ("*Broadband Plan*").

[20] *See also generally Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking in IB Docket No. 02-34, and First Report and Order in IB Docket No. 02-54, 18 FCC Rcd 10,760, 10,781 ¶ 45 n.115 (2003) ("The Commission has noted on several occasions that regulatory uncertainty can discourage investment, and so unnecessary regulatory uncertainty should be avoided.").

The proposed reclassification would undo this policy, bringing both the "burdensome regulatory costs" and "regulatory uncertainty" that the Commission has long sought to avoid because of their impact on investment. Despite the Commission's desire to use forbearance to return to this "Deregulatory Status Quo" following reclassification, *see* NOI, ¶¶ 69-70, a forbearance approach cannot solve this problem. To begin with, the Commission's proposed approach would leave in place potentially costly regulatory burdens such as exposure to claims of "unjust or unreasonable discrimination in charges" or "practices," 47 U.S.C. § 202(a), which have never applied to retail broadband Internet access service. Additionally, with respect to the other Title II provisions, which bring significant regulatory burdens, forbearance from each requires a successful majority vote by the Commission and a successful defense in court. As noted above, the Commission's authority to forbear from a number of provisions at issue remains untested, and even if a forbearance order survives direct judicial review, there is the possibility of later collateral attacks. More significantly, a subsequent Commission could potentially reverse any of these decisions.

The possibility of oppressive regulations in the future will understandably depress investment.[21] And the stakes are high. Early projections suggest that, even if the Commission forbears from the most onerous regulations, reclassification might cost the broadband industry over six hundred thousand jobs in the next five years, and slow broadband revenue growth by

[21] *See* Craig Moffett et al., Bernstein Research, *U.S. Cable: Pulling the Plug . . . Regulatory Uncertainty Clouds Terminal Growth Rates; Downgrading Sector to Neutral* 3 (May 10, 2010) ("*Pulling the Plug*") ("The FCC has voted itself a loaded gun, pointed it at the Carriers (cable and teleco alike) and then promised not to shoot. The world doesn't seem like a safer place."); Jeffrey Wlodarczak, Pivotal Research Group, *Cable/Satellite: Title II: A Solution in Search of a Problem* (May 6, 2010) (explaining to investors that reclassification "opens up a long term can of worms if the Title II rules are expanded at a later date which could include forced open access, rate regulation, additional taxes and other restrictions. Such a move in our view would have a chilling effect on investment.") ("*Pivotal Report*").

one-sixth over the next decade.[22] And, if a court or future Commission applies a broader set of Title II rules to broadband providers, the regulatory burden could greatly inhibit the next generation of broadband. *See Pivotal Report*; *see also Pulling the Plug* at 3. Many investors will delay or limit investment – which necessarily depends on predictions of future performance – when such serious consequences are so uncertain.[23] This impact on investment may last for *years*: industry-watchers estimate at least two years before the first appellate decisions appear, and much longer if the Supreme Court is involved.[24]

Reclassification-inspired uncertainty is already hindering broadband investment. Analysts have begun warning investors to avoid the broadband industry in the face of "a protracted period – likely *years* long – of enormous uncertainty." *Pulling the Plug* at 3.[25] The Commission's mere consideration of reclassification has caused broadband stock to tumble from

[22] Charles Davidson & Bret Swanson, Advanced Communications Law & Policy Institute, *Net Neutrality, Investment & Jobs: Assessing the Potential Impacts of the FCC's Proposed Net Neutrality Rules on the Broadband Ecosystem* ii (June 2010), *available at* http://www.nyls.edu/user_files/1/3/4/30/83/Davidson%20&%20Swanson%20-%20NN%20Economic%20Impact%20Paper%20-%20FINAL.pdf; Coleman Bazelon, The Brattle Group, Inc., *The Employment and Economic Impacts of Network Neutrality Regulation: An Empirical Analysis* ii, A Report to Mobile Future (April 23 2010), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7020437461.

[23] Analysts counsel avoidance, pointing out that "[t]he FCC 'nuclear option' last Thursday calls into question every assumption about the terminal value of cable stocks. Terminal growth rates are now highly uncertain." *Pulling the Plug* at 4.

[24] Craig Moffett et al., Bernstein Research, *U.S. Telecom & Cable: The FCC Goes Nuclear... A Discussion of Title II Reclassification* [Conference Call Transcript] 15 (May 18, 2010).

