

Before the
Federal Communications Commission
Washington, DC, 20554

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

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July 15, 2010

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SUMMARY

Public Knowledge (PK) welcomes the Commission's decision to reexamine the proper regulatory classification of broadband Internet access.¹ The Commission issued its *Notice of Inquiry*² in response to the *Comcast* ruling,³ but the issues involved go well beyond the Open Internet rules raised in that case. The *Comcast* ruling simply highlighted what has been clear for some time—the regulatory framework for broadband no longer reflects market realities. The *Cable Modem Ruling*⁴ that established this framework was developed when the broadband industry was nascent. Now, eight years later, broadband has flourished and taken its rightful place as nationwide critical infrastructure. This mature market deserves a mature regulatory framework.

First and foremost, the Commission must update its factual understanding of the modern broadband market. Once it has done so, it must apply its traditional tests to this rapidly maturing market in order to determine its proper classification.

This proceeding gives the Commission the opportunity to correct flaws in its 2002 analysis that arose from an incomplete understanding of the nature of broadband service. Specifically, the Commission must revise its understanding of DNS after a more complete legal analysis that takes into account all relevant statutory language.

The Commission's poor reasoning in the *Cable Modem Ruling* has created a hodgepodge of inconsistent and arbitrary classifications in which some IP-enabled services are considered

¹ Public Knowledge law clerks Anjali Bhat, Jodie Graham, Anne Halsey, Mart Kuhn, and Chris Reilly assisted in the preparation of these comments.

² Framework for Broadband Internet Service, GN Docket No. 10-127, *Notice of Inquiry*, FCC 10-114 (June 17, 2010) [hereafter *NOI*].

³ *Comcast Corp. v. FCC*, 600 F.3d 642, 651 (D.C. Cir. 2010).

⁴ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling & Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798 (2002) [hereinafter *Cable Modem Ruling*].

telecommunications services, some are considered information services, and still others remain unclassified. No clear rule provides an overarching framework for these various classification decisions. This has profound consequences for ensuring a robust, competitive broadband market that provides affordable service to all Americans. As explained in these comments, if this failure remains uncorrected it will have profound consequences for ensuring a robust, competitive broadband market that provides affordable service to all Americans. The FCC will remain powerless to protect consumers from future abusive practices, powerless to subsidize connections for low-income and rural Americans, and powerless to ensure that those with physical disabilities have meaningful access to broadband services. The Commission will have no authority to ensure that minority communities, immigrant communities and other traditionally marginalized communities enjoy the full benefits of our broadband future. Even in the face of a potentially disruptive crisis—such as a refusal of two or more major carriers to interconnect because of a commercial dispute, or because of some unforeseen consequence of the migration to IPv6—the FCC would lack clear authority to take action to prevent massive disruption of service.

As PK shows, there now exists a clearly definable broadband access service. This service is widely understood by the marketplace and Congress as providing the transmission of information from the end user to the Internet. Applying the Commission’s traditional tests, this broadband access service is a telecommunications service and therefore is properly classified under Title II. This classification is proper regardless of the platform or technology used to provide it. Indeed, a Commission finding that wireless services are sufficiently different from other broadband services to justify excluding them from Title II would create significant problems. Such a finding would also require dramatic revision to Commission broadband

policies. For example, the FCC would have no authority to include wireless broadband in the High Cost Program of the universal service fund, a critical means by which the Commission hopes to fund sustainable broadband access in rural areas. In addition, the Commission would need to exclude wireless access from its annual assessment of broadband deployment, and eliminate consideration of wireless Internet access in the same product market as wireline broadband access. The result of these changes—for better or worse—would be to redefine the “broadband Internet access” market as both far smaller and far more concentrated than official FCC statistics currently reflect.

Finally, the Commission also requests comment about forbearance. As PK explains, forbearance is a tool to give the Commission flexibility to respond to a dynamic marketplace. It is a powerful tool, to be used with precision and care, because it overrides the initial judgment of Congress that a particular statute protects the public interest. The Commission must use this power in a deliberate, sophisticated manner and must always proceed with caution when considering forbearance. In particular, PK recommends specific statutes on interconnection, information disclosure, and consumer protection from which the Commission should refrain from initially forbearing. It would be tragic if the Commission invested time and effort in properly reclassifying broadband in order to ensure an appropriate framework to protect the public only to find, when a crisis arose, that it had eliminated its authority through an imprudent forbearance.

ARGUMENT

I. The Commission Cannot Rely on Title I to Ensure that Consumer and the Public Interest Are Protected On the Internet

The Commission seeks comment on whether to attempt to build a framework on the basis of Title I “ancillary authority,” possibly reinforced by reinterpreting Section 706 as an independent source of authority.⁵ PK and others have previously explained why, in light of the *Comcast* decision, Title I provides an inadequate legal framework for Commission authority.⁶ An effort to reinterpret Section 706 as a separate source of authority would not alter this calculus. Even assuming such an effort survived judicial review, the Commission would need to make a separate determination that “advanced telecommunications capability” is *not* being deployed to all Americans in a timely manner. Even then, and assuming that this determination also survived judicial review, the nature and scope of the Commission’s additional authority would remain uncertain.

The legal framework for the Commission’s authority over broadband will provide the foundation for every single Commission decision and policy on broadband, from affordable access to public safety. The Commission cannot fulfill its obligations to the American people and

⁵ *NOI* ¶ 36.

⁶ *See, e.g.*, Reply Comments of Public Knowledge in Preserving the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52, at 1-17 (filed April 26, 2010); Reply Comments of the Nat’l Ass’n of State Util. Consumer Advocates in Preserving the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52, at 15-25 (filed April 26, 2010); Reply Comments of Earthlink, Inc., in Preserving the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52, at 15-19 (filed April 26, 2010); Reply Comments of Dish Network in Preserving the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52, at 14-19 (filed April 26, 2010); Reply Comments of Google, Inc., in Preserving the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52, at 21-27 (filed April 26, 2010); Reply Comments of the Center for Democracy & Technology in Preserving the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52, at 10-12 (filed April 26, 2010); Reply Comments of Center for Media Justice et al., in Preserving the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52, at 26-33 (filed April 26, 2010).

ensure continued, robust innovation and investment in the face of perpetual uncertainty over its authority to act.

A. Title I is Inadequate to Protect Consumers, Reform Universal Service, or Safeguard the Critical Communications Infrastructure of the 21st Century

The Commission requests comment on the wisdom of relying on Title I ancillary authority to implement its broadband policies.⁷ Such a course of action would be ill-advised. Even prior to the recent *Comcast* decision, Title I provided no benefits to offset the increased uncertainty it imposed on all Internet users.⁸ As the *Comcast* court observed, ancillary authority requires the Commission to “independently justify[]” each regulatory policy connected to the Internet.⁹ As a result, every regulatory action to protect consumers, promote competition or provide affordability is only a poor justification away from invalidation.¹⁰ Even providing multiple justifications for a policy is no guarantee of validity.

The *Comcast* decision itself vividly illustrates this vulnerability. Although the Commission attempted to base its authority in a variety of statutes, the court found each to be inadequate. Neither Section 230,¹¹ nor Section 256,¹² nor Section 623¹³ provided adequate grounds for the Commission’s attempt to require even the most basic transparency and disclosure

⁷ *NOI* ¶ 30.

⁸ Comments of Public Knowledge in Int’l Comparison & Consumer Survey Requirements in the Broadband Data Improvement Act, GN Docket Nos. 09-47, 09-51, 09-131, at 5-7 (filed Jan. 26, 2010).

⁹ *Comcast*, 600 F.3d at 651.

¹⁰ The Commission identified “accelerating broadband access and adoption in rural America; connecting low-income Americans, Native American communities, and Americans with disabilities; supporting robust use of broadband by small businesses to drive productivity, growth and ongoing innovation; lowering barriers that hinder broadband deployment; strengthening public safety communications; cybersecurity; consumer protection, including transparency and disclosure; and consumer privacy” as policies that would require new justifications prior to any Commission action. Posting of Austin Schlick to Blogband, <http://blog.broadband.gov/?entryId=356610> (Apr. 7, 2010).

¹¹ *Comcast*, 600 F.3d at 651-58.

¹² *Id.* at 659.

¹³ *Id.* at 660-61.

for consumers. Further, under Title I ancillary authority *each and every Internet-related policy* that the Commission might attempt to create would be subject to the same scrutiny and requirement for justification. Because even Title I’s purported “flexibility” compared to the “heavy hand” of Title II is illusory,¹⁴ there is simply no justification for exposing Internet users and providers to such uncertainty.

B. The Effort to Expand Authority Pursuant to Section 706 Increases Uncertainty Rather Than Enhancing Commission Authority

In the *NOI*, the Commission specifically seeks comment on grounding ancillary authority in Section 706.¹⁵ The use of Section 706 makes the thought of using Title I no less ill-advised. It is true that the *Comcast* court did not reject Section 706 outright as a basis for ancillary authority.¹⁶ However, the Commission is “bound”¹⁷ by its prior conclusions on Section 706 until it elects to revisit them. In order to revisit its conclusion in 2000 that “overall, the deployment of advanced telecommunications capability to all Americans has progressed in a reasonable and timely manner”¹⁸ the Commission would need to determine that deployment was not occurring “in a reasonable and timely fashion.”¹⁹

If it so found, the Commission would be obligated to utilize “in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating

¹⁴ Comments of Public Knowledge in Int’l Comparison & Consumer Survey Requirements in the Broadband Data Improvement Act, GN Docket Nos. 09-47, 09-51, 09-131, at 6-7 (filed Jan. 26, 2010).

¹⁵ *NOI* ¶ 36.

¹⁶ *Comcast*, 600 F.3d at 658-59.

¹⁷ *Id.* at 659.

¹⁸ Inquiry Concerning the Deployment of Advanced Telecomm. Capability to All Americans in a Reasonable & Timely Fashion, *Second Report*, 15 FCC Rcd. 20,913, 21,003, ¶ 244 (2000).

¹⁹ Telecommunications Act of 1996 § 706(b), 47 U.S.C. § 1302(b) (2006).

methods that remove barriers to infrastructure investment.”²⁰ At that point, and only at that point, the Commission would likely be able to establish a “relationship”²¹ between specific Internet policies designed to promote competition under Title I ancillary authority and Section 706.

However, such a relationship, in addition to the resulting Commission action, would inevitably result in an extended legal confrontation introducing further uncertainty into the broadband marketplace. For example, the Commission would find itself challenged on whether its additional authority—whatever its scope—extended to geographic locations where deployment was “timely.”²² As if this did not create enough new uncertainty, the Commission would find its action subject to new challenges once the Commission determined deployment of advanced telecommunications capability was again “timely.”

Finally, Section 706, however interpreted, cannot provide the Commission with the certainty it needs to achieve needed oversight of broadband providers. For example, there is no construction of Section 706 that would allow the Commission to take necessary action in the event of an unanticipated crisis—such as a *Madison River*-type refusal of major Internet service providers to interconnect or carry each other’s traffic.²³ For this reason alone, the Commission should reject this approach as inadequate.

²⁰ *Id.* at § 706(a), 47 U.S.C. § 1302(a).

²¹ *Comcast*, 600 F.3d at 654-55.

²² *See* Telecommunications Act of 1996 § 706(b), 47 U.S.C. § 1302(b).

²³ *Madison River Commc’ns, LLC & Affiliated Cos.*, Consent Decree, 20 FCC Rcd. 4295, 4297, ¶ 3 (2005). As discussed below, *see infra* Section II.B.3, the Internet has already suffered the equivalent of “near misses” in the form of major carriers refusing to exchange traffic. While these disputes have not yet reached the level of a serious public crisis, it would be the height of irresponsibility for the Commission to render itself powerless to address such a crisis on the assurance of industry providers that such a thing could “never happen” when it has come close to happening on numerous occasions.

