

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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Qwest Communications International Inc. (Qwest) files these comments in connection with the Federal Communications Commission's (Commission or FCC) *Notice of Inquiry (NOI)* regarding the appropriate legal framework for broadband Internet service.¹

I. INTRODUCTION AND SUMMARY

Paragraph 29 of the *NOI* states its central question - what regulatory framework would best advance the Commission's fundamental policy goals of "protecting consumers and promoting innovation, investment, and competition in the broadband context"?² There is a singularly compelling answer to that question: Competition has thrived and there has been robust growth in the broadband market since the Commission classified broadband Internet access as a Title I information service. There is also no evidence suggesting that the United States has experienced a broadband market failure during that time or demonstrating any other basis for intrusive regulatory intervention. Moreover, during this same time period, broadband network providers have invested huge amounts of capital to expand their networks. And, as the Commission itself recognized in its National Broadband Plan (or NBP or Plan), building the broadband infrastructure that America wants and needs is going to require massive additional

¹ *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, GN Docket No. 10-127, FCC 10-114, rel. June 17, 2010.

² *Id.* ¶ 29.

investment. The greatest risk to the NBP and the Commission's other fundamental policy goals for broadband is intrusive and unnecessary government regulation that will negatively impact this private investment. Conversely, the ideal regulatory framework to accomplish the Commission's goals is one that limits government intervention and thereby maximizes private investment and its derivative jobs creation and pro-consumer and pro-innovation benefits.

While it could perhaps be debated whether past Commission regulatory proposals premised on its Title I ancillary authority would negatively impact private investment (depending upon the precise nature of those proposals),³ there is absolutely no question with either of the Title II options presented in the *NOI*. The Commission is proposing to kill a fly with a bazooka. The 1930's style regulation contained in Title II was never intended to apply under these circumstances. Any attempt to shoehorn broadband into Title II will immediately impose significant unneeded regulation and substantially increase the risk of still further unnecessary regulation in the future.

There can be no doubt that Title II reclassification of any form would negatively impact investment in broadband networks. Indeed, since the date of the Chairman's announcement of his intent to pursue Title II classification, this fact has been confirmed in numerous reports and studies. One such study estimates that adoption of the Commission's network neutrality proposals could, over the next year, foreclose as much as \$7 billion of network provider broadband investment. Another study estimates it could cause a loss of 700,000 jobs over the next five years.

Reversion to any form of Title II is also not legally sustainable. Among other things, the

³ See, e.g., *In the Matter of Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13082 ¶ 47, 13086-88 ¶¶ 56-59, 13088-91 ¶¶ 62-66 (2009) (*2009 Open Internet NPRM*).

relevant record on the nature of broadband Internet access offerings makes clear that nothing has changed to justify a reversal of a key Commission finding in past broadband classification orders: namely, there is no severable transmission component in broadband Internet access being offered as a telecommunications service to the public. A reversal of the Commission's prior classification orders would also violate the First and Fifth Amendments. Thus, adoption of either of the *NOI's* Title II options will bring years of legal wrangling and litigation and, ultimately, reversal by the courts. This process and the regulatory uncertainty that will prevail in the interim will only further harm broadband network investment.

For all these reasons, the Commission should strive to limit any new broadband regulation to the safe confines of its existing Title I authority, while seeking Congressional action before adopting any regulation not clearly within that authority. The recent *Comcast Corporation v. FCC (Comcast v. FCC)*⁴ decision calls into question the authority of the Commission to adopt certain types of regulation for broadband. But, there is far too much at stake for the Commission to respond to that decision by simply abandoning the light touch regulatory approach that has succeeded to-date.

Notably, under a light touch approach, the Commission would retain adequate authority to implement much of its desired broadband policy framework. For example, the Commission has adequate authority to implement the central goal of accomplishing universal service for broadband. The extent of its authority to act with respect to the specific areas mentioned in the *NOI* relating to certain of its consumer protection objectives -- privacy, disabilities access, public safety, homeland security, and potential harmful ISP practices -- will have to be established based on a fully developed record, with a specific proposal in hand, and applying the well-

⁴ *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

established standard for Title I ancillary jurisdiction. In the meantime, the Commission has well established authority to accomplish numerous other key policy goals set forth in the NBP that fall squarely within its traditional purview -- *e.g.*, spectrum reform and intercarrier compensation reform. On the other hand, certain more extreme regulatory proposals would plainly exceed the Commission's Title I ancillary jurisdiction authority. But, that is not a cause for concern as, by definition, Title I services are best suited for a light touch regulatory approach. And, many of the NBP's objectives contemplate action by government entities other than the Commission, and therefore do not depend upon Title II authority.

Finally, whatever the Commission does, it should also not pursue a legal framework that would give a disparate regulatory status to wireline broadband Internet access network providers vis-à-vis other broadband network platforms (*e.g.*, wireless) or to other Internet service providers. Such a step would also be both unwise policy and subject to legal challenge.

II. DISCUSSION

A. Competition And Investment Are Thriving And No Market Failures Are Evident Under The Current Regulatory Framework

As is demonstrated in the detailed **Factual Record Appendix** attached to these comments and in past submissions of Qwest and other parties, competition has thrived and there has been robust growth in the broadband market since the Commission classified broadband Internet access service⁵ as a Title I information service.⁶ There is also no evidence suggesting

⁵ As does the Commission in the *NOI*, Qwest herein uses the terms "broadband Internet access service" and "broadband Internet service" interchangeably. The *NOI* indicates that these two terms have the same meaning. *NOI* n.1.

⁶ Factual Record Appendix, 1-22. Among other data noted therein, the NBP found that 82 percent of housing units are served by two or more fixed broadband providers. NBP, Chapter 4.1 at 37, 39. In addition to these fixed providers, 89 percent of the U.S. population is served by two or more mobile broadband providers and 77 percent is served by three or more mobile broadband providers. *Id.* at 40. *See also* comments filed in the Open Internet proceeding, *In the*

that the United States experienced a broadband market failure during that time or demonstrating any other basis for intrusive regulatory intervention.⁷ Indeed, all the evidence suggests that broadband providers do not possess undue market power.⁸ For the most part, supporters of intrusive regulation in this area tend to point to, at best, potential market imperfections.⁹ And, the Commission continues to be well served by the fact that Qwest and virtually all major broadband providers support the principles set forth in the Commission's 2005 Internet Policy Statement¹⁰ and voluntarily abide by those principles as good policy.

Moreover, during this same time period, broadband network providers have invested huge amounts of capital to expand their networks.¹¹ As discussed in the **Factual Record Appendix**, despite the recent difficult economic conditions, virtually all broadband providers have continued to invest heavily to expand their broadband footprint, and are increasing the speeds available to consumers and businesses as they seek to try and meet burgeoning bandwidth demand.¹² By way of example only, the *Broadband in America Report* estimated that aggregate U.S. capital expenditures by telephone and cable companies in 2008 were \$62.8 billion, \$41.4 billion for wireline and \$21.35 billion for wireless.¹³ While it is difficult to determine the precise

Matter of Preserving the Open Internet; Broadband Industry Practices, Jan. 14, 2010, GN Docket No. 09-151 and WC Docket No. 07-52 by AT&T at 80-87; CenturyLink at 1, 4-5; Qwest at Factual Record Appendix at 2; United States Telecom Association at 6-28; Verizon and Verizon Wireless at 12-30; Comments of CTIA at 23-25.

⁷ Factual Record Appendix, 22-34.

⁸ *Id.* at 22-28.

⁹ *Id.* at 28-31

¹⁰ *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, et al.*, Policy Statement, 20 FCC Rcd 14986 (2005) (FCC Internet Policy Principles).

¹¹ Factual Record Appendix, 7-11.

¹² *Id.* at 4-11. *See also*, text *infra*, 8-10.

¹³ *Broadband in America Report* at 28; Table 3.

amount of these expenditures that are related specifically to broadband, the *Broadband in America Report* also estimated that wireline broadband capital expenditures in 2008 were over \$20 billion, and wireless broadband expenditures were over \$10 billion.¹⁴ Other studies detail the large number of jobs created by these massive investments in broadband.¹⁵ As the NBP itself observes, “consumers are benefiting from these investments” and “competition appears to have induced broadband providers to invest in network upgrades.”¹⁶ All of these recent investments were made in an increasingly competitive environment, where broadband services have been regulated under Title 1. This “light touch” regulatory environment has created the market flexibility, regulatory certainty and competitive incentives for companies to invest billions of dollars in broadband infrastructure.

B. Massive Additional Investment Is Needed To Accomplish The Commission’s Goals For Broadband

The Commission itself has recognized that building the broadband infrastructure that America wants and needs is going to require massive additional investment.¹⁷ By way of example, the Commission, in the NBP, estimated that an initial investment of \$15.2 billion and ongoing costs of \$18.2 billion will be required to meet the NBP’s broadband availability target alone.¹⁸

C. In This Context, The Ideal Regulatory Framework Is One That Limits Government Intervention And Maximizes Private Investment

¹⁴ *Broadband in America Report* at 67; see also *Broadband Plan* at 40.

¹⁵ See, e.g., “The Substantial Consumer Benefits of Broadband Connectivity for U.S. Households”, Mark Dutz, Jonathan Orszag, Robert Willig, July 2009, at 35, n.28; “The Economic Impact of Broadband Investment”, Robert W. Crandell, Hal J. Singer, Feb. 2010, at 1-3, 9-10, 12, 23-27, 38-41, 55.

¹⁶ *Broadband Plan* at 40.

¹⁷ See, e.g., *id.* at 136.

¹⁸ *Id.* at 137.

It is in this context that the *NOI*'s central question must be answered. What is the ideal regulatory framework to advance the Commission's fundamental policy goals of "protecting consumers and promoting innovation, investment, and competition in the broadband context"?¹⁹ All of the above demonstrates that the biggest risk to the NBP and the Commission's other fundamental policy goals for broadband is intrusive and unnecessary government regulation that will negatively impact the private investment needed to build America's broadband networks of the future. Conversely, the ideal regulatory framework to accomplish the Commission's goals is one that limits government intervention and thereby maximizes private investment and its derivative jobs creation and pro-consumer and pro-innovation benefits. In other words, the ideal regulatory framework is the existing Title I framework.

D. Adoption Of Either Of The Title II Models Outlined In The *NOI* Would Bring Great Harm

Adoption of either of the Title II options presented in the *NOI* will result in great harm. To begin with, this approach would have a dramatic and negative impact on investment in broadband networks. As noted, adoption of the 1930's style regulation contained in Title II will immediately impose significant unneeded regulation and substantially increase the risk of still further unnecessary regulation in the future -- all in an area of competitive information services where Title II was never intended to apply.²⁰ A reversal of the Commission's prior classification orders is also not legally sustainable. As a result, adoption of either of the *NOI*'s Title II options

¹⁹ See *NOI* ¶ 29.

²⁰ See *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3320 (2004) (in declining to exercise Title I jurisdiction to impose economic or entry/exit regulation, the Commission explained that "[s]uch regulation would not only run counter to our decades old goals and objectives to enable information services to function in a freely competitive, unregulated environment, but would directly contravene Congress's express directives in Sections 706 and 230 of the Act...").

will bring years of legal wrangling and litigation and, ultimately, reversal by the courts. This process and the regulatory uncertainty that will prevail in the interim will only further harm broadband network investment.

