

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

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

**REPLY COMMENTS OF THE  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”) hereby submits its reply comments in the above-captioned proceeding.

**INTRODUCTION AND SUMMARY**

If there is any broad consensus reflected in the initial comments in this proceeding, it is that subjecting broadband Internet service to the full regulatory weight of Title II would be a very bad idea. There are a few outliers, to be sure, but most commenting parties agree with the Chairman that if there is to be regulation at all, anything more than a very “light” regulatory touch would chill and reverse the investment, innovation and remarkable growth that have been the hallmark of the Internet and that the Commission aims to continue to foster. The disagreement is over whether the proposed “Third Way” approach is a viable way to ensure this light touch.

The initial comments affirm NCTA’s conclusion that the combination of reclassification and forbearance embodied in the Third Way cannot be counted on to adequately cabin Title II regulation, and that the risks of a contrary outcome are so substantial that relying on ancillary Title I authority or seeking targeted legislation are preferable options to pursue.

The *Comcast* decision does not foreclose the use of Title I authority to regulate certain aspects of broadband Internet service, and few commenting parties suggest that it does. The decision *does* require that any such authority be ancillary to specific regulatory responsibilities

delegated to the Commission in other provisions of the Act – a requirement that some parties suggest creates too much uncertainty regarding the regulations that may be adopted. Some contend, for example, that the Commission’s ancillary Title I authority to implement important provisions of its National Broadband Plan is too tenuous in light of the *Comcast* decision, but, as NCTA and others showed, that is not the case. The Commission, for example, has ample authority – both direct authority under Title II and ancillary authority under Title I – to implement the universal service proposals of the National Broadband Plan. Moreover, while the Commission has existing authority to implement the National Broadband Plan’s important proposals regarding pole attachment rates, such authority would be *undermined* by classifying broadband Internet service as a telecommunications service.

The Commission’s ancillary authority to codify – and add to – the four principles of its Internet Policy Statement, as proposed in the pending “Open Internet” proceeding, is less clear-cut. The *Comcast* decision, while not ruling out such authority, made clear that any such rules would have to be justified by specific statutory responsibilities elsewhere in the Act. It is hard to imagine that the overbroad and idiosyncratic prohibition on nondiscrimination proposed in the Open Internet proceeding – a rule that would be *more* restrictive than Title II’s prohibition on “unreasonable” discrimination – would be within the scope of the Commission’s ancillary authority (or any Title II authority). Whether a more narrowly tailored backstop against potential anticompetitive conduct would be sustainable remains to be seen.

But this obligation to develop a more limited and reasonable regulatory regime hardly justifies abandoning the Commission’s longstanding Title I approach and instead pursuing the “Third Way” approach that it now proposes. First, the comments confirm that, as a matter of law, the Commission would have an uphill, if not impossible, struggle to fit broadband Internet

service within the statutory definition of a “telecommunication service” – a task made even more difficult by its previous determination that the service is *not* a telecommunications service.

Second, even if that burden could be overcome, it is hardly clear that the forbearance proposed by the Commission would be sufficient to prevent the stifling effects of Title II regulation – or that such forbearance would itself withstand legal challenge by parties seeking more comprehensive regulation.

Third, the statutory construction offered by the Commission and the proponents of Title II regulation for classifying facilities-based providers of broadband Internet service to consumers as telecommunications carriers cannot reasonably be confined to that service or those providers. For example, as several commenting parties have shown, interpretation of the statute affords no basis for distinguishing between facilities-based and non-facilities-based providers of Internet service. Nor does it rationally exclude providers of Internet backbone services or content delivery networks. In short, if the Commission adopts its proposed interpretation, it will open the floodgates to expansive and comprehensive regulation of the Internet.

Choosing the “Third Way” would therefore be even less likely to withstand judicial review than a Title I approach, while opening up the risk of much more comprehensive regulation of the Internet than intended. There is no need for, and no countervailing benefits that would justify, incurring such risks. While the effects of Title II classification would begin to be felt immediately – from the reaction of the investment community to the restructuring of existing business throughout the Internet ecosystem – no imminent harm would flow from continued treatment of broadband Internet service as an information service.

The Commission has ample time to resolve whatever uncertainty may exist regarding the scope of its authority to impose “open Internet” regulations under Title I. While the proponents

of regulation suggest an urgent need for regulations, there are no storm clouds on the horizon, much less overhead. For all their warnings, proponents still can only point to the same two examples of supposedly improper conduct – the more recent of which occurred nearly three years ago. Since then, ISPs have taken steps, along with content and application providers, to develop standards of transparent network management practices, which are likely to make problems occur even less frequently, if at all.

There is, in short, no obvious need for *any* rules to replace the Commission’s successful policy of “vigilant restraint,” and, in any event, there is plenty of time for the Commission and the courts to determine whether and to what extent the Commission has Title I authority to adopt regulations in its pending proceeding. Moreover, and more appropriately, there is plenty of time for Congress to determine whether the Commission should be given more – or less – authority to adopt such regulations.