II. The Commission Should Recognize That Broadband Access Is “Telecommunications” That Providers Offer as a “Telecommunications Service”

As explained in the *NOI*, the Commission rendered its decision in the *Cable Modem Ruling* when “the cable modem service [was] still nascent, and the shape of broadband development [was] not yet clear.”²⁴ Since that time, the broadband market has matured, developing certain common features and attributes that clearly constitute a specific, distinct, non-integrated offering of “broadband access service.” The Commission has consistently defined this offer to use the TCP/IP protocol suite to transport information created by the customer on the customer’s own equipment as the “telecommunications component” of broadband access service.²⁵ In light of market developments, recent Congressional action, and the *Comcast* decision, the Commission has a responsibility to assess whether this offer of telecommunications meets the traditional *NARUC* test for “telecommunications service,” and whether the offer is sufficiently distinct to constitute a clearly understood unique offering as part of the bundle of services offered by providers.²⁶

Under well-established precedent, this analysis looks strictly to the nature of the offer made by the provider to determine how the abstract “member of the public” would perceive the offer.²⁷ Tellingly, even in the *Cable Modem Ruling*, the Commission never required any

²⁴ *NOI* ¶ 53 (citing *In re Inquiry Concerning High-Speed Access to Internet Over Cable & Other Facilities*, Internet Over Cable Declaratory Ruling, 17 FCC Rcd. 4798, 4843-44, ¶ 83 (2002) [hereinafter *Cable Modem Ruling*]).

²⁵ See, e.g., *In re GTE Tel. Operating Cos.*, Mem. Op. & Order, 13 FCC Rcd. 22,466, 22,477-78, ¶ 20 (1998); *In re Commc’ns Assistance for Law Enforcement Act & Broadband Access & Servs.*, First Report & Order & Further Notice of Proposed Rulemaking, 20 FCC Rcd. 14,989, 14,996-97, ¶ 15 & nn.52-53 (2005), *pet. for review denied sub nom. Am. Council on Educ. v. FCC*, 451 F.3d 226, 229-35 (D.C. Cir. 2006) (recognizing “well-settled distinction” between “‘information services’ and the underlying ‘telecommunications’ that transport them”).

²⁶ *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) (*NARUC*).

²⁷ *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005) (citing *In re Amendment of § 64.702 of the Comm’n’s Rules & Regulations (Second Computer Inquiry)*,

evidence of subjective consumer impressions. Indeed, to require such evidence would appear to violate the *NARUC* court’s formulation that “a particular system is a common carrier by virtue of its functions.”²⁸ Given that the Commission gave no indication in the *Cable Modem Ruling* that it intended to depart from the long-standing *NARUC* test with regard to the nature of the “offer,” and given that the *Cable Modem Ruling* did not rely on any evidence with regard to “consumer use and perception,”²⁹ the Commission should not require any such evidence here.

Similarly, the *NARUC* factors make no distinction based on the nature of the technology, the platform, or the competitive environment.³⁰ To the contrary, as the Commission found in the *Cable Modem Ruling*, and the Supreme Court affirmed in *Brand X*, the relevant inquiry hinges entirely on the nature of the “offer,”³¹ and not on the technological platform. Accordingly, no reason exists to distinguish wireless from wireline broadband access.³²

A. Defining Broadband Access Service

The Commission has a legal responsibility to reexamine a service as it evolves, and regulatory classification must reflect changes in the service.³³ In particular, when analyzing whether or not a provider offers a service as a “telecommunications service” under Title II, the Commission looks to the actual conduct of the provider rather than how the provider chooses to

Order, 77 F.C.C.2d 384, 417-23, ¶¶ 86-101 (1980)); *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 217 (3d Cir. 2007); *Vonage Holding Corp. v. FCC*, 489 F.3d 1232, 1238-39 (D.C. Cir. 2007); *Am. Council on Educ. v. FCC*, 451 F.3d 226, 230 (D.C. Cir. 2006).

²⁸ *NARUC*, 525 F.2d at 644.

²⁹ *NOI* ¶ 56.

³⁰ *NARUC*, 525 F.2d at 640-44.

³¹ *Brand X*, 545 U.S. at 967; *Cable Modem Ruling*, 17 FCC Rcd. at 4822, ¶ 38.

³² Although PK does not specifically address such services as backbone transport or content delivery networks (CDNs), *NOI* ¶ 107, these services are subject to the same analysis under *NARUC*. Given that these providers appear to engage in precisely the kind of particularized decisions with regard to provision of service the *NARUC* court found indicative of private carriage agreements, it would appear that these services are not “telecommunications services.”

³³ *Quincy Cable TV, Inc. v. FCC*, 768 F. 2d 1434, 1442, 1457-58, 1463 (D.C. Cir. 1985); *NARUC*, 525 F.2d 630, 644.

characterize itself.³⁴ Looking to the current marketplace of 2010, and giving due deference to the signals from Congress, the Commission can and should identify a distinct “broadband Internet access service,” as proposed in the *Open Internet NPRM*: “any communication service by wire or radio that provides broadband Internet access directly to the public, or to such classes of users as to be effectively available directly to the public” that provides “Internet Protocol data transmission between an end user and the Internet,” where the Internet is defined as “the system of interconnected networks that use the Internet Protocol for communication with resources or endpoints reachable, directly or through a proxy, via a globally unique Internet address assigned by the Internet Assigned Numbers Authority.”³⁵

Put more simply, broadband access providers offer to transmit data of the end user’s choosing from the end user’s device to another device also connected to the Internet. An analysis of today’s market shows that providers offer broadband access service “indifferently,” *i.e.*, without making “individualized decisions . . . whether and on what terms to deal,”³⁶ and to such classes of the general public as they can offer. Accordingly, the Commission should treat this offering as a telecommunications service under Title II.

I. Market Signals

Broadband access providers clearly provide “broadband access” as a component in the bundle of services they offer to consumers. A sample of the advertising materials from the websites of leading broadband providers³⁷ shows that they plainly and distinctly offer to provide

³⁴ See, e.g., *Cable Modem Ruling*, 17 FCC Rcd. at 4820-22, ¶ 34-38 (“[W]e examine below the functions that cable modem service makes available to its end users”).

³⁵ *In re Preserving the Open Internet*, Notice of Proposed Rulemaking, 24 FCC Rcd. 13,064, 13,128 (2010).

³⁶ *NARUC*, 525 F.2d at 641.

³⁷ See Appendix A for a representative overview.

the service described above.³⁸ Verizon’s FiOS, for example, advertises its FiOS service as “Internet, plus all the free extras,” listing services such as email as “free extras” provided in addition to its “fast as it gets” Internet access.³⁹ Comcast offers “amazing download speeds up to 50 Mbps.”⁴⁰ Other access providers similarly display their upload and download capacity prominently, with text assuring potential customers that this access will allow “fast, affordable Internet.”⁴¹

2. *Congressional Action*

The passage of the Broadband Data Improvement Act of 2008 (“BDIA”),⁴² in which Congress instructs the FCC to make national and international comparisons with regard to availability of “broadband” through diverse technologies, further reinforces the conclusion that there exists a distinct, definable service offering called “broadband.” Although the BDIA does not define broadband, the statute directs the FCC to compare the “actual data transmission speeds” and “the types of applications and services consumers most frequently use in conjunction with such capability.”⁴³ In 2009, as part of the American Recovery and Reinvestment Act (“ARRA”), Congress acted to affirm the existence of an identifiable “broadband” service, underscore its critical importance to the economy, and express its

³⁸ In Section II.C.1 below, PK analyzes this offer under the *Cable Modem Ruling* framework to determine whether the telecommunications components and the information service components are “integrated” or not. As a preliminary first step, however, PK establishes that there exists a distinct telecommunications component identifiable as “broadband access service.”

³⁹ Verizon FiOS Internet, <http://www22.verizon.com/residential/fiosinternet> (last visited July 15, 2010).

⁴⁰ Comcast High-Speed Internet: Speed Comparison, <http://www.comcast.com/Corporate/Learn/HighSpeedInternet/speedcomparison.html> (last visited July 15, 2010).

⁴¹ AT&T Internet, ATT Offer, <http://www.attoffer.com/landing/internet> (last visited July 15, 2010).

⁴² Pub L. No. 110-385, 122 Stat. 4096 (codified at 47 U.S.C. §§1301, 1303).

⁴³ 47 U.S.C. §1303(c).

preference that providers offer this service under conditions of non-discrimination and interconnection.⁴⁴

B. The Commission Has Found That the Definition of “Telecommunications Service” Employs the Traditional *NARUC* Test

Accepting the existence of the broadband access component in the service offered by broadband providers, PK next demonstrates that this component meets the definition of a “telecommunications service” as set forth in the statute.⁴⁵ Because the Commission has not always spoken with clarity with regard to services offered using the TCP/IP protocol suite, the Commission should take this opportunity to emphasize that there is no generalized “IP exception” to the Commission’s definitional rules. To the contrary, Section 153(46) emphasizes that the determination of the service does not turn on the nature of the technology used. Particularly in light of previous Commission acceptance of tariffs for IP-based services, the Commission should forcefully reject the idea advanced by some that the inclusion of IP, like some magic pixie dust, transforms a telecommunications service into an information service. Indeed, the contrary result—allowing the use or non-use of IP to be the determinative factor in classification—creates difficult consequences as providers such as AT&T and Comcast increasingly provide voice service over IP networks, rather than over traditional switched networks.

Following passage of the 1996 Telecommunications Act, the Commission determined that Congress intended that the definition of “telecommunications service” follow the analysis set forth in *NARUC*.⁴⁶ Under this inquiry, the Commission looks to whether the provider offers

⁴⁴ Pub. L. No. 111-5, 123 Stat. 115 § 6001 (codified at 47 U.S.C. § 1305).

⁴⁵ 47 U.S.C. § 153(46) (2006).

⁴⁶ *Virgin Islands Tel. Corp v. FCC*, 198 F.3d 921, 927 (D.C. Cir. 1999) (affirming Commission interpretation that proper analysis for definition of “telecommunications service” in 47 U.S.C. §153(46) applies *NARUC* analysis).

“telecommunications” in an indifferent manner to the general public. No one can dispute that broadband access providers hold themselves out as serving the public in an indifferent manner. Indeed, over the course of several years opposing consumer protection regulation, broadband access providers have repeatedly asserted that they serve all members of the public equally and without discrimination as to terms and price. They advertise generally available prices and do not “make individualized decisions, in particular cases, whether and on what terms to deal.”⁴⁷

It is clear, therefore, that broadband access providers satisfy the primary elements of the *NARUC* test with regard to serving the public indifferently. If broadband access service meets the definition of “telecommunications,” *i.e.*, “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,”⁴⁸ then the offer to provide broadband access service in this fashion would constitute a “telecommunications service.”

Relying on both on the traditional *NARUC* factors as well as its “end-to-end” analysis, the Commission has consistently determined that the provision of an IP-based service that offers to take data generated by a user, using customer-premises equipment, to “the Internet” constitutes a telecommunications service. In the *GTE DSL Tariff*,⁴⁹ the Commission found that GTE’s ADSL service, which it offered both to ISPs and to end users, constituted an “interstate telecommunication service” properly tariffed at the federal level. After analyzing the nature of

⁴⁷ *NARUC*, 525 F.2d at 641. The fact that broadband providers routinely authorize their sales staff to offer special rates in some individualized cases to attract or retain customers does not transform a telecommunications service provider into a private carrier. *See Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003). Nor does the fact that providers reserve the right to make individualized decisions matter where this is not, in fact, their general practice. *NARUC*, 525 F.3d at 641 (“It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so.”)

⁴⁸ 47 U.S.C. § 153(43).

⁴⁹ 13 FCC Rcd. 22466 (1998).

the communication, the Commission found that the DSL service constituted a “continuous transmission” from the customer to the destination website via the ISP of the customer’s choosing.⁵⁰

The Commission explicitly rejected the argument that finding the direct transmission of data from a subscriber to an out-of-state or international website was incompatible with its earlier conclusion in the *Stevens Report* that ISPs provided information services.⁵¹ Nor, as some have suggested, did the Commission’s decision turn on the fact that GTE and those tariffing similar services offered those services to ISPs. Rather, the Commission recognized that GTE was providing what we would now recognize as “broadband access service”—a service analogous to special access service or point-to-point private line service connecting high volume end-user customers to interexchange carriers, all of which constitute telecommunications services. The Commission also found that ISPs remained information service providers because they primarily offered other functions—such as email—that involved storage and retrieval.⁵²

The description of the DSL service that was accepted and tariffed in the *GTE DSL Tariff* and subsequent *Bell Atlantic DSL Tariff*⁵³ matches the type of services offered by broadband access providers. For example, Bell Atlantic described its Infospeed DSL Service as transporting “an end user’s data from the network interface device (NID) to an Asynchronous Transfer Mode (ATM) portthe low frequency band is used for voice communications, while the high

⁵⁰ See *id.* at 22476.

