

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

**COMMENTS OF DATA FOUNDRY, INC.**

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## Executive Summary

Data Foundry supports the re-classification of both the wireline and wireless transmission components of broadband Internet access service as a “telecommunications service” subject to regulation under Title II of the Communications Act. The Commission’s decisions in 2002, 2005, and 2007 to remove from common carrier regulation the transmission service used by millions of Americans to access the myriad of content and services provided through the Internet were a costly mistake. The sooner that mistake is corrected the better.

With respect to the question of attempting to proceed once again under Title I using ancillary authority Data Foundry’s response is an emphatic “No.” In the *Comcast* decision the court specifically evaluated each of the probable justifications the Commission asserted, or might assert in a future attempt, to claim ancillary authority, and rejected each one. While the court did not absolutely rule out any possible use of Title I authority, they clearly set a very high bar. It is clear post-*Comcast* that the Commission will be unable to meet at least one of its key goals – the reform of the universal service program to support broadband Internet service – using ancillary authority.

The Commission asks “does the Commission have the legal authority to compel the offering of a broadband Internet telecommunications service that is not currently offered” and, if it does have that authority, should the Commission use it. The answer to both questions is “Yes.” If the Commission could not do so, then the first prong of the test for common carriage set forth by the court in *NARUC I* completely missed the boat. This prong specifically inquires “whether there will be any legal compulsion thus to serve indifferently....”. In a number of cases the courts have been clear that the FCC could

structure the regulations for a communication service to mandate that the entity providing the service do so on a common carrier basis. The “public interest” in broadband as expressed by Congress provides ample reason for the Commission to exercise the authority Congress gave it in section 214 to require facilities based providers to offer the transmission component of broadband Internet access service on a common carrier basis.

The question of what the Commission should identify as the transmission component of broadband Internet access depends entirely on whether or not the Commission decides to compel the provision of the transmission component on a wholesale basis or instead focus on the transmission component of the retail offering by broadband Internet access service providers.

The retail approach suggested in the NOI would force the Commission to include in the regulated transmission component the higher Layer services of the OSI stack, with the end result that many other retail services that depend on those higher Layer functionalities for their current information service classification (for example services like VoIP and IPTV) would end up subject to potential regulation under Title II.

A Commission requirement that facilities based providers of broadband Internet access provide – on a wholesale, common carrier basis – just a Layer 1 and 2 transmission component of broadband Internet access service would avoid the problems that the retail approach would create. This wholesale approach would facilitate innovation, promote competition, and allow the Commission to rely on market mechanisms to assist in enforcement. Further, the structure of Title II supports a

Commission requirement that facility owners create a wholesale offering of the transmission component of broadband Internet access.

Data Foundry believes the re-classification outlined above will also be critical to address our other key concern with the current lack of Commission oversight of facilities based broadband Internet access service providers. Users' privacy with regard to communications has become one of the most important policy challenges facing the Commission today. The Commission has expressed its commitment to safeguard online privacy and this landmark proceeding presents the opportunity to establish tangible protections for users' fundamental rights.

Data Foundry supports the continued application of these rules and opposes their forbearance, but, alone, they are not enough. Sections 222 and 631 fail to address the most insidious threat to user privacy today: network content monitoring with technologies like Deep Packet Inspection (DPI). The Commission should now institute rules similar to section 222 that protect users against the wholesale wiretapping of their online activities by eliminating nonconsensual content inspection.

Unless the threats posed by new technology like DPI are addressed by the Commission, these threats to broadband users' privacy will chill innovation, deployment, e-commerce and, ultimately, the nation's economic standing. Not until users have the choice and the ability to be free from threats like DPI will there be any semblance of privacy on the Internet.

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**COMMENTS OF DATA FOUNDRY, INC.**

Data Foundry submits the following comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) June 17, 2010 Notice of Inquiry (“NOI” or “Notice”), FCC No. 10-114, in the above-captioned proceeding.

**I. Common Carriage for the Transmission Component**

Data Foundry supports the re-classification of both the wireline and wireless transmission components of broadband Internet access service as a “telecommunications service” subject to regulation under Title II of the Communications Act. The Commission’s decisions in 2002, 2005, and 2007<sup>1</sup> to remove from common carrier

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<sup>1</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other*

regulation the transmission service used by millions of Americans to access the myriad of content and services provided through the Internet were a costly mistake that resulted in decreased competition, increased costs for consumers, and a sharp decline in America's standing among developed countries in rankings related to this essential communications infrastructure. The sooner that mistake is corrected the better.

The Commission is to be commended for issuing the above captioned NOI. These comments will respond to questions raised in the NOI in the same order that they are presented.

With respect to the question of attempting to proceed once again under Title I using ancillary authority discussed in paragraphs 30 to 51 of the NOI, Data Foundry's response is an emphatic "No." The Commission has been warned for over a decade that an ancillary authority approach was unlikely to be upheld, and now the DC Circuit decision in the *Comcast* decision<sup>2</sup> has clearly vindicated that advice. In the *Comcast* decision the court specifically evaluated each of the probable justifications the

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*Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling*); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Report and Order*); and *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (*Wireless Broadband Order*).

<sup>2</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (*Comcast*).

Commission asserted, or might assert in a future attempt, to claim ancillary authority, and rejected each one. While the court did not absolutely rule out any possible use of Title I authority in this context, they clearly set a very high bar. In particular, as foretold in 1998 by Senators Stevens and Burns, it is clear post-*Comcast* that the Commission will be unable to meet at least one of its key goals – the reform of the universal service program to support broadband Internet service – using ancillary authority.<sup>3</sup> Given that the Commission was falsely assured that the courts would uphold an FCC assertion of ancillary authority by the very same parties that continue to advocate a Title I approach, the Commission should not further waste the public’s time and resources by relying once again on those same unreliable platitudes. To the extent that advocates of a Title I approach actually provide detailed legal arguments in their comments on this NOI, Data Foundry looks forward to addressing the legal merits of those arguments in its Reply Comments.

Data Foundry now turns to the heart of the NOI, which is the re-classification of the transmission component of broadband Internet access service as a “telecommunications service”<sup>4</sup> subject to Title II of the Communications Act. The Commission asks a very prescient question in paragraph 54 of the NOI, namely “does the Commission have the legal authority to compel the offering of a broadband Internet

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<sup>3</sup> Letter from Senator Stevens and Senator Burns to Chairman Kennard, CC Docket 96-45 (Jan. 27, 1997), at 13 (“The Commission must live within the limits Congress set. We debated and decided in section 254 whether or not information services would be directly supported by universal service, and the answer was clearly not. The Commission cannot use its generic authority to trump the unambiguously expressed intent of Congress.”). Available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=1993920001>.

