

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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| In the Matter of |) | |
| |) | |
| Framework for Broadband Internet Service |) | GN Docket No. 10-127 |
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REPLY COMMENTS OF METROPCS COMMUNICATIONS, INC.

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MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, hereby respectfully submits its reply comments on the *Notice of Inquiry* (“*NOI*”) released by the Federal Communications Commission (the “FCC” or “Commission”) in the above-captioned proceeding.² As set forth in detail within, the record in this proceeding overwhelmingly demonstrates that the Commission should not establish a new framework for the regulation of broadband Internet access service. MetroPCS agrees. In support, the following is respectfully shown:

¹ For purposes of these Comments, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

² *Framework for Broadband Internet Service*, GN Docket No. 10-127, FCC 10-114 (rel. Jun. 17, 2010) (“*NOI*”).

I. INTRODUCTION AND SUMMARY

A substantial and diverse group of industry stakeholders have expressed serious concerns about the effects of the Commission’s proposal to reclassify broadband Internet access as a telecommunications service regulated under Title II. One recurring theme is the serious risk the “Third Way” would have significant adverse unintended consequences. The Internet marketplace has thrived because of – and not in spite of – the existing hands-off approach. Because of the congressional and Commission policies promoting light-touch federal government regulation, and conscious steps to discourage *ad hoc* regulation by state and local authorities, the Internet has flourished relatively free from overbearing taxation and regulation. This has come, in no small part, because of the classification of broadband Internet access as an information service, as opposed to a telecommunications service, which has shielded the Internet, and Internet access services, from intrusive legacy federal, state and local telecommunications regulations. However, the Commission’s *NOI* now proposes to reclassify broadband Internet access as a telecommunications service,³ which may undo years of careful protection of the Internet, and leave it open – now and in the future – to a myriad of state and local regulations. Such an outcome would place a substantial burden on broadband Internet access providers, at just the time when the Commission is seeking to promote increased investment in broadband and the rapid proliferation of broadband technologies.⁴

The unintended regulatory consequences may not stop at the U.S. border. Many countries around the world take their cue from the United States when crafting their own Internet policies. By proceeding with its reclassification proposal, the Commission may in fact provide

³ See, e.g., *NOI*, ¶ 66, 67.

⁴ See, e.g., FCC, CONNECTING AMERICA: A NATIONAL BROADBAND PLAN FOR OUR FUTURE, 9, 11, 23 (2010) (“*National Broadband Plan*”).

unwelcomed support for the idea that the International Telecommunications Union (“ITU”), and therefore the United Nations (“U.N.”), may properly exercise jurisdiction over the Internet internationally. Such an outcome would go against years of U.S. international policy regarding the Internet.⁵

Beyond tax and regulatory consequences, reclassification may result in unintended consequences that directly impact the ability of the Commission to achieve its *National Broadband Plan* goals. Specifically, the Commission has indicated that investment in broadband networks, particularly in rural areas, is of tantamount importance. By subjecting broadband Internet access providers to additional costs, additional regulatory burdens and substantial uncertainty, the Commission surely will decrease the amount of capital available to these providers. Without access to necessary capital, potential providers of expanded service are unable to invest in their networks and millions of Americans in communities across the country remain unconnected to the broadband world. Even for those who have Internet connectivity available in their communities, reclassification may impact the ability of low-income and minority Internet users to obtain the cutting-edge technology necessary to harness the full power of the Internet, further widening the digital divide.

In addition to the myriad unintended consequences that may arise from reclassifying broadband Internet access as a telecommunications service, there also are a number of legal and policy reasons that such a reclassification should not be undertaken. The *NOI*'s reclassification proposal may violate certain important First Amendment protections. Moreover, reclassification may upset other longstanding regulatory principles without adequate changed circumstances.

⁵ Howard Buskirk, “ITU Plenipot Looms Large as Reclassification Debate Winds Down,” *Communications Daily*, 1 (Aug. 12, 2010) (“*ITU Article*”).

For example, the Commission found in the *Cable Modem Declaratory Ruling*, the *Wireline Reclassification Order*, the *BPL Order* and the *Wireless Broadband Order* the information service component of broadband Internet access is inseverable from the telecommunications component.⁶ If the Commission now starts breaking Internet access services into distinct components, the traditional “end-to-end” analysis that the Commission has used to categorize many services as jurisdictionally interstate – and thus subject to federal regulation – is compromised.

In any event, in order for the Commission to proceed with its reclassification scheme, it must contend with the eight years of precedent, over four separate decisions, which all indicate that the information service component and telecommunications component of broadband Internet access are inseverable.⁷ The Commission must provide a reasoned analysis of its decision, and cite to the changed circumstances which necessitated such a change in policy. This, it simply cannot do. Nothing about the manner in which broadband Internet access is marketed, sold or viewed by consumers has changed since 2002 – and certainly since 2007 – that would warrant such a substantial reversal of course. As the record shows, proponents of reclassification have been unable to provide convincing evidence otherwise.

Finally, the Commission must recognize that wireless providers of broadband Internet access face substantially different circumstances than do their wired counterparts. The national spectrum crisis⁸ is forcing wireless carriers to cater to ever-expanding data demands over finite

⁶ MetroPCS Comments 3

⁷ *Id.* at 29-37.

⁸ Prepared Remarks of Chairman Julius Genachowski at the International CTIA Wireless I.T. & Entertainment Convention, “America’s Mobile Broadband Future,” Oct. 7, 2009, at 4, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293891A1.pdf.

amounts of bandwidth. Even former net neutrality opponents Verizon and Google have been able to agree on the point that the nascent wireless broadband Internet must be left alone and allowed to grow under a light-touch regulatory regime.⁹

Each step that the Commission takes towards reclassifying broadband Internet access as a Title II telecommunications service seems to lead to yet another pitfall. The Commission should be extremely wary of moving forward with a proposal without considering its full impact. As MetroPCS and others have shown, reclassification of broadband Internet access has far-reaching implications, many of which the Commission – and even the commenters in this proceeding – may not yet have considered. MetroPCS urges the Commission not to move forward with its reclassification proposal, as doing so may lead to a harmful series of unintended consequences.

II. THE COMMISSION’S RECLASSIFICATION PROPOSAL COULD HAVE SERIOUS NEGATIVE UNINTENDED CONSEQUENCES

In its comments, MetroPCS warned that, in reclassifying broadband Internet access, the Commission “cannot foresee the future and tailor its regulation in such a way to make sure that unexpected unintended consequences do not occur.”¹⁰ In particular, in “choosing to regulate only Internet connectivity, the Commission begins a swift slide down a dangerous path full of unintended consequences.”¹¹ MetroPCS is not alone in this view. A whole host of other commenters agree that there will be significant negative effects if the proposed “Third Way” approach is adopted.¹² And, the Commission’s forbearance proposal does nothing to alleviate

⁹ “Verizon-Google Legislate Framework Proposal,” rel. Aug. 9, 2010 (“*Verizon-Google Joint Proposal*”).