The Internet has flourished as the result of the investment by cable operators and others of hundreds of billions of dollars in broadband facilities of ever-expanding capabilities. And it has flourished because of Congress’ wise decision to foster Internet development “unfettered by Federal or State regulation” – a policy successfully implemented by the Commission’s approach of “vigilant restraint.” There is, nevertheless, an array of interest groups urging the Commission to abandon this policy and impose legacy Title II regulation on the Internet. The Commission’s guiding principle for preserving, promoting and maximizing the value of the Internet for consumers should be “above all, do no harm.” Nothing would be more at odds with that principle than imposing Title II regulation – in whole or in part – on broadband Internet service.

**I. THE COMMISSION, CONGRESS AND THE INTERNET COMMUNITY HAVE ALWAYS UNDERSTOOD THAT REGULATING INTERNET SERVICE PROVIDERS AS COMMON CARRIERS UNDER TITLE II WOULD HAVE TERRIBLE RESULTS.**

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For the most part, the commenting parties in this proceeding agree that replacing the Commission’s successful bi-partisan policy of “vigilant restraint”<sup>1</sup> under Title I with comprehensive Title II regulation would be a very bad idea. Several parties identify and explain the disastrous effects that would result from such “reclassification.”<sup>2</sup> And even parties who support the “Third Way” proposal generally premise their support on the notion that the proposal would result only in “light touch” regulation, which would not have the same adverse and chilling effects of full-fledged Title II regulation. Google, for example, specifically

disagree[s] with the view that the Commission should go farther than the limited scope of its Third Way proposal. Indeed, subjecting broadband Internet service to the full scope of Title II would result in regulation far greater than existing FCC oversight of wireline telephone or wireless network, and would be inconsistent with consensus deregulatory goals. We also believe that *going beyond the Third Way effectively would eliminate any benefits gained from light-touch regulation, and instead could create detrimental impacts to broadband access networks, as well as the individuals and entities that rely on them.*<sup>3</sup>

And Free Press emphasizes that the Third Way proposal

merely ensures that the Commission has the legal authority that investors and markets already presumed it had prior to the *Comcast v. FCC* decision.... Some regulation is heavy-handed, designed to control retail prices in a monopoly market, while other regulation can be much lighter, providing basic rules of the road that ensure healthier competition in an otherwise concentrated market. The FCC has proposed adopting a Title II classification merely to ensure it can adopt policies such as expanding the Universal Service Fund to broadband and requiring

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<sup>1</sup> See “FCC Chairman Kennard Shares Goal Of Local Governments To Achieve Open Broadband Access: Continues To Believe That Vigilant Restraint Is The Right Way To Get There,” FCC Press Release, Aug. 11, 1999 (emphasis in original). See also “Broadband Today,” FCC Cable Services Bureau Staff Report 15 (October 1999).

<sup>2</sup> See, e.g. Comments of AT&T, Inc. at 92-96; Comments of Verizon and Verizon Wireless at 12-20; Comments of Cablevision Systems Corporation at 29-33; Comments of Comcast Corporation at 36-38; Comments of Time Warner Cable, Inc. at 58-60.

<sup>3</sup> Comments of Google, Inc. at 3-4 (emphasis added).

better consumer disclosure of service quality and pricing. *These objectives are the lightest of regulatory touches.*<sup>4</sup>

Not everyone agrees, of course, that any Title II regulation must be narrowly circumscribed and limited to the “lightest of regulatory touches.” While Chairman Genachowski has endorsed the Third Way approach as a means of replicating what he views as the limited – and successful – regulatory oversight that was in place under Title I prior to the *Comcast* decision, some parties who have opposed that limited oversight from the outset now urge again that it be replaced with a more extensive and comprehensive Title II regime.

Thus, the joint comments of the Center for Media Justice, Consumers Union, Media Access Project, and New America Foundation (the self-styled “Public Interest Commenters”) argue that “the ‘Third Way’ approach could strike the right balance . . . *but only so long as the Commission does not forbear too broadly.*”<sup>5</sup> As discussed in NCTA’s initial comments, the forbearance proposed in the Third Way approach itself would leave untouched altogether too many regulatory provisions and requirements to qualify as “light” regulation. But the “Public Interest Commenters” urge that, in addition to applying Sections 201, 202, 208, 222, 254 and 255 of the Act to broadband Internet service providers, the Commission should also apply Sections 207, 214, 251, 256, and 257.<sup>6</sup>

Public Knowledge also provides a “list of specific statutes the Commission should not simply forbear from”:

As a general matter, these involve Commission authority over interconnection and shut down of service (Sections 251(a), 256, and portions of 214(c)), discretionary authority to compel production of information (Sections 211, 213, 215, and 218-20), provisions which provide explicit power for the Commission to hold parties

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<sup>4</sup> Comments of Free Press at 96 (emphasis added).

<sup>5</sup> Comments of Center for Media Justice *et al.* at 26 (emphasis added).

<sup>6</sup> *Id.* at 26-29.

accountable and prescribe adequate remedies (Sections 205-07, 209, 212, and 216), provisions designed to protect consumers (Sections 203 and 222), or ensure affordable deployment and the benefits of broadband access to all Americans (Sections 214(e), 225, 254, 255, and 257). These statutes are in addition to the bare minimum recognized in Section 332(c) and reiterated in the *NOI* as the minimum needed to protect consumers – Sections 201, 202, and 208.<sup>7</sup>

Meanwhile, Free Press argues that the Commission “should not categorically forbear from sections 251(b) and 251(c) . . . the authority to require nondiscriminatory access to unbundled network elements and competitive reselling.”<sup>8</sup> And, XO Communications asserts that forbearance is not appropriate for Sections 224, 229, 256, or 257.<sup>9</sup> In effect, these commenters would have the Commission apply a majority (and the most burdensome) of Title II provisions to broadband Internet service, thereby undermining the very premise of the Third Way. This is plainly inconsistent with the Third Way proposal, the Commission’s 15-year precedent for how to regulate the Internet, and Congress’s express direction that that the Internet remain unfettered by Federal or State regulation.