[25] *See also* Howard Buskirk, *Regulatory Uncertainty Created by FCC Seen Limiting Network Investment*, Comm. Daily (July 15, 2010) (citing concerns of analysts and investor that "FCC proposals to reclassify broadband under Title II of the Communications Act . . . could have a chilling effect on investment in broadband" because, *inter alia*, "[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").

a recent high, accompanied by a flurry of experts recommending only limited investment.[26] Few investors are willing to face such a long period of uncertainty and regulatory overhang. *See Pulling the Plug* at 5.

Particularly in light of these facts, Cablevision urges the Commission to reconsider the wisdom of reclassification. The Commission should work in partnership with ISPs to accomplish the important goals of the National Broadband Plan under the existing "information service" framework. In the words of the Communications Act, the Commission "must encourage the deployment of advanced telecommunications capability to all Americans by removing [regulatory] barriers to infrastructure investment."[27] With the Broadband Plan underway – and private investment being the Plan's lifeblood – the Commission has even more reason to encourage investors. It should reject reclassification and its overhanging regulatory uncertainty.

III. TITLE I, AS WELL AS CONGRESSIONAL ACTION AND COLLABORATION WITH STAKEHOLDERS, REMAIN VIABLE AND PREFERABLE PATHS FOR ADVANCING THE COMMISSION'S BROADBAND POLICIES.

As explained above, pursuing reclassification faces enormous legal and practical obstacles, and at the very least removes the momentum behind the Commission's policy goals for broadband. Cablevision urges the Commission to avoid this outcome and instead work in partnership with ISPs to achieve the Commission's laudable goals. The legal challenges of the *Comcast* decision are best addressed through a comprehensive approach, which might include voluntary actions by industry stakeholders, congressional legislation, and/or renewed efforts

[26] Thomas W. Egan, Collins Stewart, *FCC Overshadows Strong Cable 1Q* (May 7, 2010); *Pulling the Plug* at 6-8.

[27] 47 U.S.C. § 157 nt.; *see also Appropriate Framework for Broadband Access to the Internet over Wireline Broadband Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd, 14853, 14894-95, ¶ 78 (2005).

under Title I. With respect to Title I, as discussed below, Cablevision believes that, although not without difficulties, this remains the best path forward for the Commission to establish its authority.

It is important to remember the narrowness of the D.C. Circuit's holding in *Comcast*. The Court did not hold that the Commission lacks Title I ancillary authority to issue regulations governing broadband or Internet providers and applications. Nor, for that matter, did the Court even hold that the FCC lacks ancillary jurisdiction under Title I to implement the *Internet Policy Statement* it had enforced in the order on review in that case. The Court's holding was limited to a very narrow issue: the Court believed that the Commission had not done enough to *articulate* how the particular action it took relating to Comcast's network management practices in the *Comcast* order was ancillary to one of the Commission's statutory responsibilities. *See* 600 F.3d at 661 (holding that Commission had not adequately "tie[d] its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility'") (quoting *American Library Association v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)). Indeed, the Court did not even consider some of the Commission's own proposals for grounding its action in the statute because they had not been articulated in the original proceeding or properly raised in the Commission's brief. *See id*. at 660. Nothing in the D.C. Circuit's opinion prevents the FCC from coming back and articulating a more thorough basis for exercising its ancillary authority to implement its Open Internet policies and adding to the legal support underlying its other broadband objectives.

Cablevision believes these tasks can be accomplished in a manner that can withstand judicial review. For example, with respect to the open Internet principles at issue in the *Comcast* decision, as well as in the *Open Internet NPRM*, the Commission could credibly predicate openness requirements on its statutory responsibilities over carrier interconnection in section

251. *See* NOI, ¶¶ 42-44. Internet traffic is carried over both information service and telecommunications carrier networks today. *See* NOI, ¶ 6, ¶ 21, nn. 53-54. Carriers' interconnection obligations – the purpose of which is to ensure that a user's communications can arrive at their intended destination on another carrier's network without interruption – are no less applicable to Internet traffic transmitted as telecommunications over common carrier networks. In an Internet where common and private-carrier networks are pervasively intertwined, moreover, and end users may have no way of knowing whether their communications are routed over private networks, common carrier networks, or some combination thereof, there is a solid argument that interconnection policies would be undermined – and the Commission's ancillary Title I authority validly invoked – if other providers with whom telecommunications services interconnect could unreasonably block or degrade traffic and thereby impede it from arriving at its intended destination.

