

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

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

REPLY COMMENTS OF THE CENTER FOR DEMOCRACY & TECHNOLOGY

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The Center for Democracy & Technology (CDT) respectfully submits these reply comments in response to the above captioned proceeding regarding the classification of broadband Internet access service.¹ CDT is a nonprofit, public interest organization dedicated to preserving and promoting openness, innovation, and freedom on the decentralized Internet.

CDT has previously addressed many issues raised by commenters in this proceeding. For example, CDT has in prior filings addressed claims that applying a nondiscrimination principle would violate the First Amendment speech rights of Internet access providers;² that the “third way” approach of Title II classification plus broad forbearance somehow leaves carriers more exposed to the risk of a hypothetical future Commission with a highly regulatory agenda;³ that Title II treatment is inconsistent with section 230;⁴ and that the Commission should “encourage” Internet access providers to take on the new role of actively policing the content of user communications.⁵

CDT submits these brief reply comments to respond to several additional arguments.

¹ Framework for Broadband Internet Service, GN Docket No. 10-127, Notice of Inquiry (Released June 17, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-114A1.pdf. Unless otherwise noted, all references to comments refer to this proceeding.

² See Verizon comments at 79-90; Time Warner comments at 54-57; National Cable & Telecommunications Association (NCTA) comments at 31-34. CDT previously responded to similar arguments in its January 14, 2010, comments in the Open Internet proceeding (GN 09-191) at 30-31, http://cdt.org/files/pdfs/2010_CDT_openness_comments.pdf.

³ See AT&T comments at 114-124; Verizon comments at 12-20 and 99-100; NCTA comments at 65; CDT responded to similar arguments in its comments in the present proceeding at 15-16.

⁴ See AT&T Comments at 30-31; CDT previously responded to this argument in its April 26, 2010, reply comments in the Open Internet proceeding (GN 09-191) at 13, http://cdt.org/files/pdfs/CDT_Reply_Comments-Open_Internet.pdf.

⁵ See, generally, Motion Picture Association of America comments. CDT responded to this argument in its Open Internet reply comments at 30. See also CDT Comments to the Intellectual Property Enforcement Coordinator, March 24, 2010, http://www.cdt.org/files/pdfs/CDT_comments_for_IPEC.pdf.

1. The Scope of Reclassification

Some commenters argue that any move to classify Internet access services as Title II services “necessarily” extends Title II treatment to essentially the entire broadband ecosystem – CDN providers, backbone providers, hotels and coffee shops offering Wi-Fi, and more. AT&T essentially suggests that because Internet facilities are all connected, and because the “on-ramp” facilities themselves deliver functionality to users only in connection with the rest of the Internet, it is “nonsensical” for the Commission to focus only on the on-ramps.⁶ But as AT&T itself recognizes, the Act requires the Commission to classify *services*, not *facilities*.⁷ The *service* of providing the connectivity to the premises of retail subscribers is quite distinguishable from the various other services that AT&T attempts to lump together as being all interconnected parts of the Internet.

In our initial comments, CDT offered a definition of Internet access service that focuses narrowly on the provision of connectivity to end-users:

a retail service that enables a customer to send and receive Internet Protocol communications to and from Internet endpoints of the customer’s choosing by—

a. assigning an Internet Protocol address to a device owned or controlled by the customer; and

*b. providing the customer with the means for Internet Protocol communications to be transmitted physically, by wire or radio, between the customer’s device and one or more interconnection or peering points that enable further routing, directly or indirectly, to the Internet.*⁸

This definition would not and need not sweep in all the various services that make up the Internet.⁹ Nor would the precedent of adopting such a definition dictate the treatment of services such as CDNs and backbone transit. Those services are not retail services, so there is a strong argument that they are not offered “to the public.” CDN services, moreover, are widely understood to provide the function of *storing* content at locations closer to intended recipients; indeed, the term “caching” reflects the notion that the service, while it may involve some transmission, is fundamentally about data storage.¹⁰

2. The Status of DNS, Caching, and Network Security Functions

Several commenters repeat arguments that DNS, caching, and security measures are so intertwined with any transmission component that together they create a single integrated information service.¹¹ Caching and DNS, Verizon writes, “are integral to the basic function of retrieving and accessing content from the Web that obviously is central to a broadband Internet

⁶ AT&T comments at 60. See also Verizon comments at 59-63; NCTA comments at 82-83.

⁷ AT&T comments at 98 (noting that statutory definitions “turn on what functionality the customer receives, not how the service provider arranged behind the scenes for the provision of those functionalities.”).

⁸ CDT comments at 13-14.

⁹ The definition would, however, apply to entities that supply Internet access services using facilities that they rent or acquire from others. See CDT comments at 19.

¹⁰ CDN caching services are different from Internet access service providers’ own caching functions, discussed below in relation to adjunct-to-basic services and the telecommunications management exception. For access providers, caching is essentially a network management decision, aimed at alleviating congestion by locating certain highly used content closer to consumers. CDN providers, on the other hand, offer caching as a standalone Internet-based service to content providers, who are free to purchase the service or not.