1. Title II reclassification of any form would negatively impact investment

There can be no doubt that Title II reclassification of any form would negatively impact investment in broadband networks. Indeed, since the date of the Chairman's announcement of his intent to pursue Title II classification, this fact has been confirmed in numerous reports and studies. For example, a June 2010 study conducted by the Advanced Communications Law & Policy Institute at the New York Law School estimated that broadband service providers will commit at least \$30 billion annually in capital expenditures on broadband alone between 2010 and 2015, resulting in the creation or sustaining of 509,000 jobs and spurring still further capital expenditures by others throughout the broader Internet ecosystem.²¹ The study also found that adoption of the Commission's network neutrality proposals could foreclose significant portions of that investment -- possibly more than 30%, resulting in a loss of 700,000 jobs.²² A May 2010 study by Frost and Sullivan estimated that, in 2011 alone, net neutrality could cost the economy anywhere from \$2 billion to over \$7 billion, translating to a loss of 70,000 jobs in 2011.²³ Yet

²¹ "Net Neutrality, Investment & Jobs: Assessing the Potential Impacts of the FCC's Proposed Net Neutrality Rules on the Broadband Ecosystem," New York Law School - Advanced Communications Law & Policy Institute (June 2010), http://www.nyls.edu/user_files/1/3/4/30/83/Davidson%20&%20Swanson%20-%20NN%20Economic%20Impact%20Paper%20-%20FINAL.pdf at 56.

²² *Id.* at 51.

²³ See "Net Neutrality: Impact on the Consumer and Economic Growth," Frost and Sullivan (May 2010), http://internetinnovation.org/files/special-reports/Impact_of_Net_Neutrality_on_Consumers_and_Economic_Growth.pdf at 19 (also estimating that Internet service providers and network operators directly employ somewhere between 1.1 and 1.4 million people and that a total of between 2.8 and 3.7 million jobs overall

another study estimated that new network neutrality regulations proposed by the Commission could slow revenue growth in the broadband sector, causing job losses in that sector alone amounting to 14,217 in 2011 and 342,065 by 2020.²⁴ This study estimated that such regulation could result in a loss, on an economy-wide basis, of 65,404 jobs in 2011 and 1,452,943 jobs by 2020.²⁵ There has also been evidence that the Chairman's announced plan to pursue Title II reclassification had an immediate negative impact on broadband provider stock prices and capital investment plans.²⁶ And, numerous state legislative bodies have passed or are considering resolutions expressing concern that the proposed Title II approach will harm broadband investment in their states.²⁷ It has been argued by some supporters of onerous new regulation

are dependent on the Internet -- driving direct and indirect salaries and wages of approximately \$285 to \$370 billion). *Id.* at 18.

²⁴ The Employment and Economic Impacts of Network Neutrality Regulation: An Empirical Analysis," http://mobfut.3cdn.net/8f96484e2f356e7751_f4m6bxvvg.pdf at 10 (also finding it unlikely that Internet content sector could offset these job losses as it requires more spending than the broadband sector to create a job).

²⁵ *Id.*

²⁶ See, e.g., "Cable Stocks Fall After News of FCC's Internet Plan," <http://blogs.wsj.com/digits/2010/05/06/cable-stocks-fall-after-news-of-fccs-internet-plan/> (reporting that Comcast shares were down almost 4%, while Time Warner Cable and Cablevision fell by 6% or more following Chairman Julius Genachowski announcement of the Third Way proposal); "AT&T Rethinks U-Verse Spending After FCC Move," http://online.wsj.com/article/SB10001424052748704009804575308740137159622.html?mod=ooglenews_wsj (reporting that AT&T has said that it plans roughly \$19 billion in capital expenditure this year on its wireless and wireline networks combined, but quoting AT&T Chief Executive Randall Stephenson as stating that "If this Title 2 regulation looks imminent, we have to re-evaluate whether we put shovels in the ground").

²⁷ See, e.g., "Michigan House Advises FCC Not To Classify Broadband Under Title II. Legislators Say Genachowski's Plan Threatens Internet Infrastructure, Job Growth," http://www.multichannel.com/article/452664-Michigan_House_Advises_FCC_Not_To_Classify_Broadband_Under_Title_II.php (reporting that Michigan House of Representatives adopted a resolution asking the Commission not to reclassify broadband as a Title II service as it would slow investment in Michigan's Internet broadband infrastructure and jeopardize future job growth). The Michigan resolution and similar resolutions passed or proposed in Pennsylvania, Mississippi, Oklahoma, and Louisiana are as follows: H.R. 127, 2010 Reg. Leg. Sess., HLS 10RS-4847 (La. June 2, 2010) (Adopted); S.R.

that broadband network providers will continue to spend because they must do so. However, the above evidence demonstrates that such regulation may undermine the network provider's ability to get capital in the first place. This, in turn, will prevent network operators from investing even if they would like to.

2. The full Title II option is wholly inappropriate

Reclassification of the "telecommunications component" of broadband Internet service is unwarranted as a matter of law and policy, and would in fact harm the public interest. This is so whether the Commission pursues the "Second Way" approach set out in the *NOI* (*i.e.*, "Application of All Title II Provisions"²⁸) or the so-called "Third Way" proposed by Chairman Genachowski (*i.e.*, "Telecommunications Service Classification and Forbearance"²⁹). Qwest addresses the former here, and the latter in the next section.

There can be no serious claim that the application of all Title II provisions to broadband Internet service is appropriate. First, a host of the provisions at issue were expressly designed for voice service and simply have no meaning in the context of broadband Internet service. These include, for example, the following:

- **Section 223.** This provision governs the placement of obscene or harassing telephone calls. While its prohibitions might be relevant with respect to applications running over broadband (*e.g.*, interconnected VoIP), they have no meaning as applied to broadband Internet access itself.
- **Section 226.** This provision governs telephone operator services, which, again, are not relevant in the context of broadband Internet service.

160, 95th Leg., 2010 Reg. Sess. (Mich. May 19, 2010) (Adopted) and H.R. 285, 95th Leg., 2010 Reg. Sess. (Mich. May 14, 2010) (Adopted); H.R. 878, 194th Gen. Assem., 2009-10 Reg. Sess. (Pa. July 1, 2010) (Introduced); H.R. 1101, 52nd Leg. (2010), 2nd Sess. (Okla. May 24, 2010) (Introduced).

²⁸ See *NOI* at Heading II.B.2.

²⁹ See *NOI* at Heading II.B.3.

- **Section 227.** This provision limits the use of automated dialing systems and facsimile advertising, and likewise has no application with regard to broadband Internet service.
- **Section 228.** This provision regulates the offering of pay-per call services, and is irrelevant as applied to broadband.
- **Section 251.** Specific subsections of this provision require local exchange carriers to offer (among other things) local number portability and dialing parity, and to negotiate reciprocal compensation arrangements for the exchange of local telephone traffic -- none of which has application in the context of broadband.
- **Section 258.** This provision prohibits unauthorized changes in a subscriber's pre-selected telephone service provider. It, too, has no application with regard to the broadband context, where a change in provider generally requires the installation of new facilities and/or customer premises equipment (precluding surreptitious replacement of the provider) and where the selected broadband provider would need to assent to any such change (in contrast to the long-distance context that gave rise to the slamming prohibition, in which an IXC could unlawfully direct the customer's LEC to change the customer's pre-selected IXC without that original IXC's knowledge or consent).
- **Sections 271 and 272.** These provisions impose a host of requirements on Bell Operating Companies (BOCs) as preconditions to the provision of interLATA service. However, the BOCs have all received interLATA authority in all of their states, the Commission has deemed Section 271 to have been "fully implemented," and all Section 272's requirements have all sunset.

Second, even those provisions that could be argued to have some potential meaning in the broadband context are not properly extended to that context. They were designed to address a monopolistic environment that simply does not exist with regard to broadband Internet service. As discussed at length above and in the attached **Factual Record Appendix**, broadband competition is robust.³⁰ Under these circumstances, even those Title II requirements that could theoretically be applied to broadband Internet service should not be. For example:

- **Sections 203-205.** These provisions require telecommunications carriers to tariff their services. As the Commission has long recognized, their application is inappropriate in markets not dominated by a single provider. To that end, the Commission has mostly forborne from imposing tariffing requirements on long-

³⁰ Factual Record Appendix, 7-11.

distance carriers, CMRS providers, and competitive local exchange carriers.³¹ There is absolutely no basis for imposing such requirements on providers of broadband Internet access, given the high proportion of customers with access to multiple fixed and mobile broadband providers.

- **Section 214.** This section imposes (among other things) limitations on a provider's ability to enter or exit markets without regulatory approval. The Commission has long recognized that entry regulation is not appropriate in the contemporary communications market,³² and that it is particularly inappropriate in the context of advanced services.³³ Nor are "exit" limitations appropriate: In a market characterized by multiple providers and the high revenue opportunities available for the provision of voice, data, video, alarm-monitoring, and other services using the broadband connection, there is little reason to fear that a provider will exit a market such that customers are left with no broadband options. Nor is there any reason to believe that customers in such a market will be inadequately served by the same broadly applicable contractual remedies and consumer protection mandates that guard customers' interests in other non-monopoly markets.
- **Section 220.** This provision and related rules prescribe accounting practices for use by common carriers. Whether or not such requirements were appropriate for purported legacy monopoly providers operating under rate-of-return and/or price-cap pricing requirements, they certainly are not properly applied to a broadband market in which prices are constrained by competition (which is only growing) and consistently falling.
- **Sections 251 and 252.** Specific provisions of this section mandate

³¹ See *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 245(g) of the Communications Act of 1934*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (subsequent history omitted); *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411 (1994) (subsequent history omitted); *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) (subsequent history omitted); see also 47 C.F.R. § 20.15.

³² *In the Matter of Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Report and Order and Second Memorandum Opinion and Order, 14 FCC Rcd 11364 (1999).

³³ *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22415 ¶ 20 (2004) ("Regardless of the definitional classification of DigitalVoice under the Communications Act, the *Minnesota Vonage Order* directly conflicts with our pro-competitive deregulatory rules and policies governing entry regulations, tariffing, and other requirements arising from these regulations for services such as DigitalVoice.").

interconnection on specific rates and terms, unbundling of network facilities, resale of services at regulated rates, and collocation of competitors' facilities. These aggressive requirements were designed to facilitate competitive entry in the local service market, where competitors had historically faced economic and legal barriers to entry. However, such requirements impose substantial costs on providers and can deter investment by all market participants. As such, they are not appropriate for the broadband market, in which numerous entities compete over a large variety of platforms, and in which providers have successfully employed a variety of commercial agreements to ensure interconnection. Likewise, there is no reason to impose Section 252's obligations, which address the means by which carriers must negotiate and/or arbitrate interconnection agreements implementing certain Section 251 obligations.