What’s notably missing from these comments is *any* discussion of the positive effects that the Commission’s policy of “vigilant restraint” has had – and the effect of replacing that policy with full-throated Title II regulation – on investment, on deployment, on innovation and on the availability and adoption of Internet service. The well-recognized burdens and uncertainties associated with common carrier regulation were what caused the Commission to refrain from regulation in the past,<sup>10</sup> and most other commenters recognize that those burdens

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<sup>7</sup> Comments of Public Knowledge at 44 (footnotes omitted).

<sup>8</sup> Comments of Free Press at 73.

<sup>9</sup> Comments of XO Communications at 19.

<sup>10</sup> *See, e.g.*, Letter from Chairman Kennard to Kenneth S. Fellman, Chairman, Local and State Government Advisory Committee, Aug. 10, 1999 (<http://www.fcc.gov/Speeches/Kennard/Statements/stwek952.html>), noting that even “the initiation by this Commission of a formal proceeding . . . would chill investment in cable modem service, which in turn would reduce the competitive pressure on local phone companies and others who are currently investing in alternative means of providing consumers with access to broadband.” *See also* Remarks of

and uncertainties are why policymakers must avoid anything but “the lightest of regulatory touches” even if Internet service were to be classified as a telecommunications service (if it were possible to do so under those circumstances, which NCTA does not believe is the case). But Public Knowledge and the Public Interest Commenters ignore this side of the cost-benefit analysis, focusing only on the supposed need to protect against potential abuses by Internet service providers.<sup>11</sup>

Incredibly, Public Knowledge maintains that “the benefits that the Commission predicted from classifying cable modem service and other Internet access services as ‘information services’ have stubbornly failed to emerge.”<sup>12</sup> Only an ostrich could fail to have seen the innovation, investment and transformation of the Internet experience that has occurred in the absence of Title II regulation. The only thing that has “stubbornly failed to emerge” is the anticompetitive abuse and consumer harm that Public Knowledge insisted would surely result from the Commission’s failure to classify ISPs as telecommunications carriers.

In contrast to Public Knowledge, most parties acknowledge the threats posed by regulating Internet service providers as well as the benefits that have accrued during the long

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Chairman Powell at the National Summit on Broadband Deployment, Washington, D.C., October 25, 2001 (<http://www.fcc.gov/Speeches/Powell/2001/spmcp110.html>) (“We should vigilantly guard against regulatory creep of existing models into broadband, in order to encourage investment. Moreover, very substantial questions remain about consumer demand for new applications. Innovation is critical and can be stifled by constricting regulations. Regulators absolutely retain a vital role, however; they should steward the development of a minimally regulated broadband regime, and they should focus their energies on demonstrable anticompetitive risks in provisioning.”)

<sup>11</sup> Free Press argues that the Commission “should undergo a comprehensive evaluation before forbearing from any parts of Title II,” and should reclassify and delay the effective date of the reclassification order no more than 120 days while it opens a proceeding to consider forbearance. Free Press Comments at 64; *see id.* at 74-75. In other words, Free Press urges the Commission to have reclassification *with full Title II regulation* take effect three months after adoption of an order unless the Commission conducts a “comprehensive evaluation” and agrees on forbearance in that time period. The Commission’s Third Way proposal is premised on the widely accepted recognition that full Title II regulation would be wholly inappropriate. Any proposal that contemplates such comprehensive regulation should be rejected out of hand.

<sup>12</sup> Comments of Public Knowledge at 26.

history of regulatory restraint. For the proponents of the Third Way approach, the concern is that the *Comcast* decision has undermined the regulatory status quo that has produced these benefits and made uncertain the Commission’s authority to adopt regulations implementing its Internet Policy Statement or its National Broadband Plan. The comments confirm, however, that the Third Way is not a viable alternative for achieving these objectives. Implementing the Third Way approach is fraught with uncertainty and potential pitfalls – with respect both to the Commission’s legal authority to classify broadband Internet service as a telecommunications service and to the likelihood that regulation under Title II can and will be narrowly and appropriately confined in the manner that most of the Third Way’s proponents propose. Continued reliance on Title I authority or upon legislation granting new, specifically targeted authority are much better ways to protect against any real threats of harm to consumers.

## **II. THE COMMISSION LACKS AUTHORITY TO CLASSIFY INTERNET SERVICE PROVIDERS AS “TELECOMMUNICATIONS CARRIERS” SUBJECT TO TITLE II.**

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As a threshold matter, the Third Way is not a viable option because one of its fundamental preconditions – namely, classifying broadband Internet “connectivity” service as a telecommunications service – is beyond the scope of the Commission’s authority. As we explained in our initial comments, the Commission was right to determine that no element of broadband Internet service meets the statutory definition of a telecommunications service. Moreover, even if the statute were sufficiently ambiguous to permit a contrary determination, the Commission would be precluded by the standards set forth by the Supreme Court in the *Fox Broadcasting* case and by the constitutional avoidance doctrine from reversing that determination.

