

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

In the Matter of )  
 )  
 )  
Framework for Broadband Internet Service ) GN Docket No. 10-127  
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**REPLY COMMENTS OF AT&T INC.**

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## INTRODUCTION AND SUMMARY

When announcing the “third way” proposal, Chairman Genachowski asserted that Title II reclassification would “restore the status quo light-touch framework” that existed before the *Comcast* decision;<sup>1</sup> would “give providers and their investors [the] confidence” necessary to “unleash investment and innovation” and promote “job creation”; and would rest on the “soundest legal foundation, thereby eliminating as much of the current uncertainty as possible.”<sup>2</sup> The Chairman represented, however, that he would “remain open” and “ready to explore all constructive ideas” as the Commission launched its Notice of Inquiry.<sup>3</sup> The comments have now been filed and the record provides incontrovertible evidence that the “third way” would be a road to ruin. It would deliver none of the benefits the Chairman described, it would not survive judicial scrutiny, it would thwart the Administration’s ambitious broadband agenda, and it would suppress investment, innovation, and job growth just when they are needed most.

*First*, as many commenters explain, the “third way” would not “restore” the pre-*Comcast* “status quo”; instead, it would abandon decades of bipartisan support for the light-touch regulatory framework that has been indispensable to the Internet’s explosive growth. Whether or not accompanied by partial regulatory forbearance, reclassification would, for the first time ever, saddle the broadband industry with regulation originally developed for telephone monopolists seventy-five years ago. Countless financial analysts—and more than three hundred Democratic

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<sup>1</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>2</sup> See Notice of Inquiry, *Framework for Broadband Internet Service*, GN Docket No. 10-127, FCC 10-114, Statement of Chairman Julius Genachowski, at 2 (2010) (“*Genachowski NOI Statement*”); Julius Genachowski, Chairman, Federal Communications Commission, *The Third Way: A Narrowly Tailored Broadband Framework*, May 6, 2010, <http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html> (“*Genachowski ‘Third Way’ Statement*”).

<sup>3</sup> *Genachowski NOI Statement* at 3; Genachowski *‘Third Way’ Statement*.

and Republican members of Congress—thus warn that this regulatory overhang would chill investment incentives and imperil the *National Broadband Plan*'s \$350 billion vision of ubiquitous next-generation broadband for all Americans.<sup>4</sup> **Second**, as leading technical experts have explained, the reclassification proposal rests on fundamental technological and commercial misconceptions about how users connect to the Internet and how Internet access services are offered. **Third**, as many commenters further explain, any reclassification decision would very likely end in judicial reversal after prolonged, industry-destabilizing litigation. **Finally**, and for all that, reclassification would be both (1) *unnecessary*, because the government can achieve all the main goals of the *Broadband Plan* under existing authority without reclassification, and (2) *pointless*, because Title II would not even authorize the Commission to adopt the extreme net neutrality rules favored by the pro-regulation interest groups.

***1. The opening comments confirm widespread concern that the proposed “third way” would hobble economic growth and widen the digital divide.***

As discussed in our opening comments, a wide range of analysts and stakeholders have expressed deep concern about the investment-depressing consequences of any reclassification decision. For example, Craig Moffett of Bernstein Research explains that reclassification “would have sweeping implications, far, far beyond net neutrality”; would generate “a raft of regulatory obligations from the days of monopoly telecommunications regulation, potentially including price regulation”; “would broadly throw into question capital investment plans for all broadband carriers, potentially for years”; and would trigger a “radical downsizing of . . .

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<sup>4</sup> See Staff Presentation, *September 2009 Commission Meeting*, at 45 (Sept. 29, 2009), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-293742A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf); Federal Communications Commission, *Connecting America: The National Broadband Plan* (2010), <http://download.broadband.gov/plan/national-broadband-plan.pdf> (“*Broadband Plan*”).

broadband investment plans.”<sup>5</sup> Congress is similarly concerned. For example, after his recent exchange of letters with Chairman Genachowski, Congressman John Dingell concluded that the “third way” proposal “is based on unsound reasoning,” is “fraught with legal risk,” and would “confound Congress’s and the Commission’s efforts to encourage further investment in broadband infrastructure, create new jobs, and stimulate broadband adoption[.]”<sup>6</sup> Indeed, more than half of the combined members of the House and Senate urge the Commission to reject any Title II reclassification, and House Majority Leader Steny Hoyer admonishes that “authority on this critical matter” properly belongs to “lawmakers” in Congress. AT&T Comments at 4-5.<sup>7</sup>