Nor should the Commission presume that these obligations are somehow harmless, and should therefore be imposed "just in case," even if they might ultimately prove unnecessary. In fact, regulations of the sort discussed here would be disastrous for investment, which (as described above) has blossomed as a result of the Commission's Title I framework. Title II's obligations would serve to commoditize broadband Internet service, depriving providers of the opportunity to offer distinctive services that differentiate them from their competitors (of whom, as described above, there are often many). Thus, even apparently innocuous obligations can be deeply corrosive to a provider's business case, forcing the provider to incur all costs associated with deployment while sharing the benefits with competitors. In short, insofar as they can be applied to broadband, the obligations under consideration would undermine deployment, and would therefore be inimical to the public interest.

As described above, the *NOI's* "Second Way" is not a viable framework for the regulation of broadband Internet service. Many of Title II's obligations simply have no bearing with regard to broadband, and even those that might be argued to have some potential meaning in the broadband context are not appropriate to that market. The application of such regulation would impose significant unneeded regulation. This would, in turn, seriously undermine investment in next-generation broadband networks, undermining future competition and

disserving the public. The Commission must therefore eschew the *NOI*'s "full Title II" proposal.

3. The Title II forbearance option is wholly inappropriate

While clearly preferable to the application of all Title II requirements to broadband, the *NOI*'s so-called "Third Way," which "would involve classifying wired broadband Internet connectivity as a telecommunications service ... but simultaneously forbearing from applying most requirements of Title II to that connectivity service, save for a small number of provisions,"³⁴ is also wholly inappropriate as a matter of law and policy alike.³⁵

To the extent the *NOI* contemplates the application of certain Title II requirements to that transmission "component" -- specifically Sections 201, 202, and 208³⁶ -- it would be both unlawful and unwarranted, given the competitive state of the broadband ecosystem and the nearly complete absence of any claims of harm under the current regime. As described above and in the **Factual Record Appendix**, the vast majority of Americans have access to three or more fixed broadband providers and three or more mobile broadband providers. Given these conditions, one would expect to find the forces of competition protecting consumer interests, as providers work to capture and retain customers by responding to customer needs. And, in fact, this is precisely what has happened.

³⁴ See *NOI* ¶ 67.

³⁵ Because the "Third Way" relies on the identification of a separate "transmission" component of broadband Internet service and the classification of that component as a telecommunications service, it is subject to all of the legal infirmities discussed below, and could not be sustained for that reason, in addition to the reasons discussed here.

³⁶ With respect to Sections 254, 255 and 222, the principles reflected therein and their potential meaning in the broadband context, even assuming *arguendo* that any of those principles could be appropriate, they do not warrant the reclassification of broadband Internet access, given the ways in which such reclassification would undermine investment and hamper deployment. Qwest discusses the Commission's ability to address these areas under its Title I ancillary jurisdiction below.

The *NOI* essentially asks commenting parties to identify those provisions of Title II it should decline to forbear from should it pursue the “Third Way” and reclassify some portion of broadband Internet access as a telecommunications service. However, under Section 10’s forbearance standard, the Commission would have to forbear from the application of all provisions in Title II. Given the above, the Commission could not plausibly argue that Section 10’s forbearance standard permits the application of any of the common-carrier requirements designed a century ago for the provision by monopoly providers of communications and transportation offerings. Section 10 asks the Commission to consider whether “enforcement of [the] regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations ... are just and reasonable and not unjustly or unreasonably discriminatory,” whether such enforcement “is not necessary for the protection of consumers,” and whether forbearance “is consistent with the public interest.”³⁷ Here, where customers are being well-served by a multi-platform market offering, consistently improved quality of service and consistently declining prices, and where providers continue to invest massive amounts of capital in an effort to build better, faster, and more efficient networks, there can be no argument that the application of provisions that currently *do not apply* is somehow “necessary” to insuring reasonable rates, terms, or prices, to protecting consumers, or to promoting the public interest.

This conclusion is only bolstered by Section 10’s legislative history and its consistent interpretation by the Commission and the courts, all of which confirm that this provision is designed to *remove* existing requirements -- *i.e.*, to deregulate -- where (as here) the market is capable of ensuring that providers respond to consumer needs. When the Senate Committee on Commerce, Science, and Transportation passed the 1995 version of what later became the 1996

³⁷ 47 U.S.C. § 160(a).

Act -- a version whose forbearance provision largely mirrored the provision ultimately enacted -- the Report emphasized that the section would “permit the FCC to reduce the regulatory burdens on the telephone company when competition develops or when the FCC determines that relaxed regulation is in the public interest.”³⁸ Likewise, that Committee’s Chairman commented on the Senate floor that forbearance “will allow the FCC to reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest.”³⁹ The D.C. Circuit has called Section 10 “[c]ritical to Congress’s deregulation strategy.”⁴⁰ The Commission has similarly called Section 10 “[a]n integral part of the ‘pro-competitive, de-regulatory national policy framework’ established in the 1996 Act,”⁴¹ and General Counsel Austin Schlick cited “section 10’s deregulatory mandate” in his May 6 statement laying out the Third Way framework.⁴²

Given the competitive state of the market, the absence of significant harm resulting from the current framework, and Section 10’s deregulatory purpose, the Commission simply cannot sustain a refusal to forbear from application of Sections 201, 202, and 208. Moreover, the Commission cannot evade the factual record before it by relying on a “predictive judgment” that future harms might arise if it does not subject broadband Internet service to Sections 201, 202

³⁸ 104 S. Rpt. 23, Telecommunications Competition and Deregulation Act of 1995.

³⁹ 141 Cong. Rec. S7886 (daily ed. June 7, 1995) (remarks of Sen. Pressler).

⁴⁰ *AT&T Inc. v. FCC*, 452 F.3d 830, 832 (D.C. Cir. 2006).

⁴¹ See, e.g., *In the Matters of Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements; Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19487 ¶ 15 (2007) (quoting Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996)).

⁴² Austin Schlick, *A Third-Way Legal Framework for Addressing the Comcast Dilemma* (rel. May 6, 2010).

and 208. As the courts have made clear, an agency may not cite predictive judgments as a substitute for evidence, particularly where (as here) the prediction is incompatible with the evidence available. “Simply put, the Commission needs to undergird its predictive judgment ... with some evidence for that judgment to survive arbitrary and capricious review.”⁴³ The courts, accordingly, have rejected Commission predictions of harm where the feared harm has not previously materialized, or has done so only rarely. For example, in 2006, the D.C. Circuit vacated an FCC enforcement action taken against BellSouth in connection with the carrier’s special access pricing plan.⁴⁴ The Commission’s order had been grounded on a prediction that the plan would harm certain market participants. The court, however, observed that the Commission had failed to cite any provider that had been harmed over the plan’s five-year lifespan, and that the ruling was incompatible with this fact: “[T]he deference owed agencies’ predictive judgments gives them no license to ignore the past when the past relates directly to the question at issue.”⁴⁵ Likewise, the court had previously struck down a Commission decision maintaining its cable/broadcasting cross-ownership rule based on “only one instance in which a cable operator denied carriage to a broadcast station...” and a prediction of future harms based on that incident.⁴⁶ A single incident, the court held, did not show “a substantial enough probability” of harm in the rule’s absence,” and therefore was “just not enough to suggest an otherwise significant problem held in check only by the [rule].”⁴⁷ Here, too, given the dearth of

⁴³ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 409 (3rd Cir. 2004).

⁴⁴ *See BellSouth Telecomms. Inc. v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006).

⁴⁵ *Id.* at 1060 (emphasis added) (internal citations omitted).

⁴⁶ *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1050-51 (D.C. Cir. 2002), *modified on other grounds*, 293 F.3d 537 (D.C. Cir. 2002).

⁴⁷ *Id.*

harms resulting from the current regulatory framework, the Commission is barred from basing any refusal to forbear from Sections 201, 202, and/or 208 on a prediction of future harm.

As crippling as the “Third Way” could be to investment as currently envisioned, a regime that applied even more regulation to broadband Internet service would be still worse -- and the risk of such encroachment will deter investment even if the “Third Way” is adopted in its more modest forms. As described above, any new regulatory mandates are likely to undermine investment in next-generation broadband facilities.⁴⁸ But even the risk of additional regulation will depress investment, because providers considering deployment must account for future developments -- and discount expected returns accordingly. Thus, the prospect of additional regulation in the future can fundamentally alter the investment calculus today, rendering otherwise feasible deployments uneconomic.

The “Third Way” presents particular dangers in this regard, given the possibility that Commission decisions granting forbearance from certain obligations today could be overruled at some future date. Qwest believes strongly that Section 10 does not contemplate the reversal of forbearance decisions. While the Act mandates forbearance when the Section 10 criteria are met, it contains no language expressly requiring or permitting reversal of prior forbearance decisions. Moreover, “unforbearance” would be incompatible with the Congressional vision detailed above, which contemplated forbearance as the natural outgrowth of economic and technological forces eroding market power in the traditional telephony market. And, in at least some cases -- where a section 10(c) petition is granted by default -- the forbearance is deemed the action of Congress, not of the Commission.⁴⁹ These facts all suggest that the Commission may not “unforbear.”

⁴⁸ See *supra* Part II.D.1.

⁴⁹ See *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (2007) (“Congress made the decision in § 160(c) to ‘grant’ forbearance whenever the Commission ‘does not deny’ a carrier’s petition.”)

However, it is clear that others disagree -- perhaps including the Commission itself.⁵⁰ Indeed, the Commission has further exacerbated uncertainty regarding the finality of forbearance decisions by suggesting that it might be appropriate to revisit such decisions based on subsequent doubts regarding the conclusions on which they were based.⁵¹ Statements such as these cast a long shadow over investors' decision-making, introducing worrisome risk regarding the extent of future regulation. Thus, to the extent the Commission does pursue the so-called "Third Way" approach, it must make all possible efforts to ensure that its forbearance decisions can not be later reversed.

For all these reasons, it is clear that adoption of the "Third Way" will immediately impose significant unneeded regulation and substantially increase the risk of still further unnecessary regulation in the future.

4. A reversal of the Commission's prior classification orders could not be sustained legally

As noted above, a reversal of the Commission's prior classification orders could not be sustained legally. This problem, thus, exacerbates the policy concerns discussed above with respect to either of the *NOI's* two Title II options and their potential impact on investment. The relevant record on the nature of broadband Internet access offerings makes clear that nothing has changed to justify a reversal of the Commission's key finding in its past orders that there is no severable transmission component in broadband Internet access offered as a telecommunications

When the Commission failed to deny Verizon's forbearance petition within the statutory period, Congress's decision -- not the agency's -- took effect.").

⁵⁰ See, e.g., *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, FCC 10-113, ¶ 34 & n.112 (rel. June 22, 2010) (*Phoenix Order*) (declining to "prejudge" pending petition seeking to rescind relief granted to Qwest in the Omaha MSA).