<sup>4</sup> 47 U.S.C 153(46).

telecommunications service that is not currently offered” and, if it does have that authority, should the Commission use it. The answer to both questions is “Yes.”

Whether or not the Commission chooses to compel the offering of the transmission component is also the key to answering the questions the Commission asks later (in paragraphs 63-65 of the NOI) regarding how to define the transmission component of broadband Internet services that would be classified as a telecommunications service. If the Commission chooses not to compel the offering of a specified transmission component (described further below), then the definition of what constitutes the “transmission component” will necessarily have to expand if the Commission still wants to accomplish its goals.

Regardless of whether or not the Commission believes that some component of broadband Internet access service does or does not meet the definition of “telecommunications service” as currently offered, the Commission most certainly can compel broadband Internet service providers to make available the transmission component on a common carrier basis whenever such providers offer interstate communications by wire or radio. If the Commission could not do so, then the first prong of the test for common carriage set forth by the court in the seminal D.C. Circuit case of *National Association of Regulated Utility Commissioners v. FCC*, 525 F2d 630 (DC Cir. 1976) (*NARUC I*), completely missed the boat. This prong specifically inquires “whether there will be any legal compulsion thus to serve indifferently...” *Id.* at 642.<sup>5</sup> The

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<sup>5</sup> The *NARUC I* court explicitly stated that the Commission does have the power to compel a provider to act as a common, rather than a private, carrier. See *NARUC I* at 644,

*NARUC I* court then went on to discuss whether or not the Commission's regulations would require indiscriminate service, and, finding no regulations to that effect, discussed application of the second prong of the test, which is whether the entity in question does, or would be expected to in the normal course of operations, nonetheless offer indiscriminate service. *Id at 642-643.*

More recently, in *Virgin Islands Telephone Company v. FCC*, 198 F.3d 921 (DC Cir. 1999) the court applied the *NARUC I* test in a case regarding telecommunications service, and explained

... The *NARUC I* test has two parts: "[W]e must inquire, first, whether there will be any legal compulsion ... to serve [the public] indifferently, and if not, second, whether there are reasons implicit in the nature of [the] operations to expect an indifferent holding out to the eligible user public." *NARUC I*, 525 F.2d at 642. The Commission has subsequently interpreted this two-part test to mean that a carrier has to be regulated as a common carrier if it will "make capacity available to the public indifferently" *or if "the public interest requires common carrier operation of the proposed facility."* *Cable & Wireless, PLC*, 12 F.C.C.R. 8516 pp 14-15 (1997). The Bureau, applying the two-part test, decided that neither prong of the *NARUC I* standard was applicable to AT&T SSI's proposed system and that the proposed system may thus be offered on a non-common carrier basis. See Bureau Order p 69. The Bureau added, however, that it retained "the right to change the regulatory status of the cable system to common carrier should conditions change in the future." *Id.* p 2.

The Commission denied petitioner's application for review, agreeing with the Bureau that the 1996 Act did not require it to regulate AT&T-SSI as a common carrier and that "there are no other public interest reasons for doing so." *AT&T Submarine Systems, Inc.*, 13 F.C.C.R. 21585 p 1 (1998) ("Commission Order"). *Virgin Islands* at 924 (emphasis added).

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n. 76 ("it is clear that the Commission had the discretion to require [a service provider] to serve all potential customers indifferently, thus making them common carriers").

The *Virgin Islands* court continued its discussion of the first prong of the test saying

... the Commission considered whether, under the first part of the NARUC I test, "the public interest requires common carrier operation of the facility." *Id.* p 9. The Commission focused its inquiry on whether AT&T-SSI "has sufficient market power to warrant regulatory treatment as a common carrier." *Id.* The Commission concluded that because "sufficient alternative facilities" to service the St. Thomas to St. Croix route are available, "AT&TSSI does not have market power," *Id.* p 11, and the first part of the NARUC I test does not require that AT&T-SSI be regulated as a common carrier. *Id.*

Nowhere in *NARUC I* or *Virgin Islands*, or any other case where the test has been applied, have the courts appeared to doubt that the FCC could in fact structure the regulations for a communication service such that it would mandate that the entity providing the service do so on a common carrier basis.<sup>6</sup> Thus, it seems clear that the courts believe that the Communications Act does give the FCC the authority to require an entity to provide telecommunications on a common carrier basis (i.e., require the "telecommunications" be provided as a "telecommunications service") if the public interest requires such an offering.

The courts are correct that the Commission could require that the transmission component of broadband Internet access be offered on a wholesale or retail basis. The

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<sup>6</sup> In fact, the Commission has previously agreed with the courts that it has the power to compel common carriage. *See* In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Docket No. 20828, *Final Decision*, ¶ 122, 77 FCC2d 384 (May 2, 1980) (*Computer II Final Decision*) ("Instead, as the Court's opinion in *NARUC I* acknowledges, an element which must also be considered is any agency determination to impose a legal compulsion to serve indifferently. *NARUC I*, 525 F.2d at 642.")

Communications Act sets out a comprehensive scheme for the provision of communications service in the United States. Section 2(a) of the Communications Act states that “The provisions of this act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by wire or radio... and to all persons engaged within the United States in such communication or such transmission....”

With respect to transmission services offered by wire, Title II of the Communications Act provides clear authority for the Commission to compel the provision of specific types of service to the public. Section 214(a) provides that “No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless or until it shall first have been obtained from the Commission a certificate....” Under section 214(c) the Commission may “attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require” and it is only “[a]fter issuance of such certificate, and not before, the carrier may, without securing additional approval other than such certificate... proceed with the construction, extension, acquisition, operation...” of its service. Further, section 214(d) permits the Commission to order any carrier to provide service “if it is reasonably required in the interest of public convenience and necessity....” Section 224 provides both telecommunications carriers and cable operators with mandated access to the poles, ducts, and conduits of public utilities in order to provide their respective services.

With respect to transmission by radio, section 301 of the Act provides that “[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio... except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.”

Finally, with respect to video programming provided over a cable system, section 621(b) of the Act provides that a cable operator may not provide cable service without a franchise, and section 621(a) of the Act provides that “[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way....”