Some proponents of Title II classification suggest that the Commission has virtually open-ended authority to reverse course if it finds that it cannot achieve its policy objectives

under its prior Title I classification.<sup>13</sup> But while the Commission retains significant discretion to interpret ambiguous statutory provisions and definitions, that discretion is not so boundless as to make the statutory language superfluous – and it does not empower the Commission to adopt a counterfactual interpretation of the Act in order to avoid the statutory limitations on its authority affirmed by the D.C. Circuit in *Comcast* decision. The Supreme Court reaffirmed in *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005), that *reasonable* agency interpretations of ambiguous statutory provisions are entitled to deference and held that while the statutory definition of “telecommunications service” was not wholly unambiguous, the Commission’s determination that this term did not encompass cable modem service was reasonable. It does not follow, however, that a contrary determination would be equally reasonable and sustainable.

**A. The Statute Cannot Reasonably Be Construed To Treat the Telecommunications Component of Every Information Service as the Separate “Offering” of a “Telecommunications Service.”**

The Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public...,”<sup>14</sup> while an “information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*. . . .”<sup>15</sup> Virtually all commenting parties recognize that the service that broadband Internet service providers offer to consumers always *includes* capabilities identified in the definition of an information service. The dispute is whether the telecommunications element of broadband Internet access service is being separately “offered” to users of the service. In 2002, the Commission determined that it was not, and the

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<sup>13</sup> See, e.g., Comments of Open Internet Coalition at 16-18; Comments of Center for Media Justice *et al.* at 18; Comments of Free Press at 4-5.

<sup>14</sup> 47 U.S.C. § 3(46).

<sup>15</sup> 47 U.S.C. § 3(20).

Supreme Court upheld this determination as a reasonable interpretation of the term “offering.” Even Justice Scalia’s dissent did not directly challenge the Commission’s determination that the mere inclusion of telecommunications in a service that also included information service capabilities would not suffice to qualify as an “offering of telecommunications” – *i.e.*, the provision of a telecommunications service.

A more expansive interpretation of “offering” that reversed the Commission’s 2002 conclusion would mean, in effect, that *every* information service was accompanied by a telecommunications service subject to Title II. Nothing in the Act or the legislative history suggests that Congress intended to extend the scope of Title II regulation in this manner – and nothing in the Supreme Court’s decision or the dissent suggests that such an interpretation would be reasonable.

**B. There Is No Basis for Reversing the Commission’s Factual Determination That the Telecommunications and Information Service Components of Broadband Internet Service Comprise a Functionally Integrated Service.**

The disagreement in *Brand X* was not over the reasonableness of the Commission’s determination that an integrated offering of telecommunications and information service capabilities should not be deemed to include a telecommunications service. It was over the reasonableness of the Commission’s *factual* determination that the telecommunications and information service components of cable modem service were integrated:

The entire question is whether the products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes). That question turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission *in the first instance*.<sup>16</sup>

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<sup>16</sup> *NCTA v. Brand X Internet Services*, 545 U.S. 967, 991 (2005) (emphasis added).

The majority thought the Commission’s determination wholly reasonable, rejecting the dissenters’ contention that two distinct services were being offered:

What cable companies providing cable modem service and telephone companies providing telephone service ‘offer’ is Internet service and telephone service respectively – the finished services, though they do so using (or “via”) the discrete components composing the end product, including data transmission. Such *functionally integrated* components need not be described as distinct “offerings.”<sup>17</sup>

While the Commission was entitled to deference in making this factual determination “in the first instance,” its discretion to reverse course and now reach the opposite determination is more narrowly circumscribed. In *Fox Television Stations, Inc.*<sup>18</sup> the Court found that while an agency need not *always* provide a more detailed justification than what would suffice for a new policy created on a blank slate,”

[s]ometimes it must – when, for example, its new policy rests upon *factual findings that contradict those which underlay its prior policy*; or when its prior policy has engendered *serious reliance interests* that must be taken into account. . . . In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.<sup>19</sup>

Under *Fox Television Stations*, therefore, because the classification of broadband Internet service necessarily turns on the “factual particulars” of whether the service is an integrated offering of telecommunications and information service components, the Commission cannot simply ignore its previous determination that it *is* such an integrated offering. It must show why that factual determination was wrong, or why it is no longer the case. And that is a showing that, as many commenting parties have demonstrated, the facts will not support.

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<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800 (2009).

<sup>19</sup> *Id.* at 1811 (2009) (emphasis added).