¹⁰ MetroPCS Comments 46.

¹¹ *Id.* at 8.

¹² *See, e.g.*, Verizon and Verizon Wireless Comments 1; Alcatel-Lucent Comments 1; Cox Comments 1; Communications Workers of America Comments 1-2; GSM Association

(continued...)

the broad adverse consequences that will be felt outside of the Commission’s jurisdiction. The efforts of the Commission to contain this fallout will fail and the ultimate result will be an avalanche that will chill investment, bury the innovation that has come to define the success of the Internet and reduce adoption. Yet, the Commission’s *NOI* lacks any mention of and fails to discuss how reclassification could adversely affect both Internet access providers and consumers.

In a polarized political environment where Republicans and Democrats disagree more often than not, there is at least one mantra that enjoys bipartisan support: Don’t tax or regulate the Internet! But, as is discussed in greater detail below, reclassifying broadband Internet access as a telecommunications service may give state and local regulators substantial control over a once-deregulated industry at a time when they are facing severe budget deficits including the ability to tax the Internet. If the Commission proceeds with its Third Way, state and local regulators may seize upon the changes and try to fill depleted coffers with new sources of tax revenue. Also, if the Internet tax moratorium ever is allowed to expire – which is a possibility in this era of budget deficits – the reclassified telecommunications services will be subject to the heavy tax burden that applies to other non-Internet related telecommunications services. This could force providers to contend with a 50-state patchwork of regulations, resulting in Balkanized treatment of the Internet. It also could chill Internet adoption because the price of Internet access services would increase as rates are adjusted to include local and state taxes.

(...continued)

Comments 1-2; Cisco Systems Comments 1; National Cable and Telecommunications Association (“NCTA”) Comments 1-2; Leap Comments 2; Comcast Comments 2; Charter Communications Comments 1; CTIA Comments 38; Sprint Nextel Comments 18; Samsung Telecommunications America Comments 4; Telecommunications Industry America Comments 1-2; Time Warner Cable Comments 2-3; T-Mobile Comments 2; Telecommunications Manufacturers Comments 2-3; Cablevision Comments 2-5; American Cable Association (“ACA”) Comments 1-3; AT&T Comments 1-2.

Reclassification also will have the effect of decreasing investment in needed broadband infrastructure, unintentionally solidifying the digital divide, and raising troubling First Amendment issues.

A. Reclassification of Broadband Internet Access as a Telecommunications Service May Subject Broadband Internet Access Providers to Substantial Tax Burdens and a Host of Additional State and Local Regulations and May Affect Worldwide Internet Policy

If the Commission chooses to regulate broadband Internet access under Title II, even under its Third Way forbearance proposal, broadband Internet service providers may be subjected to a whole host of state and local regulations, resulting in inconsistent regulation of the Internet. In the past “insulating information services from state regulation has protected broadband services from the burdens of state-by-state and locality-by-locality regulations.”¹³ As Cablevision aptly pointed out using the Commission’s own words, “requiring ‘Internet-based services’ to ‘submit to more than 50 different regulatory regimes ... would eliminate th[e] fundamental advantage of Internet-based communication.’”¹⁴ Indeed, the “risk of disruptive state and local regulations is hardly hypothetical.”¹⁵ States appear ready to pounce on any opportunity to regulate Internet access service, and the Commission’s reclassification proposal may endanger certain protections that broadband Internet access providers have against state and local regulators, such as the congressionally-mandated moratorium on taxing Internet access: the

¹³ Cablevision Comments 22.

¹⁴ *Id.* at 23 (quoting *Vonage Preemption Order*, 19 FCC Rcd 22404, ¶ 41); see also *American Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 182 (S.D.N.Y. 1997) (“The Internet ... requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations.”).

¹⁵ Cablevision Comments 23.

Internet Tax Freedom Act (“ITFA”).¹⁶ Moreover, the reclassification the Commission is proposing may have wide-reaching effects on international policy regarding the Internet.

1. States May Attempt to Regulate Broadband Internet Access Under Various Theories If the Commission’s Reclassification Scheme is Adopted

States previously have demonstrated that they are willing to exploit any potential ambiguities in the law in order to regulate and/or tax Internet access services. The adoption of the Commission’s reclassification proposal would substantially increase the ambiguity surrounding what states can and cannot do with respect to the Internet, and allow states to take advantage of such ambiguities. The possibility that states may have the ability to do so may also act to chill investment and innovation.

For example, currently-pending state legislation in New York clearly displays the potential problems. Legislation pending in the New York Assembly

would impose “neutral internet and broadband network” requirements on ISPs and would require ISPs operated by cable companies to file annual “neutrality reports” detailing “every instance” in which they managed their networks in a manner to restrict or block access to any content or category of content. *See* N.Y. Assembly Bill A1875 at Sections 6, 243.13. Others purport to regulate the uses of personally identifying information by content and services providers. *See* N.Y. Assembly Bills A139314 and A5152.¹⁷

This type of legislation is pending prior to any actual reclassification. Once reclassification occurs, the FCC can expect state and local jurisdictions to more fully attempt to regulate such services.

¹⁶ 47 U.S.C. § 151 note.

¹⁷ Cablevision Comments 23.

In addition, if the Commission reclassifies broadband Internet access as a telecommunications service, the Commission would need to decide whether the service is to be regulated as an interstate service, an intrastate service or a combination of both. Making this determination is no easy task since the Commission itself would be treating a service as severable that it had been found in the past to be inseverable. This severing clearly implicates the “end-to-end” analysis that previously has been used to treat certain services as jurisdictionally interstate.¹⁸ This could open the Commission up to challenges by state commissions seeking to play a greater role in regulating broadband Internet access as an intrastate telecommunications service. Given that, in most cases, the connectivity portion of broadband Internet access is intrastate (*e.g.*, the customer and the first router in the Internet Service Provider’s network are in the same state), the states may succeed in persuading a Court that such service is wholly intrastate notwithstanding prior claims by the Commission that the appropriate analysis for jurisdictional purposes is an end-to-end analysis. Simply stated, courts may be persuaded that the Commission cannot sever the transmission component out in order to accord it regulatory treatment as a telecommunications service without having also to sever the component out for its “interstate/intrastate” jurisdictional analysis.