⁵¹ Federal-State Board on Universal Service, *Report to Congress*, 13 FCC Rcd. 11,501 (1998) [hereinafter *Stevens Report*].

⁵² *Id.* at 22480 (“we disagree with ALTS’s suggestion that the ‘telecommunications’ service ends where the ‘information service’ begins”).

⁵³ *Bell Atlantic DSL Tariff*, 13 FCC Rcd. 23667 (1998).

frequency band is used for data traffic, *which is sent and received via a modem supplied by the end user.*⁵⁴

To conclude the first stage of the analysis, broadband access providers of all technologies offer to provide the identical service to that accepted for tariff as a telecommunications service in the *GTE DSL Tariff* as the “telecommunications component” in their “offering.”⁵⁵ They offer to serve the public in an indifferent manner. In the next stage in the analysis, PK will demonstrate that broadband access providers offer this “telecommunications component” as their primary offering, with information services components provided as additional features, and that the combined telecommunications and information services components are not so “functionally integrated”⁵⁶ as to constitute a single information service.

C. Applying Both *NARUC* and the Analysis of the *Cable Modem Ruling* Shows That Broadband Internet Access is a Telecommunications Service

The *NOI* provides the occasion for the Commission to revisit its 2002 *Cable Modem Ruling*. In doing so, the Commission should not merely update its factual record with regard to the nature of the “offer” made by broadband providers. It must also address a fundamental flaw in its reasoning with regard to which information services constitute a part of the “offer” to consumers and which information processing services are in fact part of the basic telecommunications service as a function of Section 3(20).⁵⁷ Indeed, the Commission has explicitly solicited comment on this question.⁵⁸

In 2002, the Commission sought to answer a different question than it faces in the current Notice of Inquiry. In the *Cable Modem Ruling*, the Commission considered the following

⁵⁴ *Bell Atlantic DSL Tariff*, 13 FCC Rcd. 23667, 23670-71 (1998).

⁵⁵ See *Stevens Report* at 11,530 fn. 60, for a discussion of the distinction between an offer of a single service with distinct components, and an offer of a several distinct services.

⁵⁶ *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967, 991 (2005).

⁵⁷ Codified at 47 U.S.C. §153(20).

⁵⁸ *NOI* ¶ 59 and n.170.

question: When a provider offers its customers a bundle of services (“cable modem service”), including telecommunications components and information service components, how should it be classified? In the *Cable Modem Ruling*, the Commission offered a framework—blessed by the Supreme Court as a permissible statutory construction in *Brand X*—that held that when an information service component is functionally integrated with the telecommunications component of a combined offering, the information services components outweigh the telecommunications components and the offering as a whole becomes an information service.

The Commission applied this framework and found that cable modem service was an information service. But in doing so, the Commission made a fundamental error. DNS service—the service that the Commission and the Supreme Court both identified as being an inextricable component of Internet access—is not an information service. 47 U.S.C. § 153(20) says this expressly, codifying years of Commission precedent that found that services necessary to route, manage, or otherwise use telecommunications services are themselves regulated as telecommunications services.⁵⁹ While broadband providers may sell various information services to their customers, those services are not part of the offer of broadband Internet access service, because there is no functional integration between the broadband access and the information services.⁶⁰ Because DNS is excluded from the definition of “information service” by the plain language of the statute, the *Cable Modem Ruling*’s conclusion that DNS is “functionally integrated” with broadband access—thus converting broadband access from a

⁵⁹ 47 U.S.C. § 153(20) states that “any ... capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service” is not an information service. *See infra*, Section II.C, for more discussion of this point.

⁶⁰ Thus, when a broadband provider such as Comcast lists along with its telecommunications service an information service (such as “SmartZone® Communications Center with 7 e-mail accounts, each with 10GB of storage,” *see* Appendix A), the information service is not part of the telecommunications offer because they are not functionally integrated.

telecommunication service to an information service—cannot hold. The Commission must therefore determine, based on the provider’s advertising and other evidence of how it “holds itself out to the public,” whether services such as “e-mail, newsgroups, and maintenance of the user’s World Wide Web presence” are still “functionally integrated” with the offer of broadband access service or whether the offer of broadband access service has now emerged as a discrete offering similar to the offering of voice service with complimentary voice mail.

Under the traditional *NARUC* analysis, it is also clear that broadband providers are common carriers. Today, it is clear in a way that it was not in 2002 that the general public primarily uses Internet access service as a conduit for third-party content—to interact with information services such as email and social networking, to shop online, to watch movies and listen to music, to access reference materials, and so forth. Broadband Internet access service works best when it gets out of the way and allows consumers to access “the information of [their] choosing.”⁶¹ The *NARUC* analysis supports a classification of broadband Internet access service as a telecommunications service because that analysis hinges on what a carrier does, and ISPs do in fact hold themselves out as providing telecommunications services to their customers.

I. The Cable Modem Declaratory Ruling is Consistent With NARUC, and Supports A Classification of Broadband Access As a Telecommunications Service

In the *Cable Modem Ruling*, the Commission found that the classification of cable broadband service depends on the “nature of the functions that the end user is offered.”⁶² It further found that, “[a]s *currently provisioned* cable modem service supports such functions as e-mail, newsgroups, maintenance of the user’s World Wide Web presence, and the DNS.”⁶³

Nothing in this analysis suggests that the Commission intended to depart from the *NARUC* test,

⁶¹ 47 U.S.C. § 153(43).

⁶² *Cable Modem Ruling* ¶ 38.

⁶³ *Id.* (emphasis added).

discussed *supra*, which holds that an entity is a common carrier because of what it does, not because of how it describes itself, or how a regulatory body has categorized it. Nor does the analysis in the *Cable Modem Ruling* allow an entity to evade common carrier status by merely billing for information services as part of a bundle with telecommunications services.⁶⁴ Rather, the *Cable Modem Ruling* explains that a bundle of telecommunications services and information services becomes, in its entirety, an information service when the transmission of data is only a minor part of the overall offering, used only in conjunction with an information service also offered and maintained by the provider. When the different services are functionally integrated in this way, they become part of a single “offer,” and it is this offer that determines the regulatory classification of the service.⁶⁵ Applying this analysis, the Commission found that the information services components of the offer of broadband Internet services were predominant, and that therefore the entire offer was for information services. But this application fails today. First, because of 47 U.S.C. § 153(20), the Commission’s prior determination that DNS (or similar routing and support functions) is an information service is incorrect. Thus, an offer of

⁶⁴ As the *Stevens Report* put it, “[i]t is plain ... that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail.” *Stevens Report* at 11,530 fn. 60.

⁶⁵ This is the most reasonable interpretation of the *Cable Modem Ruling* “functional integration” test. The language of the *Ruling* is far from clear, and the erroneous characterization of users “accessing the DNS” to use the transmission functions further confuses matters. As discussed below, the *Cable Modem Ruling* and subsequent description of it by the *Brand X* majority could also be read to say that because it is necessary to use information processing for routing telecommunication transmission, this “functional integration” transforms the telecommunications service into an information service. Such a reading, however, would not only depart without notice from Commission precedent, it would be directly contrary to the plain language of Section 3(20), which makes information processing necessary for routing telecommunications a telecommunications service. *Accord* *Bright House Networks v. Verizon Cal.*, *Memorandum Opinion & Order*, 23 FCC Rcd. 10,704 (2008). Further, such a reading would have significant negative policy consequences. Every time a telecommunication carrier replaced a physical switch with a “soft switch” that used “information processing” to route calls, it would convert that segment of the PSTN into an “information service.”

“broadband Internet access” does not contain any information services components.⁶⁶ Second, it is clear that broadband providers today predominantly offer telecommunications—broadband Internet access—and not any information services that may be used along with Internet service. It is clear from the marketing materials of broadband providers themselves that they are primarily offering Internet access, and not incidental information services they may also provide.

a) The *Cable Modem Ruling* Used the Words “Support” and “Offer” in Specific Ways

To understand how the *Cable Modem Ruling* operates, it is necessary to unpack some of its terminology, because it uses two everyday words—“support” and “offer”—very precisely.

By “support,” the *Cable Modem Ruling* meant “provide as part of a bundle.” Thus, when the *Cable Modem Ruling* writes that broadband Internet access “supports” various information processing functions,⁶⁷ it did not mean that a broadband provider “supports” an independent information service like Amazon.com just because it provides a service that allows its consumers to communicate with Amazon.com. It clarified that it was referring to services that are provided

⁶⁶ It follows necessarily that an offer of telecommunications services can never be functionally integrated with an information service. But the reasoning of the *Cable Modem Ruling* is still useful, because it shows that when an offer predominantly is of an information service, a telecommunications service may be functionally integrated with it. Thus, while an offer of broadband Internet service (a telecommunications service) can never be functionally integrated with any information service, an offer of an information service (e.g., cloud computing, remote storage, or smart grid management) might be functionally integrated with a telecommunications service. To make this more concrete: An information service is never necessary to access the Internet, and thus an offer of broadband Internet access is an offer of telecommunications. But while a telecommunications service is necessary to access remote storage, an offer of remote storage is an offer of an information service even though it may have a telecommunications component. This analysis does more than merely restate the definition of “information service” which makes it clear that an information service must be provided “via telecommunications.” 47 U.S.C. § 153(20). Rather, it applies to situations where the primary offer is of an information service, but the information service provider also provides telecommunications, instead of merely using a pre-existing telecommunications capacity.

⁶⁷ *Cable Modem Ruling* ¶ 38.

to users that are “included in their cable modem service.”⁶⁸ A broadband service “supports” those information services that are bundled with Internet access, such as email or web hosting. But a broadband service does not “support” the kinds of information services that most broadband consumers use—email from independent, third-party providers (such as Gmail and Hotmail), web hosting from companies like Bluehost, and “web presences” from companies like Facebook and Twitter. Thus, when an ISP provides DNS lookup or caching to its customers when they are accessing a third-party web page, the ISP “supports” DNS lookup and caching but not the website itself.⁶⁹

The services that a broadband provider “supports” are “offered” to customers as part of Internet access only when they are an essential part of using the Internet. Only when a service is so linked to Internet access that it is impossible to use the Internet without it does it become part of the same “offer” as Internet access. As the Supreme Court explained, “[t]he entire question is whether the products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes).”⁷⁰ It is the level of integration between the different services that determines whether they are part of a single “offer.” The Commission had found that DNS was an information service, and that it was a necessary component of Internet access. Deferring to the agency’s expertise, the Supreme Court described the FCC’s reasoning thus: “the

⁶⁸ *Cable Modem Ruling* ¶ 38 fn. 153.

⁶⁹ The Supreme Court also found that when a customer uses his broadband connection to access a third party information service (i.e., a web page), he is only using an information service provided (or offered) by the ISP to the extent he is using the ISP’s DNS and caching. *Brand X* at 998-1000. Since neither DNS nor caching are information services when offered in conjunction with transmission (the implications of 47 U.S.C. § 153(20) were not squarely before the Court), it follows that a user who accessed a third-party web page over his broadband connection is not using any information services offered or provided by the ISP.

⁷⁰ *Brand X* at 991.

consumer uses the high-speed wire *always* in connection with the information-processing capabilities provided by Internet access....”⁷¹

Even in 2002, the Commission recognized that many customers would not use the email and other services offered by their broadband providers with their connections. However, it found that, even if that is the case, “[n]early every cable modem subscriber ... accesses the DNS that is provided as part of the service.”⁷² Given this analysis, it is clear that the Commission meant that a broadband provider “offered” an information service as part of Internet access only to the extent that consumers “accepted” the offer by actually making use of it. Because the Commission categorized DNS as an information service, it found that Internet access was always a combination of telecommunications and information processing services, and therefore was, as a whole, an information service.