The overwhelming majority of industry stakeholders have likewise responded to the reclassification proposal with reactions ranging from anxiety to incredulous dismay:

- Equipment makers such as Alcatel-Lucent and Cisco—like the hundreds of members of the Fiber to the Home Council and the Telecommunications Industry Association—fear that the “renewed expenditure” in broadband infrastructure “risks being reversed by the Commission’s Third Way proposal, should it be pursued” (Alcatel-Lucent Comments at 8). The views of these companies are particularly probative on the investment-suppressing risks posed by any reclassification proposal, because “[f]irms that sell goods and services that are inputs to the production and use of information services stand to gain an expanding market . . . and have the incentive to make a completely unbiased judgment on the matter.”<sup>8</sup>

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<sup>5</sup> Paul McNamara, *Comcast Net Neutrality Win Draws Mixed Reaction*, PCWorld, Apr. 7, 2010, [http://www.pcworld.com/article/193759/comcast\\_net\\_neutrality\\_win\\_draws\\_mixed\\_reaction.html](http://www.pcworld.com/article/193759/comcast_net_neutrality_win_draws_mixed_reaction.html) (“*PCWorld Comcast Article*”) (quoting Craig Moffett, Bernstein Research) (emphasis omitted).

<sup>6</sup> Letter from Rep. Dingell to Chairman Genachowski at 1 (July 28, 2010), [http://www.house.gov/dingell/pdf/20100728\\_Dingell\\_Letter\\_to\\_Genachowski\\_on\\_FCC\\_Response.pdf](http://www.house.gov/dingell/pdf/20100728_Dingell_Letter_to_Genachowski_on_FCC_Response.pdf) (“*Dingell Letter*”).

<sup>7</sup> The governors of eighteen states have similarly expressed serious concern about any reclassification, *see* AT&T Comments at 4 n.15, and the Texas Public Utility Commission likewise warns that it would be “extremely problematic for the Commission to now reverse course and potentially harm a sector of the economy that has been an important engine driving job growth and economic activity.” Texas PUC Comments at 4.

<sup>8</sup> *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993) (emphasis omitted).

- The tens of thousands of workers represented by the Communications Workers of America express similar concern that “the Title II route” would “chill[] job-creating investment and innovation” (CWA Comments at 4). And along with the AFL-CIO, civil rights groups, and others, CWA has thus declined to endorse reclassification and instead urges Congress “to move forward quickly on narrowly targeted legislation” in the wake of the *Comcast* decision, lest congressional inaction end up “discouraging deployment to low income and other disadvantaged Americans” (Letter to Chairmen Rockefeller and Waxman at 1-2, attached to CWA Comments as Exh. 1).
- Content creators—represented by the American Federation of Television and Radio Artists, the Directors Guild of America, the International Alliance of Theatrical and Stage Employees, and the Screen Actors Guild—warn that reclassification “could dramatically inhibit” efforts to protect the intellectual property rights on which their livelihoods depend (AFTRA Comments at 6).
- The more than 1000 community leaders represented by the Alliance for Digital Equality warn that the “Third Way” would “restrict deployment of broadband infrastructure by inhibiting investment,” “damag[e] . . . job creation,” and “exacerbate the too-wide digital divide” (Alliance for Digital Equality Comments at 1-2).
- The nearly 900 cable companies of the American Cable Association warn that reclassification would present “significant economic regulatory burdens and regulatory uncertainty” and “may prove to be a deterrent to market entry” for “ACA members who are not already providing broadband Internet service” (ACA Comments at 6, 13).
- Wireless providers such as Sprint, T-Mobile, MetroPCS, Leap, and Clearwire express concern about the impact of reclassification on the nascent wireless broadband industry.
- VoIP provider Vonage encourages “the Commission to develop a more robust and legally sustainable explanation for the exercise of ancillary authority” because that approach is “more straightforward, less intrusive, and less controversial” than “the thornier question of classification” (Vonage Comments at 2, 8).
- The Alliance for Telecommunications Industry Solutions (“ATIS”)—a global standards-development organization whose hundreds of members include Intel, NeuStar, Juniper Networks, Oracle, Sun Microsystems, and Verisign—explains that reclassification would involve regulation of “the Internet” under any definition of that term, and warns that the NOI’s pervasive technological misconceptions “risk . . . creating confusion about the manner in which users connect to the Internet” (ATIS Comments at 4).
- The National Exchange Carrier Association confirms that the NECA DSL tariff does not connect anyone to the Internet and, contrary to the NOI’s mistaken assumption, cannot be characterized as an “Internet connectivity service” (NECA Comments at 5-6).

