

**Before the  
Federal Communications Commission  
Washington, DC 20554**

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

**REPLY COMMENTS OF VERIZON AND VERIZON WIRELESS**

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August 12, 2010

**TABLE OF CONTENTS**

**I. INTRODUCTION AND SUMMARY.....1**

**II. THE COMMISSION’S PROPOSAL WOULD CAUSE SIGNIFICANT HARM AND IS NOT NEEDED TO SOLVE ANY PROBLEM. ....5**

**A. The Record Demonstrates That the Commission’s Proposal Would Lead To Less Investment and Fewer Jobs. ....5**

**B. The Harms That Would Result from the Commission’s Proposal Are Particularly Unjustified Because the Proposal Is Based on an Inaccurate Characterization of the Effects of the *Comcast* Decision on the Commission’s Authority.....11**

**III. THE RECORD CONFIRMS THAT THE COMMISSION LACKS A LEGAL OR FACTUAL BASIS TO RECLASSIFY BROADBAND INTERNET ACCESS AS A TELECOMMUNICATIONS SERVICE. ....15**

**A. Proponents of Title II Regulation Erroneously Assert that the Commission Has Broad Discretion to Reclassify Broadband Internet Access Services. ....15**

**1. The Commission Would Face a Heavy Burden Under *Fox* to Show That Reversal of its Prior Classification Decisions Is Not Arbitrary and Capricious.....16**

**2. Regulatory Proponents Erroneously Assume that the Commission’s Reclassification Decision Would Be Entitled to *Chevron* Deference. ....18**

**B. The Record Provides No Basis For The Commission To Reverse Its Repeated Determination That Broadband Internet Access Is An Information Service. ....21**

**IV. THE COMMISSION’S PROPOSAL REMAINS PARTICULARLY UNJUSTIFIABLE WITH RESPECT TO WIRELESS BROADBAND INTERNET ACCESS SERVICE. ....32**

**V. PROPONENTS OF REGULATION HIGHLIGHT THE SIGNIFICANT CONSTITUTIONAL PROBLEMS OF IMPOSING TITLE II COMMON CARRIAGE REGULATION ON BROADBAND INTERNET ACCESS SERVICE VIA RECLASSIFICATION. ....38**

**A. The First Amendment.....38**

**B. The Fifth Amendment .....42**

**C. The Non-Delegation Doctrine .....43**

**VI. PROPONENTS OF TITLE II RECLASSIFICATION CONFIRM THAT FORBEARANCE WILL BE UNWORKABLE AND WILL NOT REMEDY THE HARMFUL EFFECTS OR LEGAL FLAWS OF RECLASSIFICATION.....44**

**VII. THE RECORD PROVIDES FURTHER REASON THE COMMISSION SHOULD REAFFIRM THAT BROADBAND INTERNET ACCESS IS AN INHERENTLY INTERSTATE SERVICE THAT IS NOT SUBJECT TO STATE OR LOCAL REGULATION.....53**

## I. INTRODUCTION AND SUMMARY

The Commission's proposal to impose antiquated common carriage regulation on broadband Internet access services would cause widespread harm to the Internet ecosystem and the broader economy. It would deter investment and innovation at a time when policymakers seek to encourage more widespread and robust broadband, and it would lead to fewer jobs at a time when the Nation is still struggling to emerge from a recession. The harm would be significantly worse if the Commission also reclassified *wireless* broadband Internet access service, particularly at a time when wireless providers are aggressively rolling out fourth generation networks that the President has recognized are critical to the country's economic competitiveness and the quality of people's lives.

The record before the Commission overwhelmingly documents the harmful effects of reclassification through the comments of a wide range of broadband Internet access providers, reports by independent analysts with their own (and their clients') money and reputations on the line, empirical studies and analyses by eminent economists, technical analyses by engineers, the comments of equipment suppliers whose business depends on continued investment in broadband networks, the comments of labor unions whose focus is on preserving and growing jobs, and submissions by a variety of other commenters. Regulatory proponents, by contrast, employ rhetoric and speculation, but offer no concrete evidence or well-founded legal, factual, or policy analyses in support of the proposed radical transformation in government policy. In short, the Commission cannot fairly evaluate the data and substantive analyses in the record and come to any conclusion other than to reject the proposed reclassification.

Moreover, despite the Commission's efforts to portray its proposal as limited to narrowly targeted regulation of the so-called "on-ramps" to the Internet, the comments confirm that, as Verizon explained in its comments, the Commission's proposal would sweep in all segments of

the Internet ecosystem. As technical experts and a range of other commenters demonstrate, there are in fact no separate “on-ramps” to the Internet. Thus, some regulatory proponents admit that the Commission’s proposal would require regulation of the Internet from “end to end” and would require at minimum that any facilities-based provider of an information service be treated as also offering a telecommunications service subject to common carriage regulation. In fact, the logic of the Commission’s theory would encompass any Internet-based service with a transmission component. And the scope of the Commission’s theory would not stop there. The Commission itself has explained that, because the hypothesized conduct about which it professes to be concerned typically would occur, if at all, above the transmission level, its proposal would rely on Title I ancillary authority to apply the proposed net neutrality rules to the information service components of broadband Internet access. That same theory inevitably would allow the Commission to extend regulation to the rest of the Internet ecosystem, including application and content providers. The Commission ultimately would merely be substituting one Title I theory for another as the basis for its proposed net neutrality rules, while imposing heavy-handed common carriage regulation for regulation’s sake.

The Commission’s proposal would not only cause wide-ranging harms, but, as the record establishes, also would be unlawful. Again, regulatory proponents have no answer. As an initial matter, they greatly exaggerate the ease with which the Commission could just “change its mind” and reverse the considered conclusions it reached in four prior orders, as affirmed by the Supreme Court and other appellate courts. In fact, the Commission would be significantly constrained by the standard articulated in *Fox* and judicially estopped by its own statements to the Supreme Court. And it would receive no *Chevron* deference for its admitted attempt to expand the reach of its authority.

More fundamentally, under any conceivable standard, the Commission would have no basis to reverse its repeated determinations that broadband Internet access service is a single, integrated information service that is inherently designed to provide the capability to access, interact with, and send information over the Internet. Those capabilities in turn require providing consumers with the capabilities to retrieve, store, utilize, process, acquire, generate, make available, and transform information. Ironically, regulatory proponents themselves demonstrate the contrived nature of their claim that broadband Internet access providers offer a separate pure transmission service by the varying, inconsistent, and vague definitions they propose for that alleged transmission service. Regulatory proponents cannot escape the reality that broadband Internet access offerings incorporate information service capabilities through the gambits of claiming that such capabilities are either not really an integral part of the offering or are merely involved in the “management” of some (again, undefined) telecommunications service – or, in the case of DNS, inconsistently making both claims at the same time. And they ignore the significant constitutional issues that the Commission’s proposal would raise under the First Amendment, the Fifth Amendment, and the non-delegation doctrine.

Further, just as common carriage would be especially harmful in the wireless context, it also would be illegal for additional reasons. While some regulatory proponents suggest that the Commission has broad “public interest” authority to impose common carriage regulation on mobile broadband services, the opposite is true. The plain language of section 332 of the Act affirmatively bars the Commission from imposing common carriage regulation on wireless broadband Internet access service.

Finally, the comments of regulatory proponents illustrate a further problem with the Commission’s proposal: its reliance on forbearance as a means of mitigating some of the worst

effects of its proposed course will not work. The Commission has not proposed to forbear from key provisions of Title II, such as sections 201, 202, and 208, even though doing so would be necessary to achieve the Commission’s professed goals, such as no price regulation. For their part, regulatory proponents already have identified over *twenty* additional provisions that they think should apply to broadband Internet access, including tariffs, interconnection, unbundling, and merger review that would be redundant with the Department of Justice and Federal Trade Commission reviews already required under antitrust laws – as well as an alleged general “public interest duty” not limited to the specific goals set forth in Title II. These proposals concretely demonstrate the uncertainty that reclassification would cause even if the Commission initially forbears from certain requirements. Those proponents would presumably push to have this or a future Commission “unforbear,” and the Commission continues to claim the ability to do so. Moreover, the Commission has not proposed to make the findings and take other steps that would ensure that forbearance is upheld. And several recent actions cast significant doubt on its willingness to do so given its broader pro-regulatory agenda. Thus, industry and investors would have no meaningful ability to rely on forbearance as personnel change or political tides shift.

Ultimately, regulatory proponents offer no legal or policy justification for the Commission to return to outdated regulation that would severely damage the Internet ecosystem and the broader economy. Although they assert that reclassification is needed because the holding in *Comcast* deprived the Commission of authority to implement the key elements of the National Broadband Plan, they overstate the breadth of that case’s holding. In fact, as Verizon and others have demonstrated, the Commission has the authority it needs to implement those key elements. And, even if it did not, the Commission could not manufacture statutory authority to advance its policy goals.

Instead, Congress is the proper entity to determine the appropriate Internet policies for the nation and to define the scope of the Commission's regulatory authority. Verizon and Google recently released a joint legislative proposal that addresses just these issues. The joint proposal would set up a policy framework for maintaining an open Internet and provide the Commission with targeted authority to engage in case-by-case enforcement of consumer protection and nondiscrimination requirements under that framework, while encouraging the use of non-governmental dispute resolution processes built on the Internet's successful history of self-governance. The proposal also would make clear that broadband Internet access services would be eligible for universal service support and subject to disabilities access requirements. Targeted legislation of this kind is the best way to strike an appropriate balance that protects consumers and promotes continued innovation and investment, while foregoing unnecessary and harmful regulation. Verizon will continue to work with Congress, the industry, and other interested stakeholders to craft appropriate legislation that accomplishes these goals.

## **II. THE COMMISSION'S PROPOSAL WOULD CAUSE SIGNIFICANT HARM AND IS NOT NEEDED TO SOLVE ANY PROBLEM.**

### **A. The Record Demonstrates That the Commission's Proposal Would Lead To Less Investment and Fewer Jobs.**

Both the Commission and commenters start from the common ground that the Commission should promote private sector investment in broadband because it will lead to greater innovation, more jobs, and a stronger economy. Thus, as the Commission recognized in the National Broadband Plan, the government must avoid "policies [that] hinder innovation and investment in broadband."<sup>1</sup> Google and Verizon have previously observed that such investment

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<sup>1</sup> *Connecting America: The National Broadband Plan* at xiii-xiv, 4 (Mar. 16, 2010), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> ("National Broadband Plan").

“make[s] the Internet more useful for consumers and will enable new and innovative applications and services that empower consumers, grow the economy, create jobs, and address a wide range of additional national priorities from energy independence to improved health care.”<sup>2</sup>

There also can be no dispute that investment in broadband facilities has grown dramatically since the time of the Commission’s *Cable Modem Order*.<sup>3</sup> Broadband providers are estimated to have invested over half a *trillion* dollars on a cumulative basis between 2000-2008, and approximately \$60 billion in each of 2008 and 2009, despite the economic downturn. (USTelecom Comments at 3; *see also* TIA Comments at 4-6.) Verizon itself has been investing approximately \$17 billion per year on its networks (more than \$80 billion total between 2004 and 2008) and recently reported that it remains on track to invest approximately that amount this year notwithstanding the challenging economic climate.<sup>4</sup>

The Commission’s proposal, however, would, in the words of Alcatel-Lucent, create an “adverse investment environment” that would lead to reduced innovation and harm to the economy, including lost jobs. (Alcatel-Lucent Comments at 10.) As Verizon explained, that is the expectation of numerous independent analysts whose reputations and money (or clients’ money) are at stake. These analysts have concluded that the Commission’s proposal would create significant uncertainty and have a negative effect on investment and jobs. (Verizon

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<sup>2</sup> Google and Verizon Joint Submission on the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52, at 2-3 (filed Jan. 14, 2010).