Some parties contend that the Commission was wrong to have identified certain capabilities, such as DNS and caching, as “information service” components of a wholly integrated broadband Internet service under the Act.<sup>20</sup> But that’s an old argument that both the Commission and the Supreme Court expressly rejected. With respect to DNS:

A user cannot reach a third-party’s Web site without DNS, which (among other things) matches the Web site address the end user types into his browser (or “clicks” on with his mouse) with the IP address of the Web page’s host server. . . . It is *at least* reasonable to think of DNS as a “capability for . . . acquiring . . . retrieving, utilizing, or making available” Web site addresses and therefore part of the information service cable companies provide.<sup>21</sup>

And with respect to caching,

[T]he Internet service provided by cable companies facilitates access to third-party Web pages by offering consumers the ability to store, or “cache,” popular content on local computer servers. . . . Caching obviates the need for the end user to download anew information from third-party Web sites each time the consumer attempts to access them, thereby increasing the speed of information retrieval. In other words, subscribers can reach third-party Web sites via “the World Wide Web, and browse their contents, [only] because their service provider offers the ‘capability for . . . acquiring, [storing] . . . retrieving [and] utilizing . . . information.’” *Universal Service Report* 11538 ¶76 (quoting 47 U.S.C. §153(20). “The service that Internet access providers offer to members of the public is Internet access,” *Universal Service Report*, 11539, ¶ 79, not a transparent ability (from the end user’s perspective) to transmit information. We therefore conclude that the Commission’s construction was reasonable.<sup>22</sup>

Others contend that the facts have changed and that DNS, caching and other information service capabilities are no longer integral parts of broadband Internet service.<sup>23</sup> But as NCTA and several cable operators and telephone companies that provide Internet service have explained

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<sup>20</sup> See, e.g., Comments of Public Knowledge at 18-23.

<sup>21</sup> *NCTA v. Brand X Internet Services*, 545 U.S. at 999. The Supreme Court specifically rejected the argument – now raised again by Public Knowledge and others – “that access to DNS does not count as use of the information-processing capabilities of Internet service because DNS is ‘scarcely more than routing information, which is expressly excluded from the definition of “information service.”’ *Id.* at n.3 (quoting Justice Scalia’s dissenting opinion).

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., Comments of Free Press at 108-120.

at length, that is untrue. While the Commission’s and the Court’s references to the “World Wide Web” may seem antiquated, their descriptions of the functions and integral role of DNS and caching remain wholly accurate. Indeed, the complexity and the importance to consumers of the capabilities for acquiring, storing, processing, retrieving, utilizing and making available information on the Internet have only increased in the three years since the Commission last determined that broadband Internet service is an information service. As the comments indicate, a pure transport service would not provide consumers what they have come to expect and value from their Internet service providers – in particular the capability to acquire, store, process, retrieve, and utilize the boundless information available on the web.<sup>24</sup>

One way to think about the integrated nature of various offerings is to try to imagine them sold separately. Dogs and leashes are not integrated offerings because it is easy to imagine each being sold separately – and they often are. Cars, on the other hand, are almost never sold separately from steering wheels and for good reason – a car without a steering wheel cannot serve its intended purpose. In this respect, using the examples the majority and Justice Scalia used in *Brand X*, Internet access service is clearly more like cars and steering wheels than like dogs and leashes. Would any consumer subscribe to an Internet access service that did not give them the ability to search the Internet, use DNS lookup, watch a video on YouTube, or post their vacation pictures on their favorite social networking site? Clearly not – information retrieval, processing, and storage is why consumers purchase Internet access in the first place. This is not like plain-old telephone service, where some consumers purchase only the telecommunications component without the bells and whistles of “enhanced” information services. Here, the

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<sup>24</sup> See, e.g., Comments of Cablevision Systems Corporation at 12-14; Comments of Comcast Corporation at 21-26; Comments of Cox Communications, Inc. at 12-16; Comments of Time Warner Cable Inc. at 19-27; Comments of AT&T Inc. at 70-78; Comments of Verizon and Verizon Wireless at 47-55.

information service component is the whole reason consumers purchase the service; telecommunications is simply the means to the end, never the end itself.

**C. The Commission Cannot Reasonably Reinterpret the Statute in Light of the Impact on “Serious Reliance Interests.”**

There is, in other words, no basis for reversing the factual determinations on which the Commission relied in finding that broadband Internet service included functionally integrated telecommunications and information service components. Moreover, even were that not the case, the Commission would still, as mandated in *Fox Television Stations*, be required to take into account the “serious reliance interests” that would be affected by reversing ground and regulating Internet service under Title II. As Verizon points out, ISPs

have invested hundreds of billions of dollars in infrastructure, including deploying next-generation fiber networks, with the expectation that broadband Internet services would remain free from burdensome Title II regulation. These expectations were based on a series of *four* separate decisions over the course of several years in which the Commission repeatedly reaffirmed that broadband Internet access service is an information service not subject to Title II common carrier obligations – decisions that were reaffirmed by the courts where they were challenged. . . . *Fox* requires the Commission to take the investment-backed reliance interests of these providers into account before dramatically upsetting the entire industry’s expectations, and will subject any decision that does so to more searching review.<sup>25</sup>

**D. The Commission Must Avoid a Reinterpretation of the Act That Raises Serious Constitutional Issues.**

Finally, as NCTA and other commenting parties have pointed out, the enormity of the impact of such a regulatory turnabout on the broadband industry’s investment-backed reliance interests also raises serious issues of a regulatory taking without just compensation under the Fifth Amendment.<sup>26</sup> These constitutional issues are compounded by the substantial First

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<sup>25</sup> Comments of Verizon and Verizon Wireless at 33 (emphasis in original). *See also* Comments of AT&T at 80-81.