In contrast to this diverse cross-section of stakeholders concerned about any reclassification proposal, the primary advocates for regulatory heavy-handedness are inside-the-

beltway interest groups such as Free Press and Public Knowledge. Because these groups have never run any large-scale business, they remain oblivious to the costs and uncertainties of “reclassifying” broadband Internet access providers as though they were 20th-century telephone companies. And they cynically insist that reclassification would merely return the industry to the pre-*Comcast* regime. For example, Free Press opines that “[t]he Third Way proposal laid out in the Notice of Inquiry” could not “alter market fundamentals” because, Free Press submits, it “proposes to do no more than restore the pre-*Comcast* status quo.” Free Press Comments at 96.

That is nonsense, as Free Press is well aware.<sup>9</sup> The “pre-*Comcast* status quo” consisted of narrowly tailored “openness” principles without legacy Title II baggage, and it thus omitted the key investment-chilling features of the proposed “third way.” It involved no retail or wholesale regulation under sections 201 and 202 and thus no self-executing prohibitions on any retail or wholesale rate, classification, or practice that some later Commission might find “unjust,” “unreasonable,” or “unreasonabl[y] discriminat[ory].” 47 U.S.C. §§ 201, 202. And it left wireless broadband services regulated by little more than vigorous competition. Against that backdrop, reclassification would obviously upset investor expectations about the regulatory environment for this marketplace. As Jonathan Chaplin of Credit Suisse explains, in views

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<sup>9</sup> On the day of the *Comcast* decision, Free Press’s Ben Scott told the press “that he believes the FCC will reclassify broadband as a telecommunications service, *thus opening it up to tighter regulation*: ‘Comcast swung an ax at the FCC to protest the BitTorrent order. And they sliced right through the FCC’s arm and *plunged the ax into their own back.*’” *PCWorld Comcast Article* (some emphasis omitted); see Joelle Tessler, *FCC loses key ruling on Internet ‘neutrality,’* Associated Press, Apr. 6, 2010, <http://finance.yahoo.com/news/FCC-loses-key-ruling-on-apf-78990100.html?x=0> (“Scott believes that the likeliest step by the FCC is that it will simply reclassify broadband as a more heavily regulated telecommunications service. That, ironically, could be the worst-case outcome from the perspective of the phone and cable companies.”). Less publicly, Scott told a key White House ally that he viewed the *Comcast* case as a “crisis-tunity” for heavier regulation. See Sara Jerome, *Conservative ethics group claims new evidence against White House for ties to Google*, The Hill (July 27, 2010).

shared by the overwhelming majority of industry analysts,<sup>10</sup> “[t]he biggest disconnect between Washington and Wall Street is on how the competitiveness of the industry is viewed . . . . Competition is doing its job and regulations would make it very difficult for companies to get reasonable return on investment . . . . The threat of regulation could discourage investment and cost jobs[.]”<sup>11</sup>

## **2. *Reclassification would rest on a technologically incoherent foundation.***

The reclassification proposal not only underestimates the threat to investment incentives, but reflects an incoherent understanding of how users gain access to the Internet. Tellingly, the NOI fails even to identify what the Commission proposes to reclassify as a “telecommunications service.” Instead, it asks (at ¶¶ 2, 53-65) how the Commission could define a Title II-regulated “Internet connectivity service” that (1) could be reasonably portrayed as a standalone retail service that connects consumers to “the Internet” but that (2) contains no integrated information-service functionalities and is not itself part of “the Internet.” The short answer is that there is no such service, and any attempt to “identify” one would rest on sheer pretense.