Notably, several state commissions previously appealed the Commission’s *ISP Remand Decision* to the D.C. Circuit, and the Pennsylvania Public Utility Commission has appealed the decision to the Supreme Court, claiming that the portion of dial-up Internet access provided by a

¹⁸ The end-to-end analysis is based, in part, on the “inseverability, for purposes of jurisdictional analysis, of the information service and the underlying telecommunications.” *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, ¶ 13 (1999) (*rev’d on other grounds*, subsequent citations omitted). Obviously, any Commission ruling that severs Internet access into discrete telecommunications and information service components threatens this end-to-end jurisdictional analysis.

local exchange carrier is intrastate telecommunications which should be regulated by the states, not the Commission.¹⁹ If the Commission adopts the “Third Way,” the states would undoubtedly argue that some or all of the broadband Internet access service is intrastate and subject to the full panoply of state telecommunications regulation.

The risk of adverse court actions is clearly demonstrated by state actions that led to the Commission’s *Vonage Declaratory Ruling*.²⁰ Prior to 2004, a number of states were attempting to apply an array of telecommunications regulations to interconnected voice-over-IP (“VoIP”) services. The Commission determined that such services were interstate information services, thus preempting any further state action. By reclassifying broadband Internet access under Title II, the Commission could effectively be placing the broadband Internet access marketplace back into a pre-2004 world, and potentially empower state and local regulators to adopt the very types of regulations that the Commission sought to preempt in the *Vonage Declaratory Ruling*. As the Commission stated in *Vonage*, classification as a telecommunications service likely permits a state to

require the filing of an application which must contain detailed information regarding all aspects of the qualifications of the would-be service provider, including public disclosure of detailed financial information, operational and business plans, and proposed service offerings. The application process can take months and result in denial of a certificate, thus preventing entry altogether.²¹

By following the *NOI*’s reclassification proposals, the Commission very well may be subjecting broadband Internet service providers to just these types of onerous regulatory burdens, diverting

¹⁹ Petition for Writ of Certiorari, *Penn. Pub. Util. Comm’n v. FCC*, No. 10-189 (U.S. Aug. 6, 2010).

²⁰ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004).

²¹ *Id.* at ¶ 20.

important time and resources away from investment in broadband infrastructure and next-generation broadband technologies.

2. Reclassification May Result In Substantial Additional Tax Burdens on Providers and Consumers, and May Jeopardize the Protections of the ITFA

In addition, reclassification may result in additional taxation on broadband Internet access, which would place a substantial burden on providers, and slow important investment in broadband infrastructure. As it now stands, broadband Internet access is largely unfettered by state and local telecommunications taxes based on its classification as an information service. This is because, in 1998, Congress correctly recognized that Internet access was in danger of being taxed into futility by state and local regulators. Already, ten states had begun imposing taxes on Internet access, and Congress recognized the disruptive potential that such taxes may have on the free innovation of the Internet. Fortunately, Congress had the foresight to pass and extend the ITFA.²² The ITFA imposes a broad moratorium on all “taxes on Internet access” in order to codify a federal government policy against state and local government interference with interstate commerce on the Internet.²³ This ban on state and local taxation of Internet access services served to protect and incubate the nascent Internet ecosystem, encourage new entry and competition, and to provide more flexible options for consumers. The ITFA has also resulted in lower prices for consumers, as any additional taxes raise the cost of doing business, and therefore may raise the cost of service for consumers.

²² 47 U.S.C. § 151 note. The ITFA was originally scheduled to expire in 2001, but has been extended and amended a number of times – most recently in 2007 wherein the definition of “internet access” was amended and the ban on taxation was extended for an additional seven years, or until 2014.

²³ Internet Tax Freedom Act, Pub.L. No. 105-277, § 1101(a), 112 Stat. 2681-719 (1998) (“ITFA”).

While the ITFA has been amended a number of times, and the definition of “Internet access” has been changed over the years, the Commission’s ill-advised reclassification scheme may put this important exemption back into play. While the ITFA broadly bans taxes on Internet access, the definition of “Internet access” includes the term “telecommunications” – but not the term “telecommunications service,” a classification which the Commission would now apply to broadband Internet access under its proposal. Indeed, the Commission’s *NOI* proposals specifically discuss reclassifying broadband Internet access service as a telecommunications service.²⁴ Importantly, Internet access, as defined under the ITFA, does not contemplate the use or sale of telecommunications services, but rather only the “use or sale of telecommunications.” Definitional inconsistencies such as this create opportunities for mischief by budget-challenged state and local authorities. Indeed, states have demonstrated that they are willing to exploit any potential ambiguities when it comes to applying additional taxes, and the Commission’s reclassification proposal would certainly increase ambiguity in this area.²⁵

Words like “telecommunications,” “telecommunications service” and “information service” are terms of art that have come to have commonly understood meanings throughout the communications industry. Accordingly, these definitions have been incorporated into many laws and policies (the ITFA being one example) that are outside the Commission’s jurisdictional reach. The Commission in its *NOI* did not consider the impact of reclassification on these laws. When the Commission begins to alter long-settled definitions, it may find that it has shifted the

²⁴ See, e.g., *NOI*, ¶ 66, 67.

²⁵ Further, to the extent the tax moratorium was based on the Commission’s view that such services are interstate and the Commission lost such jurisdictional battle, the states may challenge the ITFA as an unreasonable violation of the interstate commerce clause. Because of this, a legislative solution, rather than reclassification, would be a more appropriate approach if further regulation of broadband Internet access services was deemed necessary.

foundation of a house of cards with troubling unintended consequences. If the Commission insists on moving forward with broadband reclassification, it must prepare itself to wade through a minefield of unexpected results.

The potential loss of the protection of the current deregulatory legal environment, such as the ITFA, is no small concern. State and local governments are notoriously eager to tax telecommunications services. In fact, studies have shown that the effective tax rates on non-Internet related telecommunications services can be as high as 33.77 percent in some states – as opposed to an effective tax of 4.50 percent on businesses in general.²⁶ If the Commission reclassifies broadband Internet access as telecommunications, state and local authorities will be free to tax service providers and consumers alike back to the dial-up age, particularly if the ITFA is allowed to expire which is a greater risk in this era of severe budget deficits.²⁷ With an increasing number of states facing substantial budget crises²⁸ and needing to be bailed out by the federal government, it appears more and more likely that state and local regulators will attempt to balance their budgets by any means necessary. Further, any action which might or could lead to increased prices for end-users flies in the face of the *National Broadband Plan*.²⁹ The

²⁶ “Study Finds Cell Phone Taxes Rising, Getting More Complex,” Tax Foundation (May 25, 2005), available at <http://www.taxfoundation.org/blog/show/502.html>. Even allowing for this extreme example, “average state and local effective tax rate on telecommunications services is 14.17% compared to 6.12% for general business nationwide.” *Id.*

²⁷ Cablevision also cites the potentially increased state and local tax burden as a potential unintended consequence of the Commission’s reclassification proposal. Citing Connecticut’s 6 percent tax on “telecommunications service,” Cablevision expresses concern that “[r]eclassifying broadband as a ‘telecommunications service’ ... [could] potentially expos[e] broadband to numerous taxes and fees.” Cablevision Comments 24.