<sup>3</sup> *See, e.g.*, Alcatel-Lucent Comments at 7-8 (describing positive investment trends after the decision in *Brand X* and the Commission’s *Wireline Broadband Order*). Unless otherwise noted, all references to the “Comments” of a party refer to the comments that the party filed in GN Docket No. 10-127 in July 2010.

<sup>4</sup> Verizon News Release, *Verizon Reports Strong Wireless, FiOS Customer Growth; Increased Enterprise Revenues; Strong Cash Flow in 2Q* (July 23, 2010), available at <http://newscenter.verizon.com/press-releases/verizon/2010/Verizon-Reports-Strong-Wireless-FiOS-Customer-Growth-Increased-Enterprise-Revenues-Strong-Cash-Flow-in-2Q.html>.

Comments at 12-13.) That is confirmed by other commenters in this proceeding, including unions and equipment manufacturers whose interests are tied directly to maximizing jobs and investment in the broadband sector.<sup>5</sup> Facebook’s chief technology officer likewise recently testified to Congress that “[o]verbroad or burdensome regulation carries the risk of stifling the innovation that is the lifeblood of the Internet and has served as a major source of jobs and economic growth.”<sup>6</sup> And empirical studies have found that increased regulation in the communications area – including regulation under Title II – has led to less investment and fewer jobs. (Verizon Comments at 16-17.)

The adverse effects of the Commission’s proposal on investment and jobs would be even worse if it were applied to the hypercompetitive and developing marketplace for wireless broadband Internet access services. CTIA reports that by the end of 2009, wireless providers had made more than \$285 billion in cumulative capital investments, including an annual average of approximately \$22.8 billion per year from 2001 through 2008. (CTIA Comments at 21-22.) Carriers are now in the midst of making billions of dollars of additional investments to deploy fourth generation wireless technologies such as LTE and WiMAX. Imposing Title II common

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<sup>5</sup> See, e.g., Cisco Comments at 1 (“the proposed ‘Third Way’ framework could diminish private-sector investment, undercutting deployment at a critical time in the Internet’s development”); CWA Comments at 4 (“The Title I route would pose substantially less risk than the Title II route of chilling job-creating investment and innovation by broadband network providers.”); Alcatel-Lucent Comments at 9-10; TIA Comments at 12.

<sup>6</sup> Testimony of Bret Taylor, Chief Technology Officer, Facebook, *Consumer Online Privacy: Hearing before the Senate Committee on Commerce, Science, & Transportation*, at 13 (July 27, 2010), available at [http://commerce.senate.gov/public/?a=Files.Serve&File\\_id=6f5a43a0-cdf3-4f00-a3de-a2496d1e29b1](http://commerce.senate.gov/public/?a=Files.Serve&File_id=6f5a43a0-cdf3-4f00-a3de-a2496d1e29b1).

carriage regulation on wireless broadband Internet access services would deter investment at the worst possible time.<sup>7</sup>

Nor would the harms from the Commission's proposal stop there. As Verizon explained, the logical result of the Commission's theory would be to impose investment-stifling Title II regulations on a variety of other Internet-based offerings with a transmission component, such as the Kindle, content delivery networks, and interconnected VoIP services. (Verizon Comments at 58-63.) Moreover, as the Commission's General Counsel has conceded, its proposal would require asserting Title I ancillary authority over the information service capabilities of broadband Internet access because the activities it apparently intends to regulate or prohibit in the name of net neutrality would occur (if at all) above the transmission level no matter how defined.<sup>8</sup> That step would expand the Commission's authority to encompass even more broadly content, applications, and services on the Internet. Thus, the Commission would have substituted one Title I theory for another, extended its reach throughout the Internet ecosystem, and in the process applied Title II common carriage regulation to broadband for regulation's sake.

In the face of this clear evidence of the harmful effects of regulatory overreach on investment and jobs, Free Press offers nothing but wholly unsupported and implausible speculation that "regulation might . . . actually encourage[] investment." (Free Press Comments

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<sup>7</sup> Some regulatory proponents cite a recent article characterizing Verizon Wireless's CEO as suggesting that Verizon Wireless does not expect to slow its announced planned investment in its LTE network. Niraj Sheth, *Verizon in Talks with Rural Firms*, Wall St. Journal (May 13, 2010). But as Verizon Wireless's CEO explained, "We are going to go out and deliver the things that we talked about next year. But in the long run I think [reclassification] could dramatically impact investment if the FCC is not careful." Transcript of Barclays Capital Communications, Media and Technology Conference (May 26, 2010).

<sup>8</sup> Austin Schlick, *A Third-Way Legal Framework for Addressing the Comcast Dilemma* at 6-7 (May 6, 2010) (proposal "would rest on *both* the Commission's direct authority under Title II *and* its ancillary authority arising from the newly recognized direct authority") (emphasis in original) ("Schlick Statement"); ITIF Comments at 6-7; ATIS Comments at 18-19.

at 93.) But its assertion is based on a misreading of history, an oversimplistic view of how investment decisions are made, and a mischaracterization of the Commission's proposal. First, Free Press's claim (at 93) that increases in ILEC investment after the 1996 Act must have been due to unbundling and other regulatory obligations lacks any empirical support and ignores numerous factors. Among other things, it fails to account for the fact that the 1996 Act also provided a path for ILECs to enter into new lines of business such as long distance service and required them to invest billions of dollars in capital in wholesale systems and processes to comply with their new obligations. As studies show, the costs and inefficiencies imposed by unbundling and similar regulations actually led to decreased investment in broadband networks.<sup>9</sup>

Second, Free Press's claim is based on clearly incorrect premises. For example, it blithely suggests that as long as demand is increasing and costs are declining, then providers have continued incentives to invest. (Free Press Comments at 96.) But it fails to recognize that Title II regulation of broadband Internet access services would *increase* costs and uncertainty. As Alcatel-Lucent explains, in a "competitive environment for resources, service provider management may redirect resources away from capital investments in network improvement and

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<sup>9</sup> See, e.g., Thomas W. Hazlett & Anil Caliskan, *Natural Experiments in U.S. Broadband Regulation*, 7 *Review of Network Economics* 460, 477 (Dec. 2008) (finding that investment incentives were highly sensitive to changes in unbundling policy and that DSL service rapidly grew following the repeal of an unbundling mandate). Free Press is also wrong in claiming that AT&T's investment pattern after agreeing to certain open access commitments in connection with its merger with SBC demonstrates that the proposed rules would not harm investment incentives. (Free Press Comments at 95 n.266.) Those commitments were narrower than the Title II regulations at issue here and, in any case, temporary in nature and thus had little or no effect on long term investment decisions. That is all the more true given that the restrictions applied to AT&T alone, and it therefore had to make investments in anticipation of competing with others who were not constrained in this way. Moreover, even if AT&T's investments increased during that time, that shows nothing about the investment effects of the voluntary commitments – to make such a showing, Free Press would have to compare the investments AT&T made against those it would have made had those commitments not been in effect, which it does not do.

expansion if the Commission's rules have an unacceptable degree of uncertainty or decrease the likelihood that an acceptable return will be realized." (Alcatel-Lucent Comments at 9.)

Third, Free Press's assertion that the Commission's proposal will not undercut investment is based on an obviously inaccurate characterization of that proposal that substantially understates the costs and uncertainty it will engender. Free Press suggests that the proposal simply "ensures that the Commission has the legal authority that investors and markets already presumed it had" prior to the *Comcast* decision. (Free Press Comments at 96.) But prior to *Comcast* and since at least the *Cable Modem Order*, investors have understood that broadband Internet access services are information services, not telecommunications services subject to intrusive common carriage regulation as under the Commission's proposal. Free Press makes the further assertion that the Commission's proposal "merely . . . ensure[s] it can adopt policies such as expanding the Universal Service Fund to broadband and requiring better consumer disclosure of service quality and pricing. These objectives are the lightest of regulatory touches." (*Id.*) But of course the Commission is proposing to do much more than that by applying broad regulatory provisions such as sections 201 and 202 that lead down the path to price regulation and more. And Free Press's own comments ask the Commission to go even further and impose a whole host of additional common carriage requirements on broadband Internet access. Thus, the proposal that Free Press claims would not discourage investment has little resemblance to the actual Commission proposal or the proposals of regulatory proponents. The fanciful assertions of regulatory proponents – some of whom invest in nothing, build nothing, operate nothing, and make no contribution to the economy – are no foundation for the Commission's lurch towards greater regulation.

**B. The Harms That Would Result from the Commission’s Proposal Are Particularly Unjustified Because the Proposal Is Based on an Inaccurate Characterization of the Effects of the *Comcast* Decision on the Commission’s Authority.**

Regulatory proponents assert that the Commission’s assertion of Title II authority over broadband Internet access is necessary because the D.C. Circuit’s decision in *Comcast* otherwise deprives the Commission of authority to implement its broadband agenda. But they substantially overstate the reach of that decision. And, in any case, Congress, not the Commission, is the appropriate body to determine whether the Commission’s regulatory authority should be expanded.

As an initial matter, the Commission has direct authority to implement the two key pillars of its broadband plan – spectrum and universal service – and nothing about *Comcast* has any effect on that authority. No commenter disputes that Title III of the Act gives the agency statutory authority over commercial spectrum, including the authority to allocate available spectrum for licensing to promote wireless broadband Internet service. *See, e.g.*, 47 U.S.C. § 309.

As for universal service, regulatory proponents note that section 254 includes some provisions that could be interpreted to preclude universal service support for broadband deployment. But, as AT&T and others explained at length, other parts of section 254 can be interpreted to give the Commission authority to provide universal service support for broadband, and the Commission has discretion to resolve that ambiguity. (Verizon Comments at 21-22; AT&T Comments at 22-27; Comcast Comments at 6-8.) Indeed, Senator Rockefeller recently reiterated this point in urging swift Commission action under current law to refocus universal

service on broadband.<sup>10</sup> Moreover, the Commission’s authority under section 254 is reinforced by section 706(b). Under that provision, if the Commission finds that broadband deployment is not reasonable and timely, it may “take immediate action to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment.” 47 U.S.C. § 1302(b). Indeed, the Commission recently found that “broadband deployment to all Americans is not reasonable and timely,” apparently based on the fact that there are some limited areas where broadband has not been deployed and is not available. While that finding is overbroad as stated, it nonetheless provides a basis for targeted universal service support for broadband investment in areas where it has not yet been deployed, and potentially other initiatives such as Lifeline and Link Up programs if an evidentiary record demonstrates that such programs stimulate demand for supported services and thereby help promote infrastructure investment. Although Public Knowledge complains (at 4) that the Commission’s authority under section 706(b) would not apply to areas where deployment was “timely,” that is hardly a problem – if broadband is already being deployed in a timely manner in an area, there should be no need for universal service support for its deployment.

Regulatory proponents also exaggerate the effect of the *Comcast* decision with respect to the Commission’s ancillary authority. The D.C. Circuit did not, as Free Press suggests, hold “that the FCC could not prohibit Comcast’s blocking using its ancillary authority.” (Free Press Comments at 19.) Rather, the court simply held that the Commission had not in the order at issue identified a legitimate statutory basis for its actions or compiled a record showing that the proposed action was necessary to give effect to a statutorily mandated responsibility. Indeed,

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<sup>10</sup> Letter from Senator Rockefeller to Julius Genachowski, Chairman of the FCC (Aug. 2, 2010).

contrary to the claims of some,<sup>11</sup> the court did not even address certain of the Commission’s arguments – such as reliance on section 201 – on the merits, but simply found that they had not been relied upon below.<sup>12</sup> Although some regulatory proponents complain that the ruling means that “in any area where the Commission seeks to regulate broadband, it must root its actions in specific statutory mandates accorded to the Commission by Congress,”<sup>13</sup> that does not, as they claim, work a revolution in the law of ancillary authority. To the contrary, that has been a fundamental requirement since the Supreme Court’s seminal decision in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). Moreover, far from “creat[ing] confusion and uncertainty” (Open Internet Coalition Comments at 12), that requirement ensures that regulation pursuant to ancillary authority is grounded in the Act and does not become a free-floating mandate to take whatever action would fit the political winds of the day – a result that *would* cause confusion and uncertainty and raise significant concerns under the non-delegation doctrine.