Although the NOI suggests that the service described in the NECA DSL tariff is such a service,<sup>12</sup> it is not. As NECA itself confirms, that service—which is primarily sold to ISPs as a wholesale input—does not itself even allow end users to connect to the Internet. NECA Comments at 5-6. More generally, as ATIS explains, (1) a mere “physical connection” like the NECA DSL service “cannot provide a communications path to other Internet users”; (2) an “Internet connectivity” service is thus “logically synonymous” with the retail “Internet access”

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<sup>10</sup> See AT&T Comments at 2-4; USTA Comments at 1-26 & Appx. 3; CTIA Comments at 7-30; NCTA Comments at 23-27.

<sup>11</sup> Yu-Ting Wang et al., *Reclassification Said to Pose Broad Risk to U.S. Economy*, *Commc’ns Daily*, at 1 (June 14, 2010) (quoting Chaplin) (some emphasis added; some omitted).

<sup>12</sup> See NOI ¶¶ 21 & n.53, 54, 65 & n.179.

service that consumers actually buy; (3) *that* service inherently requires higher-layer information processing; and (4) it “is an inherent and integral part of ‘the Internet.’” ATIS Comments at 5-7.

Simply put, consumers do not purchase any retail service that could be characterized as a mere “on-ramp” to the Internet; they purchase broadband Internet access, which offers them IP-based communications through the Internet backbone to all points on the Internet. As even some reclassification proponents appear to recognize, therefore, the Commission could not try to regulate broadband Internet access without simultaneously regulating “the Internet” under any informed definition of that term. For example, Free Press—unafraid to advocate full-blown regulation of the Internet itself—would define the regulable Title II service as “transmi[ssion of] data from *end to end over the Internet*, the international computer network of both federal and non-federal interoperable packet-switched networks.” Free Press Comments at 49 (emphasis added). Public Knowledge is vaguer in its definition of the proposed Title II service but makes clear that it, too, seeks regulation of “the Internet” under anyone’s definition of that term, urging the Commission to arbitrate Internet backbone “peering dispute[s]” and oversee “the migration to IPv6.” Public Knowledge Comments at v, 27.

In contrast, the Center for Democracy and Technology, which is more sensitive to the optics (if not the consequences) of Internet regulation, would define and regulate a “retail service that enables a customer to send and receive Internet Protocol communications to and from Internet endpoints of the customer’s choosing” by “assigning an Internet Protocol address” to the customer’s devices and “providing the customer with the means for Internet Protocol communications . . . between the customer’s device and one or more interconnection or peering points that enable further routing, directly or indirectly, to the Internet.” CDT Comments at 13. As discussed in Section II.B below, however, there is no “retail service” that provides IP-based

communications to intermediate points (let alone “peering points”) short of “the Internet.” There are, in this context, only broadband Internet access services, which offer consumers seamless communications to all points on the global Internet. And the Commission cannot try to regulate those services without regulating the Internet.

Some proponents of reclassification throw up their hands and confess that they have no idea how the Commission should define the ostensibly regulable “service”; they are certain only that *something* should be reclassified and regulated. According to DISH, the Commission should not even “seek to describe the precise parameters of the Internet connectivity service” and should instead “simply rely upon the definitions of the Communications Act.” DISH Comments at 14. DISH reasons that “broadband providers well understand these [statutory] definitions,” *id.*, and can figure out for themselves what supposed Title II “services” they are “offering,” even if DISH and the Commission itself cannot identify them. *See also* XO Comments at 8 (making a similar argument). To put it mildly, that would not be the type of reasoned decisionmaking that could survive judicial review.

As shown by this crazy-quilt of mutually inconsistent approaches to the “definition” of a non-existent “on-ramp” service, reclassification would be a messy, industry-destabilizing, and dubious affair. Moreover, precisely because (as ATIS and others explain) reclassification would entail regulation of “the Internet” under any accepted definition of that term, it would cross a line the Commission has respected since the earliest broadband Internet access services in the 1990s. The Commission has *never* treated such services as Title II common carrier services, despite the contrary and highly confused arguments on this point by the pro-regulation interest groups. Instead, through Democratic and Republican administrations alike, the Commission has always understood the acute dangers of extending legacy common carrier regulation to any aspect of the

Internet ecosystem, and it has therefore held fast against Title II regulation of any retail Internet access service. *See* AT&T Comments at 67-70.