However, as discussed more thoroughly below, the Commission’s analysis of DNS was incorrect. Because most people access the Internet in order to access independent, third-party services and make little to no use of the information services that ISPs may happen to offer when doing so, and because DNS is not an information service, most broadband consumers, when accessing the Internet, are only using the telecommunications services offered by ISPs. Even consumers who do make heavy use of ISP-provided email or other ISP-provided information services, will, when accessing third-party content on the Internet, do so without making use of any of an ISP’s information services. To access Facebook, for example, a consumer might make use of a number of Internet connectivity services a carrier provides, including

⁷¹ *Brand X* at 988 (emphasis added).

⁷² *Cable Modem Declaratory Ruling* ¶ 38 fn. 153. While email and other services may be part of the same “offer” in the common use of the term, they are not part of the *offer of Internet access* given the language of the *Cable Modem Ruling* and the Supreme Court’s analysis. Only services that are functionally integrated with Internet access are part of the offer of Internet access.

a physical connection between the cable system and the Internet by operating or interconnecting with Internet backbone facilities[,] protocol conversion, IP address number assignment, domain name resolution through a domain name system ... protocol conversion, IP address number assignment, domain name resolution through a domain name system (DNS), network security[,] caching[,] [n]etwork monitoring, capacity engineering and management, fault management, and troubleshooting⁷³

Just like DNS, none of these are information services. Therefore, while a telecommunications provider may also be in the information services business, those services remain distinct and, from the perspective of the telecommunications service, superfluous. ISPs may “offer” services to their consumers other than telecommunications services, but these are not “offers” under the analysis of the *Cable Modem Ruling* because they are not functionally integrated with it. The telecommunications services are entirely separate from, or incidental to, such information services.

b) The Commission Should Resolve an Internal Contradiction in Its Precedent by Clarifying That DNS is an Essential Component of Internet Connectivity

Because so much hinges on the characterization of DNS, this section will explore in more depth why DNS, when offered along with a telecommunications service, is itself a telecommunications service and not an information service.

In 2002, the Commission mischaracterized DNS as being an Internet application similar to web hosting or email,⁷⁴ rather than a necessary component of Internet access.⁷⁵ In 2002, the

⁷³ *Cable Modem Ruling* ¶ 17 (footnotes omitted).

⁷⁴ *Id.* at 4821-23, ¶¶ 37-38. The *Brand X* court found this characterization “at least reasonable,” 545 U.S. at 999. Justice Scalia’s dissent noted that the Court bypassed the argument that “routing information” like DNS is expressly excluded from the definition of an information service in 47 U.S.C. § 153(20). *Brand X*, 545 U.S. at 1012-13 (Scalia, J., dissenting). It would certainly be “at least reasonable” for the Commission to revisit its understanding of DNS in light of a key statutory provision the *Cable Modem Ruling* scarcely discussed. *See Cable Modem Ruling*, ¶ 38 fn.150.

⁷⁵ DNS does reside in the applications layer under the Open Systems Interconnection (OSI) model of communications systems, but just as “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics,” *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J.,

Commission got DNS exactly right when it categorized it as part of a basic “Internet connectivity” service (along with “protocol conversion, IP address number assignment . . . network security, and caching”⁷⁶). The Commission should act now to resolve this contradiction in its precedent.

DNS is a service that translates easy-to-remember domain names (*e.g.* amazon.com) into the IP addresses that are necessary to route Internet traffic (*e.g.* 72.21.207.65). The Commission’s determination that this basic functionality constitutes an “application” and an information service was wrong for several reasons. The first reason is legal and definitional. DNS is an essential part of the “the management, control, or operation of a telecommunications system or the management of a telecommunications service,”⁷⁷ and therefore cannot be an “information service” under the law. Services that are an essential part of the operation or use of a telecommunications service are part of the telecommunications service. They are inseparable from the “offering of telecommunications for a fee directly to the public.”⁷⁸ The second reason relates to an ordinary user’s perspective. From this perspective, DNS is part of plain vanilla, no-frills “Internet connectivity.” Domain names are the phone numbers of the Internet—most of the time, IP addresses are just implementation details. Thus, Internet access without DNS is like telephone service without telephone numbers. The Supreme Court was therefore right when it

dissenting), the Communications Act does not enact the Open Systems Interconnection model. From a telecommunications law perspective, what matters is the service being offered to the customer, and whether a particular component is part of that service or something extra. The offered “service” may be cross-cutting and involve components from any layer in that conceptual schema.

⁷⁶ *Cable Modem Ruling* ¶ 17 (footnotes omitted). In the current *NOI*, the Commission highlighted this previously-identified connectivity service as possibly being a service subject to Title II reclassification. *NOI* ¶¶ 2, 16.

⁷⁷ 47 U.S.C. § 153(20).

⁷⁸ 47 U.S.C. § 153(46).

found that “DNS is essential to providing Internet access.”⁷⁹ DNS lookup is as essential to ordinary Internet use as the physical connection to the house, because Internet access without DNS is of little value to an ordinary Internet user: URLs would not work, email could not be sent, and links would be broken. From the user’s perspective, DNS is no different than any other behind-the-scenes switching service, and it should be treated as such.

Another reason the Commission’s 2002 determination that DNS constitutes an information service is wrong again involves a comparison to telephone numbers—in this case, toll-free numbers, which “overlay” the plain North American Numbering Plan numbers similar to the way the domain name system overlays IP addresses. Just as the Commission used its Title II authority to promulgate rules about toll-free numbers,⁸⁰ it can use its Title II authority to regulate a service that includes DNS (which is itself, through ENUM,⁸¹ increasingly as much a telephone routing technology as a domain name lookup table).

Over the course of the forty years the Commission has followed the evolution of telecommunications and information processing, it has repeatedly considered and rejected the argument that adding computers, or a new kind of software, or a new kind of back-end network architecture to a telecommunications service makes it no longer subject to regulation. The Commission rejected this argument in *Computer III*, writing that “[d]ata processing, computer memory or storage, and switching techniques can be components of a basic service if they are used solely to facilitate the movement of information.”⁸² The Commission has also rejected this

⁷⁹ *Brand X*, 545 U.S. at 990.

⁸⁰ Toll Free Service Access Codes, 62 Fed. Reg. 20,126, ¶ 2 (Apr. 25, 1997).

⁸¹ See ENUM, What is ENUM?, <http://enum.org/what.html>; see also Dugie Standeford, *Landline, Mobile Operators Said Increasingly Deploying E-Numbering for Cheaper Call Routing*, COMMUNICATIONS DAILY, June 21, 2010, at 6-7.

⁸² Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry), *Report & Order*, 104 F.C.C.2d 958, ¶ 10 (1986) [hereafter *Computer III*].

argument in the *Frame Relay Order*⁸³ and in the *IP-in-the-Middle Order*,⁸⁴ reasoning that adding IP networking and data processing technology to a telecommunications service does not transform it into an unregulated service. For years, and for sound policy reasons, the Commission has held that “adjunct to basic”⁸⁵ services like DNS, which “are used solely to facilitate the movement of information”⁸⁶ are not information services.⁸⁷ The 1996 Telecommunications Act codified this analysis.⁸⁸ To the extent that the *Cable Modem Ruling* and subsequent decisions based on the *Cable Modem Ruling* hold to the contrary, the Commission should overrule them as inconsistent with the plain language of the Act and Commission precedent.

⁸³ Independent Data Commc’ns Mfrs. Ass’n, Inc., Petition for Declaratory Ruling that AT&T’s InterSpan Frame Relay Serv. Is a Basic Serv., *Memorandum Opinion & Order*, 10 FCC Rcd. 13,717 (1995).

⁸⁴ Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, *Order*, 19 FCC Rcd. 7457 (2004).

⁸⁵ See North Amer. Telecoms. Ass’n Petition for Declaratory Ruling Under Section 64.702 of the Comm’n’s Rules Regarding the Integration of Centrex, Enhanced Servs., and Customer Premises Equip., *Memorandum Opinion & Order*, 101 F.C.C.2d 349, ¶¶ 22-28 (1985), for a discussion of basic and adjunct to basic services.

⁸⁶ *Computer III*, 104 F.C.C.2d at ¶ 10.

⁸⁷ In fact, the Commission has repeatedly found that services necessary for the provision of transmission services should themselves be regulated as telecommunications services, whether those services are technological in character or not. For instance, in 2008, the Commission wrote that

We have previously found that services or functions that are “incidental or adjunct to common carrier transmission service” – i.e., they are “an integral part of, or inseparable from, transmission of communications” – should be classified as telecommunications services. For instance, the Commission has found that central office space for collocation, certain billing and collection services, and validation and screening services should be treated for regulatory purposes in the same manner as the transmission services underlying them, notwithstanding that none of these services actually entails transmission.

Bright House Networks v. Verizon Cal., *Memorandum Opinion & Order*, 23 FCC Rcd. 10,704, 10,715, ¶ 31 (2008) (footnote omitted).

⁸⁸ See Telecommunications Act of 1996 § 3(a)(2)(20), 47 U.S.C. § 153(20).

It is true, as PK has observed in the past,⁸⁹ that it is possible for a user to use an alternative DNS provider, rather than the DNS service that is part of the Internet connectivity purchased from the ISP. This fact is emblematic of the many changes that have come to the broadband market since 2002, that together merit reconsideration of the initial classification order. Despite the availability of alternative DNS providers, however, DNS is an essential part of Internet connectivity. Using competitive DNS (such as OpenDNS or Google DNS) to translate domain names into IP addresses is akin to using a dial-around service (*e.g.* 10-10-321) to call a long distance number on the PSTN: doing this does not change the telecommunications character of the customer's primary long-distance carrier.⁹⁰

For these reasons, when offered as part of broadband Internet access, DNS is an essential part of a telecommunications service, not an additional service and not an application that merely uses telecommunications service as an input.

2. *Broadband Access is a Telecommunications Service Under the NARUC Analysis*

The first prong of the *NARUC* analysis⁹¹ is met for broadband providers because they hold themselves out indifferently to the public. Appendix A contains screenshots and captures of the service offerings of several large broadband providers as they appeared on July 13, 2010.⁹²

⁸⁹ *Reply Comments of Public Knowledge*, in A National Broadband Plan for Our Future—NBP Public Notice #30, GN Docket Nos. 09-47, 09-51, 09-137, at 9 (filed Jan. 26, 2010).

⁹⁰ When some kinds of “adjunct to basic” services like DNS are offered on a standalone basis, unaccompanied by a traditional telecommunications service, then the “offer” is for an information service, and not for a telecommunications service. A data processing service may be an information service on its own, but regulated under Title II when functionally integrated with a telecommunications service and offered with one.

⁹¹ *NARUC*, 525 F.2d at 641.

⁹² The providers include AT&T (15.4% national market share), Comcast (15.3%), Verizon (8.8%), EarthLink (3.1%), Charter (3.0%), Qwest (2.9%), CenturyLink (CenturyTel & Embarq, 2.1%), Windstream (1.0%), MediaCom (0.8%), RCN (market share unavailable), and Cavalier (also unavailable). Market share figures are as of the third quarter of 2008. *See* ISP Planet, Top 23 U.S. ISPs by Subscriber: Q3 2008, <http://www.isp-planet.com/research/rankings/usa.html>.

While many of the broadband providers require that a user provide them with a residential address in order to view their offerings, they offer uniform prices and service to anyone who is located in their service areas. While the exact details of what services are offered might change within a provider's service area, none of the providers individually negotiate with customers to determine specific rates and service offerings. Rather, they serve the public indifferently with service levels and at standard rates.

The second prong of the *NARUC* analysis is met for broadband providers because they allow users to “transmit intelligence of their own design and choosing,”⁹³ that is, to communicate. The fact that the primary purpose of broadband service is to allow users to communicate with third parties can be shown most clearly in the way broadband providers hold themselves out to the public. Most ISPs recognize that they are interchangeable providers of a commodity service, and market their products accordingly. Appendix A clearly shows that the largest broadband providers hold themselves out as providing basic communications services: they distinguish their offerings from each other, and from those of their competitors, primarily on the basis of speed (bandwidth) and price. For example, AT&T provides potential customers a chart comparing its various broadband service offerings. This chart contains four data points: upload speed, download speed, suitability of the different speeds for communicating with various third-party Internet services, and price. Like most broadband providers, AT&T is not offering advanced services to the public that only have telecommunications as one component; rather, they are offering pure telecommunications capabilities, advertising their services using telecommunications terminology, and clearly envisioning working as a transparent communications pipe between their customers and other Internet users and services.