Thus, as to ancillary authority, the *Comcast* decision did not change the status quo. And, as Verizon explained, the issues that the Commission identifies in its NOI (other than net neutrality) are distinct from the issue in *Comcast* because, unlike that case, the Commission generally does have an explicit grant of substantive authority with respect to those issues and has previously invoked ancillary authority based on that grant. (Verizon Comments at 24-25.)

Given all of that, the Commission’s reclassification proposal has to be understood as an effort to expand its authority to adopt broad net neutrality regulations. But even on that score,

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<sup>11</sup> See, e.g., Center for Media Justice Comments at 7; Open Internet Coalition Comments at 10.

<sup>12</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642, 660-61 (D.C. Cir. 2010).

<sup>13</sup> See, e.g., Open Internet Coalition Comments at 12; Public Knowledge Comments at 2-3.

Title II reclassification is off target. Because the behavior the Commission apparently would like to regulate typically would occur (if at all) above the transmission level, the Commission's General Counsel has explained that it still would have to invoke ancillary authority based on Title I to promulgate the broad net neutrality rules that it has proposed. So at the end of the day, it still would be relying on Title I. But the Commission cannot justify undermining an entire industry and harming consumers because appellate lawyers think that reclassifying a supposed underlying transmission service may marginally strengthen the argument for relying on Title I as a basis for imposing its proposed net neutrality rules – particularly given that there is no evidence of a problem that net neutrality regulations are needed to address.<sup>14</sup>

Thus, regulatory proponents do not come close to providing a legitimate rationale for the Commission's radical reclassification proposal. Instead of taking that route and undermining investment, innovation, and the economy more broadly, the Commission should rely on a true “third way” built on the successful Internet model of industry self-governance and standard-setting, with governmental involvement serving only as a backstop to address demonstrated harm to competition or to consumers based on the specific facts involved in a particular incident where industry mechanisms are unable to resolve the conduct at issue.<sup>15</sup>

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<sup>14</sup> See Comments of Verizon and Verizon Wireless, *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, at 31-39 (filed Jan. 14, 2010) (“Verizon Net Neutrality Comments”).

<sup>15</sup> See, e.g., Verizon Comments at 26-28; ITIF Comments at 7 (“The rational approach to interim Internet regulation is for the FCC to work with the network operator community to devise self-regulatory standards and guidelines that can be guided and influenced by the Commission.”).

Verizon, along with Google, recently released a joint legislative proposal that would accomplish just that.<sup>16</sup> The proposal, if adopted by Congress, would set up a policy framework for maintaining an open Internet and provide the Commission with targeted authority to engage in case-by-case enforcement of consumer protection and nondiscrimination requirements under that framework, while encouraging the use of non-governmental dispute resolution processes. The proposal also would make clear that broadband Internet access services are eligible for universal service support and subject to disabilities access requirements. As significantly, the proposal would leave to *Congress* the significant and far-reaching choice as to whether broadband Internet access services should be subject to greater regulation and to define the scope of the Commission's regulatory authority. Congress, not the Commission, is the proper entity to make those decisions, and Verizon will continue to work with Congress, the industry, and other stakeholders to craft legislation that protects consumers and promotes continued innovation and investment, while avoiding unnecessary and harmful regulation.

### **III. THE RECORD CONFIRMS THAT THE COMMISSION LACKS A LEGAL OR FACTUAL BASIS TO RECLASSIFY BROADBAND INTERNET ACCESS AS A TELECOMMUNICATIONS SERVICE.**

#### **A. Proponents of Title II Regulation Erroneously Assert that the Commission Has Broad Discretion to Reclassify Broadband Internet Access Services.**

As explained in Verizon's comments, any attempt by the Commission to reverse its prior determinations regarding the proper statutory classification of broadband Internet access services would face exacting scrutiny by a reviewing court and, in any event, is barred by the doctrine of

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<sup>16</sup> See *Verizon-Google Legislative Framework Proposal*, available at <http://www.scribd.com/doc/35599242/Verizon-Google-Legislative-Framework-Proposal>; Tom Tauke, *Joint Policy Proposal for an Open Internet*, Verizon PolicyBlog (Aug. 10, 2010), available at <http://policyblog.verizon.com/BlogPost/742/JointPolicyProposalforanOpenInternet.aspx>.

judicial estoppel. (Verizon Comments at 29-41.) Reclassification proponents, however, blithely assert that the Commission can readily change course in order to suit its own (and their) regulatory agenda. That assertion is based on a failure to come to terms with the meaning of *Fox Television Stations*, 129 S. Ct. 1800 (2009), and *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

**1. The Commission Would Face a Heavy Burden Under *Fox* to Show That Reversal of its Prior Classification Decisions Is Not Arbitrary and Capricious.**

As explained in Verizon’s comments (at 29-34), *Fox* held that when an agency changes course, it must provide a “more detailed justification [for the change] than what would suffice for a new policy created on a blank slate” if its “new policy rests upon factual findings that contradict those which underlay its prior policy” or its “prior policy has engendered serious reliance interests that must be taken into account.”<sup>17</sup> This heightened burden will be triggered by any reclassification decision because it would be based on facts contrary to those underlying the Commission’s four prior classification decisions,<sup>18</sup> which have induced significant reliance by broadband providers. *See supra* at 6.

Although proponents of regulation mischaracterize *Fox* as holding that the Commission would receive the *same* deference in reclassifying broadband as it received in its initial

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<sup>17</sup> *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1811 (2009) (majority opinion).

<sup>18</sup> Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901 (2007) (“*Wireless Broadband Order*”); Memorandum Opinion and Order, *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service As an Information Service*, 21 FCC Rcd 13281 (2006); Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) (“*Wireline Broadband Order*”); Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) (“*Cable Modem Order*”).

classification determination,<sup>19</sup> that is wrong. The Court declined to rule that *all* agency reversals trigger a heightened standard of review but went on to hold, as set forth above, that when such reversals are based on different factual findings or implicate serious reliance interests, a heightened standard applies. Both circumstances apply here.

Free Press attempts to avoid *Fox*'s heightened burden by denying broadband providers' reliance interests.<sup>20</sup> As previously explained, this ignores the history of the Commission's classification decisions—whereby it repeatedly affirmed in four separate orders over the course of several years that broadband is a Title I information service—and the facts regarding the massive investments made in reliance on the Commission's consistent approach for over a decade.<sup>21</sup> If, as Free Press further argues, there are no reliance interests here because broadband providers “should have realized that the 2002 decision and subsequent decisions were not necessarily permanent,”<sup>22</sup> then there could never be *any* reliance interests in a federal regulatory

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<sup>19</sup> Free Press Comments at 107 (“*Fox* affirms the conclusion that changes in agency policy receive the same deference accorded to an initial policy determination.”); Center for Media Justice *et al.* Comments at 15-16 (“As the Supreme Court has made clear recently, the Commission need not meet any higher burden of proof to reverse prior decisions in response to new facts and new analysis.”); CCIA Comments at 14-15 (arguing that “the Commission can exercise that same broad discretion to hold that the transmission components of retail broadband Internet access must be treated independently as telecommunications and made subject to a narrow portion of Title II”).

<sup>20</sup> Free Press Comments at 128-30 (arguing that “a move to classify broadband Internet connectivity as a Title II service does not implicate ‘serious reliance interests’”).

<sup>21</sup> *See supra* at 6; *see also* Verizon Comments at 14-18, 33.

<sup>22</sup> Free Press Comments at 129.

scheme because the same could be said of any dramatic reversal of course that negates investment backed reliance interests.<sup>23</sup>

## **2. Regulatory Proponents Erroneously Assume that the Commission’s Reclassification Decision Would Be Entitled to *Chevron* Deference.**

As explained in Verizon’s comments, no *Chevron* deference would be due the Commission with respect to its reclassification decision because, unlike in *Brand X*, this proceeding concerns the extent of the Commission’s statutory authority over broadband Internet access service. (Verizon Comments at 35-38.) As with *Fox*, proponents of regulation mischaracterize the Supreme Court’s decision in *Brand X* and the applicable *Chevron* framework as providing the Commission with broad discretion to reclassify broadband Internet access service.<sup>24</sup>

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<sup>23</sup> In its discussion of reliance interests, Free Press concedes that reclassification would not (and could not) apply retroactively. *See* Free Press Comments at 129 (“[N]o one has suggested that the Title II classification will apply retroactively. The Commission has expressed no intention impose new liability, seek fines, or impose fees based on past acts taken in good faith reliance on the prior regulatory structure.”). As to that aspect of the issue, they are correct. *See* Verizon Comments at 98-99.

<sup>24</sup> Free Press Comments at 105-07 (“*Brand X* gives the FCC ample latitude to interpret the terms relevant to classification: ‘offer’ and ‘telecommunications service.’”); *see also* Center for Media Justice *et al.* Comments at 1 (“The Supreme Court has affirmed that making such a classification determination is well within the Commission’s discretion and present authority under the Communications Act.”); CCIA Comments at 12 (“The Supreme Court’s decision in *Brand X* instructs that the Commission has broad discretion in determining which services are ‘telecommunications’ under the Act. Thus, even if retail broadband Internet access were not so clearly within the purview of Title II, a Commission decision to classify these services as Title II telecommunications surely will enjoy considerable deference and survive any reasonable appellate scrutiny.”).

Reclassification proponents fail to recognize that the *Chevron* framework simply does not control questions of statutory authority under *Mead*.<sup>25</sup> This proceeding, according to the Commission, is expressly designed to manufacture broad authority for the Commission over broadband Internet access service. (Verizon Comments at 37.) Indeed, proponents of Title II regulation openly acknowledge that the purpose of this proceeding is to create additional legal authority for the Commission in response to *Comcast* so that the Commission can pursue its entire regulatory agenda.<sup>26</sup> As a result, under *Mead* and its progeny, no deference will be

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<sup>25</sup> *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (holding that “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority”); *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (“*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.” (citing *Mead*, 533 U.S. at 226-27)); *AT&T Corp. v. FCC*, 323 F.3d 1081, 1086 (D.C. Cir. 2003) (stating that *Chevron* deference is warranted “only when ‘Congress has left a gap for the agency to fill pursuant to an express or implied delegation of authority to the agency’” (internal quotation marks omitted) (quoting *Railway Labor Executives Ass’n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc))).