It is simply not possible, when viewing these provisions together, to conclude that Congress ever intended that the Commission would not have explicit authority through Title II, III, or VI to regulate any communication service that reaches the public, and that it could not mandate that the service be offered on a common carrier basis. The only two issues that arise with respect to Title II are whether the mandated offering meets the definition of “telecommunications”<sup>7</sup> and the use of the term “carrier” rather than “person” in section 214. Some would argue that section 214 only applies to people or entities who have been determined to be a common carrier, because the term “carrier” is defined to mean “common carrier” in section 3 of the Act. However, to accept such an interpretation is to create a chicken and egg conundrum. In order for section 214 to apply, one would first have to be a common carrier. In order to be a common carrier, one

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<sup>7</sup> While the 1996 Act codified the Commission’s prior determination to not regulate “enhanced service” (now, for the most part, “information service”) on a common carrier basis, the Commission has the full authority to require that the “telecommunications” which underlie “information service” be segregated and offered on a common carrier basis. That was precisely what the law required in 1996, before the 1996 amendments, and Congress explicitly recognized that fact in section 251(g). *See* 47 U.S.C. 251(g).

must hold oneself out indiscriminately to serve the public. Yet how does one hold oneself out to indiscriminately serve the public without first constructing an interstate wireline network for which one would need permission from multiple local and state jurisdictions? Absent the authority granted by section 214(c), such a task would take years, if it could be done at all.

It is simply inconceivable that in order to obtain the primary benefit of section 214 – the authorization to construct lines across public rights of way – a person would first have to construct and operate a network without the benefit of such authority in order to gain access to the authority in the first place. And by the same token, of what public benefit would the authority Congress granted the Commission in section 214 to block or limit the construction of lines or to require the extension of service or the provision of adequate facilities if that authority could only be applied *after* someone had constructed a network and began offering indiscriminate service. It is simply not plausible that Congress would have constructed a comprehensive regime for the regulation of all communication by wire and radio in which they provided authority in Title III to regulate every provision of radio service over public spectrum, and in Title VI to regulate every provision of cable service over public rights of way, but somehow did not provide authority in Title II to regulate every provision of non-cable wireline communication service over public rights of way.

Broadband Internet access service providers are clearly offering indiscriminate service<sup>8</sup> to the public using the access to public rights of way provided by the Commission under its grant of “blanket authority to all carriers under section 214”<sup>9</sup> and the access to utility poles, ducts, and conduits provided to telecommunications carriers in section 224. They are “availing themselves of the business of the public at large” and are using the benefits Congress conferred on common carriers and thus, under both a common law understanding and as a statutory matter, must be common carriers to do so. As a result section 214(c) of the Communications Act explicitly provides the authority for the Commission to “attach to the issuance of [the authorization to use public rights of way and provide communications service to the public] such terms and conditions as in its judgment the public interest may require.” This language aligns precisely with the first prong of the *NARUC I* test, and provides ample authority for the Commission to require facilities based providers of broadband Internet access service to offer the transmission component of that service separately, on non-discriminatory terms and conditions, to all who would seek to use it. Congress has made clear in both the

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<sup>8</sup> The wireless and wireline broadband Internet access service providers all have an immutable set of terms, conditions and prices that they offer to all comers and the providers will not individually negotiate any of those terms, conditions, or prices with specific potential customers. At the same time, the providers do not as a general rule reserve the right to refuse service to anyone who is in their service area and agrees to their terms, conditions, and prices. This fact alone would justify a finding that these providers are already “common law” common carriers – for their entire bundled offering, both telecommunications and information service.

<sup>9</sup> NOI at para. 92. See *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, CC Docket No. 97-11; AAD File No. 98-43, Report and Order and Second Memorandum Opinion and Order, 14 FCC Rcd 11364, 11372, para. 12.

Telecommunications Act and the three more recent Congressional enactments with respect to broadband that providing broadband to American consumers is a national priority<sup>10</sup>. The “public interest” in broadband as expressed by Congress provides ample reason for the Commission to exercise the authority Congress gave it in section 214 to require facilities based providers to offer the transmission component of broadband Internet access service on a common carrier basis.

The Commission asks in paragraphs 55 to 60 about the nature of broadband Internet access service that is offered today and how it might identify the transmission component. These are good questions to which the Commission has already supplied the answer. As the Commission notes in footnote 158 of the NOI “under Commission precedent, services composing a single bundle at the point of sale – for instance, local telephone service packaged with voice mail – can retain distinct identities as separate offerings for classification purposes.” Would that the Commission had followed its precedent when it adopted its misguided decisions in 2002, 2005, and 2007 regarding the transmission component of broadband Internet access.

Those orders were premised on the false conclusion by the Commission that “cable modem service as a whole met the statutory definition of ‘information service’ because its components were best viewed as a ‘single, integrated service that enables the subscriber to utilize Internet access service’ with a telecommunications component that was ‘not separable from the data processing capabilities of the service.’” NOI at paragraph 17. In reaching this conclusion the Commission ignored entirely testimony by

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<sup>10</sup> See NOI at para. 25 and the legislative cites contained in NOI notes 68, 69, and 70.

Excite@Home, an Internet service provider owned by a consortium of cable companies, that the transmission component supplied by the cable operators (“MSOs”) was in fact separate from the information processing components supplied by Excite@Home,<sup>11</sup> as well as the testimony of numerous other independent Internet service providers like EarthLink to the same effect.<sup>12</sup> As the operator of Texas.Net,<sup>13</sup> one of the now much smaller number of independent Internet service providers from the pre-*Cable Modem Declaratory Ruling* era still operating today, Data Foundry can attest to the fact that the provision of all of the information processing components cited by the Commission in the *Cable Modem Declaratory Ruling* were then, and are today, completely severable from the transmission functions provided by the physical facility operator.

Indeed, the Commission’s own action in the *2005 Wireline Broadband Report and Order* to permit telecommunications carriers – at the carrier’s discretion based on their private business interests rather than the public interest – to continue to offer DSL and fiber based broadband Internet access on a common carrier basis<sup>14</sup> demonstrates

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<sup>11</sup> See Comments of Excite@Home in GN Docket 00-185 (Dec. 1, 2000) at 9, available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6512159299>. (“At the network transmission layer, the MSOs are responsible for all transmission facilities between the CMTS and the subscriber’s cable modem. Excite@Home obtains transmission facilities between the cable headends and the local Regional Data Center (RDC) or other regional aggregation point (‘regional networks’) from MSOs as well as from incumbent local exchange carriers or competitive local exchange carriers.”).

<sup>12</sup> See Comments of EarthLink, Inc. in GN Docket 00-185 (Dec. 1, 2000) at 26-33, available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6512358681>.