Free Press persists in its claim that “the Clinton FCC” pursued policies matching Free Press’s current agenda. Free Press Comments at 81-82. That is flatly wrong. In 1999, Chairman William Kennard rejected proposals to impose common carrier regulation on then-dominant cable broadband providers precisely because, “[i]f we’ve learned anything about the Internet in government over the last 15 years, it’s that it thrived quite nicely without the intervention of government.”<sup>13</sup> And Chairman Kennard repeatedly made good on that vow. Under his leadership, the Commission twice rejected proposals in 1999 and 2000 to impose “open access” requirements on cable operators in connection with its merger-review authority, in part because the Commission found that “the potential for competition from alternative broadband providers” would suffice to protect consumer interests.<sup>14</sup> In attributing a contrary policy to “the Clinton FCC,” Free Press repeats its habitual mistake: confusing (1) the regulation of specific *facilities* under section 251(c)(3) (line-sharing and other UNE rules) or the *compelled provision of wholesale* transmission services (the *Computer Inquiry* rules) with (2) the classification of the *retail Internet access service* that consumers buy.<sup>15</sup> Only that latter issue is presented here. The

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<sup>13</sup> Remarks of Chairman Kennard, “The Road Not Taken: Building a Broadband Future for America” (June 15, 1999), <http://www.fcc.gov/Speeches/Kennard/spwek921.html>; *see also* AT&T Comments at 101, 115 (discussing Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998) (“*Stevens Report*”).

<sup>14</sup> Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group to AT&T Corp.*, 15 FCC Rcd 9816, 9872-73 ¶ 127 (2000); *see also* Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, 14 FCC Rcd 3160, 3197-98 ¶¶ 74-75 (1999).

<sup>15</sup> *See* Free Press Comments at 81-82. Although the Commission eliminated the line-sharing rules in 2003 (with the concurrence of two Democratic Commissioners and over the dissent of two Republicans), ILECs remain obligated under section 251 to lease copper loops to CLECs that, in turn, support the provision of broadband Internet access over those loops by ISPs.

Commission has *never* subjected *any* retail Internet access service to Title II regulation, and the decisions of the “Clinton FCC” exemplify that policy choice.

**3. Title II reclassification would be unlawful.**

Even if the Commission abandoned its attempt to regulate a nonexistent “connectivity” service and conceded that reclassification involves regulating the Internet itself, such regulation would still be unlawful for the reasons discussed in our opening comments and in Sections II and IV below. Reclassification would run headlong into, among other things, the statutory definitions of “information service” and “telecommunications service,” 47 U.S.C. § 153(20), (43), (46); the prohibition on treating any information service provider “as a common carrier,” *id.* § 153(44); and guarantees of provider autonomy in the provision of Internet service or any other “interactive computer service,” *e.g., id.* § 230. Title II regulation of *wireless* broadband Internet access in particular would also violate the further prohibition on treating any non-CMRS wireless provider “as a common carrier for any purpose under this [Act].” *Id.* § 332(c)(2). The proposed reclassification would be independently invalid because it would pose serious and avoidable constitutional concerns, as discussed in Section III. And those constitutional concerns would be particularly acute in the wireless context, where the Commission induced providers to pay billions of dollars for spectrum rights on the understanding that the Commission would impose common-carrier-type obligations only on licensees of upper 700 MHz C-Block spectrum for the duration of a regulatory “experiment” that has not yet even begun.

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*See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003). That section 251 obligation is independent of the retail classification of Internet access services. The same is true of the *Computer Inquiry* rules, which top Commission officials have vowed not to revive, and which the Commission could not lawfully revive in any event. *See* AT&T Comments at 102-06.