<sup>26</sup> See Free Press Comments at 2 (“In response to the *Comcast* case, the Commission can and should classify broadband Internet connectivity service as a telecommunications service under the Communications Act. By doing so, it will restore a sound foundation for its broadband agenda.”); Center for Media Justice Comments at 6 (arguing that “it is essential that the Commission promptly assert its authority over Internet connectivity service” because the “Commission’s authority to oversee broadband Internet connectivity service is essential to the realization of Congress’s and the Commission’s goals set forth in the National Broadband Plan”); Open Internet Coalition Comments at 16 (arguing that “classifying the transmission component of broadband Internet access services as telecommunications services is an appropriate path forward . . . to restoring the Commission’s ability to implement its broadband agenda”).

afforded the Commission’s decision unless it can first show that it “acted pursuant to delegated authority.”<sup>27</sup>

But there is no evidence that Congress ever intended to delegate to the Commission the authority that it seeks in this proceeding—an authority that would extend throughout the Internet ecosystem—and reclassification proponents have cited none. Indeed, it is implausible that the Congress would have delegated authority to regulate such a large sector of the national economy as the Internet to the Commission based on mere statutory ambiguity.<sup>28</sup> For these reasons, any effort by the Commission to reclassify broadband Internet access services “as needed”<sup>29</sup> simply to suit its policy agenda would be subject to skeptical review outside the *Chevron* framework.<sup>30</sup>

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<sup>27</sup> *Am. Library Ass’n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005); *see also MPAA v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (“The agency’s interpretation of [a] statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue. . . . *Mead* reinforces *Chevron*’s command that deference to an agency’s interpretation of a statute is due only when the agency acts pursuant to ‘delegated authority.’” (emphasis in original)); *see also Comcast*, 600 F.3d at 645-47, 651-60 (setting forth legal framework for analyzing statutory authority question without applying any deference to the Commission’s interpretation of its ancillary authority).

<sup>28</sup> *See ABA v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005) (“‘Mere ambiguity in a statute is not evidence of congressional delegation of authority.’”) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001)); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (stating that courts are “guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency”); *Gonzales*, 546 U.S. at 267 (Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, ‘hide elephants in mouseholes.’” (quoting *Whitman v. American Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001))).

<sup>29</sup> Free Press Comments at 105.

<sup>30</sup> A reviewing court would not afford any deference to the Commission’s reclassification decision for the additional reasons that: it would lack the “power to persuade” in view of the Commission’s overtly results-oriented approach, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); it would be starkly inconsistent with the agency’s previous classification decisions, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987); and it would create serious constitutional questions, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), *see infra* at 38-44.

**B. The Record Provides No Basis For The Commission To Reverse Its Repeated Determination That Broadband Internet Access Is An Information Service.**

Proponents of reclassification can offer no sustainable basis for the Commission to reverse its conclusion that retail broadband Internet access service offered to consumers is an integrated information service. To the contrary, the record decisively demonstrates that broadband Internet access providers do not in fact offer a separate transmission service that could be subject to common carrier regulation.

As the Commission has found and the Supreme Court affirmed in *Brand X*, under the terms of the Communications Act, only a “pure” transmission service offering can be classified as a telecommunication service. By contrast, a hybrid or mixed service that integrates both transmission and the capability to change the content or form of information must be an information service. (*See Verizon Comments at 41-46.*) As the Supreme Court recognized, any alternative interpretation would work an unsupported and “abrupt shift” in policy that “would subject to mandatory common-carrier regulation *all* information-service providers that use telecommunications as an input to provide information service to the public.” *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 994 (2005). The Court further affirmed that determining what a provider is offering consumers turns on “what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product.” *Id.* at 990; *see also id.* at 976 (the Commission has long “defined both basic and enhanced services by reference to how the consumer perceives the service being offered”).

Thus, the key question is whether broadband Internet access providers are offering a separate pure transmission service. As Verizon explained, the answer to that is no. (*See Verizon Comments at 47-58.*) Rather, what broadband Internet access providers offer – and what consumers perceive they are obtaining – is the capability to access, interact with, store, and send

information over the Internet. That in turn involves incorporating capabilities to retrieve, store, utilize, process, acquire, generate, make available, and transform information. Thus, broadband Internet access is inherently an information service.

The Commission's attempt to define an "Internet connectivity" service separate from the Internet access service that providers offer is beset with confusion. As The Alliance for Telecommunications Industry Solutions ("ATIS") – a global standards-setting organization comprised of hundreds of technology company members – explains, "[t]he Commission's attempt to create a distinction between 'Internet access service' and 'Internet connectivity service' could inject confusion into this discussion, because it suggests that 'Internet connectivity' can occur without 'Internet access.' In fact, because to connect to the Internet is to access the Internet, the two terms are logically synonymous." (ATIS Comments at 6; *see also* ITIF Comments at 6 ("any attempt to draw a single dichotomy between transport and information [on the Internet] is arbitrary").) Further, ATIS observes that mere connectivity "cannot provide a communications path to other Internet users"; rather, "the various networks that (when interconnected) comprise the Internet must perform a number of processing functions on the user's communications." (*Id.* at 7.) Similarly, "Internet connectivity" cannot be conceptualized as a separate on-ramp or last mile connection between an end user's device and "the Internet." As ATIS explains, "[t]he Internet does not exist separate and apart from the connections to it or the networks and users that comprise it; indeed, it is the very act of establishing the interconnections between computer networks and the individual computers that are, in turn, connected to those networks that bring the Internet into being." (*Id.* at 5.)

The Commission's and regulatory proponents' reliance on NECA and GTE DSL tariffs<sup>31</sup> is similarly unavailing. NECA itself explains that the service described in the tariff does not permit a consumer to connect to the Internet – rather it simply connects an end user's premises and a local point of interconnection in a central office. (NECA Comments at 5-6.) As ATIS concludes, “the NECA tariff is not actually defining or offering either Internet connectivity or access” and “does not include routing or transport capabilities that would enable the user's data to be carried past the DSL Access Service Connection Point, out onto the Internet, and to other users' computers.” (ATIS Comments at 10-11.) The same is true for the GTE DSL tariffs to which some commenters point. In both cases, the tariffs simply do not define a service that provides end users the ability to access and interact with information over the Internet and thus do not fulfill even the most basic capability users expect from broadband Internet access service.

Ironically, the comments of regulatory proponents confirm that the separate pure transmission service allegedly offered by broadband Internet access providers is entirely contrived. If such a separate service existed and users perceived that it was part of the broadband Internet offering, then it should be readily identifiable. But regulatory proponents themselves define the supposed service differently and inconsistently. Free Press, for example, states that the “Internet connectivity service” includes the entire Internet – that is, “transmi[ssion of] data from *end to end* over the Internet . . . . At a minimum, that service includes the sending, receiving, addressing, routing, scheduling, or queuing of data packets *from one end point of a user's choosing to another on the Internet.*” (Free Press Comments 49 (emphasis added).) That would, of course, encompass Internet backbone networks and, as discussed below, content delivery networks and any other transmission facilities used to provide Internet-based services.

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<sup>31</sup> See, e.g., NOI ¶ 21 n.53, ¶ 65; Public Knowledge Comments at 10-12.

Public Knowledge, in turn, is alternately inconsistent with Free Press and with itself. On the one hand, in some places it appears to conceptualize the alleged telecommunications service, similar to Free Press, as the “offer to transmit data of the end user’s choosing from the end user’s device to another device also connected to the Internet.” (Public Knowledge Comments at 7.) That definition, like Free Press’s, would sweep in Internet backbone networks and a variety of Internet-based services; indeed, Public Knowledge affirmatively encourages the Commission to get involved in issues such as peering disputes and the migration to IPv6. (*Id.* at v, 43.) On the other hand, in other places in its comments, Public Knowledge suggests that the service in question is akin to the service offered in the GTE DSL tariff, which, as discussed above, only carried traffic between the end user and the central office. (*Id.* at 10-11.) Alternatively, Public Knowledge describes the service as an “offer[] to take data generated by a user, using customer-premises equipment, to ‘the Internet.’” (*Id.* at 10.) While this is anything but clear, it appears to describe a service from an end user’s premises to some point where the provider’s service connects to the Internet backbone or some similar point. The Center for Democracy and Technology posits a similar definition of a service that “provid[es] 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.” (CDT Comments at 13.)

These latter definitions misconceive the nature of the Internet because they are based on an illusory distinction among the customer’s device and interconnection or peering points and “the Internet” – in fact, the former are part and parcel of the latter. But they also describe a wholly different “transmission service” than what Free Press claims broadband Internet access service providers offer – rather than being “end to end,” CDT and (sometimes) Public

Knowledge apparently believe that broadband Internet access providers offer one transport service from a user's device to an interconnection point; another service between that interconnection point and the rest of the Internet (since otherwise a user could not connect to the rest of the Internet); and then one or more other services that include the other functions that broadband Internet access providers typically offer to consumers (e.g., email). The fact that regulatory proponents can do no better than this hodgepodge of convoluted, inconsistent, and vague definitions of the "transmission service" that broadband Internet access providers supposedly offer is conclusive evidence that no such separate service actually is offered (and certainly that consumers do not perceive any such service).

Indeed, CableVision and Time Warner Cable argue that the provision of broadband Internet access does not involve "telecommunications" at all. (*See* CableVision Comments at 6-12; Time Warner Cable Comments 19, 24-25.) As they note, the content sought by a user may be located at the content provider's server(s), cached at one or more locations by the broadband Internet access provider's network and/or a third party such as a CDN provider, or otherwise distributed on servers, so it is the Internet access provider (or the content provider) that determines the actual end point of the communication. But, if the user is not determining the end point of his or her communication, the broadband Internet access provider is not providing "telecommunications," which includes only transmission "between or among points specified by the user." 47 U.S.C. § 153(43). The Commission is bound by this plain language in the statute; contrary to the claims of regulatory proponents (*see supra* n.26), the Court in *Brand X* found only the term "offering" to be ambiguous, not the term "telecommunications."

Regulatory proponents also cannot escape the fact that broadband Internet access offerings incorporate various applications and functions that themselves provide information

service capabilities, including DNS, security, caching, e-mail, and personal web pages. Both the Commission and the Supreme Court have previously pointed to these functions as reasons why broadband Internet access offerings are information services (Verizon Comments at 49-51), and the record makes clear that ever more information service capabilities are incorporated as part of broadband Internet offerings today as these services evolve and become more sophisticated. As ATIS explains, some of these, such as DNS, caching, and security, “are integral to the ability to connect to the Internet. Because these functions are so closely integrated with providing users the ability to communicate with other users on the Internet, they are either technically inseparable from Internet service or as a practical matter are offered as part of each and every Internet service offering.” (ATIS Comments at 13.)

Regulatory proponents do not dispute that such capabilities are incorporated in the broadband Internet access offering, but instead assert they all fall within the exception in the definition of “information service” for the “management, control, or operation of a telecommunications system or the management of a telecommunications service.” (*See, e.g.*, Free Press Comments at 117-18; Public Knowledge Comments at 13 (citing 47 U.S.C. § 153(20)).) But the Commission already explained to the Supreme Court (and the Supreme Court agreed) that this claim is wrong, and it is judicially estopped from claiming otherwise now: “information-processing capabilities such as the DNS and caching are not used ‘for the management, control, or operation’ of a telecommunications network, but instead are used to facilitate the information retrieval capabilities that are inherent in Internet access. Their use accordingly does not fall within the statutory exclusion.”<sup>32</sup>

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<sup>32</sup> FCC *Brand X* Reply Br. at 5 n.2; *Brand X*, 545 U.S. at 999-1000 & n.3.

That remains true today. DNS, for example, is a storage and retrieval service: a user types in a domain name and the browser on his or her computer sends a query to the DNS, which in turn returns certain stored information, typically an IP address (though, as Verizon previously explained, it alternatively could generate other information such as “re-direct” and typo correction). The user’s browser then takes that information and initiates a communication with the computer located at that IP address. Thus, DNS is not in any way “managing” the broadband provider’s network but providing stored information to, or generating information for, the user. If DNS and other functions such as security that clearly provide benefits to users all constituted “management” of the network, then this exception would swallow the rule and encompass any information service capability that was integral to the service offering. Indeed, when combined with proponents’ companion argument that other functions involving information service capabilities such as email also do not count because they could be provided by third parties, it would mean that no service involving transmission could ever be an information service, because every information service capability could be dismissed as either “management” or capable of being provided independently.