²⁸ See Michael Hiltzik, “Stop looking to feds to cure California’s budget crisis,” L.A. TIMES, Jan. 25, 2010, available at <http://www.latimes.com/business/la-fi-hiltzik25-2010jan25,0,1273857.column>.

²⁹ See *National Broadband Plan* xii.

National Broadband Plan has at its core the objective of increasing deployment of broadband Internet access and boosting adoption by consumers. If the reclassification results in higher taxes or regulatory costs, the cost to the consumer will rise – thus deterring both investment and adoption.

In these times of economic turmoil and soaring state and local budget deficits, offering local governments any window to impose additional taxation is ill-advised. There already are reports of state attempts to impose Internet sales taxes in order to recoup budgetary shortfalls.³⁰ The Commission should not open a chink in the current armor and invite state and local regulators to reach further into the Internet in the hopes of balancing their budgets on the backs of broadband Internet service providers and the consumers that they ultimately serve. Not only will taxes increase for providers and prices rise for consumers, but subjecting broadband Internet access providers to common carrier treatment will subject them to a host of unanticipated burdens. Simply keeping track of these additional taxes may prove untenable – indeed, “[t]elecommunications providers must file 47,921 [tax] returns per year compared to 7,501 [tax] returns for general businesses.”³¹ Further, increasing taxes undoubtedly will lead to slower adoption rates for broadband Internet access services. The Commission certainly does not want such an impediment to arise at the exact time the Commission has found that the public interest

³⁰ Maria Halikas, “States consider taxing Internet sales to help boost revenues,” *Dallas Morning News* (Apr. 14, 2010), available at <http://www.dallasnews.com/sharedcontent/dws/bus/stories/041410dnbusInternetTax.3e1a735.html>.

³¹ “Study Finds Cell Phone Taxes Rising, Getting More Complex,” Tax Foundation (May 25, 2005), available at <http://www.taxfoundation.org/blog/show/502.html>.

requires that investment in the broadband Internet be increased and services be deployed more widely.³²

3. Broadband Reclassification May Have an Unintended Impact on Worldwide Internet Policy

Treatment of broadband Internet access by other regulatory bodies may also be substantially altered by an FCC reclassification. CTIA points out that “Title II classification might trigger International Telecommunication Union (‘ITU’) jurisdiction or encourage the ITU to regulate the Internet more broadly.”³³ Specifically, because “ITU’s jurisdiction is explicitly limited to ‘telecommunications,’ by classifying Internet connectivity service as [telecommunications], the Commission may inadvertently lend support for an expanded role of the ITU, contrary to previous U.S. positions that the U.N. should not act as the global Internet regulator.”³⁴ Indeed, Commissioner McDowell recently cautioned against just such an unintended consequence:

Efforts have been under way for some time to expand ITU, and therefore U.N. jurisdiction over the Internet. This has been a multi-year effort and, should the U.S. extend regulation over the Internet, other countries will see it as a signal that their efforts are legitimized.³⁵

³² See, e.g., *National Broadband Plan* 9, 11, 23.

³³ CTIA Comments 37.

³⁴ *Id.* at 37. CTIA also points out another possible unintended consequence – that reclassifying Internet access services could divest the authority of the FTC to protect online privacy since the Federal Trade Commission Act excludes “common carriers” from the FTC’s jurisdiction. *Id.* There is no indication in the Commission’s NOI that the FCC gave any thought to, or was seeking, this possible outcome. The CTIA example points out the mischief that can be caused by reclassifying a long-standing service. The fact is that the regulatory phrases “information service,” “telecommunications service” and “common carrier service,” have had consistent meanings for a long time, and the phrases have found their way into multiple federal, state and local regulations based upon their common usage. It is inevitable that a dramatic reclassification will have impacts that the Commission will not properly consider.

³⁵ *ITU Article.*

Others have expressed similar concerns, noting that “[i]t will be difficult for the U.S. to draw a distinction between [the] traditional U.S. stance [on ITU jurisdiction over the Internet] and its limited move to reclassify broadband.”³⁶ The Commission’s policies “do[] not operate in a vacuum, and its actions can have consequences beyond our borders.”³⁷ In exploring the boundaries of its authority over the Internet, the Commission must be mindful that its actions do not have unintended consequences of global proportions.

These are but a few examples of the potential impacts that reclassification could have on the regulatory treatment by other regulatory authorities – both internationally and at home – and on the prices to be paid by the ultimate consumer. The simple fact is that, while forbearance may deal with any Commission regulatory problems, there is no way to know what other regulatory landmines may be lurking in various state, local and international jurisdictions. Giving state and local regulators an inroad to regulating access to the Internet as a telecommunications service will result in substantial uncertainty, and may require broadband Internet access providers to be subjected to a 50-state patchwork of regulation, which would slow the nimble and fast-moving Internet economy.

B. Reclassification Will Have the Unintended Consequence of Deterring Investment in Broadband Networks, Creating Difficulties for Handset Manufacturing and Aggravating the Digital Divide

As the Commission has stated, stimulating investment in broadband infrastructure is critical to the accomplishment of its *National Broadband Plan* goals. The comments show that, in direct contravention of this goal, reclassification will breed substantial litigation, and create “uncertainty in the market for broadband Internet services at the precise time that the

³⁶ *Id.*

³⁷ *Id.*

Commission requires market stability for the capital-raising required to implement the *National Broadband Plan*'s goals."³⁸ This will certainly deter needed investment in the broadband industry. In addition, such regulation will make it increasingly difficult for handset manufacturers to develop innovative new wireless devices.

AT&T cautioned that reclassification would "defeat[] the 'serious reliance interests' that broadband Internet access providers have developed in the maintenance of the existing investment-friendly regime for the past decade."³⁹ And, a coalition of 24 separate telecommunications manufacturers urged the Commission not to reclassify broadband Internet access, as increased regulation of broadband service could reduce investment incentives.⁴⁰ The Commission must heed these warnings as it considers the various proposals in the *NOI*, and not harm the *National Broadband Plan* in order to expand its authority over broadband Internet access services. In other words, the Commission should not burn the house down to save it.