<sup>13</sup> Texas.net, Inc., d/b/a [www.lonestar.texas.net](http://www.lonestar.texas.net), purchased in 2003 the data center operator, Data Foundry, Inc., d/b/a [www.datafoundry.com](http://www.datafoundry.com), and assumed the name Data Foundry.

<sup>14</sup> See NOI at para. 21 and note 52.

clearly that the Commission understood then, and knows now, that the transmission and information processing functions of broadband Internet access are both technically and functionally severable. The only thing that was ever inseparable about the transmission and information processing components of broadband Internet access service was the cable and incumbent telephone companies' joint desire to avoid having to comply with the very common carrier obligations that Congress reaffirmed in 1996 are necessary to protect consumers and make sure that rates and terms for communications services are just, reasonable, and non-discriminatory.

The question of what the Commission should identify as the transmission component of broadband Internet access depends entirely on whether or not the Commission decides to compel the provision of the transmission component on a wholesale basis by physical network facility operators or instead focus on the transmission component of the retail offering by broadband Internet access service providers. The wholesale approach mirrors the requirement the Commission successfully imposed for more than two decades on *all* non-cable facilities based providers of information services under *Computer II*.<sup>15</sup> This was the basic service / enhanced service framework that was in place when Congress adopted the Telecommunications Act in 1996, and the Commission found in the 1998 *Universal Service Report to Congress* that Congress intended to continue that *Computer II* framework in the 1996 Act.<sup>16</sup> In

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<sup>15</sup> See NOI at para. 12 (“the Commission required facilities-based providers of ‘enhanced services’ to separate out and offer on a common carrier basis the ‘basic service’ transmission component underlying their enhanced services.”) and note 21.

<sup>16</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, para. 45 (1998) (*Stevens Report*).

contrast, a retail approach would require the Commission to break new ground, and, as discussed further below, regulate more of the network functions than it otherwise would have to if it adopted a wholesale approach.

Turning to the questions asked in paragraph 60 and 61 of the NOI, requiring facilities based providers of broadband Internet access service to make a wholesale offering that is available to competing service providers would mean that the FCC could limit the “transmission component”— the “telecommunications” via which broadband Internet access service is provided – to just the provision of Layer 1 and Layer 2 of the OSI protocol stack, which would leave competing providers free to add their own Layer 3 or Layer 4 (or higher) services to create new and innovative offerings that the existing facility providers do not offer or provide competition to the existing offerings of the broadband Internet access facility providers. By limiting the “telecommunications” subject Title II regulation to the Layer 1 and 2 services that a facility based provider of broadband Internet access service provides to itself or any affiliate for the provision of broadband Internet access service, the wholesale approach would also enable the Commission to leave for a later day how they would treat IP based services (i.e. services including Layers 3 and above) -- they could either treat them as adjunct to telecommunications (for example when provided by a facilities based carrier) if they need to regulate them further (for example to prohibit the use of Deep Packet Inspection (DPI) for discriminatory purposes),<sup>17</sup> or they could continue to treat Layer 3 and above as an information service (subject to the recognition that when a facilities based provider uses

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<sup>17</sup> The importance of re-classification to the protection of user privacy is discussed in detail below.

services at Layer 3 and above to discriminate or otherwise violate the Act those higher Layer services are excluded from the definition of “information services” under the exemption in the statute).<sup>18</sup> This approach also has the advantage of clearly NOT regulating “the Internet” because the Commission could decline to regulate the provision of Internet Protocol (IP) based services that are offered over a regulated Layer 1 and 2 transmission component offering, just as the Commission did when it used the “contamination theory” in *Computer II* to exempt basic service resale from Title II requirements when the basic service was bought under tariff and combined with information processing to create an enhanced service.<sup>19</sup>

In contrast, if the Commission instead focuses on the retail offering to consumers, as suggested in the NOI,<sup>20</sup> it would have to explicitly overturn its conclusion in the *Cable Modem Declaratory Ruling* that there is never a Title II “telecommunications service” unless the provider chooses to offer “pure transmission” as a stand alone offering for a separate fee. In doing so the Commission would have to find either that:

A) cable modem service and wireline broadband Internet access service no longer contain any information processing, and therefore now constitute an

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<sup>18</sup> See 47 U.S.C. 153(20) (“The term ‘information service’... does not include any use of any such capability for the management, control, or operation of a telecommunications service.”).

<sup>19</sup> The combination of a basic transport service with an enhanced service offering by a non-facilities based carrier “contaminates” the basic offering, with the result that the entire offering is treated as an “enhanced” service. See *Independent Data Communications Manufacturers Association Inc.*, Memorandum and Order, 10 FCC Rcd 13717, para. 18, (1995).

<sup>20</sup> NOI at para. 64 – 67.

offering of “pure transmission” (i.e. telecommunications) to the public for a fee;  
or

B) the offering of information services to the public for a fee includes, by definition, the offering of telecommunications to the public for a fee, since all information services are by definition provided “via telecommunications.”

Both of these options for implementing a retail focus raise significant concerns in terms of enforcement, promoting competition, and protecting consumers. Because a retail focus eliminates the market discipline that wholesale competition provides, the Commission would have to be much more vigilant in its enforcement if consumers are going to be afforded meaningful protection. Depending on where the Commission places the presumption of lawful behavior (i.e. for example, whether a provider’s actions are presumed reasonable unless a consumer proves otherwise or a provider’s actions are presumed unreasonable once a consumer alleges misconduct), consumer protections may be more or less meaningful depending on the burden a consumer bears to successfully prosecute a complaint.

Under both retail options the facilities based providers can continue to restrict competition in the provision of services to end users simply by refusing (as they currently do) to offer a similar wholesale transmission service to competitors on the same terms. As a result, the only part of the facility providers’ offerings that would be potentially subject to Title II regulation would be their retail offerings.