⁹³ *NARUC*, 533 F.2d at 609.

Communications services that are held out to the public indifferently are among the services that are “affected with a public interest”⁹⁴ that are traditionally regulated under a common carrier framework. Because the *NARUC* factors are met with respect to broadband Internet service providers, they should be regulated as telecommunications providers.

D. The Public Interest Requires a Finding That Broadband Providers Offer Telecommunications Service

Although the purpose of an objective statutory definition and an objective test such as the *NARUC* test is to limit the “unfettered discretion” of the Commission and prohibit a determination purely on the basis of policy,⁹⁵ the Commission is also entitled to consider how its interpretation of the statute will serve the public interest by allowing it to better further the goals of Congress as expressed through the Communications Act.⁹⁶ In its previous determination that dial-up Internet access constituted an information service, the Commission stated that its findings were “reinforced by the negative policy consequences of a conclusion that Internet access services should be classed as ‘telecommunications.’”⁹⁷ Similarly, in its consideration of the classification of wireless broadband access service,⁹⁸ the Wireline Framework Order,⁹⁹ and the *Cable Modem Ruling*, the Commission supported its application of the definitional framework to the service in question with policy arguments and predictive judgments with regard to the

⁹⁴ *Munn v. Illinois*, 94 U.S. 113, 126 (1876).

⁹⁵ *NARUC*, 525 F.2d at 644; *see also MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231-32 (1994).

⁹⁶ *See Brand X*, 545 U.S. at 1003 (“Nothing in the Communications Act or the Administrative Procedure Act makes unlawful the Commission’s use of its expert policy judgment to resolve these difficult questions.”); *Computer and Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, 210-211 (D.C. Cir 1982) (“we also find that the Commission’s decision is sustainable on the alternative policy grounds”).

⁹⁷ *Stevens Report* at 11,540.

⁹⁸ Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, *Declaratory Ruling*, 22 FCC Rcd. 5901 (2007).

⁹⁹ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report & Order & Notice of Proposed Rulemaking*, 20 FCC Rcd. 14,853 (2005).

benefits of classifying the services as information services rather than as telecommunications services.

As Public Knowledge observed in its Reply Comments in the National Broadband Plan, the benefits that the Commission predicted from classifying cable modem service and other Internet access services as “information services” have stubbornly failed to emerge. Facilities based competition has not developed, and consumers generally have the same choice between cable modem service and telco-provided access that they had in 2005. Nor has high-speed access become more affordable. A study by the Open Technology Initiative at the New America Foundation found that the United States offered the most expensive top tier access of the ten industrialized nations surveyed.¹⁰⁰

The Commission’s assumption that its “ancillary jurisdiction” would provide it adequate authority to protect consumers and encourage pro-competitive policies to foster innovation and investment likewise proved mistaken. In the wake of the Comcast decision, the Commission cannot repurpose the Universal Service High Cost Fund or Lifeline/Lifeline to support broadband. Nor can the Commission ensure equal access for traditionally marginalized communities under its power to prevent “unjust and unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services.” The Commission lacks authority to require even the most basic disclosures necessary to protect consumers or promote a competitive marketplace. Nor can it order providers to protect consumer information, or discontinue abusive practices. For example, broadband providers are now free to block or degrade any application or content a user wishes to access, while simultaneously reassuring the user that nothing is

¹⁰⁰ James Losey & Chiehyu Li, Price of the Pipe: Comparing the Price of Broadband Service Around the Globe, Apr. 15, 2010, http://oti.newamerica.net/publications/policy/price_of_the_pipe.

happening. Broadband providers can terminate service at random for violation of undisclosed policies or subjective reasons such as using “too much” bandwidth.

Providers, of course, are quick to proclaim that these sorts of customer abuses or discriminatory behavior could never happen. Except, of course, that they have happened. And, under the current legal regime, no doubt will happen again.

Most troubling, however, is that under the existing legal framework, the Commission is powerless to prevent disruptions of service—and powerless to address massive disruptions if they occur. The Internet has experienced several “near misses” with regard to a catastrophic disruption of service. For example, in 2008, a peering dispute between Cogent and Sprint cut off Sprint subscribers from Cogent-hosted websites.¹⁰¹ It does not take too much effort to imagine a scenario in which two or three major providers, such as AT&T and Comcast, refuse to exchange traffic over a commercial dispute, or that MVPDs might block access to a programmer’s website and online content as a bargaining chip in a carriage dispute. Industry assurances that such things could “never happen” ring somewhat hollow in light of the claims prior—and during—the Comcast incident that Comcast was not and would not block or degrade access to legal content such as the King James Bible or recordings of barbershop quartet music in the public domain.

By contrast, classification of broadband access service as a telecommunications service would provide the Commission with the power to repurpose the Universal Service Fund, prevent discrimination in deployment of services or facilities, and protect consumers. Further, under the authority to mandate interconnection, the Commission could prevent a commercial dispute from blossoming into a massive disruption of service potentially causing significant economic harm and interfering with public safety communications. While such intervention might never prove

¹⁰¹ Mark Hachman, *Sprint Cuts off ‘Net to Cogent Sites*, PCMag, Oct. 31, 2008, <http://www.pcmag.com/article2/0,2817,2333750,00.asp>.

necessary, the recent experience with the meltdown of our financial markets and the massive oil spill in the Gulf—both of which were widely declared to be not merely unlikely to occur, but impossible to occur—should warn us that we need to be prepared for emergencies that may have a low probability of occurring, but would cause tremendous harm if they did occur. Far better to ensure that the Commission has the legal authority to step in to prevent a crisis from occurring than discover after the fact the Commission cannot even repair the damage.

E. The Commission Should Not Create a Special Regulatory Category for Wireless Offerings

The Communications Act defines a telecommunications service as “the 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.*”¹⁰² The plain language of the statute makes it clear that, in determining the regulatory status of an offering, the Commission should not look to the technology underlying that offering.

It is instructive that *NARUC*, the leading case on the classification of services under Title II, deals directly with wireless services, identifying the wireless “land mobile radio” service as a common carrier service.¹⁰³ The *NARUC* court recognized, as the Commission should today, that Title II classification is not related to the platform used to deliver a given service.¹⁰⁴ Nor does the availability of regulation under Title III, or the desire to further broader policy goals of the Communications Act, allow the Commission to exclude from Title II an offer of telecommunications that satisfies the *NARUC* test.¹⁰⁵

In light of the plain statutory language and judicial precedent establishing platform agnosticism, the Commission should not try to create a distinct regulatory structure for “wireless

¹⁰² 46 U.S.C. § 153(46) (emphasis added).

¹⁰³ *NARUC*, 525 F.2d at 647.

¹⁰⁴ *Id.* at 640-44.

¹⁰⁵ *Id.* at 644.

broadband”¹⁰⁶ simply because it uses wireless technology. It would be arbitrary for the Commission to define broadband Internet access generally as a Title II service, while at the same time creating a distinct category for that same service merely because it is offered wirelessly.

1. Wireless Internet Access Service is Still Internet Access Service

Wireless Internet access service providers, like their wired counterparts, advertise their service primarily on the basis of speed.¹⁰⁷ Sprint advertises its 4G network as being “[u]p to 10x faster” than competing 3G networks.¹⁰⁸ AT&T advertises itself as “the nation’s fastest 3G network.”¹⁰⁹ Verizon Wireless touts “speed” as the first benefit of its “mobile broadband” service.¹¹⁰ Clear invites consumers to “Blow away [their] old internet connection with CLEAR,” proclaiming itself to be “the new, fast, fresh way to connect with blistering 4G high speed wireless internet at home or around town. No streaming movie, no video game or video chat can choke it.”¹¹¹

NARUC clearly requires Title II classification for wireless Internet access service. Wireless carriers, like their wired counterparts, offer their service indifferently to the public. The website of every wireless carrier advertises generally available prices for a standard set of services.¹¹² The practice of these carriers is to “serve all indiscriminately.”¹¹³ Any consumer living within the service area capable of passing required credit checks can sign up for and

¹⁰⁶ *NOI* ¶ 102.

¹⁰⁷ Although some carriers also advertise their respective coverage areas, this fact does not weigh against classifying the service they offer as a Title II service.

¹⁰⁸ See Sprint: First and Only Wireless 4G from a National Carrier, <http://www.sprint.com/4G> (“Up to 10x Faster Claim: Based on download speed comparison of 3G’s 600 Kbps vs. 4G’s 6 Mbps.”).

¹⁰⁹ See Video: Headless (AT&T 2009), <http://www.youtube.com/watch?v=PoAuhptVF-g>.

¹¹⁰ See Appendix C: Verizon Mobile Broadband.

¹¹¹ See Clear, High Speed Mobile 4G Wireless Internet Service with WiMAX, <http://www.clear.com/>.

¹¹² See Appendix B: Wireless Internet Service Provider Webpages.

¹¹³ *NARUC*, 525 F.2d at 641.

receive advertised services—carriers do not “make individualized decisions, in particular cases, whether and on what terms to deal.”¹¹⁴ Wireless Internet access service, offered to “all people indifferently,”¹¹⁵ is a paradigmatic example of Title II common carrier service.

2. *Creating a Distinct Regulatory Category for Wireless Internet Access Services Would be Disruptive and Counterproductive*

Excluding wireless Internet access services from Title II would undermine a number of Commission programs, as well as run contrary to Commission precedent.¹¹⁶ In the past, the Commission has determined that fixed wireless offerings are more appropriately grouped with DSL Internet access services than with mobile wireless offerings.¹¹⁷ Similarly, it separated legacy wireless technologies from advanced mobile data services.¹¹⁸ In doing so, the Commission wisely recognized that making generalizations about wireless offerings was impossible and that any examination of wireless Internet access services must be done on a service-by-service basis.

¹¹⁴ *Id.*

¹¹⁵ *Id.* (internal quotations and citations omitted).

¹¹⁶ It would also create a grouping with at least as many differences as similarities. Even a single mobile phone operator may offer a wide variety of connectivity services. For example, Verizon Wireless offers pre-approved apps for “feature phones” through its VCast offering, a browser experience through its Android smartphones, single laptop connectivity through USB modems, and multiple laptop connectivity through its MiFi wireless access point. Other carriers, such as Clear, offer a wireless Internet access service designed to replace traditional wired offerings in the home.

¹¹⁷ See AT&T Inc. and BellSouth Corp. Application for Transfer of Control, *Memorandum Opinion & Order*, 22 FCC Rcd. 5662, 5841 fn.15 (2007).

¹¹⁸ Applications of Cello Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, 23 F.C.C.R. 174444, ¶¶ 56-7 (2008).

- a) Excluding Wireless Internet Access Services from Title II Would Require a Finding That Such Service is Not “Broadband Capability” as That Term is Used in BDIA and Elsewhere

Internet access service is properly classified under Title II because it meets the test established in *NARUC*.¹¹⁹ As a result, it is a logical impossibility for the Commission to say that wireless providers *are* offering Internet access service while at the same time insisting that those providers *are not* offering a Title II service. In *NARUC*, the court rejected the idea that there was any inherent inconsistency between wireless services and Title II common carrier status.¹²⁰

The Commission has properly equated Internet access services provided by a variety of technological platforms in the past.¹²¹ Once the Commission recognizes that Internet access service is properly regulated under Title II, there is simply no rational way to exclude wireless offerings. The *NARUC* court itself recognized that the use of wireless technology does not make a service ineligible for Title II classification.¹²²

The Commission cannot exclude wireless services from Title II without first determining that the service offered by wireless providers is *not* broadband Internet access service. It would be required to explain why the service offering fails the *NARUC* factors and why the service was not being offered to the public as common carrier service. Additionally, if the service being offered by wireless carriers is not broadband Internet access service, the Commission must exclude wireless service from any analysis of or planning for the broadband Internet access

¹¹⁹ See discussion *supra* Section II.B.

