

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**COMMENTS OF THE  
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## TABLE OF CONTENTS

<b>INTRODUCTION AND SUMMARY .....</b>	<b>1</b>
<b>I. There Is No Factual, Legal, or Policy Basis for the Commission to Reverse Its Prior Determination That Broadband Internet Access Service Is an Integrated Information Service .....</b>	<b>6</b>
<b>A. The Facts Underlying the Commission’s Information Services Findings Have Not Changed .....</b>	<b>8</b>
<b>1. Cable Modem Internet Service Provides Computer Processing Services Using Transport to Offer a Single, Integrated Information Service to Consumers .....</b>	<b>10</b>
<b>2. Cable Modem Functions.....</b>	<b>12</b>
<b>a. Internet Address Assignment.....</b>	<b>12</b>
<b>b. Domain Name Service (DNS).....</b>	<b>13</b>
<b>c. Caching and Use of Content Delivery Networks.....</b>	<b>15</b>
<b>d. Network Security .....</b>	<b>16</b>
<b>e. Web Hosting, E-mail and Storage .....</b>	<b>18</b>
<b>3. The Ability to Obtain Functions from Third Parties Is Irrelevant .....</b>	<b>19</b>
<b>B. The Public Interest Would Not Be Served by Designating Broadband Internet Service as a Common Carrier Offering .....</b>	<b>21</b>
<b>C. The Broadband Market Is Highly Competitive .....</b>	<b>25</b>
<b>D. Reclassification of Broadband Internet Access Service Would Not Be an Interpretive Rule But A Substantive Change To Which APA and Regulatory Flexibility Requirements Apply .....</b>	<b>27</b>
<b>E. Reclassifying the Provision of Broadband Internet Service To Include the Provision of a Telecommunications Service Subject to Title II Would Raise Serious First and Fifth Amendment Issues .....</b>	<b>30</b>
<b>1. The First Amendment.....</b>	<b>31</b>
<b>2. The Fifth Amendment .....</b>	<b>34</b>

<b>II.</b>	<b>The Commission Does Not Have to Reclassify Broadband Service In Order to Meet Its Legitimate Policy Goals .....</b>	<b>36</b>
<b>A.</b>	<b>Universal Service.....</b>	<b>38</b>
<b>B.</b>	<b>Prohibiting Potential Anticompetitive Practices by Broadband Internet Service Providers .....</b>	<b>42</b>
<b>III.</b>	<b>The “Third Way” Proposal Creates Substantial Risk of Burdensome Regulation...46</b>	
<b>A.</b>	<b>The “Third Way” Proposal Does Not Meaningfully Limit the Scope of Title II Regulation.....</b>	<b>47</b>
<b>1.</b>	<b>Classifying Internet Connectivity As a Common Carrier Offering Opens the Door to Broad Regulation .....</b>	<b>48</b>
<b>2.</b>	<b>Sections 201 and 202 Impose Broad Regulations on Common Carriers.....</b>	<b>49</b>
<b>a.</b>	<b>Price Regulation .....</b>	<b>52</b>
<b>b.</b>	<b>Resale .....</b>	<b>53</b>
<b>c.</b>	<b>Unbundling and Physical Interconnection .....</b>	<b>53</b>
<b>B.</b>	<b>Attempting to Extract an “Internet Connectivity” Offering from Internet Service Risks Being Either Over-inclusive or Under-inclusive .....</b>	<b>55</b>
<b>C.</b>	<b>The Wireless and the NECA Tariffing Models Raised in the NOI Are of Limited Relevance.....</b>	<b>57</b>
<b>1.</b>	<b>To Duplicate Wireless Services Light-Touch Regulation, the Commission Must Set Aside Its View that the Broadband Market Is Not Sufficiently Competitive.....</b>	<b>57</b>
<b>2.</b>	<b>NECA’s Tariffed DSL Offering Is Not a Valid Model for Cable Companies .....</b>	<b>59</b>
<b>IV.</b>	<b>There Are Substantial Legal Risks Associated with the Forbearance Proposal at the Heart of the “Third Way” Plan .....</b>	<b>61</b>
<b>A.</b>	<b>The “Third Way” Proposal Is Subject to the Same Forbearance Analysis As Other Forbearance Decisions.....</b>	<b>62</b>
<b>B.</b>	<b>A Decision to Forbear Is Subject to Review and Reversal.....</b>	<b>65</b>
<b>C.</b>	<b>To Establish the Strongest Factual Predicate for Forbearance, The Commission Should Reassess Its Erroneous View That There May Be Insufficient Competition in the Broadband Marketplace.....</b>	<b>65</b>

<b>D.</b>	<b>The Commission’s Forbearance Proposal is Procedurally Defective .....</b>	<b>68</b>
<b>E.</b>	<b>If the Forbearance Is Not Sustained, Internet Service Providers May Be Subject to Full Title II Regulation.....</b>	<b>72</b>
<b>F.</b>	<b>The Commission Should Delay Implementation of Certain Provisions .....</b>	<b>73</b>
	<b>1. Universal Service Contribution Requirement.....</b>	<b>73</b>
	<b>2. Pole Attachments .....</b>	<b>73</b>
<b>V.</b>	<b>Classifying Broadband Internet Services As A Telecommunications Service Will Lead to Burdensome State and Local Taxes and Regulation .....</b>	<b>77</b>
<b>VI.</b>	<b>The FCC’s “Third Way” Proposal Will Lead to the Regulation of Entities Throughout the “Internet Ecosystem”.....</b>	<b>82</b>
<b>VII.</b>	<b>The Commission Should Terminate the “Open Access” Rulemaking.....</b>	<b>84</b>
	<b>CONCLUSION .....</b>	<b>85</b>

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**COMMENTS OF THE  
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The National Cable & Telecommunications Association (“NCTA”) hereby submits its comments on the Notice of Inquiry in the above-captioned proceeding.<sup>1/</sup>

**INTRODUCTION AND SUMMARY**

This proceeding is about the proper regulatory framework for the Internet. The question is whether the Commission will retain the longstanding presumption that broadband Internet access service generally should be free from legacy regulation except where shown to be necessary, or whether that presumption should be reversed, with legacy regulation applying unless and until the government affirmatively removes it.

The “Third Way” proposal is an attempt to reverse the presumption that legacy regulation should not apply to the Internet, while seeking to contain the regulatory effects of that decision. We accept that the intent is to create a legally sustainable “light” regulatory approach similar to the current framework that has spurred the Internet’s amazing growth and development. Nevertheless, we believe that the proposal’s underlying assumptions are fundamentally flawed. As described below, a regulatory about-face would likely be reversed in court and, even if implemented exactly as proposed, would not come close to the “light” regulatory touch that

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<sup>1/</sup> See *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, FCC 10-114 (June 17, 2010) (“*NOI*”).

exists today. These may seem like abstract legal and regulatory maneuverings, but the consequences could be painfully real – casting a cloud of uncertainty over continued investment and innovation in the Internet ecosystem at the worst possible time.

The core legal issue in this proceeding is whether broadband Internet access service should continue to be classified as a Title I “information service” or whether it should be “reclassified” as a Title II “telecommunications service.” “Reclassified” is a misnomer, however, to the extent that it suggests that the Commission *ever* has classified Internet access service as a Title II telecommunications service. To the contrary, every time the Commission has examined the question – in 1998, 2002, 2005, 2006, and 2007 – it properly concluded as a factual and legal matter that Internet access service is a Title I information service. The Commission’s 2002 decision was appealed all the way to the Supreme Court, where it was affirmed in *Brand X*.

This unbroken string of precedent is not surprising. Broadband Internet access service unquestionably offers consumers the ability to “acquire,” “retrieve,” and “utilize” information on the Internet – the very definition of an “information service.”<sup>2</sup> By contrast, Title II “telecommunications services” – like traditional telephone service – do not offer consumers anything other than a transparent path for sending and receiving content between end points specified by the end user without change in its form or content.

Factually, nothing material has changed about broadband Internet access service that could justify a reversal of the Commission’s precedent. Broadband Internet access providers indisputably still provide consumers with the ability to surf the ‘Net, interact with stored data on websites, watch online videos, and make use of the countless other services available online. It

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<sup>2/</sup> 47 U.S.C. § 153(20) (defining “information service” as the “offering of a capability for . . . acquiring , . . . retrieving, utilizing, [and] making available information via telecommunications”).

also remains the case that no cable operator providing Internet access service offers consumers a transmission component of Internet access that is separate from the information service offering.

What *has* changed over the past decade is widespread availability and improved performance of broadband that has resulted from the government's conscious decision to adopt a restrained regulatory approach. Under the current framework, cable operators and other Internet service providers ("ISPs") have invested hundreds of billions of dollars to expand and improve Internet access. As documented in the National Broadband Plan, broadband is now available to more than 95 percent of all American households. Cable operators alone have invested \$160 billion in private capital since the passage of the Telecommunications Act of 1996 to build broadband networks across the United States.

Against this backdrop, the Commission would be unable to meet the heightened scrutiny for changing course. In *Fox Television*, the Supreme Court affirmed that if an agency wishes to change course, it must provide "a more detailed justification than would suffice for a new policy created on a blank slate" where, as would be the case here, its "new policy rests upon factual findings that contradict those which underlay its prior policy" or its "prior policy has engendered serious reliance interests that must be taken into account."<sup>3/</sup> It is hard to imagine reliance interests any more "serious" than the industry investment engendered here, or past factual findings any more at odds with an agency's potential change in course.

But the relevance of the cable industry's broadband investments extend far beyond reliance; they are an integral part of the virtuous cycle that has driven broadband forward in this country. Cable's broadband efforts have stimulated tremendous investment by competing providers, first by telephone companies and now by wireless and satellite companies. This competition has spurred cable broadband providers and their competitors to develop ever smarter

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<sup>3/</sup> *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

and more ubiquitous networks and applications to meet consumer demand and compete for their business. In turn, the efforts of broadband network providers to build larger, faster and better networks have helped facilitate the success of countless numbers of new Internet businesses and applications – online video services, social networking sites, data-sharing services, and interactive gaming services, to name a few. Indeed, without broadband networks, there would be no YouTube, Facebook, Twitter, Wikipedia, Flickr, Yahoo!, Google, e-Bay, Skype, or Amazon as we know them. Despite concerns about alleged limited access to bandwidth, viewership of Internet video has grown at a dramatic rate.

The proposed “Third Way” approach would needlessly jeopardize this virtuous cycle. Subjecting broadband Internet access service to public-utility-type regulation under Title II would undermine job-producing broadband investment and innovation – and ultimately undermine national priorities such as education, health care, energy, national security, and economic growth. Initial investor response to even the possibility of the “Third Way” approach demonstrates the negative implications of this scheme for future investment in broadband networks and services.

Beyond these immediately apparent consequences, the “Third Way” proposal would create a substantial risk of unintended and unanticipated consequences. As just one example, changing the regulatory classification of broadband Internet access services potentially would trigger massive increases in the pole attachment rates paid by cable operators, a result that directly contravenes recommendations made in the National Broadband Plan and the “common beliefs” adopted by the Commission unanimously only two months ago.

These infirmities cannot be cured by the prospect that the Commission could simply forbear from enforcing most of the provisions of Title II. First, the Commission insists that it

will *not* forbear from the core Title II obligations – Sections 201 and 202. Those provisions have been used to justify many of the most heavy-handed common carrier regulations – including rate-regulation and access to facilities – which the Chairman informally disclaimed any intent to include in the “Third Way” proposal but on which the NOI is noticeably silent.

Second, there is no certainty that the Commission will be able to deliver the forbearance promised, particularly given recent Commission statements – which we do not agree with – about the state of broadband competition, as well as recent Commission decisions raising the bar for forbearance grants. Indeed, the Commission has not even defined the service for which it would seek forbearance or the regulations it would retain post-forbearance. Without a clear and specific definition of the service and the proposed regulatory scheme, it is impossible to conduct an informed and rational forbearance analysis.

Third, forbearance decisions typically have been appealed to the courts and there is no reason to believe forbearance under a “Third Way” approach would be different. Some or all of the Commission’s decisions could be reversed. The NOI suggests that, if that were to happen, the Commission simply could revert back to a finding that broadband Internet access service is an “information service” after all. That kind of shell game simply reinforces the notion that the proposal is driven more by a desired result than an objective assessment of the facts and law.

Finally, a future Commission could reverse this Commission and impose any Title II obligations it desires through “unforbearance.” If the Commission can seek to reclassify Internet access service itself in the face of longstanding, bipartisan precedent, it would be difficult to place much stock in the durability of individual forbearance decisions.

In the end, we recognize that the Commission is doing its best to navigate through some difficult waters. But there is no need for precipitous actions that could do more harm than good.

The Commission can (and should) move forward on the important goals of the National Broadband Plan without resorting to reclassification – whether under its direct authority (e.g., spectrum) or by using its Title I ancillary authority (e.g., Universal Service Fund support for broadband). Ancillary authority also could allow the Commission to preserve the openness of the Internet and to guard against, at least in some targeted way, possible anti-competitive practices by broadband ISPs and others – provided it can establish the necessary relationship between any proposed rules and express authority under the Act.<sup>4/</sup> Contrary to the suggestion of some, ancillary authority, properly supported, remains fully available to the Commission after the *Comcast* decision.

Admittedly, invoking ancillary authority involves some level of uncertainty, particularly if the Commission tries to micromanage the network management practices of broadband providers. But it involves far less risk, both legally and as a matter of policy, than trying to force the round peg of broadband Internet access service into the square hole of Title II. The best option, of course, is to let Congress do its work and clarify precisely how the Internet can and should be regulated. In the meantime, we respectfully suggest that the only lawful course for the Commission is to maintain its longstanding (and wildly successful) Title I broadband regulatory framework, in which it is the *imposition* of regulation – rather than its *removal* – that must be justified.

**I. There Is No Factual, Legal, or Policy Basis for the Commission to Reverse Its Prior Determination That Broadband Internet Access Service Is an Integrated Information Service**

Beginning more than ten years ago, and consistently since then, the Commission has carefully examined cable modem and similar broadband services and determined that they are an

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<sup>4/</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

integrated offering that “combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications.”<sup>5/</sup> That finding, in turn, was based on a similar determination regarding Internet access service generally made by the Commission in the 1998 *Universal Service Order*.<sup>6/</sup>

There has been no change in the functions or nature of broadband Internet services that would justify a reversal of the Commission’s fact-bound determination that this service constitutes an integrated information service and is so perceived by the end user.<sup>7/</sup> None of the legal, technical or marketplace developments cited by the Commission provides grounds to overcome the heavy burden the Commission faces in attempting such a reversal. While the Commission typically “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one . . . [s]ometimes it must.”<sup>8/</sup> This is one of those times.

As the Supreme Court explained in *Fox Television*, an agency’s reversal is subject to heightened scrutiny where either (1) the “new policy rests upon factual findings that contradict those which underlay its prior policy;” or (2) “its prior policy has engendered serious reliance interests that must be taken into account.”<sup>9/</sup> The proposed reclassification of broadband Internet

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<sup>5/</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 38 (2002) (“*Cable Modem Order*”).

<sup>6/</sup> *Cable Modem Order* ¶ 36 (citing *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶¶ 75-76 (1998) (“*Universal Service Report*”).

<sup>7/</sup> Information service “means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications . . . but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20).

<sup>8/</sup> *Fox Television*, 129 S. Ct. at 1811.

<sup>9/</sup> *Id.* The FCC must provide a “reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Id.*

access service implicates both prongs of this analysis. In order to now identify a severable telecommunications service, the agency must contradict the factual findings that underlay its previous findings...which it has consistently affirmed for more than a decade – that there is no such severable component. Additionally, the Commission’s consistent rulings on this question during the past dozen years have engendered massive reliance on that framework by the broadband Internet industry.

Apart from the legal infirmity of the Commission’s contemplated reversal, subjecting some aspect of broadband Internet service to common carrier regulation is simply bad policy. The Commission has consistently recognized that regulation undermines investment in broadband infrastructure while deregulation enhances investment. The Commission’s “light-touch” policy has been validated. There has been tremendous investment in broadband over the past decade. The uncertainty created by the new potential regulatory approach would chill investment, as analysts and academics have already warned.

There is no need to take this ill-advised action. The investment in broadband has created a vibrant and competitive environment free of the sort of market failures that would necessitate regulatory intervention.

**A. The Facts Underlying the Commission’s Information Services Findings Have Not Changed**

The facts regarding the nature of broadband services have not changed in any meaningful way since the Commission’s 1998 *Universal Service Report*, and subsequent decisions. Cable modem service offers consumers the ability to access, and interact with, the vast store of ever-changing and expanding information available on the Internet. Consumers purchase this service not to transmit information from one point of their choosing to another, but to access and interact with Internet content and applications, which inherently involves the processing of information.

It is for this reason that the Commission has *always* defined broadband Internet access service as an information service. In its initial hard look at this service in 1998 the Commission concluded that “Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport.”<sup>10/</sup>

The Commission correctly concluded that the nature of Internet access service did not change just because the Internet provider may own the transmission facilities. This was the fundamental conclusion in the *Cable Modem Order* upheld by the Supreme Court in *Brand X*. Based on a detailed analysis of the technical features of the service, the Commission found that cable modem service – the cable industry’s broadband Internet service – provided end users with numerous capabilities *via* telecommunications. It further found, however, that this telecommunications component “is not . . . separable from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities.”<sup>11/</sup> It thus found that, “[a]s currently provisioned, cable modem service is a single, integrated service that *enables* the subscriber to utilize Internet access service through a cable provider’s facilities and to realize the benefits of a comprehensive service offering.”<sup>12/</sup>

Significantly, the Commission also found that cable modem service does not constitute a “stand-alone offering of transmission for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.”<sup>13/</sup> Cable modem service is provisioned in the

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<sup>10/</sup> *Universal Service Report* ¶ 73.

<sup>11/</sup> *Cable Modem Order* ¶ 39. The Commission recognized that, by definition, information services require the use of telecommunications.

<sup>12/</sup> *Id.* at ¶ 38 (emphasis added).

<sup>13/</sup> *Id.* at ¶ 40. *See also* 47 U.S.C. § 153(46) (defining telecommunications service as an “offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”).

same way today as it in 2002, including the fact that cable modem service still entails no offering of transmission between points specified by the user separately for a fee to the public, *i.e.*, as a telecommunications service or common carrier offering.

**1. Cable Modem Internet Service Provides Computer Processing Services Using Transport to Offer a Single, Integrated Information Service to Consumers**

The *Universal Service Report* correctly concluded that the various functions offered by Internet access providers should be viewed as a single, integrated offering:

More generally, though, it would be incorrect to conclude that Internet access providers offer subscribers separate services – electronic mail, Web browsing, and others – that should be deemed to have separate legal status, so that, for example, we might deem electronic mail to be a “telecommunications service,” and Web hosting to be an “information service.” The service that Internet access providers offer to members of the public is Internet access. That service gives users a variety of advanced capabilities. Users can exploit those capabilities through applications they install on their own computers. The Internet service provider often will not know which applications a user has installed or is using. Subscribers are able to run those applications, nonetheless, precisely because of the enhanced functionality that Internet access service gives them.<sup>14/</sup>

The Commission also recognized that this service in no way constitutes simple transmission:

“The service cannot accurately be characterized . . . as ‘transmission, between or among points specified by the user’; [for example,] the proprietor of a Web page does not specify the points to which its files will be transmitted, because it does not know who will seek to download its files.”<sup>15/</sup> Cable companies offer the same Internet access service described in the *Universal Service Report* and found to be an integrated information service in 1998 and in 2002. This is still the case today. Cable modem service offers consumers a complete package of services that enable their broadband customers to access, interact with, and be part of the Internet.

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<sup>14/</sup> *Universal Service Report* ¶ 79.

<sup>15/</sup> *Id.* at ¶ 76.

The Commission has long recognized that these various services do not have “separate legal status,” but has noted nonetheless that it “is useful to examine specific Internet applications . . . in order to understand the nature of the functionality that an Internet access provider offers.”<sup>16/</sup> It undertook a similar analysis of these and other functions in 2002 and concluded that each offers the capabilities identified in the Act’s information services definition and that “[t]aken together, they constitute an information service.”<sup>17/</sup> The NOI refers to these “Internet connectivity functions” and states that they enable “enable [broadband Internet service subscribers] to transmit data communications to and from the rest of the Internet.”<sup>18/</sup> Although each of these functions can be described separately and each in their own right is an information service, they are in fact a single service that provides access to the Internet and is part of the Internet.

The NOI asks whether “[i]dentifying a telecommunications service at a . . . high level – for instance, as the service that provides Internet connectivity – may be appropriate for this proceeding if a telecommunications service is classified.”<sup>19/</sup> The short answer is no. The functions described in the *Cable Modem Order* and referred to in the NOI as Internet connectivity include a host of functions that interact with stored information or have other attributes of an information service as defined by the Act that, “taken together,” provide broadband Internet access service. Cable companies offer these services as an integrated package that nowhere includes a stand-alone offering of a pure transmission service that solely moves the user’s information between points of the user’s choosing. That some cable providers

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<sup>16/</sup> *Universal Service Report* ¶ 75.

<sup>17/</sup> *Cable Modem Order* ¶ 38.

<sup>18/</sup> *NOI* ¶ 64 (quoting *Cable Modem Order* ¶ 17).

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

may not offer all of the functions described below is irrelevant to the question of whether cable modem service is an information service.<sup>20/</sup>

## **2. Cable Modem Functions**

### **a. Internet Address Assignment**

Although the assignment of Internet Protocol (“IP”) addresses is transparent to the consumer, it is vital to the ability of the subscriber to obtain information from the Internet. The IP address assignment function is an information service because it involves the acquiring and retrieving of stored data – the IP address.

The assignment of an IP address is necessary before the end user’s computer can use the cable modem service to send data over, or receive data from, the Internet. This is because all computers, services, and resources on the Internet must address each other by their IP addresses.<sup>21/</sup> The IP address function is performed by the Dynamic Host Configuration Protocol (“DHCP”) server, which typically resides in the head-end or regional data center and is directly or indirectly connected to the Cable Modem Termination System (“CMTS”).<sup>22/</sup> The DHCP server stores available IP addresses (*i.e.*, those made available by the Internet Assigned Numbers Authority (“IANA”)) and then temporarily assigns that publicly available and routable IP address to the subscriber’s cable modem or home computer.<sup>23/</sup>

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<sup>20/</sup> *Cable Modem Order* ¶ 38.

<sup>21/</sup> *See id.* at ¶ 17, n.73 (an IP address must be assigned to a cable modem “so that routers connected to the Internet will recognize the location of the modem for communications to and from the Internet.”).

<sup>22/</sup> As the *Cable Modem Order* notes, “Often located at the head-end is a Cable Modem Termination System (“CMTS”), which manages the flow of data between cable subscribers and the Internet and other equipment. The CMTS enables the enhanced two-way capabilities essential for cable modem service.” *id.* at ¶ 13.

<sup>23/</sup> If the subscriber has several computers connected through a wireless router, several IP addresses may be assigned.

The functions performed by the DHCP are far different from the assignment of a telephone number. The DHCP, as its name implies, performs a dynamic, ongoing function to ensure that an end user has a publicly available IP Address. For example, every time the cable modem is turned off and then on again, the cable modem must obtain the IP address from the DHCP. It may be the same IP address or a different one. Even if the cable modem is never turned off, the “lease” of the IP address will expire and must be renewed, which occurs by the modem “talking” to the DHCP server and requesting an IP address.

**b. Domain Name Service (DNS)**

The *Cable Modem Order* described DNS as “an online data retrieval and directory service” and a “distributed system” whose administration “is routinely delegated among a great many independent organizations.” It is used primarily “to provide an IP address associated with the domain name (such as www.fcc.gov),” but may also be used “to perform reverse address-to-name lookups and to identify and locate e-mail servers.” DNS “constitutes a general purpose *information processing and retrieval capability* that facilitates the use of the Internet in many ways” that is “commonly associated with Internet access service.”<sup>24/</sup> Most broadband Internet service providers have DNS servers at the head-end or in their regional networks as close to the customers as is practicable and efficient.<sup>25/</sup>

In more generic terms, DNS allows an end user to enter an Internet domain name that DNS then translates into an IP address for proper routing. For example, most end users know the Universal Resource Locators (“URLs”) of the websites that they want to visit (*e.g.*,

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<sup>24/</sup> *Cable Modem Order* ¶¶ 37-38 (emphasis added) (citing *Universal Service Report* ¶¶ 75-78).

<sup>25/</sup> *See, e.g., Cable Modem Order* ¶ 17, n.74 (“DNS servers are strategically located on the Internet. There is usually one either directly accessible to your system or accessible over as few as one router hop, ... Most Internet service providers have DNS servers.”) (quoting MCGRAW HILL ENCYCLOPEDIA OF NETWORKING AND TELECOMMUNICATIONS 390 (2001)).

[www.cnn.com](http://www.cnn.com)), but such URLs alone are insufficient to request access to the websites because traffic is routed over the Internet based on IP addresses and *not* URLs or other domain names. In addition, it is impractical to expect end users to remember the IP addresses of their favorite websites, especially since such sites have multiple IP addresses that tend to change regularly for a variety of technical reasons. Normally, when an end user mistypes a URL, the DNS server would return an error message. However, as an extension to the DNS service, the cable system ISP may instead help subscribers to find the web page for which they are looking by providing the user with a list of suggested pages and links.<sup>26/</sup>

Moreover, in order to provide a robust interactive experience, the DNS server is continually updated as new websites, with new IP addresses, are added to the Internet, or as IP addresses change. The cable modem broadband provider's DNS server is in near constant contact with other DNS servers in the Internet receiving new IP address-to-domain name translations.

It is also noteworthy that the broadband provider's DNS server performs these functions on behalf of subscribers regardless of whether they utilize other aspects of the cable modem service. For example, even if the end user utilizes a different browser application (*e.g.*, Mozilla Firefox or Internet Explorer), that browser almost always will query the broadband provider's DNS server seeking content from the Internet. The Commission's conclusion in the *Cable Modem Order* that DNS is an information service in and of itself, as well as a feature offered as part of the integrated Internet access service, remains accurate. DNS transforms and processes

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<sup>26/</sup> See Comcast, "Why am I seeing the Domain Helper page?," available at <http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=Why-am-I-seeing-the-Domain-Helper-page> (last visited July 14, 2010).

information – the URL is translated in IP addresses – and interacts with stored information as it is updated with new URL translations.

As the Commission noted in the *Cable Modem Order*, “DNS is flexible and can be enhanced, so that it is capable of supporting new functionality.”<sup>27/</sup> In fact, as described below, DNS has been enhanced and now interacts with Content Delivery Networks (“CDNs”) to maximize the speed of delivery of content to end users and plays a critical role in ensuring safe and secure interaction with websites. It has been and remains an integral part of cable modem service.

### **c. Caching and Use of Content Delivery Networks**

Caching, or its equivalent function performed in conjunction with Content Delivery Networks, is also a quintessential information service that is offered by many cable modem service providers as an integral part of their service. The Commission has described caching as “the storing of copies of content at locations in the network closer to subscribers than their original sources, *i.e.*, data from websites, that subscribers wish to see most often in order to provide more rapid retrieval of information.”<sup>28/</sup> Caching thus allows end users to retrieve popular information more rapidly. Today, that functionality can be performed by cable broadband providers themselves or by CDNs, such as Akamai, with whom many cable broadband providers have a contractual relationship. Caching eliminates long transport times “by replicating and delivering content and applications from servers close to end users around the world instead of from centralized servers.”<sup>29/</sup>

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<sup>27/</sup> *Cable Modem Order* ¶ 37.

<sup>28/</sup> *Id.* at ¶ 17, n.76.

<sup>29/</sup> See Akamai, *EdgePlatform*, available at <http://www.akamai.com/html/technology/edgeplatform.html> (last visited July 14, 2010). Akamai describes itself as “one of the world’s largest distributed computing platforms” with more than 65,000

The CDNs may also work with the cable provider's DNS to maximize the speed of delivery of the content of media intensive websites on a cost-effective basis. Generally speaking, when a CDN is used by a website, the IP address of the website returned by the DNS changes dynamically based upon where the content is located *and* where the end user is located. Thus, the CDN provider and the ISP in essence share geographic network location data which enables the CDN to send the ISP's given DNS server the most local, closest IP address for a given domain name or website. As a result, the end user has less distance to travel and may even travel over dedicated interconnection facilities, providing more direct access to Internet content.

The role that caching plays is totally transparent to most end users who rely on their broadband provider to cache content or to combine its services with a CDN's services to create a single integrated offering.

#### **d. Network Security**

The *Cable Modem Order* also identified network security as part of Internet connectivity.<sup>30/</sup> This includes a number of functions such as encryption, spam blocking, firewalls and parental controls. For example, with the advent of DNSSEC, cryptographic keys will now be stored along with the IP address information relating to a given domain name. As a result, the ISP's DNS servers will be performing a security validation that the cryptographic information for a domain is valid, a critical security check that groups such as ICANN, ISOC, the IETF, and even the U.S. government have indicated is a high-priority for security on the Internet.

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servers equipped with proprietary software that relies on applied mathematics and algorithms "to help solve congestion and vulnerability problems on the Internet." Its servers "reside within approximately 1,000 of the world's networks monitoring the Internet in real time."

<sup>30/</sup> *Cable Modem Order* ¶ 17.

Cable broadband Internet providers may also block various ports of their end users' computers to prevent potentially harmful activity. For example, the ISP might block port 25, which is commonly associated with outgoing e-mail, when the ISP detects "spam" e-mail from a user computer. When port 25 is blocked, *all outgoing e-mail on port 25 from end user computers is blocked (i.e., dropped or deleted) by the ISP*. This prevents viruses and/or malware from utilizing the user's computer to send out spam e-mails to others.<sup>31/</sup> In a similar fashion, the cable system ISP may also block other ports of the end user's computers (e.g., ports 68, 135-139, 445, 520, and 1080) to prevent the user computers from being subject to certain types of malicious attacks.<sup>32/</sup>

The cable ISP provider's offering typically also includes firewalls as part of its network security strategy. Servers located at the cable head-end typically have firewalls to protect them from certain types of attacks through which unauthorized parties could obtain access to subscribers' computers and/or sensitive information stored at the cable head-end. The cable modem may also contain a firewall that blocks (i.e., drops or deletes) unauthorized or unsafe traffic before it reaches the user's computer.<sup>33/</sup>

In addition to the network security functions described above, the cable ISP may also cause web search results to be screened for websites that contain explicit sexual content and delete them from the search results that are transmitted to the subscriber's computer for

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<sup>31/</sup> This blocking does not affect the end user's ability to send/receive e-mails, for example, through the ISP's or a third-party's e-mail server.

<sup>32/</sup> See Comcast, "What ports are blocked by Comcast High-Speed Internet?," available at <http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=What-ports-are-blocked-by-Comcast-High-Speed-Internet&fss=ports> (last visited July 14, 2010).

<sup>33/</sup> See Comcast, XFINITY Voice and Internet Wireless Gateway User Guide, p. 18, available at <http://customer.comcast.com/userguides> (last visited July 14, 2010).

display.<sup>34/</sup> The cable modem is also configured to implement parental controls selected by the subscriber (*e.g.*, blocking certain websites or keywords) to prevent certain content from being displayed on user computers that are connected to the cable modem.<sup>35/</sup>

Through their filtering, checking, and blocking functions, all of these network security offerings act upon or change the form and content of the messages as sent and received. The function themselves are information services and are part and parcel of the cable providers' broadband Internet access service.

#### **e. Web Hosting, E-mail and Storage**

The *Cable Modem Order* also recognized that “[c]omplementing the Internet access functions are Internet applications provided through cable modem service. These applications include traditional ISP services such as e-mail ... and creating or obtaining and aggregating content. The cable modem service provider will also typically offer subscribers a ‘first screen’ or ‘home page’ and the ability to create a personal web page.”<sup>36/</sup> These and other functions (*e.g.*, providing subscribers with remote storage at the cable head-end at no extra charge) remain an integral part of the cable modem service.

An integral part of the cable broadband provider's integrated offering is the ability of subscribers to create, maintain, and make available personal websites (*e.g.*, homepages, web logs (“blogs”), photo pages, events pages, and contact pages).<sup>37/</sup> Specifically, the cable broadband provider maintains a Web server that stores web pages created by its subscribers, and retrieves

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<sup>34/</sup> See Comcast, “What is SafeSearch?,” available at <http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=SafeSearch> (last visited July 14, 2010).

<sup>35/</sup> See Comcast, XFINITY Voice and Internet Wireless Gateway User Guide, at pp. 26-33.

<sup>36/</sup> *Cable Modem Order* ¶ 18 (footnotes and citations omitted).

<sup>37/</sup> See Comcast, Getting Started With Personal Webpages, available at <http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=Getting-started-with-Personal-Web-Pages&fss=personal%20web%20pages> (last visited July 14, 2010).

and provides those web pages upon request (*i.e.*, requests originating from anywhere on the Internet). The Web server also processes, stores, and provides a “first screen” that is displayed to end users upon initiating interaction with the cable system ISP (*e.g.*, by clicking an icon for the ISP on the desktop of a user computer). This first screen contains an aggregate of information deemed to be of interest to the subscriber, and its collection on this first screen saves the users the trouble of having to retrieve this information on their own (*e.g.*, from multiple websites). In addition, the cable provider customizes the content that is displayed to each subscriber based on the preferences of that user. Specifically, the cable system ISP stores user preferences for the end user, and retrieves and transmits the requested content each time the end user accesses the first screen, quintessential information services functions.<sup>38/</sup>

### **3. The Ability to Obtain Functions from Third Parties Is Irrelevant**

Proponents of Title II classification rely heavily on the fact that many services and functions that the cable provider offers are also available from independent providers.<sup>39/</sup> The NOI itself cites various entities that offer free e-mail services, message boards, web hosting, web browsing, web caching and DNS lookup.<sup>40/</sup> That end users may avail themselves of these applications from independent entities rather than utilize these functions as offered by their broadband Internet provider is neither new nor relevant.<sup>41/</sup> It is not relevant because, as the

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<sup>38/</sup> See Comcast, “Can I choose which news I want to see on the Comcast.net homepage?,” available at <http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=Can-I-choose-which-news-I-want-to-see-on-the-Comcast-net-homepage> (last visited July 14, 2010).

<sup>39/</sup> Cf. Reply Comments of Public Knowledge - NBP Public Notice #30, GN Docket Nos. 09-47, 09-51, 09-137, at 8-10 (filed Jan. 26, 2010) (asserting that “[t]he rise of web-based e-mail and ‘cloud computing’ has dramatically diminished the value of the information service offerings and made them easily separable from the underlying transmission” and that “[e]ven DNS, which both the Commission and the *Brand X* Court recognized as the inextricably integrated core information service ‘offered’ by cable modem providers, is now available as a stand alone service from Google and other providers.”).

<sup>40/</sup> See NOI ¶¶ 55-60.

<sup>41/</sup> Subscribers may even be capable of hosting these services on their local network.

Commission found in 2002, the determination that cable modem service is an integrated information service is based not on whether consumers *could* obtain functions and applications from entities other than their broadband provider, but rather on the fact that consumers *need not* obtain these functions and applications from third parties because all of the functions needed for Internet access were made available as part of the broadband provider’s offering.

The salient point was – and is – that the broadband service “enabled” end users to “realize the benefits” of a service that offered all of the transmission and data processing functions necessary to interact with the Internet. Whether the end user used all of the functions offered by the broadband provider, or whether certain functions were offered by all or only some providers, was irrelevant. That was the case then, and it is the case now.

As emphasized in the *Cable Modem Order*, the ability of subscribers to choose another entity’s e-mail or web browser was of no moment:

It bears repeating that cable modem service subscribers, by “click-through” access, may obtain many functions from companies with whom the cable operator has not even a contractual relationship. For example, a subscriber to Comcast’s cable modem service may bypass that company’s web browser, proprietary content, and e-mail. The subscriber is free to download and use instead, for example, a web browser from Netscape, content from Fox News, and e-mail in the form of Microsoft’s “Hotmail.” Whether the subscriber chooses to utilize functions offered by his cable modem service provider or obtain them from another source, these functions currently are all included in the standard cable modem service offering.<sup>42/</sup>

Thus, the very fact promoted by Title II proponents as the basis for now finding a severable telecommunications service – the ability of end users to choose to obtain functions either from

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<sup>42/</sup> *Cable Modem Order* ¶ 25. See also *id.* at ¶ 38 (cable modem service is an information service “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.”); and *id.* at ¶ 51 (finding no separate transmission component even where the cable provider contracts with an independent ISP because “[a]s described in the record, the cable operator is providing its subscribers with a single service, cable modem service, not with separate transmission, e-mail, and web surfing services.”).

their broadband provider or an independent entity – is one that the Commission has emphasized was *not* a basis to conclude that broadband Internet service constitutes severable services.<sup>43/</sup>

**B. The Public Interest Would Not Be Served by Designating Broadband Internet Service as a Common Carrier Offering**

As demonstrated above, the Commission will not be able to show that the facts warrant a reversal of the information services classification proposed in the NOI and thus any such reversal cannot pass legal muster. But even apart from the legal infirmity of the proposal, foisting common carrier regulation on some aspects of broadband Internet service is unsound as a matter of public policy. In the *Cable Modem Order*, the Commission rejected invitations to “find a telecommunications service inherent in the provision of cable modem service.”<sup>44/</sup> It found that no cable modem provider held itself out as offering a stand-alone telecommunications service and that there was no public policy reason to compel such an offering. There is no basis to reverse either of these findings. Broadband cable providers today do not offer a stand-alone transmission service, as noted above, and there still is no reasonable basis to compel broadband Internet providers to offer connectivity on a common carriage basis.

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<sup>43/</sup> Moreover, simply because a service is technically available from third parties does not mean that consumers avail themselves of that option. For instance, cable system ISPs provide their customers with access to the cable system DNS server at no extra charge as an integral part of the Internet access service. Although it is technically possible for end users to bypass the cable system’s DNS server in favor of another DNS server (*e.g.*, OpenDNS), the vast majority of end users still use and rely on the cable system’s DNS server to translate domain names into IP addresses on the end user’s behalf. Even if an end user bypasses the cable system’s DNS server with regard to the user computer’s outgoing requests, the cable system’s DNS server will still respond to requests, originating from anywhere on the Internet, for the IP addresses associated with end users’ websites that are created through the cable system ISP as well as DNS lookups relating to the subscriber’s assigned IP address (A and PTR records).

<sup>44/</sup> *Cable Modem Order* ¶ 39.

As an initial matter, the Commission cannot designate a service as common carriage simply to fulfill certain desired regulatory objectives.<sup>45/</sup> The designation must be predicated on a finding that the public interest demands that Internet connectivity be made available indiscriminately to all comers.<sup>46/</sup> No such finding can reasonably be made here.

Reclassification would work directly against the goals of broadband deployment established by Congress and the Commission. As anticipated when the initial determination to classify broadband Internet access as an information service was made, massive private sector investment in broadband has created a vibrant and competitive marketplace. Since the 2002 *Cable Modem Order* and the 2005 *Wireline Broadband Order*, both cable and wireline broadband providers have invested significant resources to deploy and upgrade their high-speed networks. From 2002 to 2009, the cable industry alone invested more than \$100 billion in their broadband networks.<sup>47/</sup> During the past decade of non-regulation, cable modem penetration expanded from 46% of U.S. households to 92% of U.S. households, including between 15-20 million rural households.<sup>48/</sup> During this time, cable companies upgraded their networks so that now DOCSIS 3.0 is being deployed, providing consumers with speeds over 105 Mbps.