Although we discuss these legal issues in detail below, one point warrants emphasis at the outset. As both the Commission and the Supreme Court have found, Domain Name System (“DNS”) functionalities are inextricably integrated within any broadband Internet access service, and their role constitutes a sufficient (though far from necessary) basis for deeming any such service an “information service.” The pro-regulation interest groups urge the Commission to reverse that finding and to conclude instead that DNS falls within the “telecommunications management” exception to the definition of “information service.” That theory of reclassification is technologically confused and legally foreclosed. For example, DNS look-up functions used with Internet access services exist for the primary benefit of end users, not network operators. They therefore fall outside the “telecommunications management” exception and, *a fortiori*, the pre-1996, nonstatutory “adjunct-to-basic” doctrine, which can be at most coextensive with that statutory exception. Indeed, in its *Brand X* reply brief, the Commission confirmed this very point, representing to the Supreme Court that DNS “does not fall within the statutory exclusion” for telecommunications management,<sup>16</sup> and the Supreme Court thereafter ruled for the Commission.<sup>17</sup> A reviewing court would react with enormous skepticism, if not outright hostility, to any effort by the Commission to retract that material (and objectively correct) representation.

**4. Title II reclassification would be both needless and pointless.**

As we discussed in our opening comments and reiterate in Section I below, reclassification would be as needless as it would be harmful and unlawful. The Commission

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<sup>16</sup> Reply Brief for the Federal Petitioners, *National Cable & Telecommc’ns Ass’n v. Brand X Internet Servs.*, Nos. 04-277 & 04-281, at 5-6 n.2 (U.S. Sup. Ct. filed Mar. 18, 2005) (“*FCC Brand X Reply Brief*”) (attached as Exh. 1 to these reply comments).

<sup>17</sup> *National Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (“*Brand X*”).

retains full authority to accomplish the two core objectives of the *Broadband Plan*—spectrum allocation and universal service reform—and it also has authority to ensure transparency in the provision of broadband Internet access, as the *Comcast* decision itself confirms. And industry self-governance initiatives, together with the prospect of FTC or DoJ intervention if the need ever arises, are more than sufficient to safeguard “net neutrality” in the months leading up to likely congressional action. Title II reclassification would thus serve no purpose beyond (1) divesting the FTC of potential jurisdiction by placing broadband practices squarely within the FTC Act’s “common carrier exemption,”<sup>18</sup> (2) stalling the momentum for legislation, (3) triggering years of legal and regulatory uncertainty, and (4) distracting the Commission from the most important component of its broadband initiative: freeing up new spectrum for broadband Internet access. *See* AT&T Comments at 10-14, 19-27. No reclassification advocate offers any persuasive response to these concerns.

Finally, the proposed reclassification would not even support a core net neutrality rule that its supporters advocate: a ban on “paid prioritization” for performance-sensitive Internet traffic. Common carriers have long offered customers the option of paying extra for higher priority to shared transmission capacity. Decades of judicial and administrative precedent confirm that it is *not even* “discriminat[ory],” let alone “unreasonabl[y]” so,<sup>19</sup> for common carriers to offer such “priority tiering” services to customers who voluntarily agree to pay for them. For that and other reasons, the Commission should not “reclassify” broadband Internet access for the purpose of adopting a no-prioritization rule, because any such rule is as foreclosed under Title II as under Title I.

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<sup>18</sup> *See* 15 U.S.C. § 45(a)(2).

<sup>19</sup> 47 U.S.C. § 202.

## DISCUSSION

### I. THE COMMISSION SHOULD DEFER TO CONGRESS FOR A COMPREHENSIVE SOLUTION WHILE RELYING ON EXISTING AUTHORITY AND INDUSTRY SELF-REGULATION IN THE INTERIM.

#### A. Reclassification Is Unnecessary to Meet the Commission's Broadband Goals.

As stressed in our opening comments, the Commission can meet its ambitious broadband objectives only by reassuring investors that, despite the nation's economic turmoil, it makes economic sense to sink hundreds of billions of dollars in private risk capital into the deployment of broadband networks across the country. The Commission would thwart those objectives if it precipitously "reclassified" the industry under Title II.<sup>20</sup> Rather than trying to cram the broadband Internet into an ill-fitting service definition designed for 20th-century telephone networks, the Commission should work with Congress, the industry, and other stakeholders to tailor a rational policy framework for the new challenges of the 21st century. A broad cross-section of the industry—along with a majority of the combined membership of the House and Senate—agrees with that assessment.<sup>21</sup> And as the Commission is aware, Congress is actively considering legislation to bring the Communications Act up to date and fill any perceived regulatory gaps left by the *Comcast* decision.<sup>22</sup>

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<sup>20</sup> See AT&T Comments at 39-44 (discussing the investment community's reaction to the multiple levels of regulatory uncertainty posed by the "third way" proposal).