¹²⁰ *NARUC*, 525 F. 2d at 644.

¹²¹ See, e.g. Industry Analysis and Technology Division Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2008 at 1*, 2010 WL 515415 (2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf.

¹²² *NARUC*, 525 F.2d at 644.

market. In addition to being catastrophic to efforts to properly develop national broadband policy, such exclusion would directly contradict past Commission practice.¹²³

- b) Excluding Wireless Internet Access Services from Title II Would Require Treating Wireless Internet Access as a Separate Product Market from Title II “Broadband Access”

The Commission currently treats wireless Internet access as “broadband capacity” under the BDIA and for certain purposes when considering product markets. In its most recent *Form 477 Report*, it combines information from all types of Internet access services including “telephone companies, cable system operators, *terrestrial wireless service providers*, *satellite service providers* and other facilities-based providers of advanced telecommunications capability.”¹²⁴ The *Form 477 Report* notes that 25 million people use mobile wireless services for high-speed “full Internet access.”¹²⁵ This type of full, high speed access is why the Commission can proclaim that there were 86 million total residential high-speed connections at the end of 2008.¹²⁶ It later subdivides this overarching category of Internet access service into 70 million fixed-technology connections and 16 million mobile wireless subscriptions.¹²⁷

Similarly, the Commission’s *700 MHz Order* equated wireless Internet access as a functionally equivalent service to wireline broadband.¹²⁸ The Commission explicitly structured its licensing to enable “new [wireless] entrants that want to compete directly with wireline

¹²³ See, e.g. FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, High-Speed Services for Internet Access: Status as of December 31, 2008 (Feb. 2010), [hereinafter *Form 477 Report*]; FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010) [hereinafter *NBP*].

¹²⁴ *Form 477 Report* at 7.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Second Report & Order*, 22 F.C.C.R. 15289 ¶ 256 (2007).

broadband alternatives.”¹²⁹ The hope of the Commission, as discussed with varying degrees of enthusiasm by then Chairman Martin¹³⁰ and Commissioners Copps,¹³¹ Adelstein,¹³² and McDowell,¹³³ was to create a “third pipe” to compete with existing wired Internet access service providers.

The creation of a wireless “third pipe,” functionally equivalent to and an effective substitute for the two dominant wireline providers, has underpinned a number of the Commission’s spectrum decisions in recent years. In approving the license transfer that allowed Clearwire Corporation to expand its high-speed wireless Internet access service, the Commission considered the effects of the transfer on both mobile telephony/broadband services and *fixed broadband services* as the relevant product market.¹³⁴ The Commission found that the merger could “speed the arrival of a wireless broadband pipe that will increase competition and consumer choice, make possible new services, and promote the availability of broadband for all Americans.”¹³⁵

Finally, the National Broadband Plan likewise treats wireless Internet access as equivalent to wireline. Recommendation 4.1 of the National Broadband Plan urges the FCC, NTIA, and Congress to take steps necessary to “foster additional wireless-wireless competition at higher speed [Internet access service] tiers.”¹³⁶ Recommendation 4.2 focuses on the collection

¹²⁹ *Id.* at ¶ 77

¹³⁰ *Id.* at appendix D, p. 294

¹³¹ *Id.* at appendix D, p. 297

¹³² *Id.* at appendix D, p. 301

¹³³ *Id.* at appendix D, p. 308

¹³⁴ Spring Nextel Corporation and Clearwire Corporation, Applications For Consent to Transfer Control of Licenses, Leases, and Authorizations, *Memorandum Opinion & Order*, 23 F.C.C.R. 17570, ¶ 38-49 (2008) [hereinafter Clearwire].

¹³⁵ *Id.* at ¶ 123.

¹³⁶ *NBP* 35.

of more data, including *Form 477* data, on “actual availability, penetration, prices, churn and bundles offered by broadband service providers to consumer and businesses.”¹³⁷

Critically, the Commission hopes to include wireless broadband in its plans to expand universal service.¹³⁸ A key concern motivating the Commission to assess the regulatory framework for broadband access is the lack of authority to include broadband providers either in the recipient pool of the High Cost Fund and Lifeline/Lifelink fund or in the contribution pool for any Universal Service Fund.¹³⁹

A finding that wireless Internet access is so different from wireline access that it does not qualify as a Title II service would fly in the face of this consistent treatment of wireless as equivalent to wireline access. Of greater importance, however, are the consequences that would flow from such a classification. The Commission would need to revise its *Form 477* to exclude wireless data, and the Commission would need to revise the number of subscribers with access to service (or multiple service providers) downward accordingly. In future mergers—or other proceedings where analysis of the broadband product market is relevant—the Commission would need to exclude wireless from consideration.

Most importantly, a finding that wireless Internet access is not a Title II service would preclude providers of wireless Internet access service from receiving Universal Service Fund support for high-cost and rural areas. Given the Commission’s oft repeated understanding that wireless access will play a critical role in expanding rural broadband access,¹⁴⁰ precluding wireless access providers from receiving such support by classifying wireless access as an

¹³⁷ *Id.*

¹³⁸ *Id.* at 140-43.

¹³⁹ *Stevens Report* at 11,522 (excluding information service providers from the contribution pool, but also finding information service providers “are not entitled to federal universal service support for serving high-cost and rural areas”).

¹⁴⁰ *NBP* at 140-43.

information service would pose a serious barrier to the goal of ensuring, at a minimum, 4 Mbps capacity in underserved areas.¹⁴¹

Excluding wireless broadband access from Title II classification is not merely a violation of the plain language Section 3(46) and contrary to Commission precedent. It is bad policy. To the extent the real differences in network capacity and architecture make certain types of traffic management necessary to prevent harm to the network, the “reasonableness” standard in Sections 201 and 202 permits the Commission to take these differences into account.

In any event, it is utterly inconsistent for the Commission to support the argument that Title II combined with suitable forbearance encourages investment and growth by pointing to the example of CMRS, then in the next breath propose treating wireless broadband access as a non-Title II service.

III. The Commission Should Not Adopt a Presumption of Forbearance

The Commission seeks comment on its proposal to forbear *ex ante* from all but a handful of provisions of Title II. Such a broad stroke not only leaves the Commission potentially without the authority to deal with potential violations or other difficulties, it also runs counter to the statutory purposes behind forbearance, as evidenced in the legislative history of Section 10.

A. The Legislative History of Section 10 Indicates that Discretion to Forbear Should Be Exercised Judiciously

In 1994, the Supreme Court held that the FCC exceeded its statutory authority to “modify” the rate-filing requirements of Section 203 of the Telecommunications Act when it declared that common carriers without market power had no obligation to file their rates with the Commission.¹⁴² The Court stated that the Commission’s decision to change the statute “from a

¹⁴¹ *Id.* at 145-46.

¹⁴² *MCI Telecomms. Corp. v. American Tel. & Tel.*, 512 U.S. 218 (1994), *superseded by statute*, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. . . may [have been] a good idea, but it was not the idea Congress enacted into law in 1934.”¹⁴³

Congress, which was already at work on telecommunications reform,¹⁴⁴ and indeed was already considering legislation granting the FCC explicit forbearance authority,¹⁴⁵ took note of the Supreme Court’s ruling and sought to give the Commission the authority it had lacked.¹⁴⁶ Although Congress was unable to pass a telecommunications bill that year, it kept in mind the goal of dealing with the Supreme Court’s ruling and granting the Commission the explicit power to forbear.¹⁴⁷

Both of the competing House and Senate bills that led up to the eventual passage of the 1996 Act placed limits on forbearance. The House bill explicitly exempted Sections 201, 202, and 208, among others, from forbearance,¹⁴⁸ while the Senate bill limited forbearance from certain interLATA¹⁴⁹ and interconnection¹⁵⁰ provisions until such time as the Commission deemed they had been fully implemented.¹⁵¹

¹⁴³ *Id.* at 231–32.

¹⁴⁴ *See, e.g.*, Communications Act of 1994, S. 1822, 103d Cong. (1994).

¹⁴⁵ *Id.* § 302. Congress had long been aware of the potential legal problems created by the Commission waiving some Title II requirements. As early as 1982, Congressman Wirth noted “the need for regulatory reform giving the FCC the ability to forbear from regulating in certain areas.” *Proposed Antitrust Settlement of United States versus AT&T, Hearing Before the Subcomm. on Telecomms., Consumer Prot., and Finance of the H. Comm. on Energy & Commerce, and the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary, 97th Cong.* (January 26 1982), available at A&P Telecom Hearings (35), at *70 (Westlaw).

¹⁴⁶ *See, e.g.*, S. REP. NO. 103-367, at 117 (1994) (minority views of Sens. Packwood and McCain) (stating that “[p]rovisions of S. 1822 seek directly to reverse” *MCI*).

¹⁴⁷ *See, e.g.*, 141 Cong. Rec. S7881-02, 7888 (1995) (statement of Sen. Pressler) (“The Federal courts have ruled that the FCC cannot deregulate. This bill [S. 652] solves that problem and makes deregulation legal and desirable.”).

¹⁴⁸ H.R. 1555, 104th Cong. §§101, 243.

¹⁴⁹ S. 652, 104th Cong. §§ 221, 255(b)(2).

The clear purpose of providing the Commission with forbearance powers, then, is to grant it the ability to make certain provisions discretionary. This should not be taken, however, as *carte blanche* for the Commission to legislate on its own behalf, disregarding at will the intent of Congress in passing particular sections of the Act.¹⁵² Section 10 operates within the confines of the Act, and it only reaches so far as it is necessary for the Commission to be able to remove mandatory regulations from carriers when doing so serves the public interest. Forbearance can only apply to those provisions where Congress has placed a duty upon a carrier, and not the Commission or another party—since Section 10 only allows the Commission to refrain from applying regulations “to a telecommunications carrier.” The Commission therefore cannot (as is logical) exempt itself from its Congressionally mandated duties by claiming forbearance. Nor does it make much sense for the Commission to forbear from provisions that are already discretionary—if the purpose of forbearance is to provide the Commission with the flexibility to deregulate when regulation is uncalled for, it is pointless for Section 10 to grant discretion (and provide a separate system of procedure for that grant) when it is already present.

Moreover, the Commission should understand its Section 10 abilities as a means to exercise a limited amount of discretion to ensure that the ultimate goals of the Communications Act—in ensuring the public interest, convenience, and necessity—are met. Those goals are also generally reflected in the provisions of Title II, and Congress has shown through those provisions its preferred means to those ends. The Commission should therefore presume, absent

¹⁵⁰ *Id.*, sec. 101, § 251(b).

¹⁵¹ *Id.*, sec. 303, § 260(d).

¹⁵² Such a broad interpretation would raise the question of whether Congress could delegate such authority to the Commission. It is one thing to allow an agency to convert a mandatory statute into a discretionary one given appropriate guiding principles. It is another thing to say that Congress delegated authority to permanently repeal a statute.

strong evidence to the contrary, that Congress deemed its statutes necessary, and should not forbear from them cavalierly.

B. In Making Forbearance Determinations, the Commission Must Account for Consumer Protection, Competition, and the Public Interest

As the Commission engages in its analysis of which provisions it may forbear from, it must take into account a number of different factors. Foremost among them are the factors required by statute in Section 10(a) and elaborated upon in Section 10(b).¹⁵³ Since the Commission is not contemplating forbearance from Sections 201 and 202,¹⁵⁴ the primary statutory factors it must consider in forbearance determinations for other Title II provisions are consumer protection and the public interest, including the public interest in competition amongst telecommunications providers. Also informing any decision to forebear should be the consideration that the Commission should retain authority necessary to promote the public interest and protect the network in the event of unforeseen violations, malfunctions, or other crises.

¹⁵³ Section 10(a) states that the Commission shall forbear from applying a provision or regulation:

if the Commission determines that - -

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a). Section 10(b) elaborates upon 10(a)(3) by noting that the Commission should consider whether forbearance would promote competitive market conditions as part of its public interest analysis. 47 U.S.C. § 160(b).

¹⁵⁴ Telecommunications Act of 1996 §§ 201, 202.