Replacing the current framework with a policy that presumes regulation and puts the burden on providers to show why regulation should be removed would thwart investment and innovation by imposing financial, technological, and market uncertainty and risks –

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<sup>45/</sup> *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) (“*NARUC I*”) (holding that the Commission does not have unfettered discretion to confer or not confer common carrier status “depending upon the regulatory goals it seeks to achieve.”).

<sup>46/</sup> *NARUC I*, 525 F.2d at 641 (“What appears to be essential to . . . the common carrier concept is that the carrier ‘undertakes to carry for all people indifferently. . . .’”) (internal citation omitted).

<sup>47/</sup> See NCTA, *Cable Industry Capital Expenditures*, available at <http://www.ncta.com/Stats/InfrastructureExpense.aspx> (last visited July 14, 2010).

<sup>48/</sup> Letter from Steven F. Morris, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-29, at 1 (filed Apr. 10, 2009).

fundamentally conflicting with the national goals of promoting broadband growth and competition. Spurring broadband deployment requires a regulatory climate that promotes private sector investment and innovation by providing certainty and eliminating all unnecessary regulatory burdens. As investment slows, networks would fail to keep pace with technological developments and the latest innovations, depriving consumers of the benefits of cutting-edge products, services and functionality.

In fact, investment analysts and academics have already sounded the alarm that Title II regulation, even under the “Third Way” proposal, will chill investment and potentially costs tens of thousands of jobs. For example, in response to the Commission’s announcement of the “Third Way” proposal, Craig Moffett of Sanford C. Bernstein & Co. predicted that “cable operators and Verizon . . . could be forced to share . . . networks with competitors” having “a profoundly negative impact on capital investment.”<sup>49/</sup> Bank of America/Merrill Lynch more bluntly stated: “Based on our analysis, the potential for lower investment are [sic] likely and the ramifications will be felt not just in telecom and cable, but potentially in the vendor sector as well.”<sup>50/</sup> Similarly, a Standard and Poor’s analyst stated that a “‘third-way’ framework . . . creates potential long-term negative investment (and competitive) implications for major cable broadband providers.”<sup>51/</sup> A primary concern is, as detailed below, that the Commission will be

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<sup>49/</sup> See Gary Kim, *There Is No Such Thing as “Light Touch” Title II Regulation*, TMCnet Legal (June 11, 2010), available at <http://legal.tmcnet.com/topics/legal/articles/88206-there-no-such-thing-as-light-touch-title.htm>, and Amy Schatz, *How the FCC Plans to Regulate Internet Lines*, WSJ Blogs Digits - Technology News and Insights (May 6, 2010), available at <http://blogs.wsj.com/digits/2010/05/06/how-the-fcc-plans-to-regulate-internet-lines/>.

<sup>50/</sup> See PHOENIX CENTER POLICY PAPER NO. 40: *The Broadband Credibility Gap* (June 2010) (“*Phoenix Center Policy Paper*”) (quoting Bank of America/Merrill Lynch, *Internet Regulation Back on the Front Burner* (May 5, 2010)), available at <http://www.phoenix-center.org/pcpp/PCPP40Final.pdf>.

<sup>51/</sup> W. Spain, *FCC Chief Broaches New Approach on “Net Neutrality,”* MARKETWATCH (May 6, 2010), available at <http://www.marketwatch.com/story/cable-shares-hit-by-fcc-move-on-net-neutrality-2010-05-06>.

unable to cabin regulation once a Title II classification is made potentially resulting in the type of “[h]eavy-handed prescriptive regulation [that] can chill investment” that Chairman Genachowski has warned against.<sup>52/</sup>

Indeed, the mere consideration of the “Third Way” proposal has already had a negative effect on the market position of the cable industry. Investors “are being scared away by the reclassification proposal:”

Wall Street is looking at this and they’re a little confused by it and I think that they want to steer clear [of the sector] to a great extent until they see how the dust settles on something like this . . . there’s a lot of focus on certainty and uncertainty. . . When the amount of risk increases, your cost of capital goes up....<sup>53/</sup>

Investment analysts also have cut ratings on cable operators based only on the prospect of such regulation.<sup>54/</sup> A recent study notes that:

[a] causal relationship exists between onerous FCC regulation and negative economic activity in the immediate communications sector and the broader U.S. economy. Further evidence of this relationship can be found in recent cable stock losses and ratings downgrades that occurred in the wake of the FCC’s announcement that it will seek to reclassify broadband Internet access as a service regulated by Title II of the Communications Act.<sup>55/</sup>

Another study estimates that implementation of the Commission’s proposed net neutrality rules,

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<sup>52/</sup> FCC Chairman Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework*, at 2 (May 6, 2010), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-297944A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf) (“Genachowski Broadband Framework Statement”). See generally *Phoenix Center Policy Paper*.

<sup>53/</sup> Howard Buskirk, *Net Neutrality Caused Market Uncertainty, McDowell Says*, COMMUNICATIONS DAILY, at 3 (July 9, 2010) (citations omitted).

<sup>54/</sup> Jeffrey Bartash, *Comcast, Cablevision Stocks Decline on Cloudy Outlook*, WALL ST. J. (May 10, 2010) (“Bernstein analyst Craig Moffett cut his rating on the [U.S. cable-television] sector to neutral from outperform, citing last week’s decision by the Federal Communications Commission to tighten regulations on high-speed Internet service.”).

<sup>55/</sup> Charles M. Davidson & Bret T. Swanson, *Net Neutrality, Investment & Jobs: Assessing the Potential Impacts of the FCC’s Proposed Net Neutrality Rules on the Broadband Ecosystem*, Advanced Communications Law & Policy Institute (June 2010), at 37, available at [http://www.nyls.edu/user\\_files/1/3/4/30/83/Davidson%20&%20Swanson%20-%20NN%20Economic%20Impact%20Paper%20-%20FINAL.pdf](http://www.nyls.edu/user_files/1/3/4/30/83/Davidson%20&%20Swanson%20-%20NN%20Economic%20Impact%20Paper%20-%20FINAL.pdf) (“Davidson & Swanson, *Net Neutrality*”).

for which the “Third Way” would pave the way, would jeopardize 65,000 jobs in 2011 and would negatively impact over 1.4 million jobs by 2020.<sup>56/</sup>

The “Third Way” proposal simply does not serve the public interest given the state of today’s broadband market. As a recent study concluded:

For a sector that is as capital intensive as the U.S. broadband/communications sector is – one that has invested hundreds of billions of dollars in network expansion and upgrades over the past decade, and that has directly generated hundreds of thousands of jobs in the communications sectors and many thousands more in related industries – the FCC’s proposed actions are enormously significant, especially at a time when the national economy is attempting to recover from a substantial downturn and private sector job creation remains a concern.<sup>57/</sup>

In light of the substantial concerns raised by the “Third Way” reclassification proposal, its adoption would run directly counter to the Commission’s stated goals and hence does not serve the public interest.

### **C. The Broadband Market Is Highly Competitive**

The Commission’s reclassification proposal is not only unlawful in that it will not be able to demonstrate the factual predicate for carving out a telecommunications service, and ill-advised as matter of policy, it is also wholly unnecessary. The broadband market is sufficiently competitive to preclude the need for prescriptive regulation. The Commission’s National Broadband Plan erroneously expressed the concern that the broadband Internet marketplace may be insufficiently competitive and therefore requires some degree of regulatory intervention.<sup>58/</sup> In fact, competition in the broadband market is vibrant and expanding. Telephone companies are

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<sup>56/</sup> Cole Bazelon, *The Employment and Economic Impacts of Network Neutrality Regulation: An Empirical Analysis*, at p. ii, A Report to Mobile Future (April 2010).

<sup>57/</sup> Davidson & Swanson, *Net Neutrality* at 1-2.

<sup>58/</sup> See, e.g., CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, The Federal Communications Commission (March 2010), at 37, available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> (declining to find that wireline broadband competition exists, and, to the extent it does, suggesting that it is “surely fragile.”) (“*National Broadband Plan*”).

making significant investments in their broadband networks and they have been improving their services as well. In particular, many incumbent local exchange carriers (“ILECs”) have been deploying fiber-to-the-home (“FTTH”) and fiber-to-the-node (“FTTN”) networks. Verizon now offers its FiOS Internet service to more than 12 million households and AT&T offers its U-Verse service to 24 million households.<sup>59/</sup> Many small rural ILECs also are deploying FTTH and FTTN networks. For example, in a recent survey of its members, the National Telecommunications Cooperative Association reported that 44 percent of its members were providing FTTH or FTTN services.<sup>60/</sup>

Wireless services also are significant and growing competitors in the broadband marketplace. Apple’s iPhone and other smartphones have created strong consumer demand for 3G data services that offer speeds comparable to low-end DSL, but with the added benefit of mobility. According to CTIA, wireless broadband services are available to more than 92 percent of the population and over 64 million people subscribe to these services.<sup>61/</sup> These services are fully capable of providing e-mail and web browsing functionality and are considered indispensable by millions of consumers. And just as consumers are substituting wireless voice services for wireline services, wireless broadband services increasingly are providing another

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<sup>59/</sup> Verizon Investor Relations -- 1Q 2010 Highlights (Apr. 22, 2010), *available at* <http://investor.verizon.com/news/view.aspx?NewsID=1049>; AT&T Investor Briefing -- 1Q 2010 (Apr. 21, 2010), *available at* [http://www.att.com/Investor/Financial/Earning\\_Info/docs/1Q\\_10\\_IB\\_FINAL.pdf](http://www.att.com/Investor/Financial/Earning_Info/docs/1Q_10_IB_FINAL.pdf).

<sup>60/</sup> NTCA 2008 Broadband/Internet Availability Survey Report (Oct. 2008), *available at* <http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2008ntcabroadbandsurveyreport.pdf>.

<sup>61/</sup> CTIA One-Page Summary, *available at* [http://files.ctia.org/pdf/President\\_Obama\\_Transition\\_Team\\_Briefing\\_One\\_Pager.pdf](http://files.ctia.org/pdf/President_Obama_Transition_Team_Briefing_One_Pager.pdf); CTIA Wireless Industry Briefing, *available at* [http://files.ctia.org/pdf/President\\_Obama\\_Transition\\_Team\\_Briefing\\_Background\\_Facts.pdf](http://files.ctia.org/pdf/President_Obama_Transition_Team_Briefing_Background_Facts.pdf).

option for consumers as speeds and functionality continue to increase and providers begin bundling their data services with netbooks and other devices beyond today's smartphones.<sup>62/</sup>

**D. Reclassification of Broadband Internet Access Service Would Not Be an Interpretive Rule But A Substantive Change To Which APA and Regulatory Flexibility Requirements Apply**

The Commission asserts that a classification of broadband Internet access service as a telecommunications service subject, for the first time, to traditional telephone regulation would constitute an "interpretive rule."<sup>63/</sup> That the Commission believes it may take this step via a procedure that is deemed sufficiently routine or ministerial as to not require notice and comment is nothing short of breathtaking.<sup>64/</sup>

As its name implies, an interpretive rule merely interprets or clarifies a statute or rule that the agency has been entrusted to administer and is, therefore, not subject to the notice and comment requirements of Section 553 of the APA or the Regulatory Flexibility Act.<sup>65/</sup>

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<sup>62/</sup> Roger O. Crockett & Olga Kharif, *AT&T and Verizon Wireless Bet on Netbooks*, BUSINESS WEEK (May 20, 2009), available at [http://www.businessweek.com/magazine/content/09\\_22/b4133000229480.htm?campaign\\_id=rss\\_tech](http://www.businessweek.com/magazine/content/09_22/b4133000229480.htm?campaign_id=rss_tech).

<sup>63/</sup> *NOI* ¶ 29 ("We note that because the broadband Internet service classification questions posed in this part II.B involve an interpretation of the Communications Act, the notice and comment procedures we follow here are not required under the Administrative Procedure Act."). The Commission has not suggested that this proceeding is an adjudication of some sort.

<sup>64/</sup> There is in fact a strong argument that the regulation of the broadband Internet services lies beyond the Commission's delegated authority, let alone constitutes a mere interpretation of statutory language. See, e.g., Letter from Seth Waxman, Counsel for the United States Telecom Association, to FCC Chairman Julius Genachowski, GN Docket Nos. 09-51, 09-191, WC Docket No. 07-52, at 10 (dated Apr. 28, 2010) ("*Waxman Letter*") ("By classifying broadband Internet access as a 'telecommunications service' under Title II, the Commission would essentially be making new law for a major sector of the economy.").

<sup>65/</sup> See *United States Telecom Ass'n. and CenturyTel, Inc. v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005). Section 553 of the APA establishes the procedures for notice and comment rulemaking, including the publication of a notice of proposed rulemaking in the *Federal Register*. The Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, was enacted because uniform federal regulatory and reporting requirements have in numerous instances imposed disproportionately burdensome demands in legal, accounting, and consulting costs upon small businesses with limited resources. The Regulatory Flexibility Act thus requires an agency issuing a notice of proposed rulemaking or promulgating a final rule to prepare initial and final regulatory flexibility analyses that include a description of the reasons why action by the agency is being

Interpretive rules are to be contrasted with “legislative rules,” which result in a substantive change and require formal notice and comment procedures. While the courts have sometimes indicated that it may be difficult to distinguish between the two,<sup>66/</sup> no such ambiguity exists here. The monumental decision to change the regulatory framework of broadband Internet services is not a simple interpretation of statutory language.

*Brand X* directly contradicts the Commission’s suggestion that its potential reversal simply constitutes an interpretation of the Act’s statutory definitions. As the Supreme Court explained, “The entire question [of] whether the products here are functionally integrated . . . or functionally separate . . . turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided. . . .”<sup>67/</sup> In other words, the complex technical, legal and policy judgments that bear on the determination whether broadband Internet services are integrated information services go well beyond simple interpretation of the words of the Act.

The decision to reverse course would go further still.<sup>68/</sup> “[W]hen an agency changes the rules of the game”<sup>68/</sup> such that new regulatory obligations are imposed on entities, or when it “has given its regulation a definitive interpretation, and later significantly revises that interpretation,”

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considered, an estimate of the number of small entities to which the proposed rule will apply, a description of the proposed reporting/recordkeeping compliance requirements, and a description of any significant alternatives to the proposed rule that would accomplish the stated objectives. 5 U.S.C. §§ 603, 604.

<sup>66/</sup> *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (“the distinction between legislative and interpretative rules is enshrouded in considerable smog.”).

<sup>67/</sup> *Nat’l Cable & Telecommc’ns Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005).

<sup>68/</sup> *Cf. Fox Television*, 129 S. Ct. at 1811 (ruling that a greater showing is required when a change is predicated on facts that contradict those previously relied upon or one that upsets serious reliance interests).

“more than a clarification has occurred.”<sup>69/</sup> In *Sprint*, for example, the Commission claimed that its change in payphone compensation rules was merely a new interpretation of its existing rule that a facilities-based provider must pay. The court disagreed, finding that “an agency’s imposition of requirements that ‘affect subsequent [agency] acts’ and have a ‘future effect’ on a party before the agency triggers the APA notice requirement” and constitutes a rulemaking rather than a clarification or interpretation of an existing rule.<sup>70/</sup>

It is hornbook law that “if a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.”<sup>71/</sup> Administrative actions that “work substantive changes” or add “major substantive legal additions,” or adopt a “new position *inconsistent with*” regulation are legislative rules, not interpretative rules.<sup>72/</sup> Even the case that the Commission cites in support of its claim that it may proceed by interpretive rulemaking, *Syncor v. Shalala*, rejected the use of interpretative rulemaking because the change there was “fundamentally new regulation.”<sup>73/</sup>

There can be no question that the proposal to reverse course and find a telecommunications services component would constitute the type of change that cannot be accomplished through an interpretive rulemaking. A welter of new, heretofore inapplicable regulatory obligations spring into being solely as a result of telecommunications services classification, a point the Commission effectively concedes by calling for simultaneous

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<sup>69/</sup> *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003); *United States Telecom Ass’n.*, 400 F.3d at 35, n.12 (quoting *Alaska Prof’l. Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)).

<sup>70/</sup> *Sprint Corp.*, 315 F.3d at 373.

<sup>71/</sup> *Id.* (internal citation omitted).

<sup>72/</sup> *United States Telecom Ass’n.*, 400 F.3d at 34-35 (citations omitted) (emphasis in original).

<sup>73/</sup> *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997).

forbearance of some of those requirements. Nor is there any doubt that the new classification would work a substantive change to a previous “rule.” The *Wireline Broadband Order*, for one, was adopted as the result of a notice and comment rulemaking proceeding and thus can be undone only through another notice and comment rulemaking. The *Cable Modem Order*, too, as noted by the Supreme Court’s statement, was more than an interpretation of legislative language. The Commission’s claim will likely be viewed by the courts as an attempt to avoid APA and Regulatory Flexibility requirements by “calling a substantive regulatory change an interpretive rule.”<sup>74/</sup>

**E. Reclassifying the Provision of Broadband Internet Service To Include the Provision of a Telecommunications Service Subject to Title II Would Raise Serious First and Fifth Amendment Issues**

While there are no changed circumstances – on either factual or policy grounds – sufficient to justify a reversal of the Commission’s prior determination, the Commission is also precluded by Constitutional considerations from regulating the provision of broadband Internet access service as a telecommunications service subject to the common carrier obligations of Title II. The Supreme Court has confirmed that the Commission’s prior determination that Internet access service is an information service and not a telecommunications service was a wholly reasonable construction of the language of the Communications Act. Even if the statute were sufficiently ambiguous to permit a contrary determination, the Commission would nonetheless be precluded from construing such ambiguous language in a manner that raises

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<sup>74/</sup> *United States Telecom Ass’n.*, 400 F.3d at 35.

serious Constitutional issues.<sup>75/</sup> Construing the Act in a manner that subjects providers of Internet access service to Title II obligations would, however, do just that.

## 1. The First Amendment

As NCTA has previously explained in discussing the Constitutional infirmities of the proposed “net neutrality” rules, “the Internet, while serving many purposes, is primarily a marketplace for speech,” and “under the First Amendment, any government interference with a marketplace for speech is highly suspect.”<sup>76/</sup> Moreover, “this freedom from government control extends, not just to those who create speech, but also to those that provide a forum for its communication to the public.”<sup>77/</sup>

Subjecting the Internet speech marketplace to the common carrier regulatory regime of Title II would constitute direct and comprehensive government interference and would be difficult, if not impossible, to justify – especially to the extent that the Commission’s purpose in doing so is precisely to shape and influence that marketplace by constraining the speech-related conduct of Internet service providers, as well as content and application providers. In particular, a “nondiscrimination” obligation that not only required cable operators to make their facilities available indifferently to all content and application providers but also prohibited content and application providers from entering into discrete commercial arrangements with ISPs in order to

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<sup>75/</sup> See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988); *United States v. Security Indus. Bank*, 459 U.S. 70, 78, 82 (1982); *NCTA v. FCC*, 415 U.S. 336, 342 (1974).

<sup>76/</sup> Comments of NCTA, GN Docket No. 09-191, at 50 (filed Jan. 14, 2010) (we incorporate by reference the full discussion of the constitutional issues in Section IV of those comments and Section VII of NCTA’s reply comments, filed Apr. 26, 2010.)

<sup>77/</sup> *Id.* at 51. (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (“[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.” (“*Turner I*”))).

make their speech attractive to and usable by consumers, would not only encroach upon but would obliterate the boundaries established by the First Amendment and would surely be subject to at least “heightened scrutiny” by the courts.

Similarly, any requirement that ISPs make their facilities available separately and indifferently, on a separate common carrier basis, to entities wishing to provide their own Internet services would also raise serious First Amendment problems. The Commission’s own Distinguished Scholar in Residence has explained that imposing common carrier requirements on the carriage of protected speech inherently raises First Amendment concerns:

Suppose that the cables in *Turner* [*I, supra*] sent, say, gas rather than video programming through their wires, and Congress passed analogous legislation – that is, a statute requiring that the operators of the cables carry gas produced by local gas companies. We can imagine a wealth of potential government interests that might be sufficient to support such legislation for purposes of rational basis constitutional review: perhaps the government wanted to give a boost to local companies simply because it preferred localism; or perhaps the government was hostile toward cable companies because it considered them too arrogant and powerful, even though (let’s imagine) there was no existing antitrust or other cognizable harm. Either of those rationales, or dozens of others, would probably satisfy any court that reviewed such legislation if it were challenged as a violation of the cable companies’ constitutional rights (most probably, their rights to due process). But because the cables at issue in *Turner* did not carry bits of gas, but instead bits of data – video programming – the threshold was raised; it would not be sufficient for Congress simply to say, for instance, that it preferred little companies to bigger ones, or local companies to national ones, just because Congress thought that such a world would be a better place. We are looking, instead, for a more weighty justification – that is, a fairly specific and fairly serious harm to the public interest that the legislature is trying to avoid or minimize – in order for a statute infringing upon free speech interests to pass muster.<sup>78/</sup>

These First Amendment concerns, according to Professor Benjamin, “would seem to apply to cable Internet service no matter how it was statutorily characterized. . . . *Although the*

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<sup>78/</sup> S. M. Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 288-89 (2000).

*issue is far from clear, the better answer seems to be that open access mandates will trigger the First Amendment inquiry discussed in this Article.”*<sup>79</sup>

It is hard to imagine a government interest sufficient to justify the infringements of First Amendment rights that would result from Title II classification of Internet access service. First of all, even those government interests that have been held, in certain circumstances, to be sufficiently “important” to justify intrusions on protected speech – such as an interest in preventing anti-competitive conduct where there is a “bottleneck” controlling access to speech – cannot provide the basis for such intrusions unless such circumstances do, in fact exist. The government “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>80</sup> For reasons discussed at length in our previous comments, there is no basis either for viewing ISPs, in today’s competitive Internet marketplace, as “bottlenecks,” or for concluding that there is a “real, not merely conjectural” harm to competition in that marketplace.<sup>81</sup>

But to the extent that a common carrier regime that requires nondiscriminatory treatment of Internet speakers is intended to enforce parity among content and application providers on the Internet by eliminating any differential treatment based on their different ability to pay for enhancements to their transmission, their different value, and their attractiveness to consumers, that is simply not a legitimate government interest. The Supreme Court has made clear that it is

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<sup>79/</sup> *Id.* at 296 n.64 (emphasis added). *See also, e.g., Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000).

<sup>80/</sup> *Turner I*, 512 U.S. at 664. *See also Time Warner Entertainment Co., L.P. v FCC*, 240 F.3d 1126, 1133 (D.C. Cir 2001). *See also Benjamin, supra*, at 363 (“How should we respond when we have reason to believe that a harm will arise in a speech-related industry if the government does not act now? One possibility is for the government to move proactively to shape events before a harm occurs. Another is to wait and see if the harm develops. In this Article, I advocate a presumption in favor of the latter approach as an application of a principle of humility in the face of uncertainty.”).

<sup>81/</sup> *See Comments of NCTA, GN Docket No. 09-191, supra*, at 56-58.

not the business of government to level the playing field so that speakers with inherent advantages cannot benefit from them.<sup>82/</sup> Under the First Amendment principle established by *Buckley* and its progeny, the government is not free to impose restrictions on speech out of a fear that, if the speech is left in private hands, some speakers will prevail at the expense of others.

The government may address bottleneck conditions and other anti-competitive activities with regulations narrowly tailored to address such conditions and activities when the risk of harm is tangible. But it may not exert an independent power to guarantee “neutral” opportunities for all potential speakers – by, for example, classifying ISPs as telecommunications service providers and subjecting them to the broad common carrier obligations of Title II.

## **2. The Fifth Amendment**

Subjecting ISPs by fiat to such a regulatory regime would also raise serious problems under the Fifth Amendment. It would fundamentally transform the business that cable operators and other ISPs have chosen to enter – after they have invested hundreds of billions of dollars in facilities that enabled them to engage in that business. A common carrier framework that prohibits ISPs from treating content and application providers differently in order to maximize the consumer value of their Internet service inherently diminishes the value of ISPs’ facilities and investment. Moreover, to the extent the rules adopted under such a framework specifically prohibit ISPs from recovering *any* payments from content and application providers, there would be no possibility of “just compensation” for the diminished revenues and return on investment resulting from this reduced value.

This is precisely the sort of government encroachment that is likely to be deemed a “regulatory taking” without just compensation under the Fifth Amendment. Although the

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<sup>82/</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*); *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008); *Meyer v. Grant*, 486 U.S. 414 (1988).

Supreme Court has not developed any “set formula” for determining when a regulatory infringement on the use of property is so severe as to become a “taking,”<sup>83</sup> it has “identified several factors – such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action – that have particular significance.”<sup>84</sup> Here, all three of these factors suggest that the threshold for establishing a regulatory taking may be met.

The key is in the character of the government action, which is not simply a targeted regulation that, like the antitrust laws, is tailored to prevent a business from engaging in unfair and anti-competitive practices or other conduct that might reasonably be deemed as contrary to the public interest. In this case, the regulatory action consists of imposing on a service that has never been deemed a common carrier service and that, indeed, was specifically and repeatedly determined *not* to be subject to common carrier regulation – or, for that matter, to *any* regulation – the comprehensive regulatory framework of Title II of the Communications Act.

This extraordinary action would, in turn, have a direct impact on the economics of the ISPs’ business. And, because the enormously costly facilities and technology for providing Internet service were largely deployed during a period of time when Congress and the Commission not only continually reaffirmed that it was the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*,”<sup>85</sup> but engaged in litigation all the way to the Supreme Court to defend its determination that ISPs should *not* be subject to Title II, any regulatory about-face would surely be viewed as a substantial interference

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<sup>83</sup> *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>84</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

<sup>85</sup> 47 U.S.C. § 230(b)(2) (emphasis added).

with “reasonable investment-backed expectations.” In the absence of any mechanism for compensating ISPs for the impact of such a comprehensive regulatory imposition on the value of their Internet service – and, indeed, especially if the Commission were to *prohibit* the recovery of any revenue from anyone but consumers – the result would be not only a regulatory taking, but a taking without just compensation under the Communications Act.

## **II. The Commission Does Not Have to Reclassify Broadband Service In Order to Meet Its Legitimate Policy Goals**

Not only is reclassification legally barred and unwise as a policy matter, there is no jurisdictional need for the Commission to reach the classification question. Contrary to the Commission’s suggestion in the NOI, the D.C. Circuit’s decision in *Comcast Corp v. FCC* does not compel the Commission to reclassify broadband service as a Title II “telecommunications service” in order to meet legitimate policy objectives. As FCC officials have acknowledged, the *Comcast* decision “has no effect at all on most of” the National Broadband Plan, including initiatives related to making spectrum available for broadband uses, improving the efficiency of wireless systems, bolstering the use of broadband in schools and developing common standards for public safety networks.<sup>86/</sup>

The *Comcast* court accepted “*Brand X’s* observation that the Commission’s ancillary authority may allow it to impose *some* kinds of obligations on cable Internet providers” pursuant to Title I. The gravamen of its decision was that such power does not amount to “plenary authority over such providers.”<sup>87/</sup> Rather, the court affirmed the principle that the Commission may not assert regulatory authority over broadband Internet providers under Title I by simply

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<sup>86/</sup> Post of Austin Shlick, FCC General Counsel, *Implications of Comcast Decision on National Broadband Plan Implementation*, <http://blog.broadband.gov/?entryId=356610> (posted Apr. 7, 2010).

<sup>87/</sup> See *Comcast Corp.*, 600 F.3d at 650.

referring to a communications policy goal,<sup>88/</sup> but must instead link any assertion of ancillary authority to the furtherance of a statutory duty contained in Titles II, III, or VI.<sup>89/</sup> It is possible that a disciplined analysis of the sort required by the court would support the exercise of ancillary jurisdiction to accomplish key regulatory policy goals set forth in the National Broadband Plan, such as extending universal service support to broadband. Title I may also provide the Commission with authority to address anticompetitive practices by broadband Internet service providers that harm consumers, but a determination of the Commission’s power to regulate in this field depends on the nature of the specific rules it proposes. Title I would *not*, for instance, authorize the Commission to adopt the broad requirements and unrestricted ban on discrimination proposed in the *Open Internet NPRM*. Other elements of the National Broadband Plan referred to in the NOI – in particular extending disabilities access and privacy to broadband services – are under active consideration by Congress, which is the appropriate place for them to be resolved.<sup>90/</sup>

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<sup>88/</sup> See *id.* at 659 (rejecting Commission attempt “to use its ancillary authority to pursue a stand-alone policy objective, rather than to support its exercise of a specifically delegated power”).

<sup>89/</sup> See *id.* at 654 (“Although policy statements may illuminate that authority, it is Title II, III or VI to which the authority must ultimately be ancillary.”). In order to rely on ancillary jurisdiction two conditions must be met. First, the subject of the regulation must be within the Commission’s general jurisdiction, which encompasses all interstate and foreign communications by wire or radio. 47 U.S.C. § 152(a). Broadband services clearly fall within the Commission’s general jurisdiction. Second, the regulation must be “reasonably ancillary to the effective performance of the Commission’s various responsibilities.” *American Library Ass’n v. FCC*, 406 F.3d 689, 693 (D.C. Cir. 2005). See also *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). The *Comcast* court accepted that cable Internet service satisfied the first prong of the test and focused only on whether the second requirement was met. *Comcast Corp.*, 600 F.3d at 646-47.

<sup>90/</sup> See, e.g., Twenty-first Century Communications and Video Accessibility Act of 2009, H.R. 3101, 111th Cong. (2010); Equal Access to 21st Century Communications Act, S.R. 3304, 111th Cong. (2010); John Eggerton, *Senate Commerce OK’s Telecom Disability Update Bill*, BROADCASTING & CABLE, July 15, 2010, available at <http://www.broadcastingcable.com/article/454789-Senate-Commerce-OK-s-Telecom-Disability-Update-Bill.php>; John Eggerton, *House Communications Subcommittee Refers Accessibility Bill To Full Committee*, BROADCASTING & CABLE, June 30, 2010, available at: <http://www.broadcastingcable.com/article/454373-House-Communications-Subcommittee-Refers-Accessibility-Bill-To-Full-Committee.php>;

## A. Universal Service

The universal service provisions of the Communications Act could justify extending universal service support to “information services.” *First*, as the Commission itself has found, Sections 254(a)(1) and (a)(2) of the Communications Act, which “mandate that the Commission define the ‘services that are supported by Federal universal service support mechanisms’[,] [do] not limit support to telecommunications services.”<sup>91/</sup> More specifically, Section 254(b)(2) of the Act directs the Commission to establish universal service policies that, *inter alia*, foster “access to advanced telecommunications *and information services* . . . in all regions of the Nation.”<sup>92/</sup> Section 254(b)(3) further instructs the Commission to take steps to enable “[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, [to] have access to telecommunications *and information services*. . . .”<sup>93/</sup> Section 254(b)’s requirement that universal service policies “shall” be based on the principles enumerated in that subsection has been construed to impose “a mandatory duty on the FCC.”<sup>94/</sup>

Section 254(c) likewise authorizes the Commission to expand universal service to encompass more than just telecommunications services. That section provides not only that universal service is an “evolving level of telecommunications services,” but also authorizes the Commission to modify “the definition of the *services* that are supported by Federal universal

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Communications Networks and Consumer Privacy: Recent Developments: Hearing Before the H. Comm. on Energy and Commerce Subcomm. on Communications, Technology and the Internet, 111th Cong. (2010); Juliana Gruenwald, *Boucher Wants Bipartisan Privacy Bill*, TECH DAILY DOSE, June 10, 2010, available at <http://techdailydose.nationaljournal.com/2010/06/boucher-wants-bipartisan-privacy.php>.

<sup>91/</sup> *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 437 (1997) (“1997 Universal Service Report and Order”), *aff’d in relevant part*, *Texas Office of Pub. Util. Council v. FCC*, 183 F.3d 393, 443-44 (5th Cir. 1999) (“*TOPUC I*”).

<sup>92/</sup> 47 U.S.C. § 254(b)(2) (emphasis added).

<sup>93/</sup> 47 U.S.C. § 254(b)(3) (emphasis added).

<sup>94/</sup> *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001).

service support mechanisms.”<sup>95/</sup> The Commission has determined that Congress deliberately distinguished between the terms “telecommunications services” and “services” in Section 254(c), and has relied on the distinction between those two terms as authority to provide universal service support for information services.<sup>96/</sup>

The Commission already has found that broadband adoption rates among several key demographic groups are lower than the national average.<sup>97/</sup> Further, the Commission has specifically determined that “[i]ncreasing community access to the Internet is particularly critical to communities in which residential adoption of broadband Internet access has historically lagged, including many rural, minority, and Tribal communities.”<sup>98/</sup> The Commission’s central statutory responsibility is “to make available, so far as possible, to all people of the United States ... a rapid, efficient Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges....”<sup>99/</sup> Universal service has been at the core of the Commission’s mission from the beginning and, prior to enactment of section 254, was based on the Commission’s Title I authority, not Title II.<sup>100/</sup> Establishing rules to facilitate access to broadband services for all Americans would be ancillary to Congress’s express directives in

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<sup>95/</sup> 47 U.S.C. § 254(c)(1)-(2) (emphasis added).

<sup>96/</sup> See *1997 Universal Service Report and Order* ¶¶ 438-49.

<sup>97/</sup> *National Broadband Plan* at 23 (“For example, only 40% of adults making less than \$20,000 per year have adopted terrestrial broadband at home, while 93% of adults earning more than \$75,000 per year have adopted broadband at home. Only 24% of those with less than a high school degree, 35% of those older than 65, 59% of African Americans and 49% of Hispanics have adopted broadband at home.”).

<sup>98/</sup> *In the Matter of Schools and Libraries Universal Service Support Mechanisms*, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 1740, ¶ 2 (2010) (“*February 18 Schools and Libraries Order*”).

<sup>99/</sup> 47 U.S.C. § 151.

<sup>100/</sup> See *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (because “universal service is an important FCC objective,” the high-cost Universal Service Fund fell within the Commission’s authority under sections 151 and 154(i).).

sections 254(b)(2) and (b)(3) that the Commission set universal service policies that promote access to “advanced telecommunications and information services.”

*Second*, Section 254(h) of the Act provides an independent basis for the exercise of jurisdiction to apply universal service support mechanisms to broadband Internet service.<sup>101/</sup> Section 254(h)(2)(A) provides that the Commission “shall establish competitively neutral rules...to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications *and information services* for all public and nonprofit elementary and secondary school classrooms....”<sup>102/</sup> The Commission’s statutory authority to provide E-rate support for information services offered by both telecommunications carriers and non-telecommunications providers is firmly established and has been upheld by the courts.<sup>103/</sup> And the 5<sup>th</sup> Circuit expressly affirmed the Commission’s reliance on its ancillary authority to extend E-rate support for the provision of information services by non-telecommunications carriers.<sup>104/</sup>

Not only does Section 254(h)(2)(A) authorize the Commission to provide universal service support for access to information for schools and libraries, it also does not restrict the provision of such support to the classroom setting. The Commission’s rules require only that such services be used for educational purposes, defined as “activities that are integral, immediate, and proximate to the education of students.”<sup>105/</sup> While the Commission’s rules establish a presumption that activities that occur “on school property” meet the test for

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<sup>101/</sup> See generally 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 (filed Mar. 1, 2010) (“*NCTA USF Letter*”).

<sup>102/</sup> 47 U.S.C. § 254(h)(2)(A) (emphasis added).

<sup>103/</sup> *1997 Universal Service Report and Order* ¶¶ 436-40.

<sup>104/</sup> *TOPUC I*, 183 F.3d at 443-44; *1997 Universal Service Report and Order* ¶¶ 591-94.

<sup>105/</sup> *Schools and Libraries Universal Service Support Mechanism*, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202, ¶ 17 (2003) (“*Schools and Libraries Second Report and Order*”); 47 C.F.R. § 54.500(b).

“educational purposes;”<sup>106/</sup> the rules do not limit the test to such activities. To the contrary, the Commission has made clear that support is available “in a place of instruction,” and not just on school property.<sup>107/</sup>

It would be a logical extension of these policies to provide E-rate support for broadband services to the homes of elementary and secondary students, since the use of broadband services for educational purposes today extends beyond the physical boundaries of the school and reaches into the home.<sup>108/</sup> In addition, relying upon Section 254(h) to underpin universal service support for residential broadband service would also be consistent with recent Commission orders relaxing the requirement that E-rate funding must be strictly limited to educational purposes. In February 2010, the Commission adopted an order enabling schools that receive E-rate funding to allow members of the general public to use the schools’ Internet access during non-operating hours, such as after school hours or during times students are out of school, and is considering whether to make such changes permanent.<sup>109/</sup> The Commission granted an 18-month waiver of rules it found “discourage public use of resources funded by E-rate,” and specifically endorsed

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<sup>106/</sup> 47 C.F.R. § 54.500(b).

<sup>107/</sup> *Schools and Libraries Second Report and Order* ¶ 20 (“We find that our clarification [of the education purpose] is consistent with statutory mandates that the purpose for which support is provided be for educational purposes in a place of instruction.”).

<sup>108/</sup> *See NCTA USF Letter* at 5-6.

<sup>109/</sup> *February 18 Schools and Libraries Order* ¶ 17. Specifically, the Commission proposes to change its rules to require schools to certify that services will be primarily for educational purposes, rather than solely for educational purposes. The *February 18 Schools and Libraries Order* builds on the Commission’s *Alaska Order*, where the Commission found good cause to waive its rule requiring schools to certify that they would use the services obtained through discounts for educational purposes only. *Federal-State Joint Board on Universal Service; Petition of the State of Alaska for Waiver for the Utilization of Schools and Libraries Internet Point-of-Presence in Rural Remote Alaska Villages Where No Local Access Exists and Request for Declaratory Ruling*, Order, 16 FCC Rcd 21511, ¶ 6 (2001). The Commission further found good cause for waiver because “it is consistent with the Commission’s efforts to encourage access to advanced telecommunications and information services.” *Id.* at ¶ 11.

the use of E-rate funds “for other purposes, such as adult education, job training, digital literacy programs, and online access to governmental services and resources.”<sup>110/</sup>

The Commission’s authority under section 254(h)(2) to extend E-rate support to Internet access services provided by non-carriers is clear, and its use of ancillary authority in support of this determination has been upheld by the courts. Based on this firm foundation, the Commission has sufficient authority to expand the E-rate program to support Internet access service outside of the physical school or classroom without reclassifying Internet access as a common carrier service. Any lingering concerns about the Commission’s authority can be addressed by Congress, which is actively considering universal service reform, including the extension of universal service support to broadband services.<sup>111/</sup>

#### **B. Prohibiting Potential Anticompetitive Practices by Broadband Internet Service Providers**

It is also possible that the Commission could justify a “backstop” prohibition on anti-competitive practices by broadband Internet service providers as ancillary to its statutory obligations elsewhere in the Act. Although in *Comcast* the Commission attempted to present arguments for ancillary authority grounded in various provisions of Titles II, III and VI, the D.C. Circuit declined to consider the merits of many of these arguments because they had not been either preserved for appeal or relied upon in the underlying order.<sup>112/</sup> The court did not,

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<sup>110/</sup> *February 18 Schools and Libraries Order* ¶ 7; *cf. NOI* ¶ 35 (asking whether the Commission could use Section 254(h)(2) to provide support for broadband used in connection with adult education).

<sup>111/</sup> *See, e.g.,* Universal Service: Reforming the High-Cost Fund: Hearing Before the H. Comm. on Energy and Commerce Subcomm. on Communications, Technology and the Internet, 111th Cong. (2009); Universal Service: Transforming the High-Cost Fund for the Broadband Era: Hearing Before the S. Comm. on Commerce, Science & Transportation, 111th Cong. (2010); Anne Veigle, *Spectrum Bill High Priority When Congress Returns*, COMMUNICATIONS DAILY, Dec. 24, 2009 (noting that “[u]niversal service legislation is another candidate for markup under House Communications Subcommittee Chairman Rick Boucher, D-Va. [who] unveiled a draft bill [] that has attracted widespread industry support”).

<sup>112/</sup> *See Comcast Corp.*, 600 F.3d at 660-61.

however, foreclose the Commission from invoking these provisions to justify the exercise of ancillary regulatory authority over broadband Internet service providers.

The increasing interconnectedness among broadband Internet services and Title II regulated telecommunications services means that the Commission's ability to satisfy its statutory responsibilities with respect to the latter may allow it to preserve the openness of the Internet and to guard against, at least in some targeted way, anti-competitive practices by broadband Internet service providers and others. For instance, the establishment of a modest and appropriately tailored regulatory framework to prevent anti-competitive blocking could potentially be linked to the Commission's Title II responsibility over network interconnection as set forth in Sections 251(a)(1) and (a)(2), as well as its responsibility to ensure reasonable, non-discriminatory access to Title II networks as required by Sections 201 and 202. Of course, the scope and applicability of any such non-discrimination safeguard must be subject to reasonable network management requirements.<sup>113/</sup>

Importantly, however, the issue of whether Title II could serve as the basis for the Commission's exercise of ancillary jurisdiction to address harmful, anti-competitive practices by broadband providers and others would depend upon the nature of the rules being proposed – a critical element missing from the NOI. The *Comcast* court clearly determined that the validity of the exercise of ancillary authority turns upon the fit between the rule under consideration and the

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<sup>113/</sup> In the context of broadband Internet services, presumptively permissible network management activities would include, but not be limited to, practices related to network congestion, security, spam, copyright protection, consumer safeguards and law enforcement needs. See Reply Comments of Comcast Corporation, GN Docket No. 09-191, at 34 (filed Apr. 26, 2010) (“*Comcast Network Neutrality Reply Comments*”); Comments of AT&T Inc., GN Docket No. 09-191, at 187 (filed Jan. 14, 2010) (“*AT&T Network Neutrality Comments*”).

furtherance of specific statutory duties in Title II of the Act.<sup>114/</sup> It is not possible to say whether openness rules in the abstract would fall within the scope of the Commission’s Title I authority.

The extent to which a regulatory safeguard against harmful discrimination could be justified under Title I is difficult to determine. For instance, the only concrete proposal advanced by the Commission to address discriminatory practices is the blanket ban on discrimination in the *Open Internet NPRM*<sup>115/</sup> – an overbroad requirement that cannot be justified under Title I. First, even assuming *arguendo* that the Commission could marshal an evidentiary record to support the adoption of a nondiscrimination requirement as an exercise of authority ancillary to its Title II responsibilities, it could not impose a nondiscrimination rule on broadband Internet service that is *more* onerous than the requirement specified in Title II.<sup>116/</sup>

As the Commission itself acknowledged, the nondiscrimination rule proposed in the *Open Internet NPRM* is a categorical prohibition against discrimination, barring any differential treatment of broadband Internet traffic,<sup>117/</sup> irrespective of whether such treatment was pro-competitive and enhanced consumer welfare. But there is no justification for precluding broadband Internet service providers from engaging in differential treatment in furtherance of

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<sup>114/</sup> See *Comcast v. FCC*, 600 F.3d at 656 (the critical linchpin permitting FCC regulatory authority over enhanced services was that “the Commission had linked its exercise of ancillary authority to its Title II responsibility over common carrier rates”).

<sup>115/</sup> *Preserving the Open Internet; Broadband Industry Practice*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009) (“*Open Internet NPRM*”).

<sup>116/</sup> See Comments of Time Warner Cable, GN Docket No. 09-191, at 63 (filed Jan. 14, 2010) (“Creating a strict nondiscrimination requirement under Title I – which imposes no specific obligations at all – for providers of information services, when Congress established a more flexible standard allowing reasonable forms of discrimination even by monopoly telephone providers, would conflict with the basic structure and logic of the Act”) (“*Time Warner Cable Network Neutrality Comments*”); *AT&T Network Neutrality Comments* at 211-13; Comments of Verizon and Verizon Wireless, GN Docket No. 09-191, at 95 (filed Jan. 14, 2010) (“*Verizon Network Neutrality Comments*”).

<sup>117/</sup> See *Open Internet NPRM* ¶¶ 103-04, 109 (acknowledging that the proposed nondiscrimination rule “bears more resemblance to unqualified prohibitions on discrimination added to Title II in the 1996 Telecommunications Act than it does to the general prohibition on ‘unjust or unreasonable discrimination’ by common carriers in section 202(a) of the Act”) (emphasis in original).

pro-competitive or consumer welfare enhancing objectives.<sup>118/</sup> Indeed, Section 202(a) of the Act only restricts “unjust or unreasonable discrimination,”<sup>119/</sup> not all discrimination.

Any exercise of ancillary authority by the Commission must be consistent with the provisions of the Communications Act.<sup>120/</sup> As AT&T noted in its comments in the *Open Internet NPRM*, the Supreme Court made clear in *Midwest Video II* that “the FCC’s ancillary authority is cabined by the substantive provisions of the Communications Act, and it cannot assert such authority to act in a manner ‘antithetical to a basic regulatory parameter established’ in the statute.”<sup>121/</sup>

Second, the nondiscrimination rule proposed in the *Open Internet NPRM* also is legally infirm because it fails to justify why only one subset of information service providers – *i.e.*, those that furnish broadband Internet access – should be subject to that obligation. Rules justified on the basis of ancillary authority are permissible only insofar as they are necessary for the “effective” performance of the Commission’s responsibilities under some other provision.<sup>122/</sup> To the extent that the Commission determines that a nondiscrimination rule is necessary to effectuate its Title II duties by ensuring a baseline level of parity between interconnected

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<sup>118/</sup> Cf. Comments of Comcast Corporation, GN Docket No. 09-191, at 39-40 (filed Jan. 14, 2010) (quoting an article written by the FCC’s Chief Technologist stating that “*Network neutrality should not be about banning all discrimination. . . . [D]iscrimination can be used in ways that benefit users, potentially improving security, improving quality of service, decreasing infrastructure costs, and allocating resources to those who benefit the most from them.*”) (emphasis in original”).

<sup>119/</sup> 47 U.S.C. § 202(a).

<sup>120/</sup> See, e.g., *Southwestern Cable Co.*, 392 U.S. at 178; *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (“*Midwest Video I*”).

<sup>121/</sup> *AT&T Network Neutrality Comments* at 209. See also Reply Comments of Time Warner Cable, GN Docket No. 09-191, at 43 (filed Apr. 26, 2010) (“the proposed rules would turn the statutory framework on its head by imposing more onerous obligations on information services, which are exempt from common carrier regulation, than on telecommunication services, which are subject to such requirements.”); *Midwest Video II*, 440 U.S. at 700-02.

<sup>122/</sup> See *Southwestern Cable Co.*, 392 U.S. at 178; *Midwest Video II*, 440 U.S. at 695; *Comcast Corp.*, 600 F.3d at 644.

broadband services and telecommunications services, it could not limit that restriction only to providers of broadband Internet access service. As numerous commenters pointed out, a nondiscrimination rule that singles out only a subset of broadband information service providers would fail to effectively accomplish the objectives underlying the rule,<sup>123/</sup> and thus would fail to withstand judicial review.

### **III. The “Third Way” Proposal Creates Substantial Risk of Burdensome Regulation**

Given the legal impediments to reclassification and the continued availability of ancillary authority to meet the objectives of the National Broadband Plan, there is no basis or need to engage in the wrenching change embodied in the “Third Way” proposal. While the NOI suggests that the “Third Way” proposal would result in light-touch regulation, the fact is that, as presented, the plan would apply Sections 201 and 202 of the Act, which impose sweeping economic regulation on common carriers. Those sections contain the “bedrock” obligations of common carrier law<sup>124/</sup> that the Commission has used to impose price regulation, resale, and access requirements. By retaining those sections, the Commission creates the very risk of heavy-handed regulation it claims to want to avoid. But even if this Commission initially succeeds in limiting regulation – and assuming its plan is sustained by the courts – there is nothing to prevent

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<sup>123/</sup> See *Time Warner Cable Network Neutrality Comments* at 73-98; *id.* at 73 (“The NPRM focuses exclusively on broadband Internet access service providers, without acknowledging that other entities have a comparable or greater ability to affect Internet openness. . . . To better ensure that any regulatory framework it adopts is effective, fair, and lawful, and to best serve consumers, the Commission should modify the scope of any rules that it ultimately adopts to treat all marketplace participants comparably.”); *Verizon Network Neutrality Comments* at 129-30 (“the distinctions among networks, applications, and devices are rapidly eroding, with the result that numerous entities can engage in the types of behaviors that the Commission would single out with respect to broadband access providers.”); *AT&T Network Neutrality Comments* at 196-207. See also *infra* Section VI.

<sup>124/</sup> *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, 13 FCC Rcd 16857, ¶ 15 (1998) (“*PCIA Order*”) (“Sections 201 and 202, codifying the bedrock consumer protection obligations of a common carrier, have represented the core concepts of federal common carrier regulation dating back over a hundred years.”).

this Commission, or a subsequent Commission, from reversing course based on perceived changes in circumstances. Under the plan, moreover, any person may bring a complaint pursuant to Section 208 claiming that their broadband provider is charging an unjust price or engaging in an unjust, unreasonable, or unreasonably discriminatory practice. The complaint process will force the Commission to address these issues, whether it wants to or not.

The “Third Way” also suffers from a lack of precision in what is meant by the “Internet connectivity” service it proposes to regulate under Title II. That is not surprising, considering that cable ISPs do not separately offer a “connectivity” service and thus there is no specific offering to which regulations attach. The likely result is that a government-imposed definition is apt to be both under-inclusive – omitting elements that should be under government oversight if the intent is to promote the deployment of broadband (or deter anti-competitive conduct) – and over-inclusive, capturing functions that clearly fall within the definition of information services and subjecting them to regulation as common carrier services.

**A. The “Third Way” Proposal Does Not Meaningfully Limit the Scope of Title II Regulation**

The Commission suggests, erroneously, that it can simultaneously reclassify Internet connectivity as a common carrier offering and cabin the effect of that determination. First, the common carrier designation itself necessarily entails a finding that Internet service providers must offer the designated telecommunications service indiscriminately. Second, as noted above, the Commission intends to retain Sections 201 and 202 – the core provisions of the Act providing for common carrier economic regulation.

## 1. Classifying Internet Connectivity As a Common Carrier Offering Opens the Door to Broad Regulation

The very act of classifying Internet connectivity as a common carrier service creates a substantial regulatory overhang.<sup>125/</sup> Once a service is classified as a telecommunications service under Title II, there are few limitations on the Commission’s authority to impose common carrier requirements on that service. To the contrary, the Communications Act gives the Commission substantial discretion in determining which and to what extent requirements of Title II apply to a common carrier service.<sup>126/</sup> Moreover, classification of Internet connectivity as a telecommunications service creates a default regime of regulation.<sup>127/</sup> Once the classification decision is made, the burden will be on the Commission to justify the lifting of any Title II provisions.<sup>128/</sup> By contrast, under Title I, the default state is no regulation; it is the *imposition* of regulation, not the *elimination* of regulation, that must be justified. The Commission expressed just this concern in the *Universal Service Report*:

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

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<sup>125/</sup> Designating Internet connectivity as a telecommunications service is synonymous with declaring it to be a common carrier offering. *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999). The broadband providers of such service, if designated as a telecommunications service, would be treated as common carriers with respect to that offering. *See* 47 U.S.C. §153(44) (a “telecommunications carrier shall be treated as a common carrier under this chapter only to the extent it is engaged in providing telecommunications services.”).

<sup>126/</sup> *See, e.g., NARUC I*, 525 F.2d at 644 (once the FCC confers common carrier status on a service, “then the Commission must determine [the service’s] responsibilities from the language of Title II common carrier provisions”).

<sup>127/</sup> *See Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, 24 FCC Rcd 9543, ¶ 21 (2009) (“*Forbearance Procedural Order*”) (Section 10 does not place on the Commission an ongoing burden of justifying regulation – regulations are deemed applicable unless forbearance criteria have been demonstrably satisfied).

<sup>128/</sup> *Id.* at ¶ 20 (those seeking forbearance have the burden of proof of demonstrating that each of the statutory forbearance criteria are met with respect to each specifically identified provision for which forbearance is sought).

regulation of such providers. Such a presumption would be inconsistent with the deregulatory and procompetitive goals of the 1996 Act.”<sup>129/</sup>

Thus, while the Commission may attempt to proceed modestly under Title II with a light regulatory touch, there is no assurance that this or a future Commission, relying on different facts or different legal or economic analyses, may determine that a more robust application of Title II is required.

## **2. Sections 201 and 202 Impose Broad Regulations on Common Carriers**

The NOI touts the fact that under the “Third Way” the Commission “could . . . forbear from applying all but a handful of core statutory provisions” to the newly-minted Internet connectivity service – but as the NOI acknowledges, among those provisions that would apply are the “core” provisions of Sections 201, 202, and 208 of the Act.<sup>130/</sup> Sections 201 and 202, however, are the source of traditional common carrier obligations that, at their heart, impose a duty to provide services indiscriminately to all comers at just and reasonable rates.<sup>131/</sup> As the Commission has explained, these sections “codify[] the bedrock consumer protection obligations of a common carrier [and] have represented the core concepts of federal common carrier regulation dating back over a hundred years.”<sup>132/</sup> When previously confronted with the question of whether to forbear from these provisions, the Commission explained the broad authority they confer on the agency:

These sections set out broad standards of conduct, requiring the provision of interstate service upon reasonable request, pursuant to charges and practices which are just and reasonable and not unjustly discriminatory. At bottom, these

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<sup>129/</sup> *Universal Service Report* ¶ 47.

<sup>130</sup> *NOI* ¶¶ 68, 75-77.

<sup>131/</sup> *NARUC I*, 525 F.2d at 641 (“What appears to be essential to . . . the common carrier concept is that the carrier ‘undertakes to carry for all people indifferently. . . .’”) (internal citation omitted).

<sup>132/</sup> *PCIA Order* ¶ 15.

provisions prohibit unreasonable discrimination by common carriers by guaranteeing consumers the basic ability to obtain telecommunications service on no less favorable terms than other similarly situated customers. The Commission gives the standards meaning by defining practices that run afoul of carriers' obligations, either by rulemaking or by case-by case adjudication. *The existence of the broad obligations, however, is what gives the Commission the power to protect consumers by defining forbidden practices and enforcing compliance.*<sup>133/</sup>

Bolstering the Commission's authority to impose economic regulations as it deems reasonable or necessary is the sweeping language of Section 201(b). This provision authorizes the agency to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."<sup>134/</sup> The Supreme Court held that this single sentence in Section 201(b), without more, conferred sufficient authority on the Commission to prescribe sweeping rules to promote local competition under the Telecommunications Act of 1996, including setting rates for unbundled network elements.<sup>135/</sup>

Even a cursory review of the language of these provisions reveals their breadth. Section 201 provides that (1) it is the duty of every common carrier to furnish communications service "upon reasonable request;" (2) covered entities shall, where the Commission finds such action "necessary or desirable in the public interest, establish physical connections with other carriers;"<sup>136/</sup> and (3) "all charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable."<sup>137/</sup> Section 202(a) bars "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any

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<sup>133/</sup> *Id.* (emphasis added).

<sup>134/</sup> 47 U.S.C. § 201(b).

<sup>135/</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996.").

<sup>136/</sup> 47 U.S.C. § 201(a).

<sup>137/</sup> 47 U.S.C. § 201(b).

means or device.” That provision further bans the giving of any “undue or unreasonable preference or advantage to any person, class of persons, or locality, or to subject any particular person, class of persons, or locality to undue or unreasonable prejudice or disadvantage.”<sup>138/</sup>

These are mandatory provisions applicable to interstate telecommunications carriers,<sup>139/</sup> and all of these obligations may be enforced through the filing of a complaint by any third person pursuant to Section 208, whether or not the complainant has suffered economic injury.<sup>140/</sup> The Commission has often characterized these provisions as imposing economic regulations that differ in substantial respect from other “consumer protection” provisions.<sup>141/</sup>

By their terms, these provisions would authorize the Commission to determine by rule or complaint whether any rate or charge assessed by a broadband Internet provider for connectivity service is just, reasonable and non-discriminatory, whether such providers may charge different

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<sup>138/</sup> 47 U.S.C. § 201(a).

<sup>139/</sup> *Ad Hoc Telecommc’ns Users Comm. v. FCC*, 572 F.3d. 903, 906 (D.C. Cir. 2009) (“Title II imposes certain mandatory common-carrier requirements on interstate telecommunications carriers,” including just and reasonable rates and not engaging in unreasonable discrimination).

<sup>140/</sup> 47 U.S.C. § 208(a) (authorizing “any person” to complain that a common carrier has contravened a provision of the Act). Notably, given the *NOI*’s comparison of the “Third Way” to wireless regulation, the Commission has stated that it would adjudicate Section 201 and 202 claims brought against wireless carriers under Section 208, including complaints regarding rates. See *PCIA Order* ¶ 16. A complainant under this provision need not assert or be economically damaged in order to file a Section 208 complaint. See 47 U.S.C. § 208(a) (“No complaint shall at any time be dismissed because of the absence of direct damage to the complaint.”). Under the FCC’s procedures, an entity may bifurcate its complaint to seek liability first and damages later, if desired. See 47 C.F.R. § 1.722(d) (describing how a complainant may proceed if it “wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made....”).

<sup>141/</sup> See, e.g., *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260, ¶ 64 (2008) ; *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, ¶ 21 n.78 (2004) (“*Vonage Preemption Order*”) (distinguishing “economic, public-utility type regulation” from “generally applicable commercial consumer protection statutes, or similar generally applicable state laws.”); *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶ 29 n.95 (2005) (differentiating “traditional common carrier economic regulation” from social policy issues such as E911).

rates to different areas, and whether such providers are under an obligation to resell their service or provide physical connections to their network facilities. Each of these is discussed in turn.

**a. Price Regulation**

Sections 201 and 202 would give the Commission authority over the level and structure of pricing for at least some aspects of Internet service. At a minimum, the Commission could establish price levels for the “connectivity” component of broadband Internet service insofar as that is a factor in the retail price of the service and is over consumer-facing pricing strategies such as consumption based billing, tiered pricing, or any subsequent price structure that Internet service providers devise. Authority over charges, practices, classifications, and regulations could also give the Commission domain over whether broadband Internet service providers could recoup costs from providers of online or other edge services in addition to end users. Sections 201 and 202 have also provided authority to order rate averaging between rural and high costs areas and urban areas. Even if the Commission forbore from applying dominant carrier regulation so as to preclude the Commission from having to *approve* rates in advance, the Commission would still have authority, and will no doubt be compelled to exercise it through Section 208 complaints, to assess whether broadband rates are just and reasonable and not unreasonably discriminatory.<sup>142/</sup> It should be noted that in the complaint setting, once the complainant has demonstrated that prices are different for like services, the Internet service provider would bear the burden of proving that pricing differences are reasonable.<sup>143/</sup>

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<sup>142/</sup> See *Ad Hoc Telecommc’ns Users*, 572 F.3d at 909-10 (affirming forbearance from dominant-carrier price regulation to special access-based broadband services in part on the ground that the FCC retained the basic common carrier requirement to charge just and reasonable rates).

<sup>143/</sup> *Jacqueline Orloff v. Vodafone AirTouch License, LLC d/b/a Verizon Wireless and New Par*, File No. EB-01-MD-009, Memorandum Opinion and Order, 17 FCC Rcd 8987, ¶ 14 (2002) (“*Orloff Order*”) (noting that when a complainant has established the first two steps of the three-part inquiry used to determine whether unjust or unreasonable discrimination has occurred per 47 U.S.C. § 202(a), then “the

## **b. Resale**

Common carriage has always involved some form of nondiscriminatory access to facilities, be it a railroad, barge, or telecommunications network.<sup>144/</sup> This could take the form of resale, physical interconnection or unbundling. Resale of common carrier services has long been viewed by the Commission as a hallmark of common carrier obligations as enforced by application of Sections 201 and 202.<sup>145/</sup> Indeed, the obligation to provide service on a wholesale basis is a fundamental duty of local exchange carriers under Section 251(b) of the Communications Act.<sup>146/</sup> Even wireless carriers faced a resale obligation until 2002.

## **c. Unbundling and Physical Interconnection**

The Commission has the authority to order unbundling and physical interconnection under Section 201. Even before the detailed unbundling regime established in Sections 251 and 271 of the Act, the Commission had ordered unbundling and physical access to networks. The Commission relied on its Section 201 authority to require local telephone companies to provide physical connections to their facilities through collocation in its *Expanded Interconnection* proceeding. It ordered local exchange carriers to provide such connections to other carriers pursuant to the language of Section 201(a) requiring common carriers to establish physical

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burden of persuasion shifts to the defendant carrier to justify the discrimination as reasonable.”), *aff’d Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

<sup>144/</sup> “The fundamental concept of communications common carriage is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . .” *NARUC I*, 525 F.2d at 641, n.58 (quoting *Industrial Radiolocation Service*, 5 F.C.C.2d 197, 202 (1966)).

<sup>145/</sup> *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Service and Facilities*, 60 F.C.C.2d 261 (1976), *aff’d sub nom. AT&T Co. v. FCC*, 572 F.2d 17 (2d Cir. 1978) *cert. denied.*, 439 U.S. 895 (1978); *Resale and Shared Use of Domestic Public Switched Network Services*, 83 F.C.C.2d 167 (1980) *recon. denied*, 86 F.C.C. 2d 820 (1981).

<sup>146/</sup> Section 251(b)(1) imposes a duty on all local exchange carriers “not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications service.” 47 U.S.C. § 251(b)(1).

connections with other carriers. It also ordered LECs to make such connections to “non-carrier interconnectors” pursuant to the language of Section 201 to “furnish communications service upon reasonable request.”<sup>147/</sup> The Commission could thus point to its authority under 201, or be compelled to address that authority under a 208 complaint, to order interconnection with other carriers or non-carrier entities, such as Google or Yahoo.

Common carrier classification of Internet connectivity could also open the door to an unbundling requirement similar to the one imposed by the Commission under the *Computer Inquiry* regime. From the beginnings of the *Computer Inquiry* proceeding in the 1970s until the Commission’s 2002 *Cable Modem Order* decision, efforts to protect information service providers from discrimination by vertically integrated telephone network operators focused on access to the common carrier transmission facilities over which the information service rode. The Commission enforced nondiscrimination first by requiring the network-affiliated information service provider to take basic transmission on the same terms and conditions available by tariff (*Computer II*), and then by requiring the network owner to unbundle the basic transmission building blocks over which its information services rode and make those transmission components available to other information service providers under regulated terms and conditions (*Computer III*). If this framework were applied to cable companies or broadband Internet providers who become common carriers with respect to transmission, cable’s broadband transmission service would have to be made available to competing ISPs on a non-discriminatory basis, possibly under a government-prescribed rate that the cable company itself would have to pay to use that transmission capacity to offer its own Internet access service.<sup>148/</sup>

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<sup>147/</sup> *Expanded Interconnection with Local Telephone Company Facilities*, Memorandum Opinion and Order, 9 FCC Rcd 5154, ¶¶ 18-19 (1994) (“*Virtual Collocation Order*”).

<sup>148/</sup> *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*,

In light of this precedent, one can easily imagine Google or Yahoo (or an existing CLEC) demanding to purchase in bulk the broadband telecommunications service that the facilities-based broadband provider is now deemed to make available to its retail end users. Google or Yahoo could then add its own access component to that transmission element and sell the service in competition with the facilities-based broadband Internet provider that is actually furnishing the physical transmission facilities. Demands for unbundled access would inevitably encompass claims that access must be provided at just, reasonable, and not unreasonably discriminatory charges, under FCC oversight. It seems implausible that the Commission could designate a service as a common carrier offering and then negate the very essence of common carriage: the duty to provide network access to all comers indiscriminately.

**B. Attempting to Extract an “Internet Connectivity” Offering from Internet Service Risks Being Either Over-inclusive or Under-inclusive**

The Commission has not defined what it intends to regulate as a severable telecommunications service other than to suggest a high level description of a “connectivity” service that enables subscribers to “transmit data to and from the rest of the Internet.” As explained above, Internet “connectivity” includes a substantial array of functions that provide information services capabilities. Moreover, “connectivity” to the Internet reaches beyond the last mile to the consumer and includes content delivery networks, regional data centers, and Internet backbone facilities. Opening the door to the common carrier regulation of “connectivity” will quickly reach these information services’ functionalities or other elements of the “Internet ecosystem,” notwithstanding the Commission’s stated intent to snare in its net only broadband Internet access providers.

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Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶¶ 24-27 (2005) (describing requirements under *Computer II and Computer III*) (“*Wireline Broadband Order*”).

The NOI's proposal to regulate "connectivity" is also at odds with the Commission's stated goal of not regulating managed or private services.<sup>149/</sup> The Commission offers no clear demarcation between the connectivity for "best efforts" access to the public Internet and the capacity – on the same networks, as the Commission itself observes<sup>150/</sup> – that is used for VoIP and other specialized services that may require, for example, certain quality-of-service or pricing arrangements.

While an over-inclusive definition of Internet connectivity service could result in the spillover of regulation to services or functions the Commission disclaims interest in regulating now, an overly narrow definition of this service could jeopardize the Commission's "open Internet" goals leading to more regulation down the road. For example, if the Commission were to attempt to define a transmission service that only involves that transmission of packets between the subscriber's home and the CMTS in the cable head-end, excluding all other functionalities such as DNS, DHCP, browser capabilities and so forth, (which, for reasons set forth above is not practicable) the Commission may find that it still does not have the authority to address the kinds of discrimination that are of concern to advocates of regulation.

If the connectivity service as initially designated proves too narrowly defined, the Commission will find itself, eventually, under renewed pressure to regulate further into the Internet and/or to add new regulatory requirements beyond those that might initially result from the "Third Way" proposal. This furthers the risk, highlighted above, that even if this initial proceeding results in some form of "light touch" regulation, changed circumstances (*e.g.*, the need for an expansion of the telecommunications service component or regulatory regime in

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<sup>149/</sup> *NOI* ¶ 108.

<sup>150/</sup> *Id.*

order to capture “discriminatory conduct”) would lead to increased regulation, including unbundling and resale obligations.

**C. The Wireless and the NECA Tariffing Models Raised in the NOI Are of Limited Relevance**

**1. To Duplicate Wireless Services Light-Touch Regulation, the Commission Must Set Aside Its View that the Broadband Market Is Not Sufficiently Competitive**

The NOI compares the “Third Way” approach to the regulatory treatment of commercial mobile radio services (CMRS), where the Commission determined to forbear from some of the requirements of Title II but not the core provisions in Sections 201, 202, and 208.<sup>151/</sup> This analogy is flawed, however. As a threshold matter, it is worth noting that the “wireless model” explicitly does not apply to wireless broadband Internet access service. The Commission has expressly held that this service, like broadband Internet access provided by cable and wireline telephone companies and broadband over powerline, is an information service not subject to Title II.<sup>152/</sup> Indeed, the Commission specifically held that wireless broadband Internet access and CMRS were mutually exclusive.<sup>153/</sup>

Moreover, the Commission’s light-touch regulation for common carrier wireless has been predicated on findings of sufficient competition to negate the need for regulatory intervention.

For example, while the Commission ordered the eventual elimination of the wireless resale

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<sup>151/</sup> *NOI* ¶ 75. The Commission was originally barred from forbearing from these provisions with respect to CMRS providers. 47 U.S.C. § 332(c)(1)(A). Following passage of the 1996 Act, PCS wireless companies sought forbearance from sections 201, 202 and 208 under Section 10. The FCC rejected this request in the *PCIA Order*.

<sup>152/</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 1 (2007) (“[W]e find that wireless broadband Internet access service is an information service under the Communications Act of 1934...[and] we find that mobile wireless broadband Internet access service is not a ‘commercial mobile service’ under section 332 of the Act.”) (“*Wireless Broadband Order*”).

<sup>153/</sup> *Id.*

requirement in 1999 and ruled that wireless carriers can make individualized pricing decisions, in both of those instances the Commission’s determinations relied on competition in the marketplace.<sup>154/</sup>

In the *Orloff Order*, moreover, the Commission was careful to note that notwithstanding a competitive market it was *not* forbearing from Section 202, which it noted continued to act as a “powerful protection for CMRS consumers.” It then identified some circumstances in which it could find Section 202 violated: “If ‘a carrier unreasonably discriminated against rural customers, who lacked adequate choice of providers, in favor of urban customers,’ or if ‘a CMRS market were inadequately competitive’ or if there were other market failures limiting ‘consumers’ ability to protect themselves’” by, for example, “simply switch[ing] to another provider.”<sup>155/</sup> Given the Commission’s (mistaken) assertions of the current state of the broadband Internet marketplace, *e.g.*, as reflected in the network neutrality rulemaking<sup>156/</sup> and suggested in the National Broadband Plan,<sup>157/</sup> it is not clear that the Commission would be able to establish the same factual predicate for the same relaxed application of Section 202 that it adopted in the *Orloff Order*.

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<sup>154/</sup> See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Memorandum Opinion and Order, 14 FCC Rcd 16340, ¶ 1 (1999) (setting the resale rule expiration date as November 24, 2002); *Orloff Order* ¶¶ 1, 16 (denying Orloff’s complaint alleging that Verizon Wireless and its affiliate violated Sections 201 and 202 of the Act by offering discounts and other inducements to certain customers taking service under Verizon’s wireless calling plans that were not made available to Orloff.).

<sup>155/</sup> *Orloff v. FCC*, 352 F.3d at 420-21.

<sup>156/</sup> See *infra*, notes 185-88 and accompanying text.

<sup>157/</sup> *National Broadband Plan* at 37 (declining to find the wireline broadband market competitive and suggesting that competition is “surely fragile.”)

## 2. NECA's Tariffed DSL Offering Is Not a Valid Model for Cable Companies

As noted in the NOI, a number of small, rural independent ILECs have chosen to offer DSL service as a standalone offering pursuant to tariff.<sup>158/</sup> That these carriers have chosen the option, left open in the *Wireline Broadband Order*,<sup>159/</sup> to offer their broadband Internet access service as a separate telecommunications service on a permissive de-tariffing basis does not and should not establish a precedent for all other broadband providers to follow. Most providers, including cable company Internet providers, do not offer a stand-alone telecommunications services product.

The carriers identified in the NOI as choosing to offer DSL as a telecommunications service are uniquely situated. As they informed the Commission, they are rate of return carriers that participate in the NECA pool. If required to treat DSL as an information service, these carriers would have been unable to assign the costs of DSL service to their rate base, adversely affecting their interstate rate of return, or their ability to participate fully in the NECA tariff pool, causing them economic harm.<sup>160/</sup> The Commission recognized these special circumstances in the *Wireline Broadband Order*, explaining:

These associations, which represent rural incumbent LECs, indicate that their members may choose to offer some wireline broadband transmission on a

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<sup>158/</sup> See, e.g., NOI ¶ 21.

<sup>159/</sup> See, e.g., *Wireline Broadband Order* ¶ 5, ¶¶ 89-95, ¶ 103 (allowing carriers the option of offering wireline broadband on a permissive detariffing basis).

<sup>160/</sup> See, e.g., Letter from Richard A. Askoff, Executive Director, Regulatory and Government Relations, NECA, Dan Mitchell, Vice President, Legal and Industry, NTCA, Stuart Polikoff, Director of Government Relations, OPASTCO, David W. Zesiger, Executive Director, ITTA, James W. Olson, Vice President, Law & General Counsel, USTA, & Derrick Owens, Director of Government Affairs, Western Telecommunications Alliance, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 1-2 (filed July 22, 2005) (“*NECA July 22, 2005 Ex Parte Letter*”); NTCA Mar. 7, 2003 *Ex Parte* Letter at 2. See also *NRTA and NTCA Letter*, CC Docket No. 02-33, (filed Nov. 15, 2002) (noting that redefinition of DSL as an information service would deprive rate of return ILECs from NECA tariff pooling and the interstate rate of return).

common carrier basis even if we eliminate the *Computer Inquiry* requirements. These associations also explain that their members' progress in deploying broadband in rural areas to date has been attributable to an ability to lower the costs of deployment through participation in the National Exchange Carrier Association, Inc. (NECA) pooling arrangements or other tariffed rate structures that reflect rate of return regulation....To participate in a NECA pool, a carrier must offer an interstate telecommunications service pursuant to a federally filed, NECA tariff that contains the same rates, terms, and conditions of service for all participating carriers. The rates for these services are based on the pooled or averaged costs of each participating carrier. Without the ability to continue tariffing broadband transmission services, rural incumbent LECs explain that they would be unable to afford the investment necessary to deploy facilities necessary to provide broadband Internet access services.<sup>161/</sup>

The NECA-tariffed DSL model, based on the unique circumstances of small, rural, rate of return carriers, provides no basis to compel all Internet providers to offer a separate, common carrier broadband connectivity service. Nor is the telecommunications services designation necessary to assure that universal service funds can be used to subsidize broadband deployment. As discussed above, the Commission has ample ancillary authority to expand the USF program to include broadband service.

Moreover, the DSL service tariffed by NECA is not a reasonable model because it does not provide Internet connectivity. Unlike cable modem service, which offers the customer a single service that connects a subscriber to the Internet (*i.e.*, to backbones and major Internet exchange points) along with providing all the functionality needed to interact with the Internet, the NECA-tariffed service only offers a connection to the telephone company's wire center serving the end user. From there, information is carried on the telephone company's special access services to the end user's "telecommunications service provider" or the end user's ISP.<sup>162</sup> The NECA-tariffed service bears no resemblance to the broadband service offered by cable providers.

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<sup>161/</sup> *Wireline Broadband Order* ¶ 89, n.269 (citations omitted).

<sup>162/</sup> NECA FCC Tariff No. 5, §§ 8.1.1, 8.4.

#### **IV. There Are Substantial Legal Risks Associated with the Forbearance Proposal at the Heart of the “Third Way” Plan**

While the value of forbearing from the “non-core” provisions of Title II may be less significant than the NOI implies, the Commission’s ability to do so is by no means certain – leaving open the possibility that Internet connectivity could be subject to the full panoply of Title II requirements. Past forbearance decisions were predicated on a finding of sufficient competition to eliminate the need for regulatory intervention. Despite the evidence to the contrary, however, the Commission continues to suggest that the broadband marketplace may not be sufficiently competitive. The NOI suggests that the Commission views the “Third Way” forbearance exercise as materially different from its past forbearance decisions and that it will adopt a far less rigorous analysis, but the Commission’s ability to engage in this “wave of the hand” forbearance is untested and at odds with practice. Indeed, the more of Title II that the Commission would jettison, the greater the risk that agency’s effort would be viewed by the court as an end run of the *Comcast* decision.<sup>163/</sup> At a minimum, to bolster its forbearance authority, the Commission must reassess its misguided view of the competitiveness of the broadband marketplace. As the courts have noted, any forbearance determination is subject to review and reversal if the Commission fails to adequately justify its decision.

The forbearance component of the NOI also raises procedural concerns. The record developed as a result of this NOI may be insufficient to support any forbearance. Parties are asked to expound on the merits of forbearance for a service that has not been defined and in light

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<sup>163</sup> See, e.g., *Waxman Letter* at 2 (“Title II classification, if adopted, could thus revolutionize government regulation of a vast sector of the economy without any warrant from Congress, all for the evident purpose of evading the consequences of a court decision limiting the Commission’s authority. In the words of the *Washington Post* editorial staff, it would be perceived as ‘a legal sleight of hand’” and ‘a naked power grab.’”) (citations omitted).

of a regulatory framework that has not been explained, let alone adopted. Indeed, an NOI may not be an appropriate vehicle to “tee up” the forbearance that the Commission has in mind.

**A. The “Third Way” Proposal Is Subject to the Same Forbearance Analysis As Other Forbearance Decisions**

The Commission suggests that forbearing from applying various Title II provisions to newly identified Internet connectivity stands in a different posture because it would not be responding to a request to eliminate or change a currently applicable regulatory framework. Rather, according to the Commission, it would be assessing to forbear from regulations that “*do not apply* at the time of the analysis.”<sup>164/</sup> The Commission asks whether in this posture, the agency could “simply observe the current marketplace” to determine whether currently inapplicable requirements should now apply.<sup>165/</sup>

There is no legal authority to support the Commission’s suggestion that the forbearance review it intends to conduct as part of the “Third Way” proposal can somehow be less rigorous than its other forbearance determinations on the asserted ground that the provisions under review do not currently apply. As an initial matter, the Commission has previously ruled that “it would be impossible to ‘forbear from applying [a] regulation or [a] provision of this Act’ that does not apply.”<sup>166/</sup> The Commission has, on the other hand, been admonished by the court that it must conduct a forbearance analysis on rules that may or may not apply,<sup>167/</sup> and neither the Commission nor the courts have suggested that some lesser standard applies when reviewing

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<sup>164/</sup> *NOI* ¶ 70 (emphasis in original).

<sup>165/</sup> *Id.*

<sup>166/</sup> *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, 20 FCC Rcd 9361, ¶ 5 (2005), *rev’d and remanded*, *AT&T Inc v. FCC*, 452 F.3d 830 (D.C. Cir. 2006) (“*AT&T v. FCC*”). The Commission found that this reasoning was compelled by the definition of forbear, which means “to desist from” or “cease.” *Id.*

<sup>167/</sup> *AT&T v. FCC*, 452 F.3d at 834.

rules whose application may be conditional.<sup>168/</sup> For example, in reviewing Feature Group IP's petition to forbear from application of access charges to certain traffic, should such charges be found to apply,<sup>169/</sup> the Commission noted the lack of sufficient evidence in the record as has been required by numerous petitions to forbear from indisputably applicable Title II requirements.<sup>170/</sup>

At any rate, there is nothing conditional about the forbearance analysis the Commission would undertake and thus there is no basis whatsoever to assert some less rigorous review. The only reason it would be conducting the forbearance review is that the Commission would have determined that some Internet connectivity service is a telecommunications service. Once that decision is rendered, all Title II requirements in fact do apply until or unless subject to forbearance. Thus the Commission will in fact be forbearing from requirements that apply to this service.

The Commission's recent announcements in the *Qwest Phoenix Forbearance Order* further complicate the agency's plans for a less rigorous forbearance analysis. The Commission there announced that the indicia of market competitiveness that it had used in previous petitions to forbear were inadequate. Instead, the Commission announced that it would assess a carrier's

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<sup>168/</sup> Cf. *AT&T*, 452 F.3d at 462-63 (agreeing with the Commission that a conditional petition must specifically identify the regulations from which forbearance is sought but remanding to determine whether SBC's petition was sufficiently specific).

<sup>169/</sup> *Feature Group IP Petition for Forbearance From Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules*, 24 FCC Rcd 1571, ¶ 6 (2009) ("*Feature Group IP Order*").

<sup>170/</sup> *Feature Group IP Order* ¶ 10, n.29 ("The Commission previously has denied section 10 forbearance petitions for lack of sufficient evidence. See *Petition of OrbitCom, Inc. for Forbearance from CLEC Access Charge Rules*, WC Docket No. 08-162, 23 FCC Rcd 13187 (2008) (denying a forbearance petition for "fail[ure] to address in any manner the statutory criteria for a grant of forbearance or to provide any showing that those criteria are met by its request"). See also *id.* at ¶ 12 ("Moreover, the Commission is unable to determine with reasonable precision the potential impact the requested forbearance would have on consumers because the petition is unclear as to what traffic would be covered by any decision here.") The somewhat more truncated analysis in that order was based on the fact that the petitioner's primary public interest claim – that grant of its forbearance petition would automatically result in the application of the reciprocal compensation scheme under section 251(b)(5) – was invalid. See *id.* at ¶ 8.

market power utilizing the rigorous standard that the Commission previously had applied to non-dominance determinations and as used by the Department of Justice in antitrust reviews.<sup>171/</sup> The Commission also ruled that prior forbearance decisions had mistakenly “assumed that a duopoly always constitutes effective competition and is necessarily sufficient to ensure just, reasonable, and non-discriminatory rates and practices, and to protect consumers.”<sup>172/</sup> The Commission’s “theoretical and empirical concerns associated with duopoly” led it to “adopt a more comprehensive analytical framework for considering forbearance requests like Qwest’s.”<sup>173/</sup>

Granted the Commission indicated that some different form of analysis may be appropriate when assessing forbearance for broadband services than for “legacy services,”<sup>174/</sup> and the D.C. Circuit has indicated that the Commission has discretion in developing its forbearance analysis for broadband services, in light of Section 706.<sup>175/</sup> Nonetheless, the adoption of a heightened standard for forbearance in one context while simultaneously suggesting a relaxed standard in another could well strike a court as little more than a results-driven approach that fails to satisfy the basic requirements of reasoned administrative decision-making.

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<sup>171/</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, FCC 10-113, ¶¶ 1, 28 (rel. June 22, 2010) (“We evaluate Qwest’s petition using a market power analysis, similar to that used by the Commission in many prior proceedings and by the Federal Trade Commission (FTC) and the Department of Justice (DOJ) in antitrust reviews.” *Id.* at ¶ 1.) (“*Qwest Phoenix Forbearance Order*”).

<sup>172/</sup> *Qwest Phoenix Forbearance Order* ¶ 29.

<sup>173/</sup> *Qwest Phoenix Forbearance Order* ¶ 37.

<sup>174/</sup> *Qwest Phoenix Forbearance Order* ¶ 39 (“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.”)

<sup>175/</sup> *Ad Hoc Telecommc’ns Users Comm.*, 572 F.3d. at 908-09. However, these cases preceded the Commission’s revised analytical approach in the *Qwest Phoenix Forbearance Order*.

## **B. A Decision to Forbear Is Subject to Review and Reversal**

The NOI implies that reversing a forbearance determination would face significant legal hurdles.<sup>176/</sup> In fact, even if the Commission were successful in forbearing from wide swaths of Title II, a decision to forbear does not immunize the decision from future reversal anymore than any other ruling. The Commission has asserted that it has “ample authority” to reverse a forbearance decision “to reflect changed circumstances.”<sup>177/</sup> The D.C. Circuit has similarly noted that forbearance decisions are “not chiseled in marble ... [s]o Congress and the FCC will be able to reassess as they reasonably see fit based on changes in market conditions, technical capabilities or policy approaches . . . .”<sup>178/</sup> Utilizing forbearance as the mechanism for light touch regulation thus provides little comfort that different regulatory obligations may not be imposed in the future.

## **C. To Establish the Strongest Factual Predicate for Forbearance, The Commission Should Reassess Its Erroneous View That There May Be Insufficient Competition in the Broadband Marketplace**

The state of competition has been the central question in the Commission’s forbearance analyses dating back to the Competitive Carrier Rulemaking in the 1970s through its forbearance decisions that followed the enactment of Section 10 in 1996. This is true whether the question has been forbearance from dominant carrier regulations,<sup>179/</sup> from the unbundling obligations of

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<sup>176/</sup> NOI ¶¶ 98-99.

<sup>177</sup> See *Implementation of Call Home Act*, 22 FCC Rcd 1030, ¶ 11, n.22 (2007) (“We have ample authority to change our decision to forbear to reflect changed circumstances”); *Petition of Verizon for Forbearance*, 19 FCC Rcd 21496, ¶ 26, n.84 (2004) (noting that to the extent its prediction that BOCs will not act unreasonably in the wholesale broadband market is wrong, the “Commission has the option of reconsidering this forbearance ruling.”) (“2004 Verizon Forbearance Petition”), *aff’d* by *Earthlink v. FCC*, 462 F.3d 1 (D.C. Cir. 2005).

<sup>178/</sup> *Ad Hoc Telecommc’ns Users Comm.*, 572 F.3d. at 911.

<sup>179/</sup> See *AT&T Broadband Order* ¶ 17 (concluding that “in light of the overall competitive alternatives available for the AT&T-specified services, as well as the way in which they are they are typically offered to enterprise customers, it is appropriate to forbear from dominant carrier regulation as it

Section 251(c)(3),<sup>180/</sup> or from the obligation under Section 271 to make available the elements used by the Bell operating companies (“BOCs”) to provide broadband Internet access service to enterprise customers.<sup>181/</sup> The competitive analysis involves not only an assessment of the current state of competition, which is essential to a finding that the statutory provision or rule is not necessary to ensure that rates and charges are just and reasonable and that there is no unreasonable or unjust discrimination,<sup>182/</sup> but also whether forbearance will “promote competitive market conditions” and hence be in the public interest.<sup>183/</sup> Forbearance grants have

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applies to these services”); *Petition of US West for Forbearance from Regulation as a Dominant Carrier*, 14 FCC Rcd 19947, ¶ 10 (1999) (“*US West Petition*”) (denying BOC petitions to forbear from dominant carrier regulation of high capacity special access services on ground that the record “concerning the state of competition” was insufficient to show lack of market power), *pet. for review granted in part, AT&T v. FCC*, 236 F.3d 729, 731 (D.C. Cir. 2001) (reversing on ground that the FCC’s sole reliance on market share constituted an unexplained departure from non-dominance proceedings where various indicia of market power, not just market share, were reviewed).

<sup>180/</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 USC §160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“*Qwest Omaha Forbearance Order*”), *aff’d, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

<sup>181/</sup> *See generally 2004 Verizon Forbearance Petition*.

<sup>182/</sup> 47 U.S.C. § 160(a)(1). *See e.g., AT&T Broadband Order* ¶ 17 (finding forbearance appropriate in light of the “overall competitive alternatives available . . . as well as the way in which they are typically offered to enterprise customers”), ¶ 22 (“we find that a number of entities currently provide broadband services in competition with AT&T’s services”), ¶ 23 (noting that although the record did not reflect extensive market share data, “other available data suggest that there are a number of competing providers for these types of services nationwide and the marketplace generally appears highly competitive”); *2004 Verizon Forbearance Petition* ¶¶ 21-22 (finding forbearance appropriate in light of “the overall state of competition in the developing broadband market” and where the record showed that the petitioners’ competitors “have had success in acquiring not only residential and small-business broadband customers, but increasingly large business customers as well”); *Verizon Telephone Cos. Petitions for Forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach MSAs*, 22 FCC Rcd 21293, ¶ 25 (2007) (“We begin our section 10(a)(1) analysis by considering the market for the services for which Verizon seeks relief and the customers that use them”).

<sup>183/</sup> 47 U.S.C. § 160(b) (in determining whether forbearance is in the public interest, “the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”). *See also US West Petition* ¶ 5.

typically involved findings that the relevant market is “highly competitive,” with a “myriad” of “significant competitive providers.”<sup>184/</sup>

Notwithstanding the Commission’s suggestion of an alternative forbearance analysis for broadband described above, this well-established precedent creates a potential and unnecessary hurdle. The transparent purpose of the classification exercise is to clear the way for regulation that the Commission has indicated may be necessary to curb market power. A primary goal of that regulation, which the Commission would impose pursuant to Sections 201 and 202, would be to prohibit discrimination against Internet application or content providers. Almost by definition, the Commission must believe that there is a market failure that requires intervention to ensure that end users and content providers are fully protected.

The Commission suggested as much in the *Open Internet* rulemaking, stating that “[i]n many parts of the United States, customers have limited options for high speed broadband Internet access service.”<sup>185</sup> Moreover, the Commission expressed concern that, even in areas where there is competition, “it is unlikely that competitive forces are sufficient to eliminate the incentive to charge a fee” [to application or content providers] and where “effective competition is lacking (*i.e.*, where broadband Internet access service providers have market power), it is more likely that price and quality discrimination will have socially adverse effects.”<sup>186/</sup> It went on there to note that “broadband Internet access service providers generally, and particularly broadband Internet access service providers with market power, may have the incentive and ability to reduce or fail to increase the transmission capacity available for standard best-effort Internet access service,” and where “broadband Internet access service providers have market

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<sup>184/</sup> *AT&T Broadband Order* ¶¶ 22-23.

<sup>185/</sup> *Open Internet NPRM* ¶ 7.

<sup>186/</sup> *Id.* at ¶¶ 69, 70.

power and are vertically integrated or affiliated with content, application, or service providers, additional concerns may arise.”<sup>187/</sup> Internet access service providers, the Commission writes, could also abuse their status as “gatekeepers” to the Internet to make it “more difficult or expensive for end users to access services competing with those offered by the network operator or its affiliates.”<sup>188/</sup>

The Commission’s concerns regarding the competitiveness of the broadband marketplace are misplaced. As described above, the broadband marketplace is in fact competitive, and that competition is delivering a number of pro-consumer benefits, including that broadband providers have invested billions of dollars in networks and services to vie for consumers’ attention. Nonetheless, the Commission’s statements to the contrary could undermine its ability to forbear from many of the Title II provisions. To mitigate this possibility, as part of any forbearance action growing out of this proceeding, the Commission should clearly and unequivocally set aside its erroneous view that the market is insufficiently competitive.

Of course, an accurate assessment of the state of competition in the broadband marketplace obviates any possible need for the “Third Way” itself. To the extent the Commission seeks to extend other policies to broadband, such as universal service, it has ample ancillary authority to do so.

#### **D. The Commission’s Forbearance Proposal is Procedurally Defective**

The Commission is proposing a complete transformation of its regulatory framework – without engaging in any formal process. The “Third Way” approach seeks to classify as telecommunications services Internet services that have never before been subject to such regulation, and attempts to fashion an overall legal/regulatory framework through forbearance

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<sup>187/</sup> *Id.* at ¶¶ 71-72.

<sup>188/</sup> *Id.* at ¶ 72.

and non-forbearance, all within the ambit of an NOI that is woefully short of any detail or analysis.

Were a carrier to seek forbearance of the breadth contemplated here on the basis of what has been set forth in NOI, the Commission would throw the application out on its ear for lack of completeness. Under the Commission's rules, a petition seeking forbearance must be complete as filed in order to make the process fair for commenters, manageable for the Commission, and more predictable for petitioners.<sup>189/</sup> The petition "must identify clearly" the scope of the requested relief, and "state the following with specificity: (1) each statutory provision rule, or requirement from which forbearance is sought;<sup>190/</sup> (2) each carrier, or group of carriers, for which forbearance is sought; (3) each service for which forbearance is sought; and (5) any other factor, condition, or limitation relevant to determining the scope of the requested relief."<sup>191/</sup>

Although the "complete as filed" rule applies only to *petitions* for forbearance, due process requires that it also inform the Commission's process when it seeks to forbear on its own motion, as it does here. Whether forbearance is proposed by petition or on the Commission's own motion, commenters must have a reasonable opportunity to provide informed and relevant material so as to create a sufficient record. Forbearance, whether resulting from a petition or its own motion, is a Commission "action,"<sup>192/</sup> which is subject to review under the Administrative Procedure Act. In determining whether to forbear, the "main issue is the adequacy of the

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<sup>189/</sup> *Forbearance Procedural Order* ¶¶ 11-12.

<sup>190/</sup> The Commission here has identified no rules from which it intends to forbear, only statutory provisions.

<sup>191/</sup> *Forbearance Procedural Order* ¶ 16.

<sup>192/</sup> An agency action includes "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). *Cf. Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007) (finding no reviewable agency action when the FCC deadlocked 2-2 and Verizon's forbearance petition was deemed granted.).

record.”<sup>193/</sup> The courts have generally agreed on the need for a sufficient record and have applied to their review of Commission forbearance determinations the familiar arbitrary and capricious standard found in Section 706(2)(a) of the APA.<sup>194/</sup> That standard, while deferential, nevertheless requires reasoned decision making and a record of the agency’s deliberative process. The standard is articulated by the Supreme Court in *Motor Vehicles Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.* and has been quoted in forbearance decisions:

[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt to make up for such deficiencies; we may not supply a reasonable basis for the agency’s action that the agency itself has not given.”<sup>195/</sup>

The Commission here has not even defined the service to which it intends to apply the forbearance criteria. Instead, it asks commenters to “propose approaches to defining the telecommunications services offered as part of wired broadband Internet service.”<sup>196/</sup> At the same time, the Commission expects cogent comment on whether it should forbear from applying various rules to whatever the service it ultimately defines. This is backward. The Commission has made clear that without a clear and specific definition of the service, it will be impossible to assess the competitive conditions that apply to the service and therefore conduct a reasoned

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<sup>193/</sup> *Forbearance Procedural Order* ¶ 20, n.76.

<sup>194/</sup> *See, e.g., CTIA v. FCC*, 330 F.3d 502, 507-08 (D.C. Cir. 2003); *AT&T Corp.*, 236 F.3d at 734-35.

<sup>195/</sup> 463 U.S. 29, 43 (1983) (citations omitted).

<sup>196/</sup> *NOI* ¶ 63.

forbearance analysis.<sup>197/</sup> Specificity is critical here because the concept of internet connectivity could extend from the end user's home to the cable head end and then to "middle mile" facilities that connect with the Internet backbone.<sup>198/</sup> Different segments of this Internet architecture may, however, face different competitive conditions with different market participants with varying degrees of market share, potentially warranting different forbearance analyses and conclusions.

Additionally, there is no detail regarding how the interconnect connectivity telecommunications service would be regulated. Apart from announcing an intent to forbear from certain non-core Title II provisions, there is no indication of the regulatory regime the Commission would impose. Will the Commission treat this connectivity service like special access services, as it once did with DSL service?<sup>199/</sup> Will it be subject to mandatory or permissive de-tariffing? Will Internet service providers be required to impute some cost for the connectivity service or break out pricing in end user bills? When using ancillary authority, these questions need not be addressed because of the scope of regulation is bounded by the regime that is articulated. Here, all Title II regulations apply unless specifically found not to apply, leaving enormous room for ambiguity and litigation.

Finally, an NOI is not an appropriate vehicle for the forbearance contemplated. The Commission intends to use decisions about whether or not to forbear not only to alleviate regulation but also to establish the regulatory framework for Internet services. Such a

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<sup>197/</sup> See *AT&T Broadband Order* ¶¶ 40-41 (forbearance must be limited to the specifically defined services in the petition, forbearance for future or potential services other broadband services offered by other carriers cannot be assessed because the FCC does not know their precise nature or the competitive conditions associated with such services).

<sup>198/</sup> See *NOI* ¶ 64 (suggesting Internet connectivity to include the functions that "enable [broadband Internet service subscribers] to transmit data communications to and from the rest of the Internet." (quoting *Wireline Broadband Order* ¶ 17)).

<sup>199/</sup> See *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998) ("*ADSL Order*").

monumental step should not be preceded by simply issuing an NOI that is designed to gather information rather than promulgate rules.<sup>200/</sup> The Commission should issue a notice of proposed rulemaking once it has defined the specific service to which forbearance would apply and specify more particularly the provisions and rules that would be subject to forbearance.

**E. If the Forbearance Is Not Sustained, Internet Service Providers May Be Subject to Full Title II Regulation**

Given the vulnerabilities of the Commission’s plan to forbear from much of Title II identified above, there is legitimate concern that Internet connectivity service, however defined, will be subject to the full weight of Title II regulation. Recognizing this possibility, the Commission seeks comment on mechanisms to address this situation by, for example, reversing its finding that there is a severable telecommunications service. NCTA is not aware of any lawful basis for a contingent return to an information services classification. As noted above, the Commission cannot change the common carrier status of an entity based on desired regulatory outcomes.

In any event, it is plain that the Commission would have a difficult time explaining why a reversal of its position (again) in such a short period of time is not arbitrary and capricious. The risk that Internet service providers would be subject to all of Title II due to a failure to sustain forbearance cautions against attempting to classify a telecommunications services component of Internet services in the first instance.

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<sup>200/</sup> See 47 C.F.R. § 1.430 (proceedings commenced by an NOI “do not result in the adoption of rules”).

## **F. The Commission Should Delay Implementation of Certain Provisions**

The NOI requests comment on whether the agency should forbear from certain Title II provisions or at least delay implementing them until the Commission has adopted rules clarifying their applicability to broadband Internet services.

### **1. Universal Service Contribution Requirement**

Section 254(d) requires all providers of telecommunications services to contribute to the Universal Service Fund based on interstate end user revenue. The NOI asks whether the Commission should delay the implementation of any contribution requirement to broadband Internet providers pending the resolution of ongoing efforts to reform the USF contribution regime. NCTA urges the Commission to take such action so as to avoid undue burden on broadband providers in attempting to fairly attribute some portion of their end user revenue to a connectivity service, however defined.<sup>201/</sup> Delaying the contribution requirement pending resolution of the contribution rules would not adversely affect the current USF program. The USF program currently does not rely on revenue from Internet access services. Moreover, the USF does receive funding on the basis of interconnected VoIP revenue that runs over the same platform as Internet access service.

### **2. Pole Attachments**

One concern regarding the “Third Way” proposal is the “all or nothing” nature of the proposed forbearance, with statutory provisions either applied or forborne from in their entirety. In some cases, a more nuanced approach will be necessary to avoid unintended consequences.

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<sup>201/</sup> Under current safe-harbor rules applicable to contributions from bundled offerings, carriers must either contribute on the basis of the revenue generated from the combined offering, or contribute on the basis of the price of the telecommunications service if as offered on a stand-alone basis, with no discount from the bundled offering being attributable to telecommunications services. *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, 16 FCC Rcd 7418, ¶¶ 50-51 (2001) (“*Bundling Order*”).

The pole attachment regime created by Section 224 is one example of a provision where a simplistic approach to forbearance could have significant negative consequences.

As described in the National Broadband Plan, the “cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands.”<sup>202</sup> Consequently, to “support the goal of broadband deployment, rates for pole attachments should be as low and as close to uniform as possible.”<sup>203</sup> The Plan recognizes that “the rate formula for cable providers articulated in Section 224(d) has been in place for 31 years and is ‘just and reasonable’ and fully compensatory for utilities” and recommended that the Commission conduct a rulemaking to “revisit its application of the telecommunications carrier rate formula to yield rates as close as possible to the cable rate.”<sup>204</sup> In May, the Commission adopted the *Pole Attachment FNPRM* to implement this recommendation.<sup>205</sup>

An “all or nothing” approach to forbearance under Section 224 could completely undermine the recommendations in the Plan. Complete forbearance from Section 224 creates the possibility that cable operators and other broadband providers would lose the right to access utility poles. That would be a disastrous result. Without the access rights granted in Section 224, broadband providers would be at the mercy of electric companies and other pole owners. In some cases providers would be unable to negotiate access arrangements. And even where access

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<sup>202</sup> *National Broadband Plan* at 109.

<sup>203</sup> *Id.* at 110.

<sup>204</sup> *Id.* (citing *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11<sup>th</sup> Cir. 2002); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987)).

<sup>205</sup> *Implementation of Section 224 of the Act*, WC Docket No. 07-245, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (rel. May 20, 2010) (“*Pole Attachment FNPRM*”).

arrangements could be negotiated, the attachment rates undoubtedly would be substantially higher than the regulated rates provided for in Section 224(d) and (e).

Designating a component of Internet service a telecommunications service without forbearing from Section 224 would produce similarly disastrous results. Cable operators could be forced to pay the telecommunications attachment rate for virtually all of their attachments, a result that would impose hundreds of millions of dollars in additional costs every year.<sup>206/</sup> Raising the attachment rate for cable operators, rather than reducing the attachment rate for telecommunications carriers, is the complete opposite of the approach recommended in the National Broadband Plan and proposed by the Commission just two months ago in the *Pole Attachment FNPRM*.<sup>207</sup> Such an approach would constitute an unwarranted and unreasonable reversal of the Commission's policy, upheld by the Supreme Court in the *Gulf Power* decision,<sup>208</sup> of applying the cable attachment rate to a cable operator's broadband services.

In short, an "all or nothing" approach to forbearance under Section 224 would result in substantial increases in pole attachment rates that would undermine investment and deployment of broadband facilities. And as the Plan and the *Pole Attachment FNPRM* recognized, these effects would be particularly harmful in rural areas where the per-subscriber cost of pole access can often be substantially higher than in urban and suburban areas.<sup>209/</sup>

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<sup>206/</sup> *Pole Attachment FNPRM* ¶ 116 (citing Comments of the National Cable & Telecommunications Association, Appendix B, Declaration of Michael D. Pelcovits at 10, WC Docket No. 07-245 (filed Sept. 24, 2009) (finding that raising attachment rates for cable operators would raise the annual cost of providing broadband service by \$208 million to \$672 million, or from \$10.46 to \$33.75 per cable broadband subscriber annually)).

<sup>207</sup> *National Broadband Plan* at 110; *Pole Attachment FNPRM* ¶ 118.

<sup>208</sup> *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002).

<sup>209/</sup> *National Broadband Plan* at 110; *Pole Attachment FNPRM* ¶ 115, n.311.

To avoid these results, the Commission must take a more careful approach than suggested in the NOI. One option would be to defer any decision on the classification of broadband Internet service until the Commission completes the pending rulemaking and reduces the telecommunications attachment rate as proposed in the *Pole Attachment FNPRM*. The Plan and the *Pole Attachment FNPRM* both recognize the critical role that pole attachment policy can play in broadband deployment and it would be entirely reasonable for the Commission to get these important issues resolved before moving on to the more controversial issues triggered by reclassification.

Alternatively, the Commission should adopt NCTA's 2008 proposal to forbear from the Section 224(e) telecommunications attachment rate and establish the Section 224(d) cable rate as the appropriate rate for any broadband attachment.<sup>210</sup> The suggestion in the NOI that the Commission may not have authority to forbear from Section 224 because that section does not directly impose obligations on telecommunications carriers is incorrect.<sup>211</sup> Congress identified only two provisions where the Commission's forbearance authority was limited in any way,<sup>212</sup> all the rest, including Section 224, presumably are eligible for forbearance if they otherwise meet the requirements of Section 10. As NCTA has explained previously, forbearance from Section 224(e) does meet all of the Section 10 requirements and should be adopted expeditiously.<sup>213</sup>

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<sup>210</sup> *Pole Attachment FNPRM* ¶ 142; Reply Comments of the National Cable & Telecommunications Association, WC Docket No. 07-245 (filed Apr. 22, 2008) at 18-20.

<sup>211</sup> *NOI* ¶ 87.

<sup>212</sup> 47 U.S.C. § 160(d).

<sup>213</sup> Reply Comments of the National Cable & Telecommunications Association, WC Docket No. 07-245 (filed Apr. 22, 2008) at 18-20.

## V. **Classifying Broadband Internet Services As A Telecommunications Service Will Lead to Burdensome State and Local Taxes and Regulation**

The NOI spends a scant two paragraphs on the implications of possible state and local regulation.<sup>214/</sup> Yet, the proposed classification of a broadband Internet connectivity as a telecommunications service raises serious concerns that states and localities will seek to impose substantial regulatory burdens on Internet service providers. Even if there is little, if any, disagreement that such a service is an interstate service with practically inseparable interstate and intrastate components,<sup>215/</sup> and even if the Commission were to conclude that state regulation would hinder its federal regulatory regime,<sup>216/</sup> there remains a substantial likelihood that states and localities will attempt to, and may be successful at, imposing costly regulations. As the Commission recognized in the *Universal Service Report*, classification of broadband Internet connectivity as a Title II common carrier service could encourage states to assert jurisdiction over Internet access services.<sup>217/</sup> State public service commissions could move to apply state regulations for telecommunications services that include requirements for certification, tariff filing, reporting requirements, and regulatory fees.

FCC forbearance from Title II regulations would not prevent state commissions from applying state telecommunications rules. While states are prohibited from enforcing federal

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<sup>214/</sup> NOI ¶¶ 109-10.

<sup>215/</sup> The Commission has previously found that DSL service is an interstate service utilizing its end-to-end jurisdictional analysis and applying its mixed use rule by which lines are deemed interstate if more than a *de minimis* amount of traffic (*i.e.* more than 10 percent) is interstate. *ADSL Order* ¶¶ 19, 25 (finding that the communications over the DSL connection “do not terminate at the ISP’s local server, as some competitive LECs and ISPs contend, but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end user.”).

<sup>216/</sup> See generally *Vonage Preemption Order* ¶ 15 (discussing judicial precedent that recognizes circumstances where state jurisdiction must yield to federal jurisdiction through the Commission’s authority to preempt state regulations that thwart the lawful exercise of federal authority over interstate communications.)

<sup>217/</sup> *Universal Service Report* ¶ 48.

rules from which the Commission forbears,<sup>218/</sup> they are not precluded from applying regulations based on state law.<sup>219/</sup>

That a service may be deemed interstate has not precluded many states from seeking to impose requirements on such services. Even with the broad preemption announced in the *Vonage Preemption Order*, for instance, state and localities have unceasingly sought to impose regulation on interconnected VoIP. A number of states, for example, have sought to require Vonage to pay into state universal service funds, dragging the company into litigation in various forums. Both Nebraska and New Mexico moved to assess state universal service fees, only to be rebuked by the courts.<sup>220/</sup>

The risk of state regulation is heightened in this proceeding because, unlike the Commission's preemption of state economic regulations applicable to VoIP because they impermissibly intruded on the Commission's deregulatory approach,<sup>221/</sup> the Commission's goal here is regulatory. Given that the Commission itself may seek to impose nondiscrimination requirements and plans to retain the broad regulatory sweep of Sections 201 and 202, states would likely claim wide leeway to regulate in ways that would be found to be consistent with this new federal regulatory regime.

The prospect of state regulation may also be heightened by the Commission's proposal to classify only the last-mile broadband transmission facility, defined as a facility with end points at

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<sup>218/</sup> 47 U.S.C. § 160(e).

<sup>219/</sup> *Universal Service Report* ¶ 48.

<sup>220/</sup> *See, e.g., Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 543 F. Supp 2d 1062 (D. Neb. 2008) (enjoining the Nebraska PSC from assessing state universal service contributions on preemption grounds), *aff'd*, 564 F.3d 900 (8th Cir. 2009); *New Mexico Pub. Reg. Comm'n v. Vonage Holdings Corp.* 640 F. Supp. 2d 1359 (D. N. M. 2009) (rejecting state commission's request for a declaratory ruling the Vonage must pay into the state universal service fund).

<sup>221/</sup> *Vonage Preemption Order* ¶¶ 20-22.

the home and at the nearest gateway, switch, head end or aggregation point. Utilizing such end points, the Commission at one time had concluded that one form of broadband access, DSL service, could constitute local telephone exchange service.<sup>222/</sup> An effort to isolate a local portion of Internet service for regulation could fuel state commission claims that the transmission component is an intrastate service with end points within the state and complicate the Commission's assertion of exclusive jurisdiction based on the end to end nature of the Internet traffic. At a minimum, one can expect litigation from state commissions who understand that, soon enough, the substantial majority of all communications will run over broadband connections, potentially putting them out of business under a regime of broad preemption.<sup>223/</sup>

Reclassification may also encourage states to extend telecommunications taxes to broadband Internet service providers, putting upward pressure on the price for broadband that could impede the goal of wider adoption. Although state regulation can be curtailed through preemption, the long-standing policy of state tax sovereignty has meant that federal intervention in matters of state taxation is far rarer and occurs in more narrowly defined circumstances. The Supreme Court has repeatedly held that the states' sovereign power of taxation is essential to their independent existence.<sup>224/</sup> For instance, localities have imposed telephone taxes on

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<sup>222/</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385at ¶ 3 (finding that DSL service “both originate and terminate ‘within a telephone exchange’”), *vacated and remanded*, *Worldcom, Inc. v. FCC*, 246 F.3d 690 (D.C. Cir. 2001).

<sup>223/</sup> Classification of a broadband transmission component as a Title II telecommunications service could also encourage greater regulation at the international level, contrary to previous U.S. statements that international organizations should not be allowed to act as global Internet regulators. *See, e.g.*, S. Res. 323, 109<sup>th</sup> Cong. (enacted) (expressing the sense of the Senate that the United Nations and other international organizations should not be allowed to exercise control over the Internet).

<sup>224/</sup> *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824) (“The power of taxation is indispensable to [the states’] existence.”); *Weston v. City of Charleston*, 27 U.S. (2 Pet.) 449, 466 (1829) (“The power of taxation is one of the most essential to a state, and one of the most extensive in its operation.”); *Railroad Co. v. Penniston*, 85 U.S. 5, 29 (1873) (“And in thus acknowledging the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence.”); *Allies Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959) (“When dealing with their

Vonage's nomadic VoIP service,<sup>225/</sup> notwithstanding the Commission's determination that it is an interstate service. Vonage's litigation with the city of Seattle case highlights the problems that would confront a broadband Internet service provider should the Commission designate a telecommunications service component. In that case, the city first defined telephone services very broadly as including "providing of telephonic, video, data, or similar communication or transmission *for hire* via a local telephone network . . . cable, microwave, or similar communication or transmission system."<sup>226/</sup> By designating broadband connectivity service as a common carrier offering and telecommunications service, which makes it a service "for hire," broadband Internet providers will be racing to review thousands of local ordinances to determine whether they would now be subject to local or state fees, taxes or other designations.

The classification of a separate transmission component as a telecommunications service may also eliminate the shield against taxation created by various Internet tax moratoria. For example, in *Community Telecable of Seattle Inc. v. City of Seattle*, the Washington Supreme Court held that the city could not impose a telephone tax on Comcast's broadband Internet service because there was no severable "telephone network service," defined under the local ordinance to include transmission over cable "to and from the site of an Internet provider."<sup>227/</sup> Critical to the court's analysis was that Comcast's Internet service was an integrated Internet service, consistent with the Commission's *Cable Modem Order* and the Supreme Court's *Brand*

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proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests.").

<sup>225/</sup> See, e.g., *Vonage America, Inc. v. City of Seattle*, 216 P.3d 1029, 1035 [¶ 20] (2009) (upholding imposition of City of Seattle telephone tax subject to determination of intrastate revenue) ("We hold the superior court properly concluded that Vonage is subject to the City's telephone utility tax but the assessment must be based on the intrastate component of Vonage's service." *Id.*).

<sup>226/</sup> See *City of Seattle*, 216 P.3d 1029, 1033 [¶12] (quoting SMC 5.48.050A, and noting that "the City's telephone utility tax is a tax on the privilege of engaging in telephone business in Seattle.").

<sup>227/</sup> *Community Telecable of Seattle Inc. v. City of Seattle*, 186 P.3d 1032, 1036-37 (Wash. 2008).

X decision, and thus protected by the state Internet tax moratorium. In rejecting the city's argument that Comcast provided severable transmission to an Internet provider the court wrote:<sup>228/</sup>

The transmission component of Internet service cannot be separated from the actual service. Moreover, the record reflects that Comcast 'transforms' and 'manipulates' data as it passes through the Comcast network; this manipulation is an integral and necessary part of the provision of the Internet services. . . . Therefore, Comcast is not engaging in the mere 'provision of transmission.' . . . We also note that [this conclusion] is consistent with the FCC and the United States Supreme Court's view of high-speed Internet services [that] 'transmission is a necessary component of Internet access' . . . It is appropriate the our state statute, consistent with the federal and other state laws, disfavors the kind of artificial division of Internet service components the City advocates.<sup>229/</sup>

Should the Commission now reverse course and create the very "artificial division" that the Washington State Supreme Court rejected, on the basis of the Commission's previous ruling, cash-strapped local governments throughout the country will seek to collect fees and taxes under their broadly worded local statutes.

While NCTA believes that such state actions should not be successful, the proposed classification would open the door to state and local governments seeking to impose regulations and taxes. The Commission should instead reject the proposed telecommunications services classification and reaffirm its previous finding that Internet service is an integrated information service. It should then take whatever additional steps are necessary to preempt state or local government efforts at regulation. Congress, the Commission and the courts, have consistently

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<sup>228/</sup> See, e.g., *Wireline Broadband Order* ¶ 12 (concluding that wireline broadband Internet access service is an interstate information service subject to minimal regulation); *Cable Modem Order* ¶ 59 (concluding that cable modem service is an interstate information service subject to the Commission's exclusive jurisdiction); *Vonage Holdings Corp.*, 290 F. Supp.2d at 1002; *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307, ¶ 15 (2004) ("*pulver.com Order*"); *Minn. Pub. Util. Comm'n v. FCC*, 483 F.3d at 580. See also *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356, 364 (4th Cir. 2001) (finding that offerings "classified as an information service... would not be subject to local franchising or common carrier regulation.").

<sup>229/</sup> *Community Telecable of Seattle Inc.*, 186 P.3d at 1036-37 (citations omitted).

found that the Communications Act prohibits the imposition of local franchising and fee requirements, or any other state or local regulation of the provision of information services, without express Commission authority. Local government involvement should be limited to reasonable management of facilities in public rights-of-way or the application of consumer protection generally applicable to the states. The Commission should further be prepared to act quickly and decisively to prevent state and local governments from attempting to avoid preemption through creative interpretations of local statutes or imagined gaps in the scope of preemption.

#### **VI. The FCC’s “Third Way” Proposal Will Lead to the Regulation of Entities Throughout the “Internet Ecosystem”**

The Commission’s classification of some aspect of Internet access service as a telecommunications service will inevitably lead to broad regulation of the Internet. As a number of trade associations and companies have previously explained, if “the Act were construed so that an information service provider is deemed to be simultaneously offering a ‘telecommunications service’ to its customers whenever it offers an information service with a telecommunications component, then the Act would subject many Internet-based information service providers who use telecommunications in their offerings to mandatory common carriage regulation.”<sup>230/</sup> The logical extension of the Commission’s classification would reach CDNs, such as Akamai, as well as backbone providers and other gatekeepers such as Google, that the Commission claims it has no current intent to reach. But the Commission has proffered so reasonable basis for such line drawing.

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<sup>230/</sup> Letter from NCTA, CTIA, United States Telecom Association, Telecommunications Industry Association, Independent Telephone and Telecommunications Alliance, Verizon, AT&T and Time Warner Cable to Chairman Julius Genachowski, FCC, GN Docket No. 09-191, WC Docket No. 07-52, GN Docket No. 09-51 (Apr. 29, 2010).

Search engines, browsers and other applications, used by millions of consumers to locate and access content, could dramatically affect the openness of the Internet by blocking or discriminating against content and application providers. As the Commission notes in the NOI, these types of gateway functions increasingly are provided by entities unaffiliated with the Internet service provider with whom the end user subscribes.<sup>231/</sup> As explained above, that consumers have the choice of obtaining a function like a web browser or e-mail from an entity other than their broadband provider is not a basis to revise the classification of Internet service. Nevertheless, the existence of these independent gateways cannot be ignored by the Commission.

There is a growing concern over the control that the “big three” search engines, Google, Yahoo and Bing, have over content and applications providers.<sup>232/</sup> NCTA’s comments in the Open Internet rulemaking explained the critical role now being played by such entities. As we noted there, “‘search engines like Google, Yahoo and Microsoft’s new Bing have become the Internet’s gatekeepers, and the crucial role they play in directing users to Web sites means that they are now as essential a component of its infrastructure as the physical network itself.’”<sup>233/</sup> Google can effectively undermine application providers by removing them from Google’s search results or placing them so far down the rankings that they are never found,<sup>234/</sup> and Google has the ability and incentive to favor its own services in search rankings – for example, by placing

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<sup>231/</sup> NOI ¶ 56.

<sup>232/</sup> See Odysseas Papadimitriou, *Google and Net Neutrality*, Seeking Alpha, available at <http://seekingalpha.com/article/198188-google-and-net-neutrality> (citing Nielsen numbers showing that, of the 10.8 billion searches performed in the U.S. in August 2009, 67.7% of searches are performed using Google, and Yahoo and Bing combined accounted for 26.6%).

<sup>233/</sup> NCTA *Open Internet Comments* at 48 (citing Adam Raff, *Search, But You May Not Find*, N.Y. TIMES, Dec. 28, 2009, available at <http://www.nytimes.com/2009/12/28/opinion/28raff.html?scp=2&sq=google%20&st=cse>).

<sup>234/</sup> *Id.*

Google Maps ahead of MapQuest. While Google complains about ISPs potentially favoring certain content, Google “doesn’t seem to find anything wrong with giving preferential treatment to its own content.”<sup>235/</sup> Google “picks winners every time, and it’s surprising how often the winner is Google.”<sup>236/</sup>

The Commission must also take care not to tilt the playing field by applying its classification decision only to cable and wireline broadband Internet platforms. The same fundamental rules must apply to all providers regardless of technology or platform, and regardless if they use their own facilities to provide Internet access. It would be arbitrary and capricious, not to mention ineffective, to only apply the legal framework to wireline providers if the goal is to prevent preferences or discrimination by those who provide access or gateways to Internet content.<sup>237/</sup> Moreover, basic principles of regulatory parity dictate that the market not be skewed by artificial regulatory advantages.<sup>238/</sup> To the extent wireless providers face particular technical limitations in implementing the regulatory requirements that follow from reclassification, those limitations could be reflected in the application of the rules – not through a complete exemption.

## **VII. The Commission Should Terminate the “Open Access” Rulemaking**

The NOI seeks comment on whether to terminate the “open access” rulemaking initiated as part of the *Cable Modem Order*.<sup>239/</sup> NCTA urges the Commission to take this action, which is long overdue. The Commission has declined to apply an open access requirement to other

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<sup>235/</sup> See Papadimitriou, *Google and Net Neutrality*.

<sup>236/</sup> *Id.*

<sup>237/</sup> Comments of the National Cable & Telecommunications Association, GN Docket No. 09-191, at 45-46 (filed Jan. 14, 2010) (“*NCTA Open Internet Comments*”).

<sup>238/</sup> *NCTA Open Internet Comments* at 45-46.

<sup>239/</sup> *NOI* ¶ 111.

broadband platforms, and the Chairman has disclaimed any attempt to do so in this proceeding. Even the Open Internet rulemaking does not propose to rely on open access requirements in order to ensure Internet openness and consumer choice. The notice of proposed rulemaking accompanying the *Cable Modem Order* having been effectively superseded, the proceeding should be terminated.

## **CONCLUSION**

For the foregoing reasons, the Commission has no legal authority to classify any part of broadband Internet access service as a common carrier offering. Such a reclassification would be fundamentally at odds with the nature of Internet access service, which remains the information service that the Commission has consistently found it to be. Not only would reversing this long-standing policy be legally unsupportable, it would also thwart rather than promote investment in broadband facilities and undermine the serious reliance interests of broadband providers and others in the existing regulatory regime. The Commission retains ancillary authority to meet legitimate policy objectives. Any ambiguities in the Commission's authority should be addressed by Congress rather than through an effort to impose legacy common carrier regulation on broadband.

Respectfully submitted,

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