<sup>21</sup> See pp. 3-4, *supra*; Cisco Comments at 9; see also, e.g., Information Technology and Innovation Foundation Comments at 3; CTIA Comments at 34-35; TIA Comments at 31; Alcatel-Lucent Comments at 10; Verizon Comments at 26.

<sup>22</sup> Rahul Gaitonde, *Congress to Hold Closed Door Meetings on Communications Policy Issues*, June 22, 2010, <http://broadbandbreakfast.com/2010/06/congress-to-hold-closed-door-meetings-on-communications-policy-issues/> ("In order to gain more information on the communications policy issues which have come up as a result of recent FCC action regarding spectrum policy, broadband deployment and the authority of the FCC; the House and Senate will hold a set of staff led stakeholder sessions."); see Cisco Comments at 9 & nn.31-34 (listing bills).

No commenter has identified any exigency that could plausibly justify industry-destabilizing regulatory action by this Commission in the months leading up to legislation. In particular, no commenter has identified any “problem” that reclassification would be needed to address in the near term. To the contrary, the broadband Internet access marketplace is healthier, more competitive, and more innovative than ever.<sup>23</sup> And despite irresponsible fear-mongering by pro-regulation interest groups,<sup>24</sup> the *Comcast* decision did not trigger any rash of bad behavior. Instead, as illustrated by the development of the BITAG process,<sup>25</sup> the industry is more committed than ever to responsible self-governance. And the FTC has shown that it is ready and willing to oversee core net neutrality controversies.<sup>26</sup> This, together with the BITAG’s own oversight, is more than sufficient to allay net neutrality concerns pending new legislation.

The Commission also need not “reclassify” broadband Internet access services in order to achieve its main broadband objectives—spectrum allocation and broadband universal service support. *See* AT&T Comments at 21-27. First, no commenter even questions the Commission’s authority to reallocate more spectrum for broadband uses. To the contrary, many suggest that the

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<sup>23</sup> *See, e.g.*, CTIA Comments at 7-30; NCTA Comments at 25-27; USTA Comments at 1-26.

<sup>24</sup> *See, e.g.*, Free Press, Press Release, *FCC Leaves the Internet Unprotected: 21 Days and Counting*, Apr. 27, 2010, <http://www.freepress.net/press-release/2010/4/27/fcc-leaves-internet-unprotected-21-days-and-counting> (insisting that “the clock is ticking at the FCC” and that “Internet users [are] in jeopardy”).

<sup>25</sup> *Initial Plans for Broadband Internet Technical Advisory Group Announced* (June 9, 2010), <http://www.prnewswire.com/news-releases/initial-plans-for-broadband-internet-technical-advisory-group-announced-95950709.html>.

<sup>26</sup> *See, e.g.*, Comments of the Federal Trade Commission, *A National Broadband Plan for Our Future*, GN Docket 09-51, at 9 n.25 (filed Sept. 4, 2009) (“[T]he FTC and FCC have concurrent jurisdiction over the provision of broadband service. So that consumers can benefit from the FTC’s competition and consumer protection expertise, national broadband policies should preserve the FTC’s jurisdiction over broadband Internet access.”); FTC, *Staff Report: Broadband Connectivity Competition Policy*, at 38 (June 2007), <http://www.ftc.gov/reports/broadband/v070000report.pdf> (“[B]roadband Internet access services . . . are part of the larger economy subject to the FTC’s general competition and consumer protection authority[.]”).

Commission should be focusing its energy and political capital on spectrum-reallocation initiatives rather than this reclassification controversy.<sup>27</sup>

As to universal service, a wide cross-section of the industry—including wired and wireless ISPs, state commissions, over-the-top VoIP providers, equipment providers, and the CWA—agrees that the Commission can extend USF funding to broadband services without reclassifying those services under Title II.<sup>28</sup> As we have explained, that authority independently rests on two alternative grounds, *see* AT&T Comments at 22-27, and no commenter persuasively challenges either one.