Option A is problematic because it would require the FCC to engage in a detailed description of exactly what constitutes “pure transmission” and this detailed definition

would simply provide a road map to the facilities based providers about how they need to modify their offering so that it no longer constitutes “pure transmission.” Under Option A the Commission would have no choice but to adopt a broad definition of the “telecommunications” component of broadband Internet access service. The definition offered in the NOI (at paragraph 64 and note 178) of “Internet connectivity” would have to be the starting point. End user consumers cannot reach the Internet without the Layer 3 and Layer 4 functions like Domain Name Service (DNS), Internet Protocol (IP), Transmission Control Protocol (TCP) and the other functions listed in note 178 of the NOI. In the absence of a wholesale requirement that allows other providers to compete in offering those functions to consumers, consumers can only reach the Internet if the facility owner (or its affiliate) provides those Layer 3 and 4 functions which are needed to reach the Internet and access content over it. While the functionality provided by DNS, IP, and TCP are all designed to enable “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received” (i.e. “telecommunications” as defined in section 3 of the Communications Act), the Commission has to date gone to great lengths to avoid classifying DNS, TCP, and IP as telecommunications. This detailed analysis and the inclusion of IP would have immediate implications for VoIP and IPTV at least, with the result that current public offerings of both would have to be classified as telecommunications services or else the re-classification proposed in the NOI would have no practical effect because facilities based broadband Internet service providers would simply re-package their service offerings to escape regulation. Failure to include at least Layers 3 and 4 would make it easy for facilities based providers to avoid regulation (as

they have to date) by including DNS, IP, or TCP in the Internet access service offering (which someone needs to do in any event for an end user to actually access the Internet). Leaving Layers 3 and 4 out would also leave the Commission unable to protect consumer privacy, since they would not be able to reach DPI, which is done at Layers 3 and 4 as well. Choosing Option A would force the Commission to include in the regulated transmission component the higher Layer services of the OSI stack, with the end result that many other retail services that depend on those higher Layer functionalities for their current information service classification (for example services like VoIP and IPTV) would end up subject to potential regulation under Title II.

Option B fares no better. While this approach might allow the FCC to be less specific about exactly what constitutes the “transmission component” of broadband Internet access service (i.e. the “telecommunications” component) because by definition all “information services” are provided “via telecommunications,” such an approach would subject to common regulation a far larger class of presently unregulated entities. This would necessarily occur because under this approach *all* providers of information services to the public for a fee would also be providing, by definition, a “telecommunications service” subject to regulation under Title II. Here it would be much harder for the Commission to avoid charges that it is “regulating the Internet” because it would be subjecting to potential regulation (the extent of which would not be precisely known until the end of the forbearance process) all of the non facilities based information service providers that previously were not subject to regulation under Title II. The

Commission emphatically rejected adopting such an approach in both the Universal Service Report in 1998<sup>21</sup> and the Cable Modem Order in 2002.<sup>22</sup>

Under either Option A or Option B of the retail approach suggested in the NOI the FCC would be leaving facilities based information service providers with a significant competitive advantage because those providers would always be able to maintain a direct relationship with the consumer through the telecommunications service offering. Competing information service providers would never be able to “own” the customer because the customer would have to write two checks – one to the facilities based provider of the telecommunications service used by the consumer to reach competing information service providers, and a second check to the competing information service provider of their choice. In contrast, a consumer that chose the facilities based information service provider would only have to write one check to cover the bundled offering of telecommunications service and information service. This bundled offering advantage is significant and was a major concern of Congress when it enacted the 1996 Act. In contrast, compelling facilities based providers of broadband Internet access services to provide a wholesale offering removes this competitive advantage by allowing competing information service providers to resell the telecommunications service to

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<sup>21</sup> See *Stevens Report* at 11535, para. 73 (“We find that Internet access services are appropriately classed as information, rather than telecommunications, services. 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>22</sup> See *Cable Modem Declaratory Ruling* at 4823, para. 39 (“Cable modem service is not itself and does not include an offering of telecommunications service to subscribers. We disagree with commenters that urge us to find a telecommunications service inherent in the provision of cable modem service.”).

consumers and thus offer a competing suite of services for a single “bundled” price for which consumers have to only write one check.

A Commission requirement that facilities based providers of broadband Internet access provide – on a wholesale, common carrier basis – the Layer 1 and 2 transmission component described above would avoid the problems that the retail approach suggested in the NOI would create. A wholesale approach would facilitate innovation, promote competition, and allow the Commission to rely on market mechanisms to assist in enforcement. Further, the structure of Title II supports a Commission requirement that facility owners create a wholesale offering of the transmission component of broadband Internet access. In the 1996 Act, when Congress added the new defined term “information service” (which was based on the definition used in the MFJ), every section in which Congress used the new term was located in Title II of the Communications Act. And in the vast majority of those sections in Title II, Congress referred to “access to... information services” rather than to the provision of the information service itself. *See* 47 U.S.C. 251(g), 254(b), 254(h), 256(b), and 259(a). Clearly Congress believed that telecommunications services would be used to provide “access to” information services.

The symbiotic relationship between telecommunications service, which Congress directed “shall be treated as a common carrier” service with full protections for consumers and competition (and to which Congress devoted the first Title of the 1996 Act), and “information service” which Congress defined in the 1996 Act but did not expressly regulate, is why Congress saw no conflict in adopting in the 1996 Act provisions that defined universal service as “an evolving level of telecommunications service” and explicitly limited the provision of specific Federal universal service support

to “eligible telecommunications carriers,” while at the same time directing the Commission to bring Internet access (and in more recent legislation, broadband Internet access) to all parts of the Nation. Reinstating wholesale requirements similar to those that existed under the Commission’s *Computer II* order at the time Congress passed the 1996 Act would help achieve Congress’ dual goals of providing universal service and promoting competition.

A point that the Commission does not address in the NOI, but that the Commission needs to address in any action to re-classify the transmission component of broadband Internet access, is the interpretation of the phrase “offering of telecommunications for a fee” in the definition of “telecommunications service.”<sup>23</sup> The Commission needs to ensure that it makes clear that the phrase “for a fee” includes both fees charged to end users and fees paid by content providers, advertisers, or anyone else seeking to have information, a message, or a service transmitted using telecommunications that is being offered to the public. If the FCC limits the phrase “for a fee” to end user fees, or is simply silent and leaves it for a court to determine, there is a significant risk that facility based providers of broadband Internet access service will once again seek to avoid regulation by changing their business model to collect revenues from advertising and content providers instead of consumers, or, even more likely, to use revenues from the provision of unregulated information services to provide a cross subsidy, in order to claim that they are offering the “telecommunications” component to the public “for free.”

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<sup>23</sup> 47 U.S.C. 153(46).

Data Foundry urges the Commission to issue a declaratory ruling based on the NOI that does the following:

1. The Commission should declare that Layer 1 and Layer 2 of the OSI protocol stack are by definition “telecommunications,” and that any higher layer of the OSI protocol stack may be excluded from the definition of “information services” under the “management of a telecommunications service” exclusion whenever that higher OSI layer is used by a facilities based provider to offer information services for a fee to the public.