<sup>26</sup> *See, e.g.*, NCTA Comments at 34-36; Comments of AT&T at 109-112; Comments of Verizon at 90-94.

Amendment questions that would arise if cable operators and other broadband providers were subjected to common carrier regulations under Title II.<sup>27</sup> Even if the statute could otherwise be interpreted to permit such Title II classification and regulation, the Commission would be compelled to avoid an interpretation that raised such serious constitutional issues and problems.

**III. EVEN IF THE COMMISSION HAD AUTHORITY TO CLASSIFY INTERNET SERVICE AS A “TELECOMMUNICATIONS SERVICE,” THE ADVERSE EFFECTS AND RISKS OF TITLE II REGULATION COULD NOT BE AMELIORATED BY ADOPTING THE “THIRD WAY” APPROACH.**

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**A. There Is a High Risk That the Regulations Applied to Internet Service Providers Under Title II Will Not Be Confined in the Manner Envisioned by Third Way Proponents.**

Even if the Third Way approach were ultimately determined, after a prolonged period of uncertainty and litigation, to be legally sustainable, it would then face an even more serious problem. As discussed above, the Third Way proposal is intended only to enable the Commission to continue along the path of very limited regulatory oversight that some believe may have been foreclosed under Title I by the *Comcast* decision. But the initial comments in this proceeding confirm that there is a substantial likelihood that the regulations that result from classifying Internet service as a Title II telecommunications service will not be confined in this manner. And, as even Third Way proponents recognize, the risk of such over-regulation to the health and potential of the Internet is enormous.

First, even if the Third Way approach were adopted as proposed by the Commission – if the Commission decided to forbear from all but those provisions of Title II set forth in the NOI – the scope of potential regulation would still be much greater than the Commission suggests. As NCTA and others have pointed out, those few provisions contain many of the most substantial

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<sup>27</sup> See, e.g., NCTA Comments at 31-34; Comments of Time Warner Cable at 54-57; Comments of Verizon at 79-89.

obligations and requirements imposed on telecommunications carriers by Title II. For example, AT&T explains that Sections 201 and 202 alone

contain vague and self-executing prohibitions that could make Internet service providers liable for any conduct that some future Commission ultimately deems “unjust,” “unreasonable,” or “discriminatory.” Countless recordkeeping, billing-related, interconnection, and other rules, scattered throughout the Code of Federal Regulations, are based in whole or in part on sections 201 and 202, provisions that the Commission routinely cites as grounds for almost all of its Title II orders. The applicability of those sections would create enormous uncertainty for broadband providers, who could be subject to complaints alleging that any number of Commission rules apply to them by virtue of those statutory provisions. In addition, application of sections 201 and 202 to broadband services would appear to require, for the first time, substantive regulation of retail prices and the other terms and conditions of retail services, as discussed above.<sup>28</sup>

As if this were not sufficiently disquieting, the Commission’s ability to forbear from all but the six sections of Title II identified in the NOI – or even to forbear at all – can hardly be taken for granted. As noted above, not all parties concur in the mainstream view that regulation of Internet service, whether pursuant to Title I, Title II or new legislation, should be narrowly confined. Some parties have identified a much longer list of sections that they believe should be removed from the scope of any forbearance, and have expressed the view that the Commission may not issue a blanket forbearance but must demonstrate that the forbearance requirements of Section 10 of the Act are met, on a case-by-case basis, for each provision from which the Commission proposes to forbear.

What this means is that the forbearance component of the Third Way approach is likely to be subject to significant litigation, and there can be no assurance that the proposed forbearance will survive intact. That would undermine the whole purpose of reclassification. As commissioner Clyburn put it:

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<sup>28</sup> Comments of AT&T Inc. at 115.

Under the Chairman's view, without forbearance there is no reclassification. You cannot have one without the other. Think peanut butter and jelly. Salt and Pepper. Batman and Robin. You get the picture.<sup>29</sup>

Some parties have expressed concern that if the Commission were instead to continue to rely on ancillary authority under Title I, there might be protracted litigation and uncertainty over whether each proposed regulation is sufficiently ancillary to some specific statutory obligation. But the likelihood of litigation and uncertainty would be at least as great if the Commission were to pursue the Third Way. The difference, as NCTA emphasized in its initial comments, is that the burden is on the proponents of regulation to justify and identify a sufficient source of ancillary authority under Title I, while the burden is on the proponents of forbearance to show that the prerequisites identified in Section 10 are met. In light of the dangers and damage that would result from overregulation of the Internet, a forbearance approach that imposes a rebuttable presumption in favor of regulation would be unduly reckless.

**B. The Proposed Interpretation of “Telecommunications Service” and “Telecommunications Carrier” Cannot Be Confined to Facilities-Based ISPs and Would Subject Many Other Internet Services and Entities to Title II Regulation.**

The threat posed by the Third Way approach is not only that the scope of Title II regulation imposed on ISPs cannot be confined to the “light regulatory touch” that the Commission proposes but also that such regulation cannot – and, if adopted, should not – be confined to ISPs. As a matter of law, if the Commission were to determine that the provision of some transport or Internet connectivity component of broadband Internet service is a separable telecommunications service, that interpretation of the statute's definitions would bring a wide range of services and entities in the Internet ecosystem within the ambit of Title II regulation.