Other important elements of the broadband Internet access ecosystem also will be disrupted. Many consumers use wireless handsets as their principal access to the mobile broadband Internet, and cutting edge technology is critical to their Internet experience. Accordingly, the design and manufacture of wireless handsets has become an important and fast-moving business. Internet access technologies change at a rapid rate, and wireless handsets must be able to evolve efficiently to enable consumers to reap the benefits of the constant Internet

³⁸ MetroPCS Comments 29.

³⁹ AT&T Comments 80.

⁴⁰ Telecommunications Manufacturers Comments 4 (citing G.S. Ford and L.J. Spiwak, "The Broadband Credibility Gap", Phoenix Center for Advanced Legal & Econ. Pub. Policy Studies at 11-22 (June 2010), available at <http://www.phoenix-center.org/pcpp/PCPP40Final.pdf>; C.M. Davidson and B.T. Swanson, "Net Neutrality, Investment & Jobs: Assessing the Potential Impacts of the FCC's Proposed Net Neutrality Rules on the Broadband Ecosystem," Advanced Communications Law & Policy Institute (June 2010)).

innovation. For example, smartphone adoption has increased substantially in just a few quarters and is reaching substantial portions of many carriers' customer bases. Indeed, the Commission itself has reported that 42 percent of U.S. consumers own smartphones.⁴¹ This rapid adoption rate is a direct by-product of the Commission's existing policies. Wireless equipment manufacturers have expressed serious concerns, however, that applying reclassification to wireless will create further difficulties in the equipment manufacturing process which could slow this virtuous cycle of development and deployment of new handsets and infrastructure.⁴² For example, major supplier Samsung indicates that "[p]roducing a handset with a stand-alone Internet access feature independent of the device's applications could be particularly burdensome on product development, and would not necessarily be responsive to consumer needs and demands."⁴³ Additionally, "as a practical matter, broadband-enabled features and services, including applications, are implemented and coordinated actively in both the network and the handset to ensure their performance and reliability. They cannot technically be separated as the Commission seems to imply."⁴⁴

Inhibiting wireless handset innovation harms consumers as a whole, and will be particularly devastating for low-income or minority consumers who rely on the mobile broadband Internet as their only gateway to the World Wide Web. Even proponents of reclassification agree with MetroPCS about the important "role [that] wireless access has played

⁴¹ *Implementation of Section 6002 (b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Federal Communications Commission, Fourteenth Report, WT Docket No. 09-66, (rel. May 20, 2010).

⁴² Samsung Telecommunications America Comments 5-6.

⁴³ *Id.* at 6.

⁴⁴ *Id.* "Segregating covered services from non-covered applications would be more difficult than the *Notice of Inquiry* would indicate." *Id.*

and can continue to play in bridging the digital divide, and in demonstrating to nonadopters the relevance to their lives of broadband Internet connectivity.”⁴⁵ As MetroPCS has stated in other proceedings, “[s]tudies have shown that a significant portion of the minority community access the Internet primarily or solely from wireless devices.”⁴⁶ The Commission must not adopt a regulatory regime that may stifle wireless handset innovation and distribution, to the detriment of the very consumers for whom the Commission is trying to increase adoption rates, and thus have the effect of widening the digital divide. If innovation or manufacture of wireless handsets is slowed, those who need it most will have reduced access to the Internet and to cutting-edge wireless devices. With the coming deployment of next-generation 4G broadband technologies, such as LTE, the Commission should take steps to promote the broad distribution of these technologies, not hamper the ability of consumers to obtain the necessary handsets to harness this innovation. MetroPCS urges the Commission to abandon the Third Way approach that may deter the adoption of advanced broadband technologies by disadvantaged or minority consumers, as this flies in the face of all of its *National Broadband Plan* objectives.

C. Reclassifying Broadband Internet Access May Violate the First Amendment

MetroPCS shares the concerns expressed by others in this proceeding, including the National Cable Television Association (“NCTA”), regarding the potential First Amendment implications of reclassifying broadband Internet access under Title II. The Commission simply does not have the constitutional authority to “exert an independent power to guarantee ‘neutral’

⁴⁵ Public Interest Commenters 21.

⁴⁶ Comments of MetroPCS Communications, Inc., WT Docket No. 10-133, 7, filed Jul. 30, 2010 (citing Cecilia Kang, “Going wireless all the way to the Web,” WASH. POST, A6 (Jul. 10, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/09/AR2010070905521.html>).

opportunities for all potential speakers.”⁴⁷ Simply put, “[u]nder the First Amendment principle established by *Buckley* and its progeny, the government is not free to impose restrictions on speech out of a fear that, if the speech is left in private hands, some speakers will prevail at the expense of others.”⁴⁸ This foray into the outer bounds of the First Amendment would “surely be subject to at least ‘heightened scrutiny’ by the courts.”⁴⁹ Particularly troubling is the *NOI*’s proposal that broadband Internet access providers must not only “make their facilities available indifferently to all content and application providers but also prohibit[] content and application providers from entering into discrete commercial arrangements with ISPs in order to make their speech attractive to and usable by consumers.”⁵⁰ This is a direct prior restraint on speech, which will not be upheld. Since, as NCTA correctly points out, any Commission decision to reverse long-standing precedents to reclassify broadband will be subject to heightened scrutiny,⁵¹ the Commission must be careful not to trample important constitutional free speech principles. MetroPCS urges the Commission to consider the broad-reaching constitutional implications before it acts in this proceeding.

In the view of MetroPCS, some commenters turn the First Amendment on its head when they attempt to use it in favor of the *NOI*’s proposal. For example, the ACLU claims that the First Amendment requires protecting the methods by which communications occur, and supports reclassification which it claims “will prevent speech restrictive abuses by companies that are

⁴⁷ NCTA Comments 34.

⁴⁸ *Id.* at 34 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*); *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008); *Meyer v. Grant*, 486 U.S. 414 (1988)).

⁴⁹ *Id.* at 32.

⁵⁰ *Id.* at 31-32.