⁵¹ See *id.*

service to the public. A reversal of the Commission’s prior classification orders would also violate the First and Fifth Amendments.

a. The relevant record on the nature of broadband Internet access offerings

The *NOI* asks a number of detailed questions regarding the current facts in the broadband marketplace, all apparently tailored to determining whether the facts have changed on the question whether there is a severable transmission component in broadband Internet access being offered as a telecommunications service to the public. Answering that question requires a straight-forward application of the following principles:

- The Act defines a “telecommunications service” as “the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used.”⁵²
- “[T]elecommunications” is defined as “the transmission . . . of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁵³
- An “information service” is defined as the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”⁵⁴
- The Commission has found that the categories of telecommunications service and information service are mutually exclusive.⁵⁵

⁵² 47 U.S.C. § 153(46).

⁵³ *Id.* at (43).

⁵⁴ *Id.* at (20).

⁵⁵ See *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4823 ¶¶ 39-40 (2002) (*Cable Modem Order*); *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11516-26 ¶¶ 33-48, 11530 ¶ 59 (1998) (*Report to Congress*); *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24029 ¶¶ 35-37 (1998); *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd 385,

- As recognized by both the Commission in its various classification orders and the *NOI* itself and by the Supreme Court in *Brand X*, “[i]t is common usage to describe what a company ‘offers’ to a consumer as what the consumer perceives to be the integrated finished product.”⁵⁶
- Similarly, the term “offer” in the definition of “telecommunications service” means a stand-alone offering of telecommunications that transparently transmits information chosen by the user, which, from the user’s perspective, is different in kind from the provision of data processing capabilities integrated with transmission capability that is the hallmark of an “information service.”⁵⁷

Applying these principles, it is clear that, for Qwest’s broadband Internet service offerings as well as those of other providers, the consumer perceives the finished product to be an integrated broadband Internet access product and not a separate transmission service. As the

394-95 ¶ 21 (1999); *In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7120 ¶ 27 (1999); *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, Report and Order, 18 FCC Rcd 7418, 7447 ¶¶ 49-50 (2001).

⁵⁶ See *National Cable Telecomm. Ass’n v. Brand X*, 545 U.S. 967, 990 (2005) (*Brand X*); see also, *Amendment of Section 64.702 of the Comm’n’s Rules & Regulations, Second Computer Inquiry*, Final Decision, 77 FCC 2d 384 (1980) (*Computer II Final Decision*), *aff’d sub nom. Computer & Comm’n’s Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *Amendment of Section 64.702 of the Comm’n’s Rules & Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Phase I, Report and Order, 104 F.C.C. 2d 958 (1986) (*Computer III Phase I Order*) (subsequent history omitted); *Cable Modem Order*, 17 FCC Rcd 4798; *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005); *In the Matter of United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006); *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007); and see also *NOI* ¶¶ 12-21.

⁵⁷ See 1998 Report to Congress, 13 FCC Rcd at 11507-78 ¶ 13, 11516-526 ¶¶ 33-48. See also, *Brand X*, 545 U.S. at 990 (“One might well say that a car dealership ‘offers’ cars, but does not ‘offer’ the integrated major inputs that make purchasing the car valuable, such as the engine or the chassis. It would, in fact, be odd to describe a car dealership as ‘offering’ consumers the car’s components in addition to the car itself.”).

Supreme Court found in *Brand X*, the service that Qwest and other providers offer to members of the public “is Internet access, ‘not a transparent ability (from the end user’s perspective) to transmit information.’”⁵⁸ Moreover, to the point of the question in the *NOI*, nothing has changed that would warrant a different finding by the Commission on these issues.

Indeed, if anything, broadband Internet access services are even more clearly characterized today as the provision of information processing (as opposed to transmission) than they were at the time of the Commission’s prior reclassification orders. As the Supreme Court found in the *Brand X* decision, Qwest’s broadband Internet access can only be characterized as an integrated service that “provides consumers with a comprehensive capability for manipulating information using the Internet.” Every aspect of this service entails information processing. Whether a consumer is using the service to browse web pages, to download or upload files, or for any other function, the consumer is generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. And, broadband Internet access is, at its essence, a service that provides such capability to the consumer.

Relatedly, the technical functionality underlying this service inherently entails a broad variety of integrated information processing just as it did at the time of the Commission’s prior orders. Much has been made by proponents of intrusive regulation that domain name system (DNS) functionality (the functionality by which a uniform resource locator (URL) entered into the address bar is converted into an IP address by a DNS service) is available from third parties on a stand alone basis.⁵⁹ However, virtually all consumers today rely on broadband providers to offer that functionality as an integral part of broadband Internet access service. DNS is a critical

⁵⁸ *Brand X*, 545 U.S. at 999-1000 (finding that “subscribers can reach third-party Web sites via “the World Wide Web, and browse their contents, only because their service provider offers the ‘capability for ... acquiring, [storing] ... retrieving [and] utilizing ... information.’”).

⁵⁹ See, e.g., *NOI* ¶ 58.

security component of Internet access and Qwest goes to great lengths to protect its DNS service from attacks or corruption. Moreover, in addition to DNS, broadband Internet access inherently entails a variety of other information processing technical functionality. This includes, to name just a few aspects: the information processing necessary to establish a physical layer between a modem and the broadband network in the first place; radius server information processing (providing the authentication and other essential radius functionality that permits an end user to interact with broader Internet access architecture); routing capabilities and security mechanisms to ensure IP packets are delivered to the appropriate recipients; and web browsing functionality by which an end user connects with the IP address provided by the DNS service. Qwest's systems and engineers are also constantly monitoring Internet traffic flows to protect broadband customers from denial of service attacks and Qwest has a dedicated security team and its Consumer Internet Protection Program in place to alert customers of possible malware, worms, and viruses that may be on their computers through our Walled Garden infrastructure.⁶⁰ Qwest's broadband Internet access service also inherently entails information processing in the form of spam and malware protection, network monitoring and other management techniques to provide a safe, high performance Internet experience for customers. Some end users may choose to obtain some limited portion of this functionality from a third party. For example, some end users

⁶⁰ The Commission's Network Reliability and Interoperability Council (NRIC) website catalogues more than 200 cybersecurity best practices for network operators to implement within their networks. See NRIC Best Practices website, available at <https://www.fcc.gov/nors/outage/bestpractice/BestPractice.cfm>. Among other things, these best practices address surveillance of the network (Detailed Information for the Best Practice: 7-7-0401, available at <https://www.fcc.gov/nors/outage/bestpractice/DetailedBestPractice.cfm?number=7-7-0401>), protection against denial of service attacks (Detailed Information for the Best Practice: 7-6-8047, available at <https://www.fcc.gov/nors/outage/bestpractice/DetailedBestPractice.cfm?number=7-6-8047>), and protection of the domain name system from poisoning (Detailed Information for the Best Practice: 7-6-8048, available at <https://www.fcc.gov/nors/outage/bestpractice/DetailedBestPractice.cfm?number=7-6-8048>).

choose to use third-party web browsers. But, again, all of the Qwest technical functionality is still provided with the service and is fully integrated with the Internet access service offering. And, much of this functionality is, in fact, exclusively provided by Qwest.

Nor has anything changed in terms of the features that come with broadband Internet access. All of Qwest's residential broadband Internet access plans include some or all of the following: email accounts and email storage; parental controls; personal blogs; pop-up blockers; junk mail guards; instant messaging; Wi-Fi access; online backup protection; a suite of backup, security, and other support services; home networking assistance, and the ability to set up a personalized home page that automatically retrieves games, weather, news and other information selected by the user.⁶¹ Qwest's business plans include similar email functionality, security and other support, as well as web hosting, online marketing, wireless networking, and a variety of other business tools.⁶² All of these features similarly involve "generating, acquiring, storing, transforming, processing, retrieving [and/or] utilizing" information. Again, for some of these features, a customer may choose to utilize a third party. For example, Qwest residential customers can choose to use G.mail instead of the Qwest email feature. But, the Qwest email feature is still provided with the service. And, end users still must rely on the network provider for the technical functionality described above.

Moreover, Qwest and other broadband providers compete based on these service functionalities and features, just as they compete based on speed and price. Providers use these

⁶¹ See Qwest's residential offer and ordering web site: <http://www.qwest.com/residential/internet/broadbandlanding>; *see also* http://www.qwest.com/residential/internet/broadbandlanding/compare_plans.html (providing a comparison of Qwest retail residential high speed Internet Services).

⁶² See Qwest's small business offer and ordering web site: <https://www.qwest.com/smallbusiness/products/products-internet.html>.

aspects of broadband Internet service to differentiate their services from those of competitors.⁶³

b. Any reversal of the Commission's prior classification orders could not be sustained legally

In light of the above, any reversal of the Commission's past rulings regarding the classification of broadband Internet access under Title I would be legally untenable. The Commission, in its *Cable Modem Order* and its subsequent decisions addressing the regulatory status of other broadband technologies, ruled that broadband Internet access is an information service with an inseparable telecommunications component.⁶⁴ It follows, said the Commission, that broadband Internet access is not a telecommunications service within the Commission's

⁶³ See, e.g., Comcast

<http://www.comcast.com/Corporate/Learn/HighSpeedInternet/highspeedinternet.html?lid=2LearnHSI&pos=Nav>;

Cox <http://ww2.cox.com/residential/arizona/internet.cox>;

Charter: <http://www.charter.com/Visitors/Products.aspx?MenuItem=20>;

Mediacom: http://www.mediacomcc.com/internet_online.html;

Cableone: <http://www.cableone.net/FYH/Pages/highspeedinternet.aspx>

Qwest <http://www.qwest.com/#hsi>;

AT&T

http://localization.att.com/loc/controller?cdvn=landinglocalization&pid=1080<ype=res&prod-snip=res_internet_dsl.

⁶⁴ *In re Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Order*), *rev'd*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd*, *NCTA v. Brand X*, 545 U.S. 967 (2005); *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*), *aff'd sub nom. Time Warner Telecom v. FCC*, No. 05-4769 (and cons. cases), 507 F.3d 207 (2007); *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (*Wireless Broadband Order*).

Title II jurisdiction.⁶⁵ As demonstrated above and in prior submissions to the Commission by Qwest and other parties, the factual underpinnings to these rulings have not changed.⁶⁶ Indeed, this conclusion is even more accurate today.

Moreover, the industry, particularly broadband providers who have invested billions of dollars in network build-out since the Commission's rulings, has relied heavily on these rulings in making significant financial outlays.⁶⁷ In this context, the Commission can not simply cast aside its prior rulings.

Applicable legal precedent establishes the burden that applies where a reversal by the Commission would require it to make factual findings that contradict its earlier rulings and where its policy has engendered serious reliance interests such as those at stake here.⁶⁸

Specifically, the Supreme Court has held:

This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must -- when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account....It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.⁶⁹

This legal standard can not be met here. The transmission component of broadband Internet access is, if anything, more integrated into the finished service than at the time of the

⁶⁵ *Cable Modem Order*, 17 FCC Rcd at 4823 ¶ 39; *Wireline Broadband Order*, 20 FCC Rcd at 14902 ¶ 93; *Wireless Broadband Order*, 22 FCC Rcd at 5908 ¶ 18.

⁶⁶ See, e.g., letter to Julius Genachowski, Chairman, Federal Communications Commission, GN Docket Nos. 09-191 and 09-51 and WC Docket No. 07-52, from Steve Davis, Qwest, *et al.*, dated Feb. 22, 2010 (Feb. 22 letter to Genachowski).