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<sup>29</sup> See *Broadband Authority and the Illusion of Regulatory Certainty*, Remarks of Commissioner Mignon Clyburn, Media Institute, June 3, 2010.

The policy proclaimed by Congress of preserving “the vibrant and free market that presently exists for the Internet . . . unfettered by Federal or State regulation”<sup>30</sup> would be shattered to an even greater degree.

As commenting parties have pointed out, the cascading regulatory implications of a reclassification of broadband Internet service as a telecommunications service are pervasive. First of all, as the Supreme Court has recognized, there is no basis in the statutory definitions for distinguishing between facilities-based and non-facilities-based ISPs.<sup>31</sup> Therefore, the notion that wireline ISPs are “necessarily ‘offering telecommunications’” would “subject to common carrier regulation non-facilities-based ISPs that own no transmission facilities.”<sup>32</sup>

Earthlink maintains that this is not the case, noting that “the Commission has consistently held that non-facilities-based Internet access providers that are unaffiliated with a carrier offer only an information service [because] [t]hese providers, while they utilize the

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<sup>30</sup> 47 U.S.C § 230(b)(2). As the comments make clear, classifying broadband Internet service as a “telecommunications service” subject to Title II regulation could open the door to State as well as Federal regulation. For example, the California Public Utilities Commission, which supports Title II classification, suggests that “the States should share . . . regulation with the FCC,” CPUC Comments at 9, and ominously points out that “[w]hen not acting pursuant to specific preemption provisions of the Communications Act, the proper legal test for FCC preemption of states requires both inseparability and inconsistency with the statutory goals.” *Id.*, n.27. The CPUC’s comments suggest that absent preemption, Title II classification would allow states to apply to ISPs the common carrier regulatory paradigms traditionally employed by regulators overseeing monopoly services, with regulation that goes well beyond the Third Way. If the Commission were to adopt its Third Way approach, simultaneous preemption would be essential.

The CPUC’s comments are, in any event, sharply at odds with the position advocated by the governor of California, who has urged the Chairman to maintain an open Internet that is free from government regulation, and expressed concern that any “attempt to saddle broadband services with a new regulatory scheme will only serve to stifle investment in the wired and wireline broadband networks that are so essential to these innovative services that are in turn crucial to our citizens and our economy.” Letter of Gov. Arnold Schwarzenegger to Chairman Genachowski, May 11, 2010.

<sup>31</sup> See *NCTA v. Brand X Internet Services*, 545 U.S. at 994.

<sup>32</sup> Similarly, *wireless* broadband Internet service is, of course, indistinguishable from *wireline* services in terms of the telecommunications and information service components being offered to customers. The Commission has already rightly proposed that whatever regulatory classification it ultimately applies to wireline services be applied to wireless services as well.

telecommunications input, do not themselves provide a telecommunications service.”<sup>33</sup> But from the consumer’s perspective, Earthlink and other non-facilities-based ISPs provide the same telecommunications to their customers as facilities-based ISPs provide to theirs. It’s just that they, unlike facilities-based providers, must acquire the telecommunications from other providers before selling it, along with information service capabilities, to their customers. As AT&T correctly points out,

ISPs such as Earthlink are today considered “information service” providers rather than “telecommunications service” providers . . . *not* because they own no last-mile facilities, but because they provide classic information-service functionalities with their services, including DNS lookup, email, and often caching. If the Commission reversed course and deemed those functionalities insufficient to keep “facilities-based” ISPs from Title II regulation, “non-facilities-based” ISPs would necessarily become telecommunications carriers as well.<sup>34</sup>

Moreover, as AT&T points out, it’s not only non-facilities-based ISPs that would be subjected to such regulation: “[T]he same conclusion would apply to a range of other providers that assume responsibility for transporting data throughout the Internet, ranging from Akamai to Amazon to Level 3 to Netflix.”<sup>35</sup> Backbone providers, CDNs, or providers of content and applications to consumers via wireless networks and devices independent of the consumer’s ISP service – entities that arrange to offer transport along with information service capabilities to the public or identifiable segments of the public for a fee – would all be placed under the cloud of potential Title II liability, subject to case-by-case determinations of whether their information and telecommunications capabilities are sufficiently integrated to qualify as information services or whether they qualify for regulatory forbearance.

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<sup>33</sup> Comments of Earthlink, Inc. at 16.

<sup>34</sup> Comments of AT&T at 100 (emphasis added).

<sup>35</sup> *Id.*

There may be instances where, if the Commission were to subject ISPs to regulation under the Commission’s ancillary Title I jurisdiction, it would make sense to extend comparable regulation to other Internet entities. For example, NCTA argued in its comments in the Open Internet proceeding, that if the Commission found it appropriate to restrict ISPs from offering any enhancements, prioritization or quality of service guarantees to content or application providers, similar restrictions should be imposed on other service providers (such as Akamai and Google), which are positioned to provide the same sort of prioritization and enhancements and, because of their dominant positions in their respective markets, have the ability to affect the competitive viability of content and application providers on the Internet.<sup>36</sup>

In contrast to Title II, which subjects entities defined as “telecommunications carriers” (and only such entities) to a comprehensive regulatory regime, Title I ancillary authority would give the Commission *greater* control and flexibility to ensure that regulation of the Internet is neither underinclusive nor overinclusive in promoting its legitimate and specific regulatory responsibilities. If the Commission can identify a mandate in the Act to restrict anticompetitive practices that adversely affect Internet services in a way that harms consumers, that mandate can provide ancillary authority to prevent providers of communications services from engaging in such practices. But in the absence of any such identifiable mandate, neither ISPs nor other Internet entities may be regulated.