2. Using its authority under sections 201, 203, 214, and 332(c), the Commission should compel all facilities based providers of Layer 1 and 2 services used to offer information service for a fee to the public to:

A) offer the Layer 1 and 2 transmission services separately to anyone who wants to purchase them on non-discriminatory terms and conditions;

B) post the terms, conditions, and locations served on a public website;  
and

C) post on the same website the technical specifications and protocols used to provide the Layer 1 and 2 services.

3. Require all facilities based providers of information services offered for a fee to the public to purchase the Layer 1 and 2 services used for those services on the same terms and conditions as are posted on their website.

4. Declare that the Commission interprets the phrase “for a fee” in the definition of “telecommunications service” to include any fee paid by any person to facilitate the offering of an information service to the public, including fees paid by end users, content or service providers, advertisers, or cross subsidies from other services provided by the person offering the information service.

5. Require any person offering telecommunications to the public, whether separately or as part of any information service, to identify on consumer bills the fee charged for such telecommunications in order to facilitate enforcement of the non-discriminatory terms and conditions required under paragraph 2.

6. In order to determine the availability of broadband in each location in the United States, the Commission should use its authority under sections 203 and 214 to require facilities based providers of Layer 1 and 2 services to disclose the locations served by such services and the technical specifications and protocols of the Layer 1 and 2 services available to serve each such location.

7. The Commission should affirm that the telecommunications component of broadband Internet access service is inherently interstate, and pre-empt any State regulation of that component. The Commission should also reaffirm that the provision of information services is inherently interstate, and maintain its preemption of State regulation of information services.

## **II. User Privacy**

Data Foundry believes the re-classification outlined above will also be critical to address our other key concern with the current lack of Commission oversight of facilities

based broadband Internet access service providers. Users' privacy with regard to communications has become one of the most important policy challenges facing the Commission today. The issue is a flashpoint for the conflict between Internet users' civil liberties and new technologies that enable content, access and service providers to collect increasingly sensitive personal information. In recent years, the Commission has expressed its commitment to safeguard online privacy and this landmark proceeding presents the opportunity to establish tangible protections for users' fundamental rights.<sup>24</sup> The Commission has requested comments addressing whether section 222<sup>25</sup> – and its sister provision for cable operators, section 631<sup>26</sup> – are necessary and/or sufficient to protect the privacy of broadband Internet users should the Commission reclassify the transmission component of broadband access as a telecommunications service. Data Foundry supports the continued application of these rules and opposes their forbearance, but, alone, they are not enough.

These protections are vitally important, as far as they go, but they fail to address the most insidious threat to user privacy today: network content monitoring with technologies like Deep Packet Inspection (“DPI”). The Commission should now institute rules similar to section 222 that protect users against the wholesale wiretapping of their online activities by eliminating nonconsensual content inspection. Users need to have the opportunity to decline or consent to the monitoring of their Internet traffic by their

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<sup>24</sup> See NOI at para. 82.

<sup>25</sup> 47 U.S.C. 222.

<sup>26</sup> 47 U.S.C. 551. Hereafter, reference to this section will be implied when referring to section 222 alone.

broadband access provider. Not until users have the choice and the ability to be free from threats like DPI will there be any semblance of privacy on the Internet.

It is difficult to understate the importance of privacy to broadband users and the Internet at large. It is a facilitator of free expression and e-commerce. Privacy provides the opportunity for confidentiality in online communications, both personal and commercial. As Commissioner Copps has noted, safeguarding Internet privacy should be one of “the most basic protections” of the Digital Age.<sup>27</sup> This sentiment echoes Justice Louis Brandeis’s famous description of privacy as “the most comprehensive of rights and the right most valued by civilized men.”<sup>28</sup> At its essence, privacy is not just a stand-alone fundamental right; it is also a catalyst for other fundamental rights. But new technologies capable of monitoring every bit of information that users send and receive over broadband transmission links, exposing the totality of their online activities, has endangered online privacy and all its benefits.

Unless the threats posed by new technology like DPI are addressed by the Commission soon, these threats to broadband users’ privacy will chill innovation, deployment, e-commerce and, ultimately, the nation’s economic standing. As the Commission explained in the National Broadband Plan, “the disclosure of previously private, personal information has made many Americans wary of the medium. Innovation will suffer if a lack of trust exists between users and the entities with which they interact

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<sup>27</sup> See NOI Statement of Commissioner Michael J. Copps.

<sup>28</sup> See *Olmstead v. United States*, 277 U.S. 438 at 478 (1928).

over the Internet.”<sup>29</sup> The Plan noted a recent study showing that “[a]lmost half of all consumers have concerns about online privacy and security, which may limit their adoption or use of broadband.”<sup>30</sup> This NOI provides the Commission with an opportunity to prevent these disastrous effects through establishing meaningful protections against privacy invasions by broadband Internet access providers.

It is only appropriate that the Commission take up the task of protecting against abusive network inspection practices in the same proceeding it considers reclassifying broadband network providers as common carriers. Historically, common carriers have always refrained from inspecting the content of private communications they were entrusted to deliver. In American law, this policy of protecting the content of communications goes back as early as the nation’s first privacy law, which protected the confidentiality of messages carried by the country’s original postal service and was enacted with the help of Benjamin Franklin.<sup>31</sup> This tradition has been carried over to the Internet in more recent years with section 230 of the Communications Decency Act.<sup>32</sup> Section 230 specifically exempts interactive computer service providers from liability for the communications of a user and intentionally provides an incentive for service providers to remain merely passive conduits, delivering communications without regard for their content, while still maintaining the privacy of the communicating parties.

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<sup>29</sup> See National Broadband Plan at 53.

<sup>30</sup> See *id* at 17.

<sup>31</sup> See Robert Ellis Smith, *Ben Franklin’s Web Site: Privacy and Curiosity from Plymouth Rock to the Internet* (2002).

<sup>32</sup> 47 U.S.C. 230.

This refrain from inspection and monitoring is the fundamental reason why American law has recognized that traditional means of communications will support a reasonable expectation of privacy.<sup>33</sup> The absence of inspection is why the Fourth Amendment protects the content of letters in the mail.<sup>34</sup> It is why doctors and lawyers can

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<sup>33</sup> Under the Third Party Doctrine, information that is “knowingly exposed” to a third party cannot maintain an expectation of privacy for purposes of the Fourth Amendment, legal privileges, or for legal confidentiality. The long-standing Doctrine holds that when one exposes private information to another, he assumes the risk that the third party will divulge the information to others. This rule establishes a “binary” test for privacy. Information is either entirely private and undisclosed to third parties, or it is wholly public and disclosed.