⁶⁷ *Id.* at 3. See also, Section II.A, *supra*.

⁶⁸ *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1810-1811 (2009).

⁶⁹ *Id.* at 1811.

Commission's prior broadband decisions.

Nor is *Comcast v. FCC* itself a basis for the Commission to justify Title II classification. In that decision, the D.C. Circuit simply ruled that, whatever the Commission may seek to do in terms of regulating broadband, it must satisfy the Title I ancillary jurisdiction standard.

Similarly, the Commission could not reverse its prior classification orders based on some observation about the current state of competition for broadband. To begin with, as demonstrated above and in a variety of other dockets currently before the Commission, competition has thrived and there has been robust growth in the broadband market since the Commission classified broadband Internet access as a Title I information service.⁷⁰ But, even if that were not the case, it would be reversible error to premise a reclassification decision upon any determination regarding the current state of competition. The classification analysis is not, and never has been, properly guided by concerns of competition policy. The relevant statutory definitions speak to the functionalities provided, not the state of the market for those functionalities.⁷¹ Likewise, the Commission's decisions addressing service classification have examined the functionality of the services provided, and the degree to which any information-service aspects were integrated with, or merely incidental to, the underlying transmission -- not to the state of the market for the offering at issue.⁷²

⁷⁰ See Section II.A., *supra*. See also, Factual Record Appendix, *generally*.

⁷¹ See 47 U.S.C. § 153(20) (defining "information service"), 153(43), (46) (together providing definition of "telecommunications service").

⁷² See, e.g., *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10731 (2008); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006); *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826 (2005); *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and

c. Title II reclassification would violate the First and Fifth Amendment Rights of Internet Access Service Providers

Reclassification under either of the Title II options identified by the Commission would also violate both the First and Fifth Amendments. Even the Commission's "third way" -- *i.e.*, reclassification together with substantial forbearance of many of the provisions of Title II -- would still impose the core common-carrier obligations of Sections 201 and 202 on broadband Internet access service providers, compelling them to dedicate their privately owned networks for the use of third-party content providers and denying access providers the right to choose how to transmit the traffic on their networks. Although, in responding to competitive market forces, Qwest and many other providers are committed to affording consumers the best possible Internet experience, which in many cases may include such things as nondiscriminatory traffic management, there is a world of difference between what access service providers will decide as a matter of business policy and what government may compel as a matter of law.

i. Reclassification would violate the Fifth Amendment.

First, mandating that broadband providers open their networks to all comers, on an equal basis, appropriates private property and constitutes a taking within the meaning of the Fifth Amendment. Such a rule would effectively grant third-party content providers the use of a portion of an access provider's network and thereby represent an occupation of that property. It would cede to a third party what would amount to an easement to intrude its content onto the provider's transmission equipment, computers, and cables. The government-compelled occupation and use of provider property would strip the provider of its right to exclude others --

Report and Order, 21 FCC Rcd 7290 (2006); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002). The Supreme Court followed the same approach in *Brand X*.

perhaps the most fundamental element of the bundle of rights known as “property.”

In the context of the cable must-carry rules, the courts in *Turner Broadcasting*⁷³ noted the potential Fifth Amendment question arising from the compelled opening of private property to third-party use, even though the issue of a taking was not before them.⁷⁴ In *Turner I*, four Justices noted “possible Takings Clause issues” from a hypothetical government mandate to transform cable systems into common carriers. 512 U.S. at 684 (O’Connor, J., concurring in part and dissenting in part, joined by Scalia, Thomas, and Ginsburg, JJ.). These concerns are equally relevant here.

The elimination of the power to exclude works a taking. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court applied the Takings Clause to a state law compelling apartment building owners to permit cable operators to place a small cable box and about 30 feet of one-half inch cable on their apartment buildings. *Id.* at 422. Explaining that the “power to exclude has traditionally been considered one of the most treasured strands in an

⁷³ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*), and *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*).

⁷⁴ See *Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 56 (D.D.C. 1993) (Sporkin, J., concurring) (“No challenge has been made under the taking provision of the Fifth Amendment or any other legal provision.”). Judge Williams raised the Fifth Amendment issue in the three-judge district court:

Because of my conclusions on the First Amendment challenge to the must-carry provisions, I do not reach the contention . . . that those provisions also represent an unconstitutional taking of cablecasters’ property in violation of the Fifth Amendment. I do not, however, regard that claim as frivolous. The creation of an entitlement in some parties to use the facilities of another, *gratis*, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) where the Court struck down a statute entitling cable companies to place equipment in an owner’s building so that tenants could receive cable television. The NAB responds that *Loretto* is limited to “physical” occupations of “real property.” But the insertion of local stations’ programs into a cable operator’s line-up presumably is not a metaphysical act, and presumably takes place on real property.

Turner, 819 F. Supp. at 67 n.10 (Williams, J., dissenting) (internal citation omitted).

owner's bundle of property rights," *id.* at 435, the Court held that even such a "minor" occupation of an owner's property authorized by government "constitutes a 'taking' of property for which just compensation is due." *Id.* at 421. This *per se* rule is warranted because "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* at 436. "An owner is entitled to the absolute and undisturbed possession of every part of his premises. . . ." *Id.* at 436 n.13 (brackets, quotation marks and citation omitted).

The Supreme Court specifically held that a government-authorized invasion by a private party is treated no differently than a trespass by the government itself. "A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." *Loretto*, 458 U.S. at 432, n.9. Indeed, "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property." *Id.* at 436 (original emphasis). To force an owner to permit a third party to use and control part of his property "literally adds insult to injury." *Id.* at 436.

Following *Loretto*, the D.C. Circuit in *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994), invalidated the Commission's physical co-location rules, which granted competitive telephone providers "the right to exclusive use of a portion of the [local exchange carrier's] central offices." The FCC's rules "directly implicate[d] the Just Compensation Clause of the Fifth Amendment, under which a 'permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.'" *Id.* at 1445 (quoting *Loretto*, 458 U.S. at 426). The court had no occasion to consider the FCC's virtual co-location rules because it deemed them a mere exception to the physical co-location requirement; it therefore vacated the virtual co-location rules as a matter of severability and did

not consider their constitutionality. *Id.* at 1447.

By the same token, applying Sections 201 and 202 to broadband access service providers would require that they accept the intrusion of third-party network traffic onto their property -- their transmission equipment, computers, and cables. Such a rule is not a mere *regulation* of the provider's property. A "regulatory taking . . . does not give the government [or its agent] any right to use the property, nor does it dispossess the owner or affect her right to exclude others." *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324, n.19 (2002). In contrast, reclassification would lead to a physical invasion of transmission facilities and a "practical ouster of [the access provider's] possession." *Loretto*, 458 U.S. at 428 (citation and quotation marks omitted). It compels "an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." *Id.* at 431 (citation and quotation marks omitted). The *Loretto* Court stated that a *per se* taking occurs when the government authorizes a third party to "'regularly' use, or 'permanently' occupy, . . . a thing which theretofore was understood to be under private ownership." *Id.* at 427 n.5 (citation and quotation marks omitted). Reclassification would have these same harmful impacts.

The taking cannot be avoided by describing the invasion as "electronic" rather than "physical." The law recognizes many forms of property -- real, personal, intellectual and so on -- and the forms of physical encroachment are just as varied. In fact, an invasion need not even physically touch the property in order to "occupy" it: the placement of telephone lines suspended above another's real estate or building or right-of-way constitutes a compensable physical invasion, "even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." *Loretto*, 458 U.S. at 430; *see also id.* at 422 (intruding cable company wires were suspended above rooftop of plaintiff's

building); *id.* at 429-30 (“construct[ing] and operat[ing] telegraph lines over a railroad’s right of way” would “be a compensable taking”).

In the case of a provider’s network, an electronic invasion or occupation is every bit as real as a physical one. Otherwise, the government could appropriate the entire network by, for example, commanding it to carry only content supplied by the government or a designated third party, and then claim that no “taking” of private property had occurred. The Fifth Amendment may not be circumvented through such subterfuge. *E.g.*, *Kimball Laundry v. United States*, 338 U.S. 1, 12 (1949) (government must pay just compensation “where public-utility property has been taken over for continued operation by a governmental authority”); *cf. Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 2010 WL 2400086 (U.S. June 17, 2010) (opinion of Scalia, J., joined by Roberts, C.J., Thomas, and Alito, JJ.) (“[T]hough the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing. Thus, . . . States effect a taking if they recharacterize as public property what was previously private property.”). Even the famous “seizure” of the steel mills in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 630-31 (1952), did not involve physical invasion as such of the mills by government agents. Rather, the presidents of the various mills were deputized as “operations managers” and directed to carry on their activities in accordance with regulations and directions of the Secretary of Commerce. 343 U.S. at 583.

Thus, reclassification would qualify as a *per se* taking whether the invasion is described as “physical” or “electronic.” Further, reclassification would violate the Fifth Amendment even if it were analyzed not under *Loretto* but as a regulatory taking. In *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), for example, the Supreme Court held that a nondiscrimination rule

requiring open access to a privately developed marina constituted a compensable taking.

Although the Supreme Court has “been unable to develop any ‘set formula’ ” for such regulatory takings, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), it has “identified several factors -- such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action -- that have particular significance.” *Kaiser Aetna*, 444 U.S. at 175.

Starting with the character of the government action, here -- as in *Kaiser Aetna* -- the challenged action is the government’s imposition on the property owner of a servitude or easement allowing others to use the property and preventing the owner from exercising the right to exclude. In *Kaiser Aetna*, the government tried to impose a navigational servitude that would have allowed the public free access to private property. 444 U.S. at 169, 178. There, the public - like a third-party content provider here -- was “an interloper with a government license.”

Florida Power, 480 U.S. at 253. The Supreme Court found a taking:

[W]e hold that the “right to exclude,” so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners’ private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.

Kaiser Aetna, 444 U.S. at 179-80 (internal citations and footnotes omitted); *see also Nollan v.*

California Coastal Comm’n, 483 U.S. 825 (1987) (state could not, without paying compensation, require beachfront property owners to grant an easement allowing members of the public to pass across their property). The same result would obtain in this case.

The economic impact of the government-licensed invasion imposed by reclassification would be far greater than that of the navigational servitude at issue in *Kaiser Aetna*. There, the

public would have enjoyed “free access” to the marina “while [the property owners’] agreement with their customers call[ed] for an annual \$72 regular fee.” 444 U.S. at 180. Under Sections 201 and 202 of Title II, content providers throughout the country would enjoy free use of a broadband access service provider’s facilities and free access to the provider’s customers -- property rights worth considerably more.

Finally, there are the provider’s reasonable, investment-backed expectations. Broadband Internet access service providers have invested billions of dollars to upgrade their systems to handle increased capacity and to offer a host of innovative services, all to the end of offering their customers a better product. For the government to take advantage of the providers’ own market-driven improvements to their property to impose Title II obligations in order to subsidize and encourage independent content providers would upset reasonable, investment-backed expectations and violate basic norms of fairness.

ii. Reclassification would violate the First Amendment

Reclassification would displace access service providers’ editorial control over their networks and would therefore violate the First Amendment rights of free speech and free press. The First Amendment protects the process of editorial control and selection of information, as well as the transmission of content of one’s own creation. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995), for example, the Supreme Court made clear that the process of choosing among messages was itself an act of expression:

Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others. For that matter, the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers’ opinion pages, which, of course, fall squarely within the core of First Amendment security, as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper. The selection of contingents to make a parade is entitled to similar protection.