Regulatory proponents are equally wrong in asserting that capabilities such as e-mail and personal web storage are not incorporated as part of the service offering because they are available from third parties and are not always featured in advertisements for the service offering. (Free Press Comments at 111-16; Public Knowledge Comments at 7-8, 16.) As the Commission previously concluded and told the Supreme Court, whether a consumer could also obtain a particular capability from a third party does nothing to change whether that capability is part and parcel of the broadband Internet access service offering. And likewise the fact that particular capabilities may not be featured in all advertisements – or may not be as prominent as

other characteristics such as speed – does not mean they are not part of the offering.

Advertisements for cars typically do not feature mufflers, carburetors, and windshield wipers, but those are no less integral parts of cars that dealers offer. In any event, as Verizon shows, advertisements and other documentation provided to consumers do discuss these capabilities. (Verizon Comments, Services Decl. ¶¶ 28-29.)

Moreover, the comments of regulatory proponents confirm that their various theories would sweep in a wide variety of other Internet-based offerings. Indeed, the Supreme Court rejected challenges to the Commission’s classification of cable modem service as an information service based in part on its recognition that such a reclassification would make an “abrupt shift” that would be breathtakingly broad, as it “would subject to mandatory common-carrier regulation *all* information-service providers that use telecommunications as an input to provide information service to the public.” *Brand X*, 545 U.S. at 994 (emphasis added).

Free Press concedes that under the Commission’s approach, any “facilities-based provider” of an enhanced or information service also would be offering a basic or telecommunications service. (Free Press Comments at 80.) This admission is significant on its own terms since providers such as Google and Amazon all have extensive network facilities that they use to provide their content and applications – thus, as Free Press has now conceded, they and other facilities-based providers of information services would be offering a separate telecommunication service under the Commission’s theory.

Further, Free Press’s attempt to limit the reach of reclassification to *facilities-based* providers is untenable. As the Supreme Court recognized in *Brand X*, nothing in the statutory definitions contains such a limitation. And for that reason, resellers and other non-facilities-based providers have long been classified as providers of telecommunications services. As the

Commission explained, “There is no reason to classify wireline broadband Internet access services differently depending on who owns the transmission facilities. . . . As the Commission indicated in its *Report to Congress*, what matters is the finished product made available through a service rather than the facilities used to provide it.”<sup>33</sup> The Supreme Court agreed, explaining that the statutory analysis “do[es] not distinguish facilities-based and non-facilities-based carriers.” *Brand X*, 545 U.S. at 997. Indeed, because consumers often would have no idea whether the provider from whom they are obtaining a service is using its own facilities or facilities it has leased from someone else, a user’s perception of a service has nothing to do with whether the provider is facilities-based or not. Further, the Commission could not achieve its policy goals without including non-facilities-based providers. In the case of net neutrality, for example, as ITIF explains, the action at issue in the *Comcast* case “is an action that a non-facilities-based ISP could take just as easily as Comcast did.” (ITIF Comments at 6.)

Thus, Free Press is wrong to claim that Akamai and other content delivery networks would not be implicated by the Commission’s theory because they “procur[e] transmission capacity from third-party telecommunications network providers” in order to transmit data from their customers’ premises to Akamai’s servers. (Free Press Comments at 88-89.) In fact, like broadband Internet access providers, these providers transport customers’ data and information to and from the Internet. If that transmission constitutes a separate telecommunications service in the case of broadband Internet access, then it equally does in the case of a content delivery network, whether the provider uses its own facilities or someone else’s.

The same is true with respect to a wide range of other Internet-based offerings that include a transmission component, including the Kindle and other e-readers, interconnected

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<sup>33</sup> *Wireline Broadband Order*, 20 FCC Rcd at 14865 ¶ 16.

VoIP services, and a variety of application and content providers. (Verizon Comments at 58-62.) And the Commission’s plan to assert Title I ancillary authority over the information service components of broadband Internet access in order to promulgate “net neutrality” rules would allow it to regulate other content, applications, and information services delivered over the Internet. Thus, the logical consequence of the Commission’s theory would give it the authority to regulate much of the Internet ecosystem – further reason, as the Supreme Court noted, that the theory is in fact wrong.

Finally, the Commission could not *compel* broadband Internet access providers to offer a separate transmission service. Most regulatory proponents do not address this issue since they wrongly assume that broadband Internet access providers are already offering a separate telecommunications service as part of their broadband offerings. One commenter, Data Foundry, claims that the Commission can and should compel broadband Internet access providers to offer a *wholesale* transmission service on a common carriage basis. (Data Foundry Comments at 3-11.) As Verizon explained, however, the Act does not provide the “clear warrant” that would be necessary to give the Commission authority to compel a provider to dedicate its network for the use of others by offering a new common carrier transport service. (Verizon Comments at 63-65.) But even if it had such authority, doing so would at a bare minimum require a showing of market power. (*See id.* at 65.) Indeed, although Data Foundry seems to suggest the Commission need only find it to be in the public interest to compel the offering of a common carriage service, the very cases they cite confirm the market power requirement.<sup>34</sup>

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<sup>34</sup> See Data Foundry Comments at 6 (inquiry focuses on “whether [provider] ‘has sufficient market power to warrant regulatory treatment as a common carrier’” (quoting *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999))).

As the record demonstrates, and the Commission has previously concluded, competition is thriving and broadband Internet access providers do not have market power. (Verizon Comments at 65-72.) Although a few commenters suggest otherwise, they fail to grapple with the actual evidence of competition. Indeed, Free Press’s entire “analysis” of competition does not so much as *mention* wireless broadband services. (See Free Press Comments at 120-28.) Yet, as the Department of Justice recognized, “the fact that some customers are willing to abandon the established wireline providers for a wireless carrier suggests that the two offerings may become part of a broader marketplace.”<sup>35</sup> Since then, the marketplace has continued to evolve rapidly resulting in even greater cross-platform competition. As Verizon recently explained in great detail,<sup>36</sup> just the past year has seen the emergence of significant new competition from a variety of providers who previously did not exist or were at best minor players. For example, Clearwire has aggressively deployed 4G wireless broadband service and advertises it as a substitute for wireline offerings. Other providers such as Leap and Atlantic Tele-Network have dramatically expanded the scope of their offerings. And a variety of providers are likewise rolling out 4G services with capabilities that rival traditional wireline offerings and provide the added benefit of mobility. (See Verizon Comments at 69-72.) Indeed, even in the short time since the opening comments were filed, a new business venture called LightSquared has emerged as the “[f]irst-ever wholesale nationwide 4G-LTE wireless broadband network integrated with satellite coverage,” which plans to invest \$7 billion in a network that

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<sup>35</sup> Ex Parte Submission of the United States Department of Justice, *Economic Issues in Broadband Competition; A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 10 (filed Jan. 4, 2010).

<sup>36</sup> Comments of Verizon Wireless, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, including Commercial Mobile Services*, WT Docket No. 10-133 (filed July 30, 2010) (“Verizon Wireless Competition Comments”).

will “allow[] partners to offer terrestrial-only, satellite-only, or integrated satellite-terrestrial services to their end users.”<sup>37</sup> The Chairman has lauded the agreement to create a “new nationwide 4G wireless broadband network,”<sup>38</sup> which commentators have noted will be a new competitor in the provision of mobile broadband services.<sup>39</sup>

#### **IV. THE COMMISSION’S PROPOSAL REMAINS PARTICULARLY UNJUSTIFIABLE WITH RESPECT TO WIRELESS BROADBAND INTERNET ACCESS SERVICE.**

Although some regulatory proponents insist that the Commission’s proposal should apply to wireless broadband Internet access as well, they fail to come to grips with the reasons why extending Title II regulation to wireless broadband Internet access would be especially harmful and unlawful, and the record contains no basis for such an outcome.

First, imposing Title II regulation on wireless broadband Internet access would make particularly little sense as a matter of policy. As described above and as the record establishes, the wireless broadband Internet access marketplace is intensely competitive and growing more so.<sup>40</sup> The wireless industry is comprised of literally hundreds of players, with non-facilities-

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<sup>37</sup> See Press Release, LightSquared, Introducing LightSquared: Revolutionizing the U.S. Wireless Industry (July 20, 2010), <http://www.lightsquared.com/press-room/press-releases/>.

<sup>38</sup> See Tim Warren & Yu-Ting Wang, *Nokia Siemens to Operate 4G Network for Harbinger*, COMMUNICATIONS DAILY, July 21, 2010, at 8.

<sup>39</sup> See, e.g., Varun Modi, *LightSquared Squares Competition*, HEADLINER WATCH, July 20, 2010, <http://www.headlinerwatch.com/8108/lightsquared-squares-competition.htm> (“The 4G market is facing a stiff competition with Verizon Wireless and Clearwire Corp facing another competitor in the Harbinger Capital Partners’ LightSquared, which announced a plan with Nokia-Siemens Networks of \$7bn.”); Peter Svensson, *LightSquared Will Make Broadband Wireless Access More Competitive*, CHRISTIAN SCIENCE MONITOR, July 21, 2010 (“LightSquared will launch a new wireless broadband network that aims to provide competition to the incumbent phone companies”), <http://www.csmonitor.com/From-the-news-wires/2010/0721/LightSquared-will-make-Broadband-wireless-access-more-competitive>.

<sup>40</sup> See, e.g., Verizon Comments at 69-72, 74-76; CTIA Comments at 18-21; MetroPCS Comments at 42-45.

based players such as TracFone, regional providers such as MetroPCS and Leap, and new entrants such as Clearwire, all showing rapid growth.<sup>41</sup> Consumers have benefited from increased facilities and coverage, innovative devices and service plans, and falling prices. Virtually all consumers can choose among multiple wireless broadband providers, which compete for their business through differentiated pricing plans, innovative handsets, applications, and features, and network quality and coverage. All signs point to this competition and choice increasing as wireless broadband providers embark on massive investments in 4G networks.

Regulatory proponents seek to use this very success against wireless broadband Internet access providers, suggesting that they should be subject to common carrier regulation *because* wireless broadband Internet services are becoming more popular and consumers increasingly rely on them. (*See, e.g.,* Center for Media Justice at 21-23; Mobile Internet Content Coalition at 2-3.) But the success of wireless broadband services is borne of a competitive market free of heavy-handed regulation such as Title II rules. It makes no sense to suggest that the Commission should now reverse that successful policy and impose burdensome regulations that will endanger the very success of wireless broadband by reducing incentives to invest and innovate. That would be particularly perverse because the intense competition already provides strong incentives for wireless broadband Internet access providers to avoid actions that would be

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<sup>41</sup> See Verizon Wireless Competition Comments; Comments of CTIA, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, including Commercial Mobile Services*, WT Docket No. 10-133 (filed July 30, 2010).

harmful to consumers.<sup>42</sup> Moreover, now would be a particularly harmful time to inflict Title II regulation given that providers are in the midst of making the massive investments that are needed to deploy 4G networks that will provide far greater speeds and capabilities and produce the third (fourth, fifth, and sixth) broadband pipes into the home.

Second, wireless broadband Internet access services face unique technological and operational constraints that require flexibility and innovation to handle. Yet Title II regulation would reduce that flexibility by, among other things, calling into question whether new pricing plans or models would be deemed to run afoul of rate regulation or techniques designed to deal with congestion and spectrum constraints might be determined to be “discriminatory.” (*See* Verizon Comments at 77-78.) The outcome of such limits on flexibility and obstacles to innovation would be lower service quality and reduced value for consumers.