An important exception to the Doctrine, known as the Content-Envelope Distinction has developed in order to protect the content of private communications. Under this Distinction, data that can be analogized to the addressing information on the outside of an envelope in the mail, loses its expectation of privacy because the sender has knowingly exposed that information to the third party conducting the delivery. The information that can be analogized to the content of a letter within an envelope in the mail, however, will retain all expectations of privacy because the sender will know that, in the regular course of business, the third party in possession of the envelope will usually never see or access the content.

The Content-Envelope Distinction has transferred to other technologies with relative success. For telephone calls, the dialed numbers, as well as the date and time of a call, constitute the envelope information that the phone company must necessarily see. The audio of a call would constitute the content information that retains all expectations of privacy. For the Internet, email addressing data, such as the “To” and “From” address is unprotected envelope information, while email content remains private. For IP packets, the header information contains the addressing information and would constitute unprotected envelope data, whereas the packet payload constitutes the private and protected content. A network technology, such as DPI, that invades the payload of packets would threaten the privacy protections of all packets traversing the Internet.

<sup>34</sup> See *United States v. Choate*, 576 F.2d 165, 174 (9<sup>th</sup> Cir. 1978) (“[I]t is settled that the Fourth Amendment’s protection against ‘unreasonable searches and seizures’ protects a citizen against the warrantless opening of sealed letters and packages addressed to him in order to examine the contents.”) (Quoting *Ex parte Jackson* 96 U.S. 727, 733 (1877)); *Lustiger v. United States*, 386 F.2d 132, 139 (9<sup>th</sup> Cir. 1967) (“[F]irst class mail cannot be seized and retained, nor opened and searched, without the authority of a search warrant.”); *United States v. Jacobsen*, 466 U.S. 109 (1984); *United States v. Van Leeuwen*, 397 U.S. 249 (1970); see also *United States v. Boyd*, 2006 U.S. Dist. LEXIS 4795 (D. Mass. 2006) (An expectation of privacy in one’s mail also applies to private delivery companies, such as Federal Express).

communicate confidentially with their patients and clients by telephone. And it is why the Internet was initially safe for financial transactions and business communications involving protected trade secrets and proprietary information. Only recently, with the introduction of newer and more powerful inspection technologies have these traditional expectations of privacy in online communications come under attack.<sup>35</sup> Should the Commission reclassify the transmission component of broadband access as a telecommunications service, it can reestablish authority over access providers' network practices and take the steps necessary to protect users against abusive and nonconsensual DPI.

In the NOI, the Commission requested comments on whether privacy can be safeguarded under the current information service classification.<sup>36</sup> If it cannot, the NOI asked whether section 222 would be sufficient to protect Internet privacy if the Commission were to reclassify the transmission component of broadband access as a

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<sup>35</sup> See *United States v. Hart*, 2009 U.S. Dist. LEXIS 72597 (W.D. Ky. July 28, 2009) (“Moreover, the generic Yahoo! Privacy Policy that has been in effect since November 2006 clearly explains why a subscriber should have no expectation of privacy with respect to his account data. See <http://info.yahoo.com/privacy/us/yahoo/details.html> (Privacy Policy, effective Nov. 2006)(in which Yahoo! notifies customers that it will share account data with trusted partners, will allow its employees to access account data in the course of providing service, and will respond to legal process). ... Given that persons creating and using Yahoo! accounts in 2006 consented to the above-cited provisions of the Yahoo! Terms of Service, it is difficult to conclude that Mr. Hart had an actual expectation of privacy in the contents of any communications sent or received with his Yahoo! accounts.”).

<sup>36</sup> See NOI at para. 39.

telecommunications service.<sup>37</sup> Additionally, the NOI requested comments addressing how best to proceed without reducing the Federal Trade Commission's ("FTC") ability to also address Internet privacy issues.<sup>38</sup>

The current Title I information service classification of broadband Internet access cannot provide the type of effective privacy safeguards that users need. The *Comcast* decision has jeopardized the Commission's ability to enact any meaningful consumer protections for broadband Internet access, including privacy protections. It is entirely unclear what statutory hook would be available to provide the Commission with ancillary authority to impose privacy rules over providers of Internet connectivity. Utilizing Title I to protect online privacy would likely fail a legal challenge and bring the Commission right back to the position it is in now. Furthermore, trusting industry self-regulation in the uncompetitive broadband access market to protect users' privacy would prove disastrous. As demonstrated by the NebuAd debacle of 2008 – and the pervasive selling of “clickstream” data today – broadband Internet access providers are all too willing to sacrifice their users' privacy for the promise of additional profits.

This leaves the Commission with the question of how best to protect Internet privacy if it were to reclassify the transmission component of broadband access as a telecommunications service. In the NOI, the Commission predicted that “[s]ection 222 would appear to provide the Commission clear authority to implement appropriate privacy requirements for broadband Internet connectivity.” While section 222 is a

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<sup>37</sup> See *id* at para. 82.

<sup>38</sup> See *id* at para. 83.

necessary privacy protection and should not be forborne, it is not enough to safeguard all users' expectations of privacy, particularly with regard to content of online communications.

Section 222 governs the retention practices for customer proprietary network information (“CPNI”), but protecting privacy is about more than just third party data security.<sup>39</sup> Protecting privacy also includes keeping the content of private communications out of the hands of third parties that the communicants never intended to have access – *including the broadband transmission provider*. Section 222 protects against nonconsensual data *dissemination*, but it provides no protection against unwanted data *inspection and collection*. Protecting against the former, without addressing the latter, would merely be an attempt to contain the damage already done by inspection. For highly-invasive forms of content monitoring like DPI, section 222 is merely a band-aid for a privacy hemorrhage. Relying solely on section 222 to protect users' privacy will allow broadband access providers to continue to monitor their customers' online activities without their informed consent and destroy any notion of privacy that they once had.

Additionally, the Electronic Communications Privacy Act (“ECPA”) provides no protection against network inspection because it explicitly exempts any interceptions and disclosures of communications that occur with “consent.”<sup>40</sup> Using nearly impenetrable legalese, broadband Internet access providers bury blanket privacy waivers in their online

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<sup>39</sup> 47 U.S.C. 222.

<sup>40</sup> 18 U.S.C. 2511(2)(c).

terms of service that permit the monitoring and disclosure of any customer communications. These access providers can point to these (adhesion) contracts as a license to conduct unrestrained DPI without providing users any ability to decline. Broadband users are essentially being forced to consent to DPI as a mandatory condition of connecting to the Internet today.