⁵¹ *Id.* at 7 (citing *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)).

fundamentally profit seeking rather than civic-minded.”⁵² This argument overlooks the fact, pointed out by NCTA, that the Commission’s blunderbuss approach actually prohibits some content and applications. Similarly, the Center for Democracy and Technology (“CDT”) seems to find the Commission’s effort to regulate the transmission component of broadband tolerable, even though it argues that the Commission should “expressly disclaim legal authority over Internet content and applications” in part because “communications over the Internet warrant the full protection of the First Amendment.”⁵³ What CDT fails to properly acknowledge is the extent to which the Commission’s Third Way proposal erodes that protection by impacting certain applications and content.

III. THE INSEVERABLE NATURE OF THE TELECOMMUNICATIONS AND INFORMATION SERVICE COMPONENTS OF BROADBAND INTERNET ACCESS MAKE IT INAPPROPRIATE FOR TITLE II CLASSIFICATION

In its comments, Free Press argues that “[t]he fact that broadband providers may bundle services together in one package does not and should not affect the regulatory classification of these discrete services.”⁵⁴ This statement, however, entirely misconstrues the concept of

⁵² Comments of the American Civil Liberties Union and the Speech, Privacy and Technology Project of the ACLU 6. The ACLU fails to understand that broadband Internet access, unlike historically regulated local exchange services, is offered over private facilities not paid for by rate payers in a regulated monopoly environment, and is funded by the monies of private investors. It is not common for courts to require owners of private property to allow unlimited access to their premises for the purposes of First Amendment speech, particularly for commercial speech. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (finding unconstitutional a New Hampshire statute requiring “that appellees use their private property as a ‘mobile billboard’ for the State’s ideological message”). Further, those rights were in completely different context – such as shopping malls and schools – where the public was being invited in or it is a government facility. Here, broadband Internet access providers are providing a service and there is no reason they should have to transmit the speech of others.

⁵³ Center for Democracy and Technology Comments 1, 3.

⁵⁴ Free Press Comments iii, 53.

“bundling” versus the inseverable integration discussed in the Supreme Court’s *Brand X* decision. Bundling is, in fact, quite different than inseverable integration.

Consumers may, for example, purchase a package of cable, broadband Internet and telephone services – but each of the distinct services is offered separately, priced separately and is “bundled” only in the billing process to provide consumers with a discount. There is no physical or other integration of the services, and each continues to be provided as a separate service. A bundle of this nature may benefit the consumer, but in no way changes the fundamental character of individual components that are marketed and consumed by consumers. At the end of the day, a consumer can pick and choose how many discrete services will be added to the package, and a declined element can be purchased separately from an alternative supplier. For example, a consumer could forgo the package and purchase satellite television, landline telephone and cable broadband Internet services.

Brand X-style integration, on the other hand, arises where the group of services are functionally integrated, marketed as a single product to consumers, and are not separately marketed or sold on their own. Indeed, this is specifically addressed in *Brand X*, where the Supreme Court stated that:

Respondents argue that under the Commission's construction a telephone company could, for example, offer an information service like voice mail together with telephone service, thereby avoiding common-carrier regulation of its telephone service.

...

As we understand the [Cable Modem] Declaratory Ruling, the Commission did not say that any telecommunications service that is priced or bundled with an information service is automatically unregulated under Title II. The Commission said that a telecommunications input used to provide an information service that is not “separable from the data-processing capabilities of the service” and is instead “part and parcel of [the information service] and is integral to [the information service’s] other capabilities” is not a telecommunications offering.⁵⁵

With respect to broadband Internet access, “[i]n effectively all circumstances, [the information service and telecommunications] components are seen as one combined integrated service by consumers,”⁵⁶ and so are properly considered to be one integrated service under a *Brand X* analysis. Unlike the broadband Internet access and television example given above, “a Comcast cable modem subscriber does not purchase Internet connectivity from Comcast and separate information services from Cox.”⁵⁷ As *Brand X* states, “[i]t is common usage to describe what a company ‘offers’ to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product.”⁵⁸ The focus in *Brand X* is on how the consumer views the product, not on whether or not it can be divided artificially into discrete components. No matter how Free Press would like to spin their story, broadband Internet access simply is not marketed, nor is it viewed by consumers, as a collection of storage, caching, security, parental content controls, malware protection and other information services, each of which are independent purchases merely bundled together for convenience or a discount. And, although some of these products may have separate analogs (such as virus protection software), they do not operate the same. Virus protection offered by a carrier is

⁵⁵ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 997 (2005).

⁵⁶ MetroPCS Comments 33.

⁵⁷ *Id.* 33.

⁵⁸ *Brand X*, 545 U.S. at 990.

provided on the carrier's facilities as part and parcel of the broadband Internet access service, while a virus protection program purchased separately operates solely on the user's computer. The carrier's product is different because it is a service that can be used by any device and operates as part of the broadband Internet access. In contrast, the stand-alone software program does not alter the broadband Internet access. Accordingly, only the virus protection offered by the carrier is truly part of the broadband Internet access service. Accordingly, even though broadband Internet access may be comprised of discrete components, the entire service is sold, marketed, and viewed by consumers as a single integrated offering, and therefore must be considered a single service under the *Brand X* standard.

IV. THERE ARE NO CHANGED CIRCUMSTANCES THAT JUSTIFY SUCH A RADICAL CHANGE IN COMMISSION POLICY WITH RESPECT TO THE CLASSIFICATION OF BROADBAND INTERNET ACCESS

As even proponents of broadband reclassification readily admit, "in revisiting a prior policy, 'the agency must show that there are good reasons for the new policy,'" and "should also take into account changed circumstances."⁵⁹ Courts have long held that "where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious."⁶⁰ In order to properly make such a departure, the Commission "must supply a reasoned analysis' establishing that prior policies and standards are being deliberately changed."⁶¹ Such a showing is required here because the Commission has found, in

⁵⁹ Free Press Comments 107 (quoting *Fox Television Stations, Inc. v. FCC*, 129 S. Ct. 1800, 1811 (2009)).

⁶⁰ *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995); *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 304 (D.C. Cir. 2009) ("*Verizon*") ("[I]t is arbitrary and capricious for the FCC to apply such new approaches without providing a satisfactory explanation when it has not followed such approaches in the past.").

⁶¹ *Verizon*, 570 F.3d at 301 (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 57); see also *Wis. Valley Improvement v. FERC*, 236 F.3d 738, 748 (D.C.

(continued...)

four separate orders and “with remarkable consistency of language, that the various broadband Internet services each ‘offer a single, integrated service (i.e., Internet access) to end users.’”⁶²

As MetroPCS has shown,

[t]he *Cable Modem Declaratory Ruling*, the *Wireline Reclassification Order*, the *BPL Order* and the *Wireless Broadband Order* represent cohesive, consistent rulings, which stand for the proposition that the telecommunications provided in connection with broadband Internet access is an integrated information service that cannot be regulated under Title II as a telecommunications service.⁶³

In order to undo eight years of consistent decisions, the Commission must be able to specifically articulate the changed circumstances, or initial policy deficiency, that requires a change after so many years of settled law and policy. Even further, such changed circumstances would have to be demonstrated as occurring from as recently as three years ago.