Id. at 570 (citations omitted).

Similarly, in *Turner I*, 512 U.S. 622 and *Turner II*, 520 U.S. 180, the Supreme Court held that the First Amendment protects the right of cable operators to decide what channels to carry, whether or not the programming involved is produced by the cable operator or an affiliate: “Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable programmers and operators ‘seek to communicate messages on a wide variety of topics and in a wide variety of formats.’” *Turner I*, 512 U.S. at 636 (quoting *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)). The Court held that mandatory carriage rules interfered with a provider’s editorial control and therefore abridged “speech” within the meaning of the First Amendment. *Turner I*, 512 U.S. at 636-37. A bare majority of the Supreme Court upheld this must-carry regime even though all agreed that it substantially infringed the First Amendment rights of both cable operators and cable programmers: “At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Turner I*, 512 U.S. at 641. The must-carry regime invaded the cable companies’ constitutionally guaranteed autonomy to choose “what to say and what to leave unsaid.” *Pacific Gas & Elec. Co. v. Public Utilities Comm’n*, 475 U.S. 1, 11 (1986) (plurality opinion).⁷⁵

⁷⁵ In the wake of *Turner Broadcasting*, lower courts have continued to apply the same principle. In *Time Warner Ent’t Co. v. FCC*, 240 F.3d 1126, 1133-34 (D.C. Cir. 2001), for example, the court of appeals held that the Commission’s 30% subscriber cap on cable operators did not satisfy intermediate scrutiny under the First Amendment because it limited the ability of cable companies to speak with their customers. In *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009), the D.C. Circuit vacated the subscriber cap limit without the opportunity for further proceedings because of the substantial First Amendment principles involved. *See also Cablevisions Sys. Corp. v. FCC*, 597 F.3d 1306, 1322 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (“As to the cable operators, the exclusivity ban dampens their incentives to invest in

These vital First Amendment principles apply to the Internet as well as everywhere else. The Supreme Court has made clear that Internet speech enjoys full First Amendment protection. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868-69 (1997) (“Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry”).

Reclassification would strip the ability of broadband Internet access service providers to exercise editorial control over their networks by transforming them into common carriers. Although Qwest and other providers have heretofore chosen to disseminate speech on an open and equal basis, their voluntary choice to do so cannot be replaced by a government mandate that effectively eliminates their right to exercise editorial control. Reclassification would be like a rule requiring a cable operator to carry all broadcast stations, but see *Turner I* and *II*, or a parade organizer to admit all applicants on a lottery basis, but see *Hurley*, or a newspaper to carry replies to its editorials, but see, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Reclassification would therefore trigger First Amendment scrutiny because it would eliminate broadband providers’ editorial control over their networks. At a minimum, the intermediate scrutiny standard applied in *Turner Broadcasting* requires the Government to demonstrate that a content-neutral regulation “advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” *Turner Broadcasting II*, 520 U.S. at 189. For reasons

new or existing programming networks. They might not take the risk and spend the money if they cannot fully reap the fruits of their investment. Similarly, competitors of cable operators may feel less need to invest in new programming networks because they can piggyback on the cable-affiliated networks. As a result, there may be fewer new video programming networks than there otherwise would be. As this Court has explained, the resulting reduction in speech (compared to what otherwise would occur) implicates First Amendment interests.”).

developed in greater detail elsewhere in these comments, it is clear that the requirements of intermediate scrutiny could not be satisfied here. Reclassification would not advance important governmental interests -- in fact, it would discourage broadband deployment, reduce innovation, and harm consumers. Moreover, reclassification is unnecessary in light of other regulatory alternatives available to the Commission.

Accordingly, reclassification would violate both the First and Fifth Amendments. At a minimum, the Commission should construe its authority to avoid raising such questions. *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress”).

E The Commission Should Limit New Regulation To Its Existing Title I Authority And Seek Congressional Action Before Taking Action Not Clearly Within That Authority

In light of the policy and legal concerns detailed above, the Commission should reject the two Title II options discussed in the *NOI*. Rather, it should strive to limit any new broadband regulation to the safe confines of its existing Title I authority, while seeking Congressional action before adopting any regulation not clearly within that authority. The recent *Comcast v. FCC*⁷⁶ decision calls into question the authority of the Commission to adopt certain types of regulation for broadband. But, there is far too much at stake for the Commission to respond to that decision by simply abandoning the light touch regulatory approach that has succeeded to-date.

⁷⁶ *Comcast v. FCC*, 600 F.3d 642.

F. The Commission Has Adequate Authority To Implement Much Of Its Desired Broadband Policy Framework Using Its Existing Legal Authority

Various parties seek to justify Title II re-classification by presenting a false choice suggesting that, if the Commission doesn't have the jurisdiction and authority to impose the more onerous aspects of its proposed regulatory framework, it can do nothing in this area.⁷⁷ This is pure smokescreen. The Commission is not powerless to act under Title I. It simply must, in adopting any new regulation, remain within the limits of its Title I authority. And, the Commission enjoys adequate authority to implement its most important desired broadband policy using its existing Title I legal framework. It clearly has adequate authority to implement the central goal of accomplishing universal service for broadband. The extent of the Commission's authority to act with respect to its consumer protection objectives enumerated in the *NOI* will have to be established based on a fully developed record, with a specific proposal in hand, and applying the well-established standard for Title I ancillary jurisdiction. There is also no dispute that the Commission also has adequate authority to accomplish numerous other key policy goals set forth in the NBP that fall squarely within its traditional purview. On the other hand, certain extreme regulatory proposals would clearly exceed the Commission's Title I authority. And, many of the NBP's objectives contemplate action by government entities other than the Commission, and therefore do not depend on Title II authority.

1. The Commission has adequate authority to implement the central goal of accomplishing universal service for broadband

The Commission can use its ancillary authority to accomplish universal service support for broadband Internet service within the existing legal framework. In doing so, the Commission

⁷⁷ See, e.g., Public Knowledge NBP #30 Reply, GN Docket Nos. 09-47, 09-51 and 09-137, filed Jan. 27, 2010 at 1-5.

can still rely upon the D.C. Circuit's opinion in *Rural Telephone Coalition v. FCC*,⁷⁸ which approved the Commission's creation of the universal service program (out of whole cloth) pursuant to its ancillary authority. In *Comcast v. FCC*, the Commission argued that *Rural Telephone Coalition v. FCC* was a case in which the court upheld the Commission's use of ancillary authority on the basis of policy statements alone.⁷⁹ But, the court distinguished the case on the grounds that the Commission's creation of the Universal Service Fund was in fact ancillary to the Commission's Title II responsibility to set reasonable interstate telephone rates.⁸⁰ This case was decided at a time when the current universal service provisions of the Communications Act did not exist. Now, the Commission's ability to exercise its ancillary authority to accomplish universal service for broadband is linked to its express statutory duties to promote universal service pursuant to Section 254 of the Act. This includes its express statutory duty to base its policies for the preservation and advancement of universal service in part on the principle that access to advance telecommunications and information services should be provided in all regions of the Nation.⁸¹ The use of the Commission's ancillary authority is a flexible approach that provides the Commission with the legal authority to reform universal service for broadband Internet service support, without reclassifying broadband services.

The Commission's ancillary authority "may be employed, in the Commission's discretion, when [(1)] Title I of the Act gives the Commission subject matter jurisdiction over the service to be regulated and [(2)] the assertion of jurisdiction is 'reasonably ancillary to the

⁷⁸ 838 F.2d 1307 (D.C. Cir. 1988).

⁷⁹ *Comcast Corp. v. FCC*, 600 F.3d at 655-56.

⁸⁰ *Id.* at 656.

⁸¹ *See* 47 U.S.C. § 254(b)(2).

effective performance of [its] various responsibilities.”⁸²

As for the context of providing subsidies for broadband Internet service, both of these predicates are met. First, the Commission has subject matter jurisdiction over broadband services. Broadband services are ‘wire communications’ or ‘radio communications,’ as defined in sections 3(52) and 3(33) of the Act,⁸³ and section 2(a) of the Communications Act gives the Commission subject matter jurisdiction over ‘all interstate and foreign communications by wire or radio.’⁸⁴ Second, universal service support for broadband Internet service is “reasonably ancillary” to the effective performance of the Commission’s various universal service responsibilities. Section 254(d) requires the Commission to establish “specific, predictable, and sufficient mechanisms . . . to preserve and advance universal service.”⁸⁵ Under the enumerated principles of section 254(b), the Commission is twice directed to base its universal service policies on providing access to “advanced telecommunications and information services.”⁸⁶ Thus, even after *Comcast v. FCC*, the “requisite nexus” between the universal service provisions

⁸²*In the Matter of Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format; IP-Enabled Services, Report and Order and Notice of Proposed Rulemaking*, 21 FCC Rcd 7518, 7541-42 ¶ 46 (2006) (*VoIP Contribution Order*), citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968).

⁸³ 47 U.S.C. §§ 153(33), (52).

⁸⁴ *Broadband NOI*, 22 FCC Rcd at 7896 ¶ 6 (citing 47 U.S.C. § 152(a)).

⁸⁵ 47 U.S.C. § 254(d).

⁸⁶ 47 U.S.C. §§ 254(b)(2) & (b)(3).

of Section 254 and the Commission's ancillary authority exists.⁸⁷

2. The extent of the Commission's authority to act with respect to consumer protection objectives would have to be established based on a fully developed record

The extent of the Commission's authority to act with respect to the specific areas mentioned in the *NOI* relating to certain of its consumer protection objectives -- privacy, disabilities access, public safety, homeland security, and potential harmful ISP practices -- will have to be established based on a fully developed record, with specific proposals in hand, and applying the well-established standard for Title I ancillary jurisdiction. Below, Qwest addresses each of these topics in turn. In all cases, there is room for Commission activity in this area, although -- in the absence of a particular focused inquiry and rule proposal -- it is difficult to do more than note that the Commission has acted in these areas before either without challenge or overcoming challenges to its authority. But before commenting specifically on these items, Qwest lends its support to some of what the Commission calls "Other Approaches to Oversight." (Section II.B.1.F of the *NOI*.)

a. Other approaches are worth pursuing before regulatory mandates.

A number of the proposals identified in the *NOI*'s "Other Approaches to Oversight." Section are worth pursuing either *in lieu* of (Qwest's preferred position) or in conjunction with

⁸⁷ See *VoIP Contribution Order*, 21 FCC Rcd at 7542 ¶ 47. The fact that Section 254 establishes a universal service program does not preclude the Commission from using its ancillary authority to provide universal service support for broadband services. As the Commission itself recognized in the *VoIP Contribution Order*, "[w]e do not believe that the grant of permissive authority in section 254(d) precludes us from exercising our ancillary jurisdiction in the universal service context . . . Nothing in the legislative history, text, or structure of the 1996 Act suggests that Congress intended to strip the Commission of its ancillary authority over universal service obligations by adopting section 254." *Id.* at 7543, n. 171. In a similar vein, nothing in Section 254 precludes the Commission from implementing universal service programs for broadband Internet service.

any regulatory mandates.