A broad definition of telecommunications services will, in contrast, presumptively subject to regulation a broad swath of the Internet beyond ISPs – whether or not particular entities pose any threat of harmful conduct, much less the harmful conduct addressed by each of

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<sup>36</sup> See NCTA Comments at 22-29.

the many regulatory requirements arising under Title II. Classifying ISPs as telecommunications carriers would pose the very threats to the Internet that Congress sought to avoid.

**IV. THERE IS NO REASON TO INCUR THE SERIOUS RISKS OF TITLE II REGULATION.**

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With a broad consensus that expansive Title II regulation would be a very bad outcome, and a significant likelihood that the Third Way approach could not be confined to the “light regulation” of ISPs that the Commission had intended to pursue under Title I, there is nothing that justifies taking on the enormous risks inherent in pursuing the Third Way. While the driving force behind this proceeding is the *Comcast* decision, virtually none of the commenting parties claim that the Commission’s authority to implement its National Broadband Plan or potentially to adopt appropriate and focused safeguards to protect consumers from harmful anticompetitive conduct by ISPs or other parties if it arises has been clearly vitiated by the court’s decision. To the extent that they address it at all, they simply argue that the *Comcast* decision makes uncertain or calls into question the Commission’s Title I authority and that using a combination of Title II regulation and forbearance to replicate the Commission’s Title I approach would remove this uncertainty and permit the Commission to move forward with its plans.

In fact, as NCTA and others have shown, the *Comcast* decision, while imposing reasonable limits on the Commission’s unfettered exercise of Title I jurisdiction, does not impose substantial roadblocks to the implementation of the National Broadband Plan. And to the extent that the Commission’s ancillary authority proves to be insufficient to implement the light regulatory approach that it sought to pursue under Title I, narrowly tailored legislation that authorizes such limited regulation is far preferable to the risky path of classifying ISPs – and other Internet entities – as Title II telecommunications carriers.

Like NCTA, AT&T demonstrates at length that the Commission’s authority to implement key elements of the National Broadband Plan was not put in serious jeopardy by the *Comcast* decision. While the decision could require the Commission to identify specific statutory responsibilities in other titles and provisions of the Act to which various Broadband Plan initiatives are sufficiently ancillary, there is nothing in the decision that suggests this is an insurmountable burden. NCTA showed that the path to universal service reform endorsed by the Commission was not blocked by the *Comcast* decision,<sup>37</sup> and argued that it was “also possible that the Commission could justify a ‘backstop’ prohibition on anticompetitive practices by broadband Internet service providers as ancillary to its statutory obligations elsewhere in the Act.”<sup>38</sup> Time Warner Cable, AT&T, Comcast and others similarly describe statutory provisions that could provide a basis for universal service regulation – as well as the Broadband Plan’s approaches to transparency, disabilities access, privacy, and cyber security.<sup>39</sup>

The proponents of Title II classification of broadband Internet services do not argue that the Commission lacks such Title I authority – only that it is uncertain and that reclassification is necessary to quickly remove this uncertainty. As we’ve shown above, however, the Commission’s authority to classify broadband Internet services as “telecommunications services” is far more tenuous than its Title I authority. And its efforts to use forbearance to ensure that the scope of Title II regulation of the Internet remains narrowly circumscribed could be subject to at least as attenuated case-by-case, provision-by-provision tests, with as much uncertainty, as any exercise of Title I authority.

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<sup>37</sup> NCTA Comments at 38-42.

<sup>38</sup> *Id.* at 42.

<sup>39</sup> *See* Comments of Time Warner at 79-86; Comments of AT&T at 20-39; Comments of Comcast at 6-17.

The main difference is that the damage that would result if the Commission were unable successfully to cabin the scope of its Title II regulation would be immediate and enormous, while the damage, if any, caused by a determination that the Commission lacks ancillary jurisdiction under Title I would be minimal and readily curable by targeted regulation. It remains the case that there is no imminent threat to the openness of the Internet – no pattern of conduct of the sort that the Commission has proposed restricting, and certainly no evidence of harm to consumers and to the Internet resulting from any such conduct. The comments in this proceeding, like those in the Open Internet proceeding, point to no new instances of harmful conduct. It should by now be clear, five years after the *Madison River* incident and three years after the dispute that resulted in the *Comcast* decision arose, that those two isolated instances do not signify a cascading trend that requires immediate action – especially action encumbered with the risks of Title II classification.

## CONCLUSION

There is ample time to get this right – to determine whether the Commission needs any new authority from Congress to implement aspects of its Broadband Plan, to determine whether there is a need for any prophylactic regulation to protect against conduct by Internet entities that harms consumers, and to ensure that any such regulation and any new statutory authority is no more extensive than necessary to address such harm. For the foregoing reasons, attempting to use legacy Title II regulation to address these issues would be precisely the wrong way to go.

Respectfully submitted,

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