Here, the record clearly shows that there have been no materially changed circumstances since the Commission’s latest ruling (in 2007), or for that matter, since its first ruling (in 2002), in the way that broadband Internet access is marketed, sold or viewed by consumers. As MetroPCS has shown both in its initial Comments and above, “[b]ecause there have been no significant changes in how broadband Internet access is provided, marketed or sold, the Commission is unable to make the showing required to effect a reasoned reversal of settled

(...continued)

Cir. 2001) (“[A]n agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so.”); *Telecomms. Research and Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986) (“When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms.”).

⁶² MetroPCS Comments 3 (quoting *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 14 (2005) (“*Wireline Reclassification Order*”)).

⁶³ *Id.*

law.”⁶⁴ Although Free Press argues that “alterations in the factual landscape” may “provide ample reason for an agency to reconsider past policies” it fails to point to any adequate factual alterations that justify a stark reversal in regulatory policy.⁶⁵ For example, Free Press seeks refuge in the fact that Comcast has an internal organizational structure that divides responsibility over the Internet connectivity component of its broadband Internet service and its email and data storage component.⁶⁶ However, the manner in which a single private enterprise allocates its workforce certainly is not dispositive as to the proper regulatory classification of – or the lawfulness of reclassifying – broadband Internet access; it cannot even credibly be called part of the equation.⁶⁷ What matters is not how Comcast internally allocates its resources, but rather how these services are marketed, sold and viewed by consumers. Even a brief review of Comcast’s marketing materials reveals that its broadband Internet access service, email service, data storage service, along with a host of other security and entertainment services, are all marketed and sold as part of one integrated service offering.⁶⁸

Free Press also makes much of the fact that “Comcast has created an entire marketing campaign around the speed of their service.”⁶⁹ But, the fact that a company chooses to

⁶⁴ *Id.* 4.

⁶⁵ Indeed, to the extent that the competitive landscape has changed, it has changed to be more competitive. Since 2002, Verizon has launched FiOS, AT&T has launched U-verse, Clearwire has begun offering 4G wireless broadband services, and other wireless carriers have both deployed 3G broadband services and are in the process of deploying 4G broadband services. This argues against further regulation.

⁶⁶ Free Press Comments 113.

⁶⁷ For example, MetroPCS does not divide its internal organizational structure in the same way.

⁶⁸ See “High Speed Internet,” Comcast.com marketing material, *available at* <http://www.comcast.com/Corporate/Learn/HighSpeedInternet/highspeedinternet.html?INTCMP=ILCCOMCOMHS20906>.

⁶⁹ Free Press Comments 112.

emphasize one aspect of its product or service over another does not mean that other aspects are not an integrated part of the product or service.⁷⁰ For example, a sports car manufacturer may advertise its cars' "zero-to-60" time in order to impress consumers with the cars' speed. This does not mean the brakes or the airbags are not an integrated part of the vehicle or less important to the driver experience. A consumer cannot buy the gas pedal alone. Although one particular manufacturer might promote a car's speed, another might focus on safety, or storage capacity, or any number of other redeeming car qualities. The car manufacturer is not "'offering' consumers the car's components in addition to the car itself,"⁷¹ just as broadband Internet service providers are not offering their customers an "a la carte" selection of information services or telecommunications products. These providers are offering a single, integrated service in exactly the same manner as they have been doing since the *Cable Modem Declaratory Ruling* and before. The real significance of the fact that broadband Internet access providers are competing on different aspects of their service, is that this demonstrates how competitive and cutthroat competition currently is in the broadband Internet marketplace.⁷² This competitive environment argues against intrusive government regulation.

Commenters further argue that the telecommunications and information service components of broadband Internet access are severable by stating that "[c]onsumers can and do

⁷⁰ Again, Free Press focuses too much on a single provider and that is inappropriate here. First, this is a rulemaking, not a complaint proceeding focused on Comcast. Second, not all broadband Internet access providers advertise their speeds. Third, it is not clear how advertising speeds somehow transform an information service into a telecommunications service.

⁷¹ *Brand X*, 545 U.S. at 990.

⁷² For example, HughesNet, a satellite broadband Internet service provider, touts the geographic breadth of its coverage over its speed, leading its website with the statement that "HughesNet satellite Internet is available everywhere – even where cable Internet and DSL don't reach." See HughesNet company website, available at <http://www.hughesnet.com/>.

seek out third-party providers for the types of services that the Commission historically considered integrated with data transmission.”⁷³ As an example, Free Press seeks to emphasize that “consumers need not rely on their broadband provider for e-mail services.”⁷⁴ However, simply because consumers can choose a third-party provider to provide one information services component does not in any way change the service that is being marketed or sold by broadband Internet service providers. Indeed, Free Press itself notes that some 2.7 million consumers were active users of AT&T’s email service in 2009 – hardly a *de minimis* number of users. The fact that some, or even many, consumers prefer to use third party email programs, is irrelevant to the regulatory classification of broadband Internet access. This argument also fails to take into account the numerous other services/functions which are provided by broadband Internet access providers which are information services, such as filtering, spam protection and web hosting.

Despite the fact that certain consumers may use third party email programs, broadband Internet access providers continue to offer these services to their customers as part of an integrated information service, and many customers continue to use these services. MetroPCS’ own experience in the marketplace confirms this. MetroPCS considers its mail@metro email service to be an important part of its offering to customers, and the company’s own research shows that a substantial number of MetroPCS’ customers sign up for this service in the service plan which includes it. As AT&T stated, “For purposes of determining what a purchaser is ‘offered,’ it makes no difference that some users could theoretically seek out third-party ... services in addition to those combined with their broadband services, just as it makes no difference that a consumer could buy a car at a car dealership and then replace the wheels or

⁷³ Free Press Comments 113; *see also* DISH Network Comments 8; Public Interest Commenters 17.

⁷⁴ Free Press Comments 114.

install custom seats.”⁷⁵ Simply because it is possible to modify or augment a product or service, does not change the underlying classification of what that product or service is. Again, as MetroPCS and others have continually shown, the prevailing legal test for integration is “what the consumer perceives to be the integrated finished product.”⁷⁶ Because the manner in which broadband Internet access is marketed, sold and viewed by consumers has remained materially unchanged since the 2002 *Cable Modem Declaratory Ruling* – and certainly since the 2007 *Wireless Broadband Order* – broadband Internet service still properly is viewed as a single, integrated offering. Accordingly, in order to reclassify broadband Internet access, the Commission will need to demonstrate changed circumstances in order to overturn years of administrative and judicial precedent. This it cannot do.