For example, Qwest supports the creation of technical advisory groups (such as proposed by Verizon and Google)⁸⁸ because -- in the area of intersecting technologies and regulations -- such groups only make sense. As the technical functionality of architectures, operating systems, and features become more complex *and* various industries start to overlap, it is impossible for a regulatory body to understand, without input from such groups, how a proposed regulation might impact those regulated by it or the markets in which they operate.

Indeed, the cross-stakeholder participation of technical advisory groups is why Qwest is an advocate of standards bodies. While those bodies may not get everything right all the time, they are open to cross-industry participation and generally work through various drafts of positions before they get the standards technically feasible for implementation. They also generally combine industry sectors of service providers and manufacturers.

The *NOI* specifically asks whether the Commission could “pursue policies based on standards set by third parties and enforced by the Commission.”⁸⁹ As discussed above and below, the extent of the Commission’s authority to act with respect to its consumer protection objectives would have to be established based on a fully developed record and applicable Title I ancillary jurisdiction legal standards. But, to the extent the Commission creates a valid Title I rule, it has the authority to enforce it under its general forfeiture authority.⁹⁰ The Commission could also enforce such a rule by ordering parties in violation to cease and desist from engaging

⁸⁸ *NOI* ¶ 51 and n. 147.

⁸⁹ *Id.*

⁹⁰ *See* 47 U.S.C. § 503(b) (subjecting to forfeiture any person found to have “willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act”).

in the proscribed activity.⁹¹ It is also not out of the question that the Commission might endorse a particular industry standard⁹² or even incorporate the recommendations of industry organizations into its rules or mandates.⁹³

Another reason that other approaches are generally preferable to Commission regulatory mandates is that other federal agencies also potentially have jurisdiction or policy-making authority in the area of telecommunications and broadband services. Specifically, with respect to the issues enumerated in the *NOI*, the Federal Trade Commission (FTC)⁹⁴ and the National Telecommunications and Information Administration potentially have jurisdiction and authority. Because of this, the preferred approach would be to engage cooperatively with these agencies.

As a matter of principle, then, the Commission should endorse (and create if appropriate) industry activities “‘comprised of a range of stakeholders with technical expertise’ to develop best practices, resolve disputes, issue advisory opinions, and coordinate with standards-setting bodies.”⁹⁵ And, the preferred approach would be for the Commission to engage cooperatively with other federal agencies having jurisdiction or policy-making authority in the area of telecommunications and broadband services.

b. Privacy and CPNI-type regulation/protection.

The *NOI* notes that the Commission has previously stated that “[c]onsumers’ privacy

⁹¹ *See, id.*, § 312(b) (providing that “[w]here any person ... has violated or failed to observe any rule or regulation of the Commission authorized by this Act ..., the Commission may order such person to cease and desist from such action”).

⁹² *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access Services*, Second Report and Order and Memorandum Opinion and Order, 21 FCC Rcd 5360 ¶ 1, 5363 ¶ 8, 5369 ¶ 23 (2006).

⁹³ *See* 47 C.F.R. § 52.26(a).

⁹⁴ As suggested by the *NOI* ¶ 51.

⁹⁵ *Id.*

needs are no less important when consumers communicate over and use broadband Internet access than when they rely on [telephone] services.”⁹⁶ To that end, the Commission has sought “comment on whether [it] should extend privacy requirements similar to the Act’s CPNI requirements to providers of broadband Internet access services.”⁹⁷ With respect to its jurisdiction to adopt such CPNI-type requirements, the Commission noted that it had adopted CPNI rules long before the passage of the Telecommunications Act of 1996 (indeed, those rules were part of the Commission’s *Computer III Inquiry* proceeding);⁹⁸ and it inquired whether -- in any event -- it would have authority to enact similar rules under its Title I authority.

The Commission has, of course, already extended portions of its CPNI rules to VoIP providers, under a Title I analysis.⁹⁹ No party challenged that decision. The extent to which the Commission has Title I authority to extend privacy regulations beyond VoIP providers, not only to facilities-based IP providers but application and content providers as well, will depend on the specifics of any proposed regulation. For this reason, Qwest cannot comment more definitively on this issue at this time. But clearly, the achievement of this policy objective is not excluded even if Title II jurisdiction is not exercised over service providers.

Of course, even without regulations, service providers have self-interested reasons to protect their customers’ privacy and information. First and foremost is the relationship interest. Service providers want to please their customers, not irritate them. For this reason, they are

⁹⁶ *Id.* ¶ 39, quoting from *Wireline Broadband Order*, 20 FCC Rcd at 14930 ¶ 148.

⁹⁷ *Wireline Broadband Order*, 20 FCC Rcd at 14930-31 ¶ 149.

⁹⁸ *Id.* and n. 447.

⁹⁹ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 6927 (2007) (holding that CPNI obligations were reasonably ancillary to the Commission’s statutory responsibilities under sections 1, 222 and 706 and exerting Title I jurisdiction), *aff’d sub nom. Nat’l Cable & Telecomm. Ass’n v. FCC*, 555 F.3d 996 (D.C.Cir. 2009).

likely to use information in a non-harmful manner. Second, there is a self-regulation interest, buoyed by long-standing FTC expectations in the area of privacy and customer information, including the promulgation and posting of privacy policies. Third, there is the matter of reporting of breaches, something required not only by Commission rules¹⁰⁰ but by a host of state statutes as well. Service providers dislike being associated with breach notifications, as their reputation and brand can be negatively impacted.

In the event of a particular CPNI/privacy proposed regulation, it may be that the record amassed as part of such proceeding would render unnecessary any affirmative Commission prescription. Clearly any such analysis would incorporate the extent to which industry is already acting to achieve the Commission's consumer protection objectives in this area without legal compulsion.

c. Access for individuals with disabilities.

In the *NOI*, the Commission also inquires as to its authority and ability to ensure achievement of its policy goals in the area of access to broadband capabilities by persons with disabilities.¹⁰¹ As the *NOI* notes, in 2007 the Commission extended Section 255-type obligations to VoIP providers¹⁰² as well as Telephone Relay Service (TRS) obligations;¹⁰³ and broader

¹⁰⁰ 47 C.F.R. § 64.2011.

¹⁰¹ *NOI* ¶ 40.

¹⁰² *Id.* n. 120. See *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons With Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Report and Order, 22 FCC Rcd 11275, 11286-89 ¶¶ 21-24 (2007) (*VoIP Accessibility Order*).

¹⁰³ *Id.* at 11291 ¶ 32. And see *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5177-78 ¶ 88 (2000) (finding that “section

extension of disability access is already the subject of an existing inquiry, associated with the Commission's 2005 *Wireline Broadband Order*.¹⁰⁴ The Commission has not only extended its policy favoring access for persons with disabilities to non-common carriers but it has extended that policy to admittedly information services; specifically carrier interactive menus and voice mail services.¹⁰⁵

In the absence of a particular proposal, it is not possible to state whether or not the Commission would have sufficient ancillary authority to support it. But it is clear that the absence of a particular authorizing statute might not be an impediment to the Commission's achieving its policy objectives in this area.

Additionally, it should be noted that service providers, industry groups, and manufacturers are all motivated to create products and services that are accessible by persons with disabilities. Service features such as "talking dialing" or "talking typing" had their genesis in the realm of disability-access accommodation; and such features have helped support user demand interested in innovation and ease of use. It may well be that a record of any particular regulation might demonstrate that the marketplace is already well equipped to "better enable Americans with disabilities to experience the benefits of broadband."¹⁰⁶ Qwest looks forward to

225 does not limit relay services to telecommunications services, but . . . reaches enhanced or information services.").

¹⁰⁴ *NOI* ¶ 40. *And see Wireline Broadband Order*, 20 FCC Rcd at 14921 ¶¶ 121-23. *And see IP-Enabled Services NPRM*, 19 FCC Rcd 4863, 4897-501 ¶¶ 58-60 (2004).

¹⁰⁵ *NOI* ¶ 40 and n. 121. *And see Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons With Disabilities*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6455 ¶ 93 (1999) (*1999 Section 255 Order*) (further inquiry regarding the extension of disability-access requirements to Internet telephony and certain computer-based equipment), 16 FCC Rcd 6417 (1999).

¹⁰⁶ *NOI* n. 123, quoting from the Commission's *Broadband Action Agenda* (April, 2010).

reviewing and commenting on any particular Commission proposal in this area.

d. Public safety and homeland security.

The *NOI* states that the Commission has a purpose relative to the national defense (homeland security) and an important role to play in the promotion of safety of life and property (public safety).¹⁰⁷ It is understandable that these two areas (homeland security and public safety) would be joined together in the *NOI* for the purpose of examining the scope of the Commission's jurisdiction with respect to broadband Internet service. Instinctively, they seem to fit together. Qwest believes, though, that the Commission's involvement in these areas with respect to legacy wireline telecommunications services (and wireless voice service) has been quite different, and a separate examination of each area relative to the Commission's ability to exert ancillary jurisdiction over broadband Internet service is appropriate. Because the topics are merely introduced in the *NOI* without proposals for specific Commission action, only general impressions concerning the Commission's ancillary jurisdiction as to public safety and homeland security are provided here.

The Commission has historically played a significant role in the public safety area and has had the responsibility to encourage and support efforts by States to deploy comprehensive end-to-end emergency communications infrastructures and programs.¹⁰⁸ Congress gave the Commission the responsibility, on its own or through an entity to which it delegated the responsibility, to "designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance."¹⁰⁹

The Commission also has responsibility for the regulatory oversight of the National

¹⁰⁷ *Id.* ¶ 41.

¹⁰⁸ *See* 47 U.S.C. § 615.

¹⁰⁹ 47 U.S.C. § 251(e)(3).

Security/Emergency Preparedness (NS/EP) Telecommunications Service Priority (TSP) System,¹¹⁰ which includes authority to enforce the TSP System's rules and regulations.¹¹¹ The Commission has been given great deference for legacy communications, and for emerging telephony substitutes (like VoIP and the Commission's 911/E911 prescriptions).¹¹²

Whether providing support to States for the deployment of emergency communications infrastructures, ensuring the use of 9-1-1 as the universal emergency telephone number within the U.S., or providing regulatory oversight for the TSP System, it is apparent that the Commission has a well entrenched, statutorily-based role in the public safety area. It would be imprudent to conclude, without qualification or a specific proposal to consider, that the Commission could assert ancillary jurisdiction over broadband Internet service to ensure the continuation of vital public safety communications infrastructures, systems and programs. But, again, accomplishment of this policy objective is also not excluded without Title II authority - particularly if the Commission acts in a measured way and its actions are designed to ensure the continuation of public safety programs and services that the nation has come to rely on.

It is unclear to Qwest how broadly the Commission uses the term homeland security in the *NOI*. Qwest is aware that the Commission is very interested in the subject of cyber security and has a notice of inquiry pending concerning a cyber security certification program.¹¹³ Relative to cyber security, the Commission finds itself in a much different historical place as to its role than with respect to public safety. The Commission has had no significant historical role or

¹¹⁰ Under the TSP program, designated NS/EP entities receive priority treatment for vital telecommunications services. There is an analogous Wireless Priority Service program.

¹¹¹ See 47 C.F.R. Part 64, Appendix A, §§ 6(a)(1) and (2).

¹¹² See 47 U.S.C. §§ 615a and 615a-1.

¹¹³ *In the Matter of Cyber Security Certification Program*, Notice of Inquiry, 25 FCC Rcd 4345 (2010). Qwest filed comments in this proceeding on July 12.

statutory mandate in the cyber security area. Rather, other Federal agencies, such as the Department of Homeland Security, the State Department, the Department of Defense, the Commerce Department and the Federal Bureau of Investigation, have been given responsibility for the U.S effort to enhance cyber security. Broadband network services providers, information/Internet services providers and other entities that operate in the cyber/Internet ecosystem have engaged in numerous public-private partnership initiatives with these Federal agencies to assist in the effort to enhance cyber security. While there is more to be done in the cyber security area, there are other Federal agencies performing the necessary tasks, assisted by the communications industry. Currently, Congress is evaluating the nation's cyber security readiness and reassessing Federal cyber security policies, goals and agency responsibilities.

In the absence of a specific cyber security proposal, it is simply not possible to further analyze the ancillary jurisdictional questions posed by the Commission in the *NOI*. Qwest would observe, though, that the Commission may be able to exert ancillary authority in the cyber security area, but such an exercise is not without bounds. The boundaries cannot be defined in the abstract. Further, Congress may ultimately act to expand or restrict the Commission's jurisdiction in this area should it pass new cyber security legislation.

e. Potential Harmful ISP Practices

Based on an appropriate record, the Commission has demonstrated its capability to deter potential harmful ISP practices. Indeed, the Commission has already acted at least once to address just an issue -- albeit under its Title II authority for the services at issue there -- in the *Madison River* case.¹¹⁴ As noted, it is difficult to comment any more specifically on what steps the Commission might take under its existing authority without knowing the particular regulatory

¹¹⁴ *In the Matter of Madison River Communications, LLC and affiliated companies*, Order, 20 FCC Rcd 4295 (2005).

proposal. And, this context is one that is particularly well suited for restraint and for pursuit of other approaches before regulatory mandates. Even if the Commission were to do nothing in this area or if it were to seek Congressional action before adopting any new regulation, it will continue to be well served by the fact that Qwest and virtually all major broadband providers support the FCC Internet Policy Principles and voluntarily abide by those principles as good policy. Moreover, as the *NOI* itself notes and as is discussed more fully above, there have been numerous industry self-regulation efforts initiated.¹¹⁵ As mentioned, Qwest also supports the proposals of Verizon, Google and others regarding industry Technical Advisory Groups.

3. The Commission has adequate authority to accomplish numerous other important policy goals set forth in the NBP that fall within its purview

Likewise, the Commission enjoys clear authority to implement other FCC-specific recommendations set out in the NBP. For example, setting aside the merits of any particular reform, the Commission surely possesses the legal authority to allocate additional spectrum for wireless broadband services;¹¹⁶ to collect and publish detailed data regarding broadband's availability, penetration, pricing, and so on;¹¹⁷ to reevaluate its wholesale competition framework;¹¹⁸ and to address the terms and conditions under which broadband providers obtain access to poles, ducts, conduits, and rights-of-way in states subject to Section 224.¹¹⁹

4. Certain extreme regulatory proposals would clearly exceed the Commission's Title I authority

It should also come as no surprise that certain extreme regulatory proposals would clearly

¹¹⁵ See *NOI* ¶ 51.

¹¹⁶ See NBP Recommendations 4.1, 5.1-5.3, 5.7-5.17.

¹¹⁷ See NBP Recommendations 4.2-4.6.

¹¹⁸ See NBP Recommendations 4.6-4.9.

¹¹⁹ See NBP Recommendations 6.1-6.6.

exceed the Commission's Title I authority. The services at issue are, by definition and as discussed above, competitive services where only light touch regulation is anticipated. Accordingly, the Commission should not attempt to apply Title II solutions -- or, as in the case of the strict nondiscrimination obligation proposed in the *Open Internet NPRM*, solutions that exceed even its Title II authority -- to Title I services. This is not only what the law requires, but is the best policy result for services that operate in a competitive broadband provider market.

5. Many of the NBP's objectives contemplate action by government entities other than the Commission, and therefore do not depend upon Title II authority

Moreover, the fact that the Commission lacks authority to implement certain other aspects of the NBP itself is no cause for concern, because, as the Plan recognizes, those goals were understood to fall outside the scope of the Commission's authority. Rather, many of the NBP's recommendations expressly require action by other entities, including Congress, the states, the Executive Branch, and other independent agencies. Indeed, half of the NBP's recommendations are directed at entities other than the Commission. The Plan includes no fewer than 44 separate recommendations calling for legislation by Congress across the entire class of issues considered in the document.

In addition, the Plan contemplates action by a broad collection of federal agencies. For example, the Plan urges the FTC to take various actions with regard to online privacy and identity theft;¹²⁰ calls on the Department of Transportation to rethink the federal funding of highway, road and bridge projects;¹²¹ urges the National Science Foundation to promote broadband research;¹²² proposes that the Department of Commerce's National

¹²⁰ See NBP Recommendations 4.17.

¹²¹ See NBP Recommendation 6.7.

¹²² See NBP Recommendation 7.5.

Telecommunications and Information Administration explore the use of public-private partnerships in advancing broadband adoption;¹²³ urges the Department of Health and Human Services to take various actions to facilitate the adoption of health IT solutions;¹²⁴ asks the Department of Education to take various actions to promote digital education and the use of broadband;¹²⁵ seeks action from the Department of Energy, the Federal Energy Regulatory Commission, and the Rural Utilities Service to promote smart-grid deployment;¹²⁶ and makes assorted other requests involving the Small Business Administration,¹²⁷ the Department of Labor,¹²⁸ the Office of Management and Budget,¹²⁹ the White House Office of Science and Technology Policy,¹³⁰ the Department of Defense,¹³¹ and the National Highway Traffic Safety Administration.¹³²

Further, the Plan envisions a very substantial role for the states, recommending that state governments facilitate demand aggregation and use of governmental broadband networks,¹³³ help develop a framework for providing service to anchor institutions,¹³⁴ reduce barriers to adoption of

¹²³ See NBP Recommendation 9.4.

¹²⁴ See NBP Recommendations 10.1, 10.2.

¹²⁵ See NBP Recommendations 11.1-11.3, 11.6-11.8, 11.10-11.13.

¹²⁶ See NBP Recommendations 12.8, 12.9, 12.10.

¹²⁷ See NBP Recommendation 13.1.

¹²⁸ NBP Recommendation 13.5.

¹²⁹ NBP Recommendations 14.3, 14.5, 14.6, 14.4, 14.15, 14.18, 14.20, 14.21.

¹³⁰ NBP Recommendations 14.20, 15.11.

¹³¹ NBP Recommendation 15.14.

¹³² NBP Recommendation 16.13.

¹³³ See NBP Recommendation 8.20.

¹³⁴ See NBP Recommendation 8.22.

health IT solutions;¹³⁵ change course accreditation and teacher certification requirements to promote online learning;¹³⁶ include digital literacy in public-school curricula;¹³⁷ promote use of commercial networks in smart-grid projects and expand consumers' access to their own energy usage data;¹³⁸ and modernize the election process.¹³⁹

Thus, any suggestion that the current classification of broadband Internet access somehow thwarts the goals of the NBP is, at best, deeply misguided. The plan includes many recommendations with respect to which the Commission maintains clear legal authority, and many others that do not rely on the Commission's jurisdiction at all.

G. The FCC Should Not Pursue A Legal Framework That Would Create Disparate Regulatory Status For Other Broadband Platforms Or For Other Internet Service Providers

Any Commission decision to impose onerous new regulations on wireline broadband providers while exempting wireless broadband providers and other Internet service providers would also be legally defective as arbitrary and capricious.

First, to be clear, Qwest believes that Title II regulation should not be applied to any broadband network provider. The policy and legal arguments above demonstrating the problems inherent with a Title II reclassification approach apply equally to wireline and wireless platforms. But, should the Commission proceed with Title II reclassification for wireline broadband networks, there are no factual or legal bases for distinguishing between wireline and wireless broadband platforms.

Thus, creating a disparate regulatory status for wireless broadband Internet access would

¹³⁵ See NBP Recommendation 10.2.

¹³⁶ See NBP Recommendation 11.5.

¹³⁷ See NBP Recommendation 11.8-11.10.

¹³⁸ See NBP Recommendations 12.2, 12.7.

¹³⁹ See NBP Recommendation 15.12, 15.13.

only create an additional legal basis for challenging the Commission's actions. The *Open Internet NPRM* raised the question of whether there are factual differences between mobile wireless broadband platforms and wireline platforms that justify differences in how any Internet openness principles are applied.¹⁴⁰ Similarly, the *NOI* asks whether these same purported differences "are relevant to the Commission's statutory approach to terrestrial wireless and satellite-based broadband Internet services." As Qwest has previously discussed in detail in its *Open Internet NPRM* comments, the potential distinguishing factors cited by the Commission in the *Open Internet NPRM* are really distinctions without differences. If anything, the Commission's recognition of how these concerns around capacity and consumer usage impact wireless providers, only further supports the case for the Commission proceeding with caution as it contemplates new regulation for any broadband provider. But, in all events, these distinctions do not create a factual basis for arbitrarily choosing to regulate one platform as a common carrier and not the other. There is also no conceivable legal basis for such disparate treatment.

Second, as Qwest and other parties have also previously detailed, the Commission could not choose to regulate broadband Internet access providers under Title II while giving a disparate regulatory status to other Internet service providers that use a telecommunications input to provide information services to the public.¹⁴¹ There is simply no factual or legal justification for doing so. As the Supreme Court already recognized in the *Brand X* decision, if the Commission were to construe the Communications Act to "classif[y] as telecommunications carriers all entities that use telecommunications inputs to provide information service," this approach would extend Title II common carrier regulation not only to broadband Internet access providers, but to

¹⁴⁰ 2009 *Open Internet NPRM*, 24 FCC Rcd at 13117-18 ¶¶ 154-57.

¹⁴¹ See Feb. 22 letter to Genachowski at 10-13.

applications and content providers and the like.¹⁴² In other words, in response to the specific question teed-up in the *NOI* regarding whether the same policy and legal concerns apply to non-facilities based Internet service providers, the answer is clearly “yes.” Indeed, because these entities can not be distinguished on either a factual or legal basis, creation of a disparate regulatory status for them would also be legally defective as arbitrary and capricious.

III. CONCLUSION

For the reasons stated above, the Commission should take the action described herein.

Respectfully submitted,

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¹⁴² *Id.*