First, the Commission’s authority to fund broadband rests on section 254 of the Communications Act itself, especially when read in connection with section 1 of the

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<sup>27</sup> *See* Consumer Electronics Association Comments at 1 (“CEA believes that while the robust and thorough discussion regarding the need or desire for broadband reclassification takes place, we must remember that spectrum is a key driver of broadband services and applications.”); Verizon Comments at 21 (“Title III of the Act gives the agency statutory authority over commercial spectrum, including the authority to allocate available spectrum for licensing to promote wireless broadband Internet service . . . [which is of] critical importance . . . moving forward[.]”); Cisco Comments at 8 (citing the fact that “[t]he Commission also retains authority to effectuate a great majority of the NBP’s spectrum-related recommendations” as a reason why the agency should not pursue reclassification); CTIA Comments at 89 (arguing that the Commission should focus its resources on stimulating investment in broadband deployment, and pointing to efforts to bring 500 MHz of broadband spectrum to market).

<sup>28</sup> *See, e.g.*, Public Utilities Commission of Ohio Comments at 5; Vonage Comments at ii, 6-7; Cablevision Comments at 35-36; Comcast Comments at 6-11; CTIA Comments at 49-53; Independent Telephone and Telecommunications Alliance Comments at 2-3, 13-16; NCTA Comments at 6, 38-42; Qwest Comments at 38-41; USTA Comments at 69-73; Cisco Comments at 8; CWA Comments, Exh. 2 at 1; Time Warner Cable Comments at 80; TIA Comments at 27-28; Verizon Comments at 21-23. Universal service reform legislation is also proceeding apace before Congress, which can eliminate any question about the Commission’s authority in this area. *See* John Eggerton, *Boucher/Terry Bill Would Clarify FCC Authority to Migrate USF to Broadband*, *Broadcasting & Cable*, July 22, 2010, [http://www.broadcastingcable.com/article/455107-Boucher\\_Terry\\_Bill\\_Would\\_Clarify\\_FCC\\_Authority\\_to\\_Migrate\\_USF\\_to\\_Broadband.php](http://www.broadcastingcable.com/article/455107-Boucher_Terry_Bill_Would_Clarify_FCC_Authority_to_Migrate_USF_to_Broadband.php).

Communications Act and section 706(b) of the Telecommunications Act of 1996.<sup>29</sup> Among all the commenters, only Free Press develops any sustained argument against this use of section 254. It argues that section 254(c)(1), which refers to universal service as “an evolving level of *telecommunications services*,” makes the Commission “vulnerable to the argument that Congress specifically described universal service as a ‘telecommunications service.’”<sup>30</sup> This narrow interpretation is not the best reading of section 254, let alone the only permissible reading.

To begin with, Free Press’s reading contradicts section 254(c)(1), which defines universal service as “evolving” and compels the FCC to “tak[e] into account advances in telecommunications *and information technologies and services*.” 47 U.S.C. § 254(c)(1) (emphasis added). *See* Cisco Comments at 8; NCTA Comments at 38. Free Press’s construction further contradicts section 254(b)(3), which provides that “[c]onsumers in all regions of the Nation, . . . should have access to telecommunications *and information services*, including interexchange services and *advanced telecommunications and information services*, that are reasonably comparable to those services provided in urban areas[.]” 47 U.S.C. § 254(b)(3) (emphasis added). It also conflicts with section 254(b)(2), which mandates that “[a]ccess to *advanced telecommunications and information services* should be provided in all regions of the

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<sup>29</sup> *See* NOI ¶ 37; Letter from Gary Phillips, AT&T, to Marlene H. Dortch, FCC, GN Docket Nos. 09-51, 09-47, & 09-137, WC Docket Nos. 05-337 & 03-109, Attach. (filed Jan. 29, 2010).

<sup>30</sup> Free Press Comments at 25 (quoting 47 U.S.C. § 254(c)(1)) (some emphasis omitted); *see also* Center for Media Justice, Consumers Union, Media Access