Contrary to the claims of one commenter, it does not make sense to use the layers in the OSI Reference Model to separate Internet “transmission” from Internet content and information services by characterizing Layers 1-3 as “transmission” and Layers 4-7 as “content and information services.” (Scott Jordan Comments § 1.) Among other things, Layer 3, the IP layer which concerns routing of packets from one network node to the next, cannot be separated from the TCP layer, which concerns the flow of network traffic, response to congestion, and

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<sup>42</sup> The Mobile Internet Content Coalition claims that wireless providers somehow impede its members’ ability to deliver content to mobile subscribers over the Internet and through text messaging and mobile short number code marketing campaigns. (MICC Comments at 3-4.) However, members of the coalition are not in any way restricted from reaching consumers over the Internet. And the use of short codes and text messaging is not an Internet-based service, so that complaint has no relevance to this proceeding. In any case, as has been detailed in other proceedings (*e.g.*, Comments of Verizon Wireless, WT Dkt. No. 08-7, filed March 14, 2008), the guidelines instituted by wireless carriers and the Mobile Marketing Association for short code campaigns are designed to protect subscribers from unwanted content and unanticipated charges in that narrow context.

retransmission of lost packets.<sup>43</sup> Such a division would be even more off the mark in the context of wireless broadband Internet access. In wireless networks, the close interaction between the network, devices, and applications requires tight coupling of not just layers 1-4, but all layers – all the more so as wireless networks have shifted from 2G to 3G and 4G technologies.<sup>44</sup> For example, information concerning the specific application in use (Layer 7) is critical to determine transmission of packets assigned Quality of Service (QoS), and that information must be coordinated on a mobile network requires with information on where the mobile device is and in what environment it is transmitting.<sup>45</sup> Further, as CTIA points out, imposing a division of layers would require revisions to wireless standards for 2G, 3G and 4G networks to ensure interoperability and backwards compatibility.<sup>46</sup> Thus, an artificial division of layers between transmission and information services would be entirely inconsistent with the development of and current operations of wireless broadband networks.

Third, reclassification of wireless broadband Internet access services would be unlawful. As with broadband services generally, wireless broadband Internet access service does not include a separate transmission service offered on a common carriage basis, and the Commission would have no justification for compelling wireless providers to make such a common carriage offering because there is no record evidence that any wireless provider possesses the requisite market power. In its most recent assessment of wireless competition, adopted in May 2010, the

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<sup>43</sup> See ATIS Comments at 7-10 (Internet protocol is usually referred to as TCP/IP); CTIA Comments, Attachment, “Wireless Transport Separation –Technical Facts,” at 2-4 (“CTIA Technical Comments”).

<sup>44</sup> See CTIA Technical Comments at 1-2.

<sup>45</sup> See *id.* at 4; Verizon Comments, Tech. Decl., ¶¶ 20, 26-27; ATIS Comments at 15-16.

<sup>46</sup> See CTIA Technical Comments at 4-5.

Commission did not find that any competitors enjoyed market power.<sup>47</sup> Comments filed in response to the Commission’s latest inquiry into CMRS competition confirm that fact. Prices for devices, plans, and services are declining, choices are increasing, and consumers are reaping the benefits of this intensely competitive market.<sup>48</sup> This is hardly the picture of an industry for which the Commission could justify imposing common carrier regulation.

Moreover, as Verizon explained, section 332 bars the Commission from imposing common carrier regulation on wireless broadband Internet access services. (Verizon Comments at 72-74; *see also* AT&T Comments at 112-14.) Regulatory proponents focus their attention on arguing that the definitions of “telecommunications service” and “information service” do not themselves differentiate between wireline and wireless technologies, but they ignore entirely that Congress specifically addressed the issue of applying common carriage regulation to wireless in section 332.<sup>49</sup> And, in that section, Congress expressly barred such regulation from applying to any wireless service that is not a commercial mobile service. 47 U.S.C. §§ 332(c)(2), 332(d)(3). That, in effect, means that, unless a wireless service is interconnected with the public switched network, it cannot be subject to common carrier regulation. *Id.* §§ 332(d)(1)-(2). As the Commission has previously concluded, wireless broadband Internet access service does not meet

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<sup>47</sup> *Fourteenth Report, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, including Commercial Mobile Services*, WT Docket No. 09-66, FCC 10-81, ¶ 342 (rel. May 20, 2010) (“*Fourteenth CMRS Report*”).

<sup>48</sup> *See supra* note 41.

<sup>49</sup> *See, e.g.*, Free Press Comments at 56-57; Public Knowledge Comments at 28-29. Even in discussing these definitional provisions, regulatory proponents fail to grapple with the fact that the definition of “telecommunications carrier” prohibits the Commission from imposing common carrier regulation on the information service aspects of wireless broadband Internet access service. 47 U.S.C. § 153(44) (a “telecommunications carrier shall be treated as a common carrier under this Act *only to the extent that it is engaged in providing telecommunications services*”) (emphasis added).

this standard because it does not itself provide users with the ability to communicate with all users of the public switched telephone network (and the same would be true of any “transmission service” the Commission found, contrary to reality, was a separate part of wireless broadband offerings).<sup>50</sup> Thus, the plain language of section 332 prohibits the Commission from reclassifying wireless broadband Internet access as a Title II service subject to common carriage regulation.

Although some commenters suggest that Title III itself provides the FCC with broad discretion to implement conditions on wireless licensees that “serve the public interest” (*see, e.g., Leap and Cricket Comments at 2-5*), the Commission does not have sweeping authority to impose whatever conditions on wireless providers that it finds to be in the “public interest.” (*See Verizon Comments at 74.*) “The FCC must act pursuant to *delegated authority* before any ‘public interest’ inquiry is made under §303(r).” *MPAA v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (emphasis in original). No Title III provision authorizes the FCC to impose common carrier regulation on mobile information services, or the transmission function of an integrated mobile information service; instead, section 332(c)(2), along with section 153(44), affirmatively preclude such regulation.

Ultimately, regulatory proponents appear to rely on some form of a regulatory parity argument, saying that if wireline broadband Internet access is subject to Title II, then so should wireless broadband Internet access. (*See, e.g., Free Press Comments at 62-64.*) But, as described above, wireless broadband Internet access service cannot be subject to common carriage regulation even if their wireline counterparts (wrongly) were. And, in any case, appeals to regulatory parity beg the question. The regime in place today achieves such parity by

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<sup>50</sup> *Wireless Broadband Order*, 22 FCC Rcd at 5916-18.

classifying all broadband Internet access services as information services subject to Title I.

Given the extraordinary successes of the broadband and Internet marketplaces, a heavy burden lies with those that would reverse course and impose a new form of parity by subjecting all such services to intrusive Title II regulation. They have not come close to bearing that burden.

**V. PROPONENTS OF REGULATION HIGHLIGHT THE SIGNIFICANT CONSTITUTIONAL PROBLEMS OF IMPOSING TITLE II COMMON CARRIAGE REGULATION ON BROADBAND INTERNET ACCESS SERVICE VIA RECLASSIFICATION.**

As explained in Verizon's comments, Title II common carriage regulation of broadband Internet access service would create serious problems under the First Amendment, Fifth Amendment, and non-delegation doctrine. (Verizon Comments at 78-96.) None of the proponents of reclassification says anything in its comments to alleviate these constitutional concerns. To the contrary, their comments only exacerbate such concerns by revealing the breathtaking scope of the proponents' desired regulation of broadband Internet service – essentially full Title II regulation, including such radical action as rate regulation and forced access requirements. In short, the opening comments of both broadband Internet service providers and regulatory proponents show that reclassification would set the Commission on a collision course with the Constitution.

**A. The First Amendment**

Because broadband Internet networks are used for the communication of speech by network owners and their partners, any effort to mandate access to those networks for third parties or to regulate the terms, conditions, or price of such access would present serious First Amendment problems. (Verizon Comments at 79-89.) Further, the lack of clarity as to what rules would govern their services, and the inherent vagueness in any number of the standards that would apply (such as the “unjust or unreasonable” standard of Section 201), would chill speech

and speech-related activities because providers would not know *ex ante* the scope of legally permissible conduct. Finally, the irrational distinctions among speakers made in the Commission’s proposal, targeting only the speech of facilities-based broadband service providers, also would violate the First Amendment.

The comments of those who favor reclassification only highlight the First Amendment problems with this entire enterprise. Most notably, as explained above, proponents of regulation are unable to provide a consistent – much less coherent – definition of the Internet connectivity service that would be reclassified and thus subjected to common carrier regulation.<sup>51</sup> And the Commission’s own attempt thus far is entirely circular, as would be any attempt to conjure a service that does not exist.<sup>52</sup> Accordingly, there will be no way for broadband Internet service providers to know how to steer clear of the shoals of unlawful conduct when operating their networks, and the problem will only be compounded as technologies continue to evolve. As a result, providers inevitably would be forced to take overbroad measures, thus limiting their speech and the speech of others on non-Title II parts of their systems, rather than subject themselves to an enforcement action. The First Amendment, however, prohibits vague enforcement schemes with such chilling effects.<sup>53</sup>

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<sup>51</sup> See *supra* at 23-25.

<sup>52</sup> See NOI ¶ 64 (proposing to “[i]dentify[] a telecommunications service at a . . . high level—for instance, as the service that provides Internet connectivity— . . . if a telecommunications service is classified”).

<sup>53</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); see also *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

In addition, by confirming their desire to achieve access to broadband networks for all on uniform terms,<sup>54</sup> regulatory proponents have now made clear that they are indeed asking the Commission to extinguish, in the name of “net neutrality,” broadband providers’ First Amendment rights to exercise editorial discretion in the selection of content and decisions about where and how to feature that content. But the First Amendment does not permit this attempt to “equalize” speakers either.<sup>55</sup> Nor does it permit the type of direct costs, such as rate regulation and other revenue-depriving, audience-shrinking action, that proponents’ comments also confirm they are seeking to impose on broadband providers’ speech.<sup>56</sup>

Likewise, the comments of those who advocate reclassification highlight the impermissible speaker-based distinctions in the Commission’s proposal. These proponents, like the NOI itself, arbitrarily resist the implications of their own theories.<sup>57</sup> The ownership structure of a particular set of speakers cannot justify special speech burdens for them alone.<sup>58</sup> And if the concern is that Internet companies will somehow prevent customers from accessing the content and applications of their choice (which, as we have explained, is factually unfounded), numerous actors in the Internet ecosystem other than facilities-based broadband Internet service providers are at least equally if not *more* capable of effecting such outcomes. Arbitrarily excluding such

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<sup>54</sup> See Free Press Comments at 41-42; Open Internet Coalitions Comments at 3, 6-9; see also Comments of Free Press, *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, at 74-82 (filed Jan. 14, 2010); Comments of Open Internet Coalition, *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, at 15-36 (filed Jan. 14, 2010).

<sup>55</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 904-05 (2010).

<sup>56</sup> See *id.* at 896, 898.

<sup>57</sup> See, e.g., Free Press Comments at 85 (asserting that “[t]he content and applications that run over broadband transmission would continue to be classified as information services” and urging Commission to “distinguish[] connectivity from content” but failing to address statutory definitions or rationale for regulation of broadband Internet services).

<sup>58</sup> See *Citizens United*, 130 S. Ct. at 906.

other speakers from any Commission action would indicate that impermissible motives of dampening a disfavored category of speakers' rights, rather than the rational advancement of non-speech-related policy goals, animate the decision. Drawing such arbitrary distinctions between speakers is unconstitutional under the First Amendment.<sup>59</sup>

As Verizon explained its opening comments, the above-described speech burdens trigger strict scrutiny but, even under intermediate scrutiny, they would fail to survive judicial review because no party in the pending net neutrality rulemaking has adduced any evidence of an actual problem that could possibly justify infringing the speech of broadband Internet service providers. (Verizon Comments at 88-89.) No such evidence was adduced here either. Instead, proponents point to the Commission's supposed need for statutory authority to implement the National Broadband Plan and to adopt the proposed net neutrality regulations. As we demonstrated, the Commission already has the power to adopt the key parts of the National Broadband Plan, but the sweeping net neutrality proposals suffer from a host of constitutional (and other legal) infirmities.<sup>60</sup> In any event, the Commission's desire to generate additional statutory authority for itself cannot substitute for empirical evidence of an actual problem sufficient to justify the threatened infringement of speech. Because there is no other evidence of a concrete systemic problem to be solved, the Commission's proposal could not survive any standard of review under the First Amendment.