The interconnection of private and common-carrier networks on the Internet – and the fact that consumer information is likely to be transmitted across both – may equally anchor FCC initiatives to protect consumer privacy online, using rationales similar to those it has used in the context of VoIP carriers (which themselves may be information services under the 1996 Act). *See generally In re Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Propriety Network Information and Other Customer Information*, 22 FCC Rcd 6927, 6956, ¶ 56 (2007), *review denied sub nom. Nat'l Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996 (D.C. Cir. 2009).

A number of credible legal theories have also been advanced regarding the Commission's ability to pursue its universal service objectives using regulation ancillary to its statutory responsibilities under Section 254. As AT&T has advocated, the statutory text in section 254 is

ambiguous as to the exact scope of the universal service contributions and subsidies the Commission is to implement, granting the FCC substantial deference under *Chevron* to interpret the provision in line with the objectives in its National Broadband Plan. *See* NOI, ¶¶ 32-34 & n.87 (citing Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-151, 09-47, 09-137, WC Docket Nos. 05-337, 03-109, attachment (Jan. 29, 2010)). The NCTA has similarly demonstrated that section 254(h) would grant the FCC wide authority – currently unutilized – to help make Internet access in the home affordable when it is connected to educational purposes. *See* NOI , ¶ 35 & n.101 (citing Letter from Kyle McSlarrow, President & CEO, National Cable & Telecommunications Association, to Julius Genachowski, Chairman, FCC, GN Docket Nos. 09-51, 09-191, WC Docket No. 07-52 (March 1, 2010)). And multiple commenters in this proceeding have articulated equally plausible theories for extending certain disability access protections to ISPs.

These proposals – and others the FCC receives in response to the NOI – may require the FCC to more closely conform its proposed regulatory efforts to the scope of its Title I authority so as to satisfy the requirements of the *Comcast* decision. But an open process of perfecting the Commission's regulatory efforts under Title I can proceed much more smoothly, and without throwing the broadband industry into a state of doubt, than years of contentious litigation over a Title II reclassification. And while Cablevision acknowledges that these are not easy legal questions, the risks to the Commission by proceeding under Title II are much greater, and threaten more substantial damage to the Commission's objectives in broadband deployment and affordability.

IV. THE SAME REGULATORY CLASSIFICATION MUST APPLY EQUALLY TO ALL BROADBAND PROVIDERS REGARDLESS OF THE TECHNOLOGY USED

Finally, whatever legal framework the Commission adopts for broadband Internet access services, it must apply across the board to all technologies, wired and wireless.[28] There is no legal justification for interpreting the 1996 Act's definitions differently with respect to different technologies, and no sound basis to depart from the Commission's prior holdings that broadband services should be treated alike regardless of technology. Moreover, apart from the basic legal principles at issue, treating wired and wireless technologies differently is bad policy, as it skews competition and capital allocation.

As the Commission has recognized, the technology used by a broadband provider has no bearing whatsoever on whether the service provided is an "information service" or "telecommunications service" under the 1996 Act. Those statutory terms are defined without reference to the technology used. Thus, the Commission has categorized all broadband Internet access services as information services for the same reasons: "Like cable modem service, wireline broadband Internet access service, and BPL-enabled Internet access service, wireless broadband Internet access service offers a single, integrated service to end users, Internet access, that inextricably combines the transmission of data with computer processing." *Wireless Broadband Order*, 22 FCC Rcd 5904, 5910-11, ¶¶ 25-26. The Commission has similarly found that consumers have the same expectations for broadband provided over different technologies. *See id.* at 5913, ¶ 31 (concluding that, "consistent with" the FCC's findings regarding consumer

[28] The NOI specifically seeks comment on which legal framework "would best support the Commission's policy goals for wireless broadband." NOI, ¶ 102. The legal framework governing wireless broadband services is a different question from the specific regulatory requirements to which those services should be subject. Whatever latitude the Commission has for applying different regulatory requirements to different technologies, as discussed below, it has little latitude with respect to applying different legal classifications.

expectations for wired Internet access, "an end user subscribing to wireless broadband Internet access service expects to receive (and pay for) a finished, functionally integrated service that provides access to the Internet, rather than receive (and pay for) two distinct services – Internet access service and a distinct transmission service."); *Open Internet NPRM*, 24 FCC Rcd 13,064, 13,118, ¶ 155 ("[W]ireless broadband Internet access has emerged as a technology that, from a consumer's perspective, now supports many of the same functions as DSL and cable modem service."). There is thus no basis in law or in fact for treating the same service provided over different technologies differently.