1. *Consumer Protection*

Section 10 only allows the Commission to forbear from a regulation or a provision of the Act if it finds that the provision is not necessary for the protection of consumers. A number of provisions within Title II provide necessary protections for consumers apart from the six sections identified by the Commission.

Consumer protection is not limited to the protection of the privacy of CPNI,¹⁵⁵ nor to freedom from unjust and unreasonable discrimination.¹⁵⁶ Many other Title II provisions, including the Section 203 requirements of carriers to report rates,¹⁵⁷ provide consumers with the transparency necessary to protect their interests, whether through legal action or their exercise of buying power. Even in the presence of a competitive market, this transparency is necessary for consumers to take advantage of that competitive market. Without the necessary information to distinguish between providers, consumers are no better off with several providers to choose from. Nor should the mere presence of competitors permit carriers to execute changes in subscriber selections of providers contrary to Section 258,¹⁵⁸ for example.

2. *Competition*

Section 10(b) emphasizes the importance of promoting competition in the public interest, indicating that a provision should not be forborne if it is necessary to promote competition. A wide variety of provisions that the Commission proposes to forbear from enforcing are essential to promoting competition beyond the protections provided by Sections 201 and 202, and the sweeping forbearance proposed for them by the *NOI* is unwarranted.

¹⁵⁵ 47 U.S.C. § 222.

¹⁵⁶ 47 U.S.C. §§ 201, 202.

¹⁵⁷ 47 U.S.C. § 203.

¹⁵⁸ 47 U.S.C. § 258.

Underlying the need for preserving these provisions is the fact that the current markets in broadband Internet connectivity services are far from competitive. The Commission's *Broadband Status Report* notes that at most two broadband providers pass most homes, with 50-80% of homes having the speeds they need available only from one provider.¹⁵⁹ In its filing in the National Broadband Plan docket, the Department of Justice noted that the number of suppliers would be limited, with high barriers to entry for wireline providers and great uncertainty as to whether wireless providers could act as a significant competitive restraint on wireline broadband providers.¹⁶⁰ The National Association of Telecommunications Officers and Advisors likewise found "consolidated market power for the existing cable and telecom duopoly" and intermodal competition "an illusory promise."¹⁶¹

The *NOI* notes as analogous precedent the Commission's decisions to forbear from several provisions of Title II for commercial mobile radio services (CMRS) in 1994. However, the analogy is not entirely apt. In the early 90s, the market for CMRS was nascent,¹⁶² in stark contrast to the more established nature of the broadband Internet market today. Although this market could benefit from additional penetration and buildout, it is substantially more developed than the CMRS market from which the Commission forbore a large number of Title II provisions over fifteen years ago. There is no need in the current landscape for broadband carriers to be coddled in the same manner as the emergent CMRS carriers of decades past.

¹⁵⁹ FCC National Broadband Plan, September Commission Meeting 135, Sept. 29, 2009, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf .

¹⁶⁰ *Ex Parte* Submission of the United States Department of Justice, in A National Broadband Plan for Our Future, GN Dkt. No. 09-51 (Jan. 4, 2010), at 7-8.

¹⁶¹ Comments of the National Association of Telecommunications Officers and Advisors, et al., in A National Broadband Plan for Our Future, GN Dkt. No. 09-51 (June 8, 2009), at 17-18.

¹⁶² *NOI* ¶ 75.

The Commission cannot abdicate its responsibilities under the various pro-competitive sections of Title II unless it first finds that competition can be promoted without the authority granted by those provisions. A bare finding that a particular geographic region lacks a dominant carrier, for instance, would not suffice to allow the Commission to forbear from Section 251(a). As an initial matter, the lack of a single dominant carrier does not translate into a competitive market—the presence of a near-duopoly or oligopoly can prevent any one carrier from being dominant while failing to provide consumers with a competitive market.¹⁶³

3. *Other Public Interest Factors*

However, competition is not the sole consideration of the public interest. Several other provisions of Title II were enacted by Congress out of specific concern for interests and values separate from competitive and market concerns. In the *NOI*, the Commission seeks specific comment on two of those provisions, Section 222 (regarding the privacy of customer proprietary network information), and Section 255 (regarding the accessibility of telecommunications services for the disabled). Commendably, the Commission recognizes that these provisions are critical in the broadband context as well as in traditional telephony.¹⁶⁴ However, other Title II provisions focused upon the public interest are at least as important as these. Section 257(b), for example, requires that the Commission promote diversity in media voices, economic competition, and technological advancement as it encourages new market entrants.¹⁶⁵ Just as the Commission needs to secure its authority to protect the public interest in customer privacy and disability access, the Commission's charge to promote other aspects of the public interest, such

¹⁶³ Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, *Memorandum Opinion & Order*, WC Docket No. 09-135 (rel. June 22, 2010).

¹⁶⁴ *NOI* ¶¶ 39-40.

¹⁶⁵ 47 U.S.C. § 257(b).

as media diversity, robust competition, and technological innovation, should not be quarantined within the realm of telephony.

Nor is the public interest limited to the specific goals anticipated and explicated in the provisions of Title II. The Commission's public interest duty extends to ensuring that the network remains open and operable. The Commission's concerns therefore do not extend solely to potential violations of regulations by carriers, but to more fundamental potential failures as well.

For example, in 2001, the California-based ISP Northpoint declared bankruptcy and, unable to raise funds, shut down its network, leaving 100,000 subscribers without broadband access.¹⁶⁶ While a service interruption of that nature was massively inconvenient in 2001, its effects would be devastating today, given increased consumer and small business reliance upon broadband Internet services to engage in commercial and civic life. Other instances of peering disputes abound, in each case causing significant disruption of Internet traffic.¹⁶⁷ While these

¹⁶⁶ *Northpoint Shuts Down Network Due to Lack of Cash*, CHANNELWEB, Mar. 29, 2001, <http://www.crn.com/it-channel/18822290>.

¹⁶⁷ See, e.g., Patricia Fusco, *PSINet, Exodus Terminate Peering Agreement*, THE INTERNET NEWS, Apr. 5, 2000, http://www.internetnews.com/xSP/article.php/8_334471 (peering dispute between PSINet and Exodus threatening access to "25 to 30 percent of the content on the Internet"); James Evans, *PSINet, C&W Spat Causes Net Disconnect*, IDG NEWS SERVICE, June 7, 2001, [http://www.computerworld.com/s/article/61180/PSINet_C_W_spat_causes_Net_disconnect_\(2001_peering_dispute_between_PSI_Net_and_C&W_resulting_in_a_four-day_disruption_in_customers'_service\)](http://www.computerworld.com/s/article/61180/PSINet_C_W_spat_causes_Net_disconnect_(2001_peering_dispute_between_PSI_Net_and_C&W_resulting_in_a_four-day_disruption_in_customers'_service)); *France Telecom Severs All Network Links to Competitor Cogent*, HEISE ONLINE, Apr. 21, 2005, <http://morse.colorado.edu/~epperson/courses/routing-protocols/handouts/cogent-ft.html> (France Telecom severing connections to Cogent, which allegedly "blackholed" all France Telecom IP address in retaliation); Yuki Noguchi, *'Peering' Dispute with AOL Slows Cogent Customer Access*, WASH. POST, Dec. 28, 2002, at E1, available at <http://legalminds.lp.findlaw.com/list/cyberia-l/msg42080.html> (dispute between Cogent and AOL leads to AOL disconnecting from Cogent, affecting many customers including DC-area students); Stacy Cowley, *ISP Spat Blacks Out Net Connections*, INFOWORLD, Oct. 6, 2005, <http://www.infoworld.com/t/networking/isp-spat-blacks-out-net-connections-492> (dispute between Level 3 and Cogent preventing customers from accessing the Internet); Mikael Ricknäs,

cases have, happily, not created major disruptions of service, they provide warning to the prudent that—despite the incentives of network carriers to reach agreement and to remain solvent—consumers, businesses, and others dependent on internet connectivity may suffer as a consequence of market failure.

Such disruptions can occur even without a market failure. At present, carriers are engaged in migration from IPv4 to IPv6.¹⁶⁸ It may be that the private sector will successfully carry out this migration. It may also be that some event, or series of events, creates significant problems that will require immediate action to prevent significant fragmentation of the Internet.¹⁶⁹ The Commission should ensure that it retains adequate authority to intervene where necessary to protect public safety and avoid catastrophic financial loss. As the recent tragic events in the Gulf show, some problems are simply not addressable with *ad hoc* remedies.

Closer to home, the *Comcast* decision demonstrates the Commission must ensure a proper legal basis for action *before* the need arises, rather than wait until after something happens and hope the Commission has authority to address it.

C. Specific Statutory Provisions

Given the forbearance framework and public interest concerns discussed above, and mindful that the existing broadband market is neither as nascent nor as competitive as the wireless market was in 1994, when the Commission engaged in blanket forbearance, Public

Sprint-Cogent Dispute Puts Small Rip in Fabric of Internet, IDG NEWS SERVICE, Oct. 31, 2008, http://www.pcworld.com/businesscenter/article/153123/sprintcogent_dispute_puts_small_rip_in_fabric_of_internet.html (dispute leading Sprint to disconnect from Cogent).

¹⁶⁸ Curtis Franklin, *What You Need to Know About IPv6*, PCWORLD, July 6, 2010, http://www.pcworld.com/businesscenter/article/200580/what_you_need_to_know_about_ipv6.html.

¹⁶⁹ Jack M. Germain, *The Rocky Road to IPv6*, TECHNEWSWORLD, July 8, 2010, <http://www.technewsworld.com/story/The-Rocky-Road-to-IPv6-70370.html>; Dave Kresse, CEO, Mu Dynamics, Reader Forum: The Quiet Problem: IPv6, RCR Wireless, <http://www.rcrwireless.com/article/20100705/READERFORUM/100619964/reader-forum-the-quiet-problem-ipv6> (last visited July 15, 2010).

Knowledge provides this list of specific statutes the Commission should not simply forbear from on the assumption that doing so meets the statutory criteria. As a general matter, these involve Commission authority over interconnection and shut down of service (Sections 251(a), 256, and portions of 214(c))¹⁷⁰, discretionary authority to compel production of information (Sections 211, 213, 215, and 218-20),¹⁷¹ provisions which provide explicit power for the Commission to hold parties accountable and prescribe adequate remedies (Sections 205-07, 209, 212, and 216),¹⁷² provisions designed to protect consumers (Sections 203 and 222),¹⁷³ or ensure affordable deployment and the benefits of broadband access to all Americans (Sections 214(e), 225, 254, 255, and 257).¹⁷⁴ These statutes are in addition to the bare minimum recognized in Section 332(c)¹⁷⁵ and reiterated in the *NOI*¹⁷⁶ as the minimum needed to protect consumers—Sections 201, 202, and 208.

On the other hand, it would appear that forbearance from some provisions would serve the public interest, either because they create barriers to deployment and improvement of capacity (such as provisions of Section 214 requiring Commission approval for construction or improvement of lines),¹⁷⁷ or because it is unclear what these provisions would mean in the context of broadband access service – assuming they applied at all (such as Sections 223, 226, 228, and 260).¹⁷⁸ Public Knowledge expresses no opinion on statutes not specifically addressed, beyond urging the Commission to apply the general framework discussed above.

¹⁷⁰ 47 U.S.C. §§ 214(c), 251(a), 256 (2006).

¹⁷¹ *Id.* §§ 211, 213, 215, 218-20.

¹⁷² *Id.* §§ 205-07, 209, 212, 216.

¹⁷³ *Id.* §§ 203, 222.

¹⁷⁴ *Id.* §§ 214(e), 225, 254, 255, 257.

¹⁷⁵ *Id.* § 332(c)(1)(A).

¹⁷⁶ *NOI* ¶ 75.

¹⁷⁷ 47 U.S.C. § 214 (2006).

¹⁷⁸ *Id.* §§ 223, 226, 228, 260.