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<sup>59</sup> See, e.g., *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999).

<sup>60</sup> See Verizon Comments at 21-26, 86-87; see also Verizon Net Neutrality Comments at 86-129; Reply Comments of Verizon and Verizon Wireless, *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, at 81-121 (filed Jan. 14, 2010) ("Verizon Net Neutrality Reply Comments").

## **B. The Fifth Amendment**

As Verizon explained in its opening comments, reclassification of broadband Internet service by compelled common carrier status would violate network operators' property rights and their investment-backed expectations under the Takings Clause by forcing network operators to dedicate their network facilities to the use of others on government-dictated terms without any (much less just) compensation. (Verizon Comments at 90-94.) The position taken by the proponents of reclassification in their comments only exacerbate the Takings problems.

In particular, the proponents' insistence on ultimately subjecting broadband providers to "open Internet" requirements increases the perils of reclassification under the Takings Clause. Such mandated access would effect a permanent, physical occupation of broadband networks and thus a *per se* taking. In all events, such a mandate would be a major incursion on the investment-backed expectations of network operators, which invested billions in building and upgrading their networks in the reasonable belief based on multiple Commission classification decisions that they enjoyed the full scope of private property rights in those networks, including the fundamental rights to use, to control, and to exclude. Indeed, the right to exclude "is one of the most essential sticks in the bundle of rights that are commonly characterized as property,"<sup>61</sup> yet it is just that right that access mandates would destroy.

The opening comments reveal another type of Fifth Amendment problem with reclassification. The Commission would violate fundamental principles of Due Process if it attempted to enforce any new Title II regulation against covered broadband Internet service providers without first specifying, in a reasonably ascertainable way, the purported

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<sup>61</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994); *see also United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (explaining that the Takings Clause protects not just the "vulgar and untechnical sense of the physical thing" but also "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it").

telecommunications service at issue.<sup>62</sup> “Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”<sup>63</sup> In particular, an agency regulation provides fair notice only if the standards of conduct are set forth with “ascertainable certainty.”<sup>64</sup> But, as we have noted, no “reasonably ascertainable” definition of the component of Internet broadband that would be covered by Title II has yet been advanced.

### **C. The Non-Delegation Doctrine**

The Commission’s theory of reclassification would leave it unfettered discretion to reclassify not just broadband Internet access service but any service that arguably incorporates a transmission function, as well as unfettered discretion to regulate under Title I any information service delivered over the Internet. (*See Verizon Comments* at 94-96.) Nothing in the pro-classification comments provides the limiting principle that is necessary to save the Commission’s proposed course of action from violating the non-delegation doctrine.

Free Press suggests obliquely that Title II might solve the non-delegation problem because it “imposes clearer boundaries on the Commission” than the Commission’s prior theories of ancillary authority over the Internet.<sup>65</sup> That claim overlooks the fact that the Commission’s theory for applying Title II to some newly minted “broadband Internet connectivity” service contains no principle that would limit it from sweeping in actors throughout the Internet ecosystem and not just facilities-based broadband Internet access providers. It also ignores the fact that the Commission plans ultimately to rely on its Title I

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<sup>62</sup> *See Time Warner Comments* at 35; *see also Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 631 (D.C. Cir. 2000); *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

<sup>63</sup> *Satellite Broad.*, 824 F.2d at 3.

<sup>64</sup> *Trinity Broad. of Fla.*, 211 F.3d at 630-31.

<sup>65</sup> *See Free Press Comments* at 85 & n.251.

ancillary authority to support its proposed net neutrality rules, and that the scope of its theory on that score is likewise unbounded.

Ironically, other proponents of reclassification hint that the Commission’s proposed forbearance might violate the non-delegation doctrine.<sup>66</sup> There is no basis to this suggestion either. In Section 10, Congress set forth three specific, mandatory statutory criteria to control the exercise of the Commission’s expressly delegated authority on forbearance.<sup>67</sup> Congress further provided that, when analyzing the third question whether forbearance would serve the public interest, the Commission must consider whether forbearance would “promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services,” and fenced off certain provisions of the 1996 Act from forbearance until the Commission found they were fully implemented.<sup>68</sup> This is more than enough Congressional guidance to satisfy the non-delegation doctrine.

Indeed, Section 10, with its grant of express statutory authority and the basic policy choices that Congress made about the scope of that authority, stands in stark contrast to the Commission’s legal theory under which it would arrogate unto itself unbridled discretion to reclassify services and to reach still other services under Title I.

**VI. PROPONENTS OF TITLE II RECLASSIFICATION CONFIRM THAT FORBEARANCE WILL BE UNWORKABLE AND WILL NOT REMEDY THE HARMFUL EFFECTS OR LEGAL FLAWS OF RECLASSIFICATION.**

As Verizon explained in its opening comments, the possibility of forbearance under Section 10 of the Act does not remedy the harmful effects or legal flaws of Title II

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<sup>66</sup> See Public Knowledge Comments at 37 & n.152.

<sup>67</sup> See 47 U.S.C. § 160(a)(1)-(3).

<sup>68</sup> See *id.* §§ 160(b), (d).

reclassification. (Verizon Comments at 99-107.) The Commission's forbearance proposal would neither alter the lack of lawful authority to apply common carrier regulation in the first place nor eliminate the massive uncertainty created by reclassification. The limited forbearance proposed by the Commission also would not achieve its stated goal of merely replicating the purported regulatory *status quo* because imposing Sections 201, 202, and 208 on broadband Internet access providers inevitably would lead to the very price regulation that the Department of Justice and others have warned could stifle the infrastructure investment needed to expand broadband Internet access. Moreover, the Commission has not proposed to make the factual findings that would ensure that forbearance is sustained or to create a framework that would give teeth to its commitment not to unforbear. As a consequence, the Commission's proposal does not ensure that forbearance would be upheld on judicial review or that the forbearance rug will not be pulled out from under providers as the Commission is now proposing to do with respect to classification. Nothing in the opening comments submitted in response to the NOI assuages these concerns. Instead, the comments filed by regulatory proponents confirm that forbearance will neither eliminate the uncertainty in the broadband markets caused by reclassification nor replicate the prior regulatory status.

*First*, forbearance would not eliminate the uncertainty in broadband markets caused by reclassification. (Verizon Comments at 99-101.) Although the Commission suggests that it may forbear from some Title II obligations, its recent pro-regulatory initiatives cast doubt on the agency's willingness to engage in the type of broad forbearance that would be needed to retain the prevailing "light touch" regulatory model. In the wireless setting, for example, the Commission is proposing to replace its hands-off approach with burdensome regulations on a multitude of issues. (Verizon Comments at 18-19). In addition, the Commission has recently

issued reports questioning, albeit incorrectly, the competitiveness of the wireless and broadband marketplaces.<sup>69</sup> In short, the Commission’s pro-regulatory agenda undermines any assurances it gives that reclassification will be followed by broad forbearance. Forbearance thus cannot provide the type of regulatory certainty on which broadband investment and innovation depend.

Moreover, even if the Commission is committed to broad forbearance, regulatory proponents have made clear that a Commission order granting any meaningful forbearance would be subject to an immediate and prolonged legal assault. Indeed, *the leading regulatory proponents fundamentally oppose granting virtually any forbearance at all*. Public Knowledge, for example, argues that there should be a strong presumption *against* forbearance and that “the Commission should understand its Section 10 abilities as a means to exercise a *limited amount* of discretion to ensure that the ultimate goals of the Communications Act . . . are met.”<sup>70</sup> Regulatory proponents, in sum, generally resist the extent of the forbearance proposed in this proceeding.

But regulatory proponents do not just rest on general objections to forbearance. Rather, the long list of Title II provisions they would have the Commission impose on broadband Internet access providers reveals their true (and indeed long-standing) agenda: full-blown Title II regulation with all of its heavy burdens. Not only do they support enforcement of the six provisions of Title II identified by the NOI for possible non-forbearance, regulatory proponents

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<sup>69</sup> See *Sixth Broadband Deployment Report, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act*, GN Docket No. 09-51, FCC 10-129, ¶ 28 (rel. July 20, 2010); Fourteenth Report, *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, including Commercial Mobile Services*, WT Docket No. 09-66, FCC 10-81, ¶ 342 (rel. May 20, 2010).

<sup>70</sup> Comments of Public Knowledge at 37-38 (emphasis added).

also oppose forbearance from numerous other Title II provisions, including, for example, rate regulation, unbundling, and merger review provisions.<sup>71</sup> Specifically, they argue that the Commission should not forbear from the following provisions of Title II: Sections 201, 202, 203, 204, 205, 206, 207, 208, 209, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 222, 251, 254, 255, 256, 257, 258, and 271.<sup>72</sup> And, if that were not enough, regulatory proponents also argue that the Commission should not forbear from its alleged general “public interest duty” to fulfill additional goals not “limited to the specific goals . . . explicated in the provisions of Title II.”<sup>73</sup> In other words, they would regulate broadband services even more severely than Title II contemplates for traditional telecommunications services.

In any event, the claim of regulatory proponents that the Commission has only very “limited discretion” to forbear with a presumption against forbearance is contrary to the statute’s text, Commission precedent, and governing case law. (Verizon Comments at 101-102.) Because Section 10 provides that forbearance “shall” be granted when the statutory criteria are met, the

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<sup>71</sup> See Comments of Free Press at 64-74; Comments of Public Knowledge at 35-51; Comments of Center for Media Justice *et al.* at 26-30.

<sup>72</sup> Comments of Free Press at 64-74; Comments of Public Knowledge at 39-51; Comments of The Computer & Communications Industry Association at 15-26; Comments of Center for Media Justice *et al.* at 26-29.

<sup>73</sup> Comments of Public Knowledge at 42. Even with respect to those few Title II provisions from which regulatory proponents do not oppose forbearance, they have made clear that any attempt to forbear on a nationwide basis will be challenged. See Comments of Free Press at 73-74; Comments of Center for Media Justice *et al.* at 28. But Congress has allowed the Commission to broadly forbear on a nationwide basis without the need to undertake “a more granular geographic” analysis of market conditions. NOI ¶ 73. Because the text of the statute allows the Commission to forbear “in any or some of [a telecommunication carrier’s] geographic markets,” 47 U.S.C. § 160(a), “[o]n its face, the statute imposes no particular mode of market analysis or geographic rigor,” *Earthlink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006); see also *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009). With respect to forbearance in the broadband setting, in particular, the Commission may lawfully “refrain from a traditional market analysis and [] rely instead on larger trends and predictions concerning the future of the broadband services market.” *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 221 (3d Cir. 2007).

statute is clear that the Commission “*must* forbear from applying a given provision of the Communications Act to a telecommunications carrier” if the record before the agency warrants such action.<sup>74</sup> Thus, Public Knowledge’s argument that there is a strong presumption against forbearance is exactly backwards. In reality, given the current state of the broadband marketplace, if the Commission unwisely were to proceed with reclassification, broad forbearance would be legally required. The intense and growing competition for broadband Internet access services already works to protect consumers.<sup>75</sup> Indeed, there is no evidence that imposing *any* Title II obligations is needed to ensure just, reasonable, and non-discriminatory rates and practices, to protect consumers, or to further the public interest.<sup>76</sup> As the Information Technology and Innovation Foundation put it, “we’re unaware of any *current* behavior in the Internet marketplace that would demand immediate Commission action.”<sup>77</sup>

Moreover, the path urged by regulatory proponents will lead to precisely the full blown Title II regime that the Commission says it wants to avoid. As Chairman Genachowski has explained, “fully reclassifying broadband services as ‘telecommunications services’ and applying the full suite of Title II obligations . . . would . . . subject the providers of broadband communications services to extensive regulations ill-suited to broadband.”<sup>78</sup> For example, imposing the “unbundling” requirements of Section 251(c) on retail broadband Internet access, as some regulatory proponents suggest,<sup>79</sup> would not only be contrary to the Commission’s

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<sup>74</sup> *Earthlink*, 462 F.3d at 4 (emphasis added); *see also* NOI ¶ 73 (explaining that “Section 10 *requires* the Commission to forbear from unnecessary requirements”) (emphasis added).