¹¹ See Verizon comments 49-55 and Attachment B; Time Warner comments 19-26; AT&T comments at 70-78.

access service offering.”¹² Similarly, various security features “ensure consumers’ ability to access, interact with, send, and store information over the Internet safely.”¹³ But as CDT argued in its initial comments, the fact that these services are so bound up in *facilitating basic transmission* to and from endpoints of the user’s choosing¹⁴ means that they fall squarely within the longstanding adjunct-to-basic doctrine and the subsequent telecommunications management exception to the definition of an information service.¹⁵

AT&T repeatedly describes DNS as “complex,” as if technical complexity disqualifies a function from adjunct-to-basic or network management treatment.¹⁶ The hierarchy of DNS servers and the complexity of any DNS request are irrelevant to how the service is classified. Regardless of its technical implementation, it performs a function that is intended to facilitate connectivity without altering the nature of that connectivity, and it should be treated as such.

Verizon argues against an adjunct-to-basic classification on the ground that DNS, caching, and security features are plainly information services, and on the ground that Internet access service offers no telecommunications service to which they can be adjunct.¹⁷ The first argument ignores the Commission’s test for adjunct-to-basic services, which in fact can only apply to information services. To be an adjunct-to-basic service, a service must:

- 1) otherwise meet the definition of enhanced (information) service, and
- 2) both:
 - a) be intended to facilitate the use of a basic (telecommunications) service, and
 - b) not alter the fundamental character of the basic (telecommunications) service.¹⁸

As CDT has argued, DNS, caching, and security measures meet this test.¹⁹ Moreover, Verizon and other commenters all but acknowledge this (albeit while ignoring the test) with the above assertions that these services are so integral to their broadband offering.²⁰

Verizon’s second argument is circular and should be rejected. It suggests that DNS, caching, and security features cannot be adjunct-to-basic services or their equivalent because Internet access service is not a telecommunications service, while having previously argued that Internet access service cannot be a telecommunication service because DNS, caching, and security features are not adjunct-to-basic services. In fact, neither is true: Internet connectivity is fundamentally a telecommunications service. And rather than together creating an integrated information service, DNS, caching, and network security functions are adjunct services aimed at facilitating that connectivity.

IP address assignment through the dynamic host configuration protocol (DHCP), cited by Time Warner and others alongside DNS service, similarly meets the test for adjunct-to-basic or

¹² Verizon comments at 52.

¹³ *Id.*

¹⁴ Time Warner’s argument (at 24-25) that users do not choose Internet endpoints is silly. Ignorance of the precise location of the servers hosting particular content does not mean that users are not selecting where they point their browsers. They navigate to URLs corresponding to the content or service they wish to access, and the DNS seamlessly routes their requests to the appropriate IP addresses. The choice is *entirely* the users’.

¹⁵ CDT comments at 11-13.

¹⁶ AT&T comments at 89.

¹⁷ Verizon comments at 56-57.

¹⁸ See *In re Establishment of a Funding Mechanism for Interstate Operator Services for the Deaf*, 11 F.C.C.R. 6808 ¶16.

¹⁹ CDT comments at 11-13.

²⁰ See *supra* notes 12 and 13 and accompanying text; See also Time Warner comments at 26, note 81 and accompanying text (noting that providers “*must* offer [DNS service] for their services to work.” (emphasis in original)).

equivalent classification.²¹ Obtaining an IP address facilitates basic connectivity; in fact, Internet connectivity would by definition be impossible without an IP address. Contrary to NCTA's assertion, assigning an IP address is in fact directly comparable to assigning telephone numbers, notwithstanding the variability of the addresses.²² Thus the process for assigning addresses – complexity or dynamism aside – is best considered under the adjunct-to-basic doctrine or the management exception.

3. The Risk of Price Regulation

Some commenters argue that, even if the Commission forbears from all portions of Title II except 201 and 202, Internet access providers will be exposed to intolerable regulatory uncertainty.²³ Much of the concern seems to be that those sections could in theory serve as a basis for retail price regulation.²⁴ But commercial mobile radio services have been subject to just such a regulatory scheme – forbearance from many provisions, but not 201 or 202 – under section 332(c). Retail price regulation has failed to materialize, and there is no evidence that the theoretical possibility of some Commission deciding to embark on price regulation under those provisions has in any way discouraged the deployment of wireless services. The idea that the applicability of these sections has “self-executing”²⁵ consequences that will chill the broadband marketplace is groundless.

4. The Role of Third-Party Advice

Finally, some commenters argue that private efforts to launch the Broadband Industry Technology Advisory Group (BITAG) somehow show that Commission action here is not necessary.²⁶ But as CDT discussed in our initial comments, BITAG can play an effective role in this area only if there is a baseline policy framework under which it can provide input and technical expertise.²⁷ Perhaps BITAG or similar efforts could help promote consensus solutions and minimize disputes – but it will be able to do that only in the context of a policy framework with Commission authority as a backstop.

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CDT supports the Commission's proposal to apply select provisions of Title II to all providers of broadband Internet access service, and appreciates the opportunity to provide these brief reply comments.

Respectfully submitted,

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²¹ Time Warner comments at 21-22; NCTA Comments at 13.

²² See NCTA comments at 13.

²³ AT&T comments at 7, 40; Verizon comments at 27.

²⁴ AT&T comments at 6, 42, 43, 95-96; NCTA comments at 52-53.

²⁵ *Id.* at 96.

²⁶ AT&T comments at 18.

²⁷ CDT comments at 20-21.