1. *Interconnection and Termination of Operation*

The Commission should not forbear from requiring interconnection as a duty on all broadband providers, and therefore should not forbear from Section 251(a) (general duty of telecommunications carriers).¹⁷⁹ Similarly, the Commission must retain the authority provided in Section 256 (coordination for interconnectivity),¹⁸⁰ particularly the ability to promote “nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services,”¹⁸¹ and ensure the “ability of users and information providers to seamlessly and transparently transmit and receive information.”¹⁸²

As the Commission¹⁸³ and Congress¹⁸⁴ have long recognized, on communications networks generally, and the Internet in particular, interconnection is the *sine qua non* of maintaining competition between network providers and ensuring that users retain access to the entire Internet. As discussed above, problems with interconnection can occur as a consequence of a failure of business negotiation, as a consequence of a deliberate business strategy, or even as a consequence of unforeseen circumstances. The Commission should not assume that a failure of interconnection or a refusal by a provider to participate in the Commission’s interconnection coordination would be adequately addressed under Sections 201 and 202. Because a failure of

¹⁷⁹ *Id.* § 251(a). In addition, the Commission must make clear that any general forbearance in this proceeding does not impact incumbent local exchange carriers’ (ILECs) interconnection requirements pursuant to the rest of Section 251. Such an unintended consequence would significantly undermine the ability of competing providers to access network elements that remain necessary for competition.

¹⁸⁰ *Id.* § 256 (interconnectivity coordination).

¹⁸¹ *Id.* § 256 (a)(1).

¹⁸² *Id.* § 256 (a)(2).

¹⁸³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement*, 20 FCC Rcd. 14,986, 14,986-88, ¶¶ 1-4 (2005).

¹⁸⁴ H.R. REP. NO. 104-204, at 71 (1995) (noting that interconnection “is a cornerstone principle of common carriage”); 142 CONG. REC. S708 (1996) (statement of Sen. Snowe) (calling for “a mechanism . . . to ensure that all Americans can continue to be interconnected” over computer networks).

interconnection can cause a failure of service impairing critical public safety communications and creating serious economic hardship, the Commission must ensure that it has clear authority to address such a situation swiftly.

Additionally, the Commission should carefully consider whether complete forbearance from Section 214 would serve the public interest.¹⁸⁵ While forbearance from regulations with regard to the extension or improvement of lines would clearly serve the public interest by promoting deployment and investment in infrastructure, the Commission should carefully consider whether to eliminate all authority over whether and how a broadband access provider can suddenly terminate service.¹⁸⁶ The Commission should not eliminate its jurisdiction over termination of operations markets where a single provider may be the only point of access to the Internet. As recognized by Congress, it is necessary to protect consumers from service interruption and termination. Consumers, businesses, public safety entities and government agencies rely on telecommunications services for an ever-increasing number of critical functions. Therefore, there are strong reasons not to forbear from this provision.

2. *Discretionary Authority to Compel Production of Information*

Congress recognized that for the Commission to exercise proper oversight of those providing critical infrastructure such as telecommunications, the Commission would need broad authority to compel production of information relevant not merely to a specific service, but also to the broader economic context in which these carriers operate. Congress therefore gave the FCC broad discretionary powers to compel production of useful information or the filing of regular reports on matters ranging from filing of contracts (Section 211), carrier property valuation (Section 213), service and equipment transactions (Section 215), financial information

¹⁸⁵ 47 U.S.C. § 214.

¹⁸⁶ Public Knowledge expresses no opinion at this time on whether it would serve the public interest to forbear from Commission review of transfers of ownership.

(Section 220), general management practices (Section 218), and any other information of interest to the Commission (Section 219).¹⁸⁷

Forbearance from these statutes, to the extent forbearance from an exercise of an already discretionary statute has meaning, would not serve the public interest. As this Commission in particular has emphasized, the ability to make informed policy choices that promote the Congressional goals of ubiquitous, affordable deployment depends on access to accurate data in a timely manner. The reports or other information the Commission may require providers to produce, and subsequent description and analysis of this information by the Commission, serve to inform other stakeholders and enhance the overall consideration of broadband policy issues. As an economic matter, the functioning of efficient markets depends on ensuring sufficient information with indicia of reliability, something that may only be possible when the government acts as a neutral party to compel production of information from all market participants.¹⁸⁸ Finally, as the Commission recognized in its *Truth In Billing Inquiry*¹⁸⁹ and subsequent public notices, the ability to compel production of truthful information provides a potent mechanism for consumer protection.

While the Commission might be able to compel production of information under other statutes, there is no offsetting advantage to forbearance that would warrant creating needless confusion or curtailing the ability of the Commission to demand prompt production of information in the absence of an “unforbearance” proceeding. Application of these statutes is already discretionary. To the extent carriers fear that any specific production requirement would

¹⁸⁷ *Id.* §§ 211, 213, 215, 218-220.

¹⁸⁸ See generally George Akerlof, *The Market for “Lemons”: Quality Uncertainty & the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

¹⁸⁹ *Consumer Info. & Disclosure*, Notice of Inquiry, 24 FCC Rcd. 11,380, 11,381-83, ¶¶ 1-7 (2009).

impose unnecessary costs or might needlessly expose proprietary information, the Commission can consider such arguments in the context of any specific production request or rule and weigh the competing benefits and costs accordingly.

In short, the ability to compel truthful information is “necessary for the protection of consumers” and potentially enhances competition — the Commission cannot find that Sections 211, 213, 215, and 218-20 are “not necessary for the protection of consumers” or that forbearance would “promote competitive market conditions.” The Commission therefore must not forbear from these statutes.

3. *Power to Provide Adequate Remedies and Accountability*

For similar reasons, the Commission should not forbear from express delegations of authority by Congress to hold carriers accountable and prescribe sufficient remedies to make injured parties whole and promote the public interest—even where the Commission might arguably have similar authority under the broad grant of Sections 201 and 202 and its general authority under Section 4(i).¹⁹⁰ There appears to be no *a priori* reason to assume that the Commission can adequately protect consumers by disclaiming its authority to suspend unjust rates and practices (Section 204),¹⁹¹ prescribe specific just and reasonable rates and charges (Section 205)¹⁹² or order payments of money (Section 209)¹⁹³ where justified and the public interest so demands. Nor does it protect consumers to relieve carriers of liability for damages (Section 206)¹⁹⁴ or from responsibility for the acts or omissions of their agents or to relieve

¹⁹⁰ 47 U.S.C. §§ 4(i), 201, 202.

¹⁹¹ *Id.* § 204.

¹⁹² *Id.* § 205.

¹⁹³ *Id.* § 209.

¹⁹⁴ *Id.* § 206.

receivers and trustees of their obligations (Sections 216-17).¹⁹⁵ Nor does it foster competition to automatically allow interlocking directorates (Section 212).¹⁹⁶

In particular, Public Knowledge questions whether the Commission even has the authority to forbear from application of Section 207, which permits consumers to seek redress in a federal court. As discussed above, Congress intended forbearance to give the Commission flexibility to relieve carriers of mandatory obligations rendered obsolete by changes in the competitive landscape. Congress did not intend to allow the Commission to insulate carriers from accountability, or confer on the Commission the power to eliminate Congress' decision to provide consumers with an alternate forum for redress of grievances. Even assuming such authority, however, nothing in the record would justify forbearance from Section 207.

Again, Public Knowledge stresses that the current broadband market is substantially different from the market faced by CMRS providers in 1994, and the willingness of Commission to forbear from certain of these statutes in that instance¹⁹⁷ is not relevant here. In 1994, CMRS was a nascent service with numerous potential new entrants and generally regarded as a luxury. In 2010, broadband access is a well-established service widely acknowledged as critical infrastructure for economic activity, civic engagement, education, and public safety. New entrants do not face a wide open field of potential new customers as CMRS entrants did in 1994. Rather, a handful of mammoth vertically integrated providers control the vast majority of residential subscribers, and numerous geographic locations have a choice of two or fewer providers. Accordingly, even though the FCC found it would serve the public interest to forbear

¹⁹⁵ *Id.* § 216-17.

¹⁹⁶ *Id.* § 212.

¹⁹⁷ *Implementation of Sections 3(n) & 332 of the Commc'ns Act*, Second Report & Order, 9 FCC Rcd. 1411, 1467-68, ¶ 138 (1994).

from Sections 204-05, 211 and 212 in 1994,¹⁹⁸ it should not assume that forbearance would serve the public interest here.

4. *Power to Protect Consumers*

The Commission has already suggested that it would not serve the public interest to forbear from the privacy protections of Section 222.¹⁹⁹ PK wholeheartedly agrees. In addition, PK urges the Commission to refrain from immediately forbearing from the requirement to publish rates under Section 203. The requirement to publish rates and charges can provide valuable protection both to consumers and to competitors. Instead of full forbearance, the Commission should consider whether to permit carriers to meet this obligation by advertising rates (and permitting flexibility to offer individualized discounts and incentives).²⁰⁰

5. *Authority to Ensure Meaningful Access for All Americans*

In commanding the Commission to create the National Broadband Plan, Congress ordered the Commission to develop a plan that would provide “the most effective and efficient mechanisms for ensuring broadband access by all people of the United States” and include “a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public.”²⁰¹ Congress has delegated to the Commission specific powers and responsibilities to ensure meaningful access by those with physical disabilities (Sections 225 and 255),²⁰² to provide for deployment and affordability in high-cost areas, for community anchor institutions, and for those who could not otherwise afford

¹⁹⁸ *Id.* at 1411, 1478-80, 1485, ¶¶ 175-81, 196-97.

¹⁹⁹ *NOI* ¶¶ 82-83.

²⁰⁰ If the Commission does so, it should clarify that rates established by advertising are not “filed” with the Commission and therefore not subject to the presumption of lawfulness under the “filed rate doctrine.”

²⁰¹ *ARRA* § 6001(k)(2)(A)-(B), 47 U.S.C. § 1305(k)(2)(A)-(B).

²⁰² 47 U.S.C. § 225, 255.

the service (Sections 214(e) and 254),²⁰³ and to regularly report on potential barriers to entry by minority-owned businesses and small businesses and to act to remove these barriers (Section 257).²⁰⁴ The Commission has already suggested that it would not serve the public interest to forbear from Sections 222,²⁰⁵ 254,²⁰⁶ and 255,²⁰⁷ and that it lacks authority to forbear from Section 257.²⁰⁸

Public Knowledge strongly concurs that the Commission cannot relieve itself of its obligation to report on what barriers prevent minority communities or small businesses from enjoying any and all economic and social benefits from access to broadband, or from taking action to remove these barriers. Furthermore, the Commission should understand the directive of Congress to provide affordable broadband access to “*all* people of the United States”²⁰⁹ in a manner that encourages “maximum utilization”²¹⁰ as requiring the Commission to use all its available authority to ensure that those with physical disabilities, individuals with low incomes, and residents of high-cost areas have meaningful access to broadband service. The Commission should therefore refrain from forbearing from these statutes.

CONCLUSION

Although the *Comcast* decision provided the immediate impetus for this proceeding, a review of the Commission’s legal framework for broadband services is long overdue. The Commission’s effort to build a legal framework on the basis of the *Cable Modem Ruling*—formulated in an entirely different environment and based on an incorrect understanding on the

²⁰³ *Id.* §§ 214(e), 254.

²⁰⁴ *Id.* § 257.

²⁰⁵ NOI ¶¶ 82-83.

²⁰⁶ *Id.* ¶¶ 78-81.

²⁰⁷ *Id.* ¶¶ 84-85

²⁰⁸ *Id.* ¶ 90.

²⁰⁹ *ARRA* § 6001(k)(2)(A), 47 U.S.C. § 1305(k)(2)(A) (emphasis added).

²¹⁰ *ARRA* § 6001(k)(2)(B), 47 U.S.C. § 1305(k)(2)(B).

nature of DNS—has resulted in a morass of conflicting decisions and uncertainty over whether the Commission can implement the goals of the National Broadband Plan or adequately protect the public in the event of an unanticipated crisis. The Commission should move quickly to recognize the market reality that a distinct broadband access service exists and that it is properly classified as a “telecommunications service” regardless of the technology or platform used. Further, while limited forbearance would serve the public interest, the Commission should exercise caution when exercising its forbearance authority so as not to undermine its ability to fulfill its responsibilities to the American people.

Respectfully submitted,

Public Knowledge

July 15, 2010