<sup>75</sup> *See* Verizon Comments at 66-72; Verizon Net Neutrality Reply Comments at 23-31.

<sup>76</sup> *See* 47 U.S.C. § 160(b).

<sup>77</sup> ITIF Net Neutrality Comments at 10.

<sup>78</sup> Genachowski Statement at 4; *see also* NOI ¶ 98.

<sup>79</sup> Comments of Free Press at 73; Comments of Center for Media Justice *et al.* at 28-29.

assurances that its reclassification proposal will not lead to unbundling,<sup>80</sup> it would also fundamentally alter how broadband providers offer their services in a manner that would further undermine investment incentives, raise costs, and lead to customer confusion. Even assuming it is technically feasible,<sup>81</sup> broadband providers could thus be required to unbundle their retail offerings and separately offer the different components of what is now a functionally integrated service—a radical change from the perspective of both providers and consumers.<sup>82</sup> The same concern applies with equal force to many other Title II obligations from which regulatory proponents oppose forbearance. Imposing tariffs, interconnection, and merger review obligations (among others) on broadband Internet providers likewise would lead to the antiquated common carriage approach that, as the Commission acknowledges, would devastate broadband investment and innovation.

In sum, as the above examples show, imposing the full panoply of common carriage obligations on broadband Internet access services would be both legally unwarranted given the robust competition in the broadband market and functionally catastrophic because it would result in massive reductions in investment and innovation, lost jobs, harm to the economy, and disruption to consumers' services. To avoid this outcome, the Commission should take steps to

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<sup>80</sup> See Genachowski Statement at 5 (stating that reclassification “would not change established policy understandings at the FCC, such as the existing approach to unbundling or the practice of not regulating broadband prices or pricing structures”); Schlick Statement at 7 (rejecting the notion that “deviation from the current information service classification of broadband Internet access would open the door to new network unbundling authority under section 251(c) of the Communications Act”).

<sup>81</sup> See AT&T Comments at 103 (“Indeed, it is altogether unclear how, simply as an engineering matter, the Commission could force all broadband Internet access providers—including the cable modem systems and wireless networks that have *never* been subject to the *Computer Inquiry* rules—to ‘unbundle’ the transmission components of shared network infrastructure.”)

<sup>82</sup> Verizon Net Neutrality Reply Comments at 101-04; see also AT&T Comments at 103; Comcast Corporation Comments at i; Time Warner Cable Inc. Comments at 39.

ensure that its forbearance decision is upheld on judicial review. Foremost, the Commission should make detailed factual findings, which are amply supported by the record, showing that the Section 10 forbearance criteria are easily met here. Moreover, as NCTA suggests, the Commission should also expressly disavow past negative statements about the state of competition in the broadband market.<sup>83</sup> In addition, the Commission should reject the deeply troubling (and revealing) suggestion by regulatory proponents to delink reclassification from successful forbearance.<sup>84</sup> If reclassification and successful forbearance are not tied together, there would remain the very real possibility that providers would be subject to the full weight of Title II regulation in the event the forbearance decision was invalidated by a reviewing court. (Verizon Comments at 106-107.) The Commission should take every measure possible to prevent this worst-case scenario from occurring. Although the express non-severability statement suggested by Verizon is perhaps the only viable option for limiting that risk, the safest course would be to not pursue reclassification at all.

*Second*, even if the initial forbearance decision withstands legal challenge, there can be no certainty if regulatory proponents endlessly seek to undo forbearance and consistently oppose forbearance for any new regulatory issues that might arise. Regulatory proponents have already begun to lay the groundwork for such a campaign.<sup>85</sup> It is vitally important, therefore, that the Commission take the steps necessary to ensure that the same abrupt reversal of course that is proposed in this proceeding with respect to reclassification does not occur in the forbearance

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<sup>83</sup> See NCTA Comments at 65-68.

<sup>84</sup> See Comments of Free Press at 75 n.221; Comments of Center for Media Justice *et al.* at 29.

<sup>85</sup> See, e.g., Comments of the Center for Democracy and Technology at 15 (“The current Commission of course cannot handcuff future Commissions; if an action is within the Commission’s discretion to take, it would be within the power of a future Commission to reverse, so long as the future Commission articulates legally sufficient reasons.”).

setting. In particular, as Verizon has explained, the Commission should expressly provide that it must overcome a heightened standard to reverse a forbearance decision in light of the factual nature of that decision and the reliance interests it will induce. (Verizon Comments at 104.) Even the Center for Democracy and Technology concedes that, by premising its forbearance decision on “factual premises that are not likely to change in the near term” and “through the strength of its rationale for forbearance, [the Commission may] be able to raise the justification bar that a future Commission would need to clear to reverse course.”<sup>86</sup> The Commission should heed that advice. Additionally, the Commission should create a procedural framework to further limit the possibility of unforbearance and protect the reliance interests generated by forbearance. (Verizon Comments at 103-106.)

*Third*, and last, it is important to reiterate that the Commission’s proposal does not even do what it promises—*i.e.*, “Forbearing To Maintain The Deregulatory Status Quo.”<sup>87</sup> To at least partially solve this problem, as Verizon has explained, the Commission should forbear from Sections 201, 202, and 208 in order to prevent the possibility of rate regulation. (Verizon Comments at 102.) In their opening comments, however, regulatory proponents have doubled down on rate regulation by urging the Commission not to forbear from Section 203,<sup>88</sup> which requires common carriers to file a schedule of their rates and charges with the Commission and to charge customers only those rates.<sup>89</sup> But in forbearing from Section 203 in the CMRS context, the Commission recognized that “market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market

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<sup>86</sup> Comments of the Center for Democracy and Technology at 16.

<sup>87</sup> See NOI ¶ 69.

<sup>88</sup> Comments of Public Knowledge at 50.

<sup>89</sup> 47 U.S.C. § 203;

power.”<sup>90</sup> The requirements of Section 203 “take away carriers’ ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings,” “impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors,” and “impose costs on carriers that attempt to make new offerings.”<sup>91</sup> For these reasons, the Commission has consistently forbore from Section 203 in the context of wireline broadband services other than broadband Internet access services.<sup>92</sup> It must do so here too.<sup>93</sup> The Commission should reject

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<sup>90</sup> *CMRS Forbearance Order* ¶ 173; *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) (“Rates are determined by the market, not the Commission, as are the level of profits. With § 203 no longer applicable, there is no statutory provision even requiring that the carrier publicly disclose any of its rates, although competition will force it to do so.”).

<sup>91</sup> *CMRS Forbearance Order* ¶ 177; *see also id.* (“Second, tariff filings would enable carriers to ascertain competitors’ prices and any changes to rates, which might encourage carriers to maintain rates at an artificially high level. Moreover, tariffs may simplify tacit collusion as compared to when rates are individually negotiated, since publicly filed tariffs facilitate monitoring. Third, tariffing, with its attendant filing and reporting requirements, imposes administrative costs upon carriers. These costs could lead to increased rates for consumers and potential adverse effects on competition.”).

<sup>92</sup> *See, e.g., Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with respect to its Broadband Services*, 22 FCC Rcd 18705, 18725, ¶ 33 (2007) (finding that “tariff regulation simply is not necessary to ensure that the rates, terms, and conditions for the AT&T-specified broadband services are just and reasonable and not unjustly or unreasonably discriminatory” because the “better policy for consumers is to allow AT&T to respond to technological and market developments without the Commission reviewing in advance the rates, and terms, and conditions under which AT&T offers these services”), *aff’d*, *AD HOC Telecom. Users Committee v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009); *see also Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, 22 FCC Rcd 16304, 16351-52, ¶ 106 (2007); *Qwest Petition for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with respect to Broadband Services*, 23 FCC Rcd 12260, 12280-81, ¶ 36 (2008); *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*, 22 FCC Rcd 19478, 19497, ¶ 32 (2007).

the request of regulatory proponents to engage in price regulation, honor its promise to retain the deregulatory *status quo*, and forbear from all provision of Title II—including Sections 201, 202, 203, and 208—that would undermine broadband investment and impede competition in the broadband market.

In the end, the Commission’s forbearance proposal simply is not a workable solution. As the opening comments of regulatory proponents make clear, they will challenge even the limited forbearance contemplated by the NOI. The Commission’s suggestion that it can reclassify broadband Internet access service and then create a perfectly calibrated forbearance regime that mirrors the regulatory *status quo* thus is simply unrealistic. The goal line on reclassification is already being moved well beyond the purportedly “targeted” approach proposed in the NOI to a burdensome Title II regime with almost no forbearance at all and no protection from the elimination of whatever minimal forbearance is adopted. And forcing broadband Internet access providers continually to justify forbearance and endlessly defend against unforbearance petitions does not resemble the “light touch” or *status quo ante* regulatory model promised by the NOI. In short, once the door is opened to Title II reclassification, there is no way for this Commission to control the ultimate forbearance outcome.

**VII. THE RECORD PROVIDES FURTHER REASON THE COMMISSION SHOULD REAFFIRM THAT BROADBAND INTERNET ACCESS IS AN INHERENTLY INTERSTATE SERVICE THAT IS NOT SUBJECT TO STATE OR LOCAL REGULATION.**

The Commission should reaffirm its prior determination that broadband Internet access service, VoIP, and other IP-based services are interstate services and make clear that they are not

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<sup>93</sup> Indeed, it would be difficult for the Commission to square any refusal to do so with these prior forbearance orders. *See generally Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

subject to state and local regulation. (*See* Verizon Comments at 107-11.) There is no practical way to separate intrastate and interstate components of broadband Internet service, and thus it is exclusively interstate for regulatory purposes. And state regulation of this service would interfere with Congress's clear desire for a national broadband policy.

The record confirms the need for the Commission to confirm that state or local regulation should not apply regardless of the outcome of this proceeding. Comments filed by various state and local jurisdictions, as well as the recent resolution passed by NARUC, demonstrate that these jurisdictions want to impose their own regulations on broadband Internet access services concerning subjects ranging from service quality to billing and marketing.<sup>94</sup> But a patchwork of regulation by 50 states and potentially innumerable localities would impose enormous burdens and costs and undercut the federal goals of having a cohesive federal broadband policy and of encouraging broadband deployment, investment, and innovation. Thus, whatever other action it may take in this proceeding, the Commission should confirm that broadband Internet access services are interstate for regulatory purposes and are not subject to state or local regulation.

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<sup>94</sup> *See, e.g.*, California Public Utilities Commission Comments at 18; Public Utilities Commission of Ohio Comments at 9; Pennsylvania Public Utilities Commission Comments at 2-3; State of New York Broadband Development and Deployment Council Comments at 3; Montgomery County Comments at 13-15.

## CONCLUSION

The record provides no legal, factual, or policy basis for the Commission to reverse course and find that broadband Internet access service is (or contains) a Title II telecommunications service subject to common carriage regulation. Instead, Congress is the appropriate body to determine the Internet policies for the nation and define the scope of the Commission's regulatory authority through targeted legislation that both protects consumers and promotes continued investment and innovation.

Respectfully submitted,

*/s/ Edward Shakin*

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August 12, 2010