V. MANY CARRIERS ALSO AGREE THAT ANY BROADBAND RECLASSIFICATION MUST NOT BE APPLIED TO WIRELESS BROADBAND INTERNET SERVICES

While MetroPCS strongly opposes the imposition of common carrier regulation on any broadband Internet service providers, “the Commission should in particular refrain from applying this reclassification to wireless broadband Internet access providers.”⁷⁷ In part, this is due to the fact that “wireless services are subject to particularly intense and continually growing competition, with ongoing investment and innovation that has brought tremendous benefits to consumers.”⁷⁸ However, the robust competition and consumer innovation are only part of the reason why broadband reclassification is particularly inappropriate for the mobile wireless broadband industry. At the present time, the “wireless industry faces unique challenges in the

⁷⁵ AT&T Comments 72.

⁷⁶ *Brand X*, 545 U.S. at 990.

⁷⁷ MetroPCS Comments 37.

⁷⁸ Verizon Comments 74; *see also Verizon-Google Joint Proposal*.

form of spectrum constraints and bandwidth limitations, and is in many ways a developing industry when it comes to broadband data services.”⁷⁹ Spectrum scarcity is a particularly acute problem, and MetroPCS pointed to the memorandum released by President Barack Obama as only the latest example of the recognition of the spectrum crisis.⁸⁰ As well, “[t]he Commission recognized in its National Broadband Plan that mobile broadband ‘is a nascent market’ that is ‘growing at unprecedented rates.’”⁸¹

Importantly, even leading proponents of FCC net neutrality regulation have come to recognize that the wireless broadband Internet is different and deserves careful treatment. Google, a noteworthy participant in the net neutrality debate, recently released a joint statement with Verizon regarding the Commission’s reclassification and net neutrality proposals. In this proposal, the companies acknowledge the fundamental truth that

[b]ecause of the unique technical and operational characteristics of wireless networks, and the competitive and still-developing nature of wireless broadband services, only the transparency principle would apply to wireless broadband at this time. The U.S. Government Accountability Office would report to Congress annually on the continued development and robustness of wireless broadband Internet access services.⁸²

It is quite telling that once-adverse parties are coming together to urge the Commission to consider the unique and tenuous position of the wireless broadband Internet. The Commission should heed this advice and, should it decide to pursue any broadband reclassification, specifically and unequivocally exempt wireless broadband. This will enable the mobile wireless

⁷⁹ Leap Comments 6.

⁸⁰ MetroPCS Comments 38 (citing Memorandum on Unleashing the Wireless Broadband Revolution, DAILY COMP. PRES. DOCS., 2010 DCPD No. 201000556 (Jun. 28, 2010)).

⁸¹ Leap Comments 6 (citing *National Broadband Plan* 9).

⁸² See *Verizon-Google Joint Proposal*.

broadband Internet to become increasingly competitive with wired broadband, and aid the Commission in the achievement of its *National Broadband Plan* goals.

VI. THERE IS BROAD AGREEMENT AMONG SERVICE PROVIDERS THAT BROADBAND RECLASSIFICATION IS UNNECESSARY AND WILL LIKELY HARM THE THRIVING INTERNET MARKETPLACE

As MetroPCS showed in its Comments, “[t]his proposed reclassification of broadband Internet access as a Title II service is not only unwise and potentially harmful, it also is impermissible based on longstanding Commission and judicial precedent.”⁸³ Not surprisingly, MetroPCS was far from alone in sharing its grave concern about the Commission’s ill-advised proposal.⁸⁴ Echoing MetroPCS’ very sentiments, Verizon remarked that “[t]he Commission’s proposed ‘third way’ is in reality a return to the old way of antiquated common carriage regulation that was developed in the 1800s for monopoly transportation and utility services.”⁸⁵ There simply is no need for the Commission to take action to regulate a market that has been a hotbed of innovation and a model for the virtuous cycle of investment, innovation and consumer demand. Indeed, “broadband Internet access services have developed—and flourished—in an environment of minimal regulation, a result that fully comports with congressional policy.”⁸⁶ The Commission’s light-touch policy “policy [also] has contributed significantly to the success of

⁸³ MetroPCS Comments 3.

⁸⁴ See, e.g., Comments filed in GN Docket No. 10-127 by: Verizon, NCTA, ITIC, Samsung Telecommunications America, TIA, Comcast Corporation, Time Warner Cable, Telecommunications Manufacturers, ACA, CTIA, Leap Wireless, T-Mobile and AT&T.

⁸⁵ Verizon Comments 1; see also MetroPCS Comments 6 (stating that “there is no reason for the Commission to impose draconian common carrier regulations – regulations that were created to regulate a telephone service monopoly of almost a century ago”).

⁸⁶ Time Warner Cable Comments ii.

small and medium-size [broadband Internet service providers] in delivering broadband to smaller markets and rural areas.”⁸⁷

Apart from the substantial legal concerns raised by MetroPCS and other commenters, “subjecting some aspect of broadband Internet service to common carrier regulation is simply bad policy,” as “the Commission has consistently recognized that regulation undermines investment in broadband infrastructure while deregulation enhances investment.”⁸⁸ MetroPCS urges the Commission to follow this near-consensus among broadband Internet service providers – those who actually provide consumers with the necessary and valuable connection – and to refrain from adopting a harsh regulatory scheme to govern a thriving industry.

VII. CONCLUSION

Ultimately, the Commission should resolve this proceeding by embracing the principles in Section 230 of the Act.”⁸⁹ “The Internet and other interactive computer services have flourished to the benefit of all Americans, with a minimum of government regulation.”⁹⁰ This progress will only be maintained if the Commission wholeheartedly embraces the policy “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by federal or state regulation. The foregoing premises having been duly considered, MetroPCS respectfully requests that the Commission refrain from engaging in an unnecessary, and likely harmful, reclassification of the transmission component of broadband Internet connectivity, whether based on its Third Way legal theory or any other

⁸⁷ American Cable Association Comments 1.

⁸⁸ NCTA Comments 8.

⁸⁹ 47 U.S.C. § 230.

⁹⁰ *Id.* § 230(a)(5).

legal theory. MetroPCS urges the Commission to consider the myriad unintended consequences that may arise from such a reclassification and to avoid going down this unknown road.

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