In the National Broadband Plan, the Commission conceded that there are no privacy protections in place to prevent broadband access providers from conducting wholesale DPI against their users' wishes.<sup>41</sup> Should the Commission now resolve to reclassify the transmission component of broadband Internet access as a telecommunications service, this proceeding would provide it a perfect opportunity to prove that it is serious about protecting Internet privacy by implementing effective safeguards against abusive network inspection. Nonconsensual DPI is a privacy invasion occurring at the physical network infrastructure (*i.e.*, on the transmission component) and the proposed reclassification would place network inspection practices squarely within the jurisdiction of the Commission.

If the Commission were to reclassify the transmission component, yet not address the privacy invasion posed by compulsory DPI, it would send the message to users that everything they do online is subject to monitoring and that it is up to users to protect their own privacy. In order to obtain connectivity they would have to waive any expectation of privacy regarding the content of their communications – for all purposes, both personal and commercial – given that the current terms of service for virtually all providers

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<sup>41</sup> See National Broadband Plan at 54.

expressly retain the right to examine content. The only way for a user to keep information private would be to not use the link or to use strong end-to-end encryption, which is largely beyond the means and ability of all but the most savvy and well to do. The Commission must not fail to act and neglect its responsibility to provide basic consumer protections. Users require the same safeguards against the monitoring and collection of their private communications as they already have over the retention policies of those that hold their private information. New Commission rules, akin to section 222's requirement of informed consent, should establish the same prerequisite that the content of users' communications only be inspected once the broadband network provider has secured their users' informed and voluntary consent. Users need to be provided the choice of whether or not they will submit their communications to monitoring. Those that value personalized advertising, or other network inspection facilitated services, will opt-in and those that value their privacy will retain their rights.

Additionally, should the Commission fail to address the threats of network inspection and, by omission, provide broadband access providers with free reign to conduct DPI, many of the Broadband Plan's recommendations and goals could be threatened. The Plan specifically recommended initiatives for the adoption of digital health records,<sup>42</sup> electronic educational records,<sup>43</sup> Smart Grid technologies,<sup>44</sup> telework,<sup>45</sup>

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<sup>42</sup> See National Broadband Plan at 202-9.

<sup>43</sup> See *id* at 233-5.

<sup>44</sup> See *id* at 245-57.

<sup>45</sup> See *id* at 272-73.

and cloud computing.<sup>46</sup> All of these online systems, however, will only be embraced if users can expect that their information will remain secure and confidential across the Net. A public Internet subject to pervasive packet inspection and monitoring would undermine these efforts by exposing users' personal information to unintended third parties, including the transmission provider. After just a few cases holding there is no longer any reasonable expectation of privacy to electronic communications users simply will not trust that their medical, educational, financial, or other confidential information will remain secure and private because they know (or will be deemed to know) that the man-in-middle is or could be monitoring their communications. This is precisely the chilling effect described in the Broadband Plan's warning that "privacy concerns can serve as a barrier to the adoption and utilization of broadband."<sup>47</sup>

To enforce new Commission rules against the nonconsensual inspection of users' communications by broadband access providers, the Commission should adopt the section 208 complaint process.<sup>48</sup> Section 208 provides aggrieved parties with a choice of venue at the Commission or before a federal district court where they reside. Explicitly permitting individual users to bring their claims in local federal courts would provide access to recourse for those without the means to bring a formal complaint to the Commission. Establishing joint venue with the courts would also alleviate some of the enforcement burden on the Commission. Additionally, the prospect of adjudication by judges and juries, rather than the familiar Commission, may provide added incentive for

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<sup>46</sup> See National Broadband Plan at 286.

<sup>47</sup> See *id* at 53.

<sup>48</sup> 47 U.S.C. 208.

large carriers to stay safely on the right side of rules. These entities know the Commission well, and are used to dealing with it and minimizing the regulatory bother and risk. With all due respect, the possibility of Commission sanctions or damages is trivial to them, akin to a cost of doing business. They fear juries, and for good reason. A civil cause of action in court, with recourse to a jury is the only real deterrent to significant and widespread privacy intrusions.

The Commission has requested comments addressing how to protect online privacy without compromising the FTC's established Internet privacy responsibilities.<sup>49</sup> While each will have a role, that role will be defined by the services at issue, just as they are today. When, for example, a telephone company is acting in its capacity as a LEC, jurisdiction lies with the Commission. On the other hand, when the telephone company is acting as a DSL provider, jurisdiction would be split between the FTC's traditional consumer protection authority and the Commission's Title II authority.

Thus, should the Commission reclassify the transmission component as telecommunications service, then access providers' network practices involving that component will be the responsibility of the Commission. Any information services offered by the broadband access provider, such as webmail, would then be the responsibility of the FTC, along with any applicable ancillary authority retained by the Commission. In this regard, the FTC benefits from a narrowly tailored reclassification limited only to the transmission component of broadband Internet access. But any new reclassification of a Title I information service to a Title II telecommunications service

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<sup>49</sup> See NOI at para. 83.

will necessarily transfer to the Commission some of the FTC's ability to address privacy issues for the transmission component. Simply put, the Commission cannot take on additional authority without also taking on additional responsibility.

For the issue of Internet privacy, DPI is the elephant in the room that policymakers have yet to meaningfully address. However, with a potential reclassification of the transmission component of broadband access as a Title II telecommunications service, the Commission may soon find DPI to be solely its own responsibility. Network inspection is a privacy invasion at the physical network infrastructure, where Internet access is provisioned to users, which reclassification would make the Commission's turf.

This challenge presents an opportunity for the Commission to prove that Internet privacy is a priority and that users will finally receive meaningful protections against nonconsensual DPI. The Commission should now establish rules that protect users' right to refuse to have their online communications monitored through network inspection. This protection, combined with the continued application of Section 222, would ensure that the Internet is once again a means of communicating privately and confidentially. And with these additional privacy protections, the public's increased confidence in the security of the Internet will foster innovation while hastening broadband adoption and deployment.

## **Conclusion**

The Commission should re-classify the transmission component of broadband Internet access service and require facilities based providers of such to offer the

transmission component as a wholesale telecommunications service regulated under Title II of the Communications Act. The Commission should not forbear from the provisions of the Act needed to require this wholesale offering and to ensure that such offering is made on just, reasonable, and non-discriminatory terms and conditions. The Commission should also expand the consumer privacy protections found in section 222 to protect users' privacy by prohibiting Deep Packet Inspection and other non-consensual inspections of a user's content.

Respectfully submitted.

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