For that reason, the Commission should make clear that whatever decision it makes in this proceeding applies equally to all technologies. For example, were the Commission to limit its decision to wired technology, and not reach the question of the classification of wireless as some have advocated, that would only lead to greater regulatory uncertainty. Because in the end these technologies must be treated alike as a legal matter, any delay in articulating that fact will only lead to confusion, and serve no meaningful purpose.[29]

[29] Moreover, to the extent the Commission has any latitude to apply different legal classifications to different technologies, the "information service" argument for wired broadband service is actually *stronger* than for wireless. Unlike wired service, wireless Internet connectivity is typically sold on a standalone basis (or packaged only with wireless telephone service) without features such as email accounts, newsgroups, and webhosting. *See, e.g.*, http://www.wireless.att.com/cell-phone-service/services/services-list.jsp (offering various data plans priced separately from voice service); http://www.t-mobile.com/shop/plans/Cell-Phone-Plans.aspx?catgroup=Internet-Email-cell-phone-plan (same); http://shop.sprint.com/NASApp/onlinestore/en/Action/SubmitRegionAction?isUpgradePathForCoverage=false&currZipCode=&upgradeOption=&nextPage=DisplayPlans&equipmentSKUurlPart=&filterStringParamName=&newZipCode=20002 (offering Mobile Broadband Connection Plan separate from voice service); http://www.verizonwireless.com/b2c/mobilebroadband/?page=products_connect (offering mobile broadband tethering service through phone, separate from voice service); *see also* http://consumer.hughesnet.com/plans.cfm (advertising satellite broadband service plans without mention of email, newsgroups, or webhosting).

Additionally, wholly apart from the law, there is no policy reason for the Commission to depart from its long held position that broadband services provided over different technologies should be regulated in a like manner. The *Wireline Broadband Order* recognized, rightly, that it would foster robust intermodal competition and technological innovation to classify DSL (like cable modem service) as an information service while declining to apply *Computer II* requirements to which cable modem providers were not subject, thereby creating regulatory parity among different kinds of broadband providers. *See* 20 FCC Rcd 14,853, 14887-88, ¶¶ 45, 65; *id.* at 14899, ¶ 86; *see also id.* at 14,884-85, ¶ 58 (emphasizing importance of competitive pressure from wireless service). The same is true as between wired and wireless. In both the *BPL-Enabled Broadband Order* and the *Wireless Broadband Order*, the Commission again reiterated the importance of establishing "a consistent regulatory framework across broadband platforms by regulating like services in a similar manner." *BPL-Enabled Broadband Order*, 21 FCC Rcd 13,281, 13281-82, ¶ 2; *Wireless Broadband Order*, 22 FCC Rcd 5901, 5901, ¶ 2. And just a few months ago the Commission, while recognizing the possibility of some differences in *application* across platforms, proposed that its open Internet principles apply equally to all broadband providers – wired and wireless alike. *See Open Internet NPRM*, 24 FCC Rcd 13,064, 13117-18, ¶ 154.

This regulatory parity makes sense. When all providers operate under the same regulatory framework, with the same benefits and burdens, private capital is allocated according to the relative merits of each. As the Commission explained in the *Wireline Broadband Order*, this has worked to the benefits of consumers, who now enjoy the choice and efficiency of robust inter- and intramodal competition among ISPs. Creating a new legal and regulatory disparity by

regulating wired providers under a different framework than wireless providers would distort this competition.

CONCLUSION

The Commission should decline its proposal to pursue a reclassification of broadband Internet service under Title II, and should instead continue to pursue its broadband policy goals through a combination of Title I regulation and outreach to stakeholders, while working with Congress on comprehensive clarification of the FCC's role in the broadband and Internet space.

Respectfully Submitted,

Michael E. Olsen
Senior Vice President, Legal Regulatory and Legislative Affairs
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-2300

/s/ Samuel L. Feder
Samuel L. Feder
Luke C. Platzer
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, D.C. 20001
(202) 639-6000

Howard J. Symons
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, D.C. 20004
(202) 434-7300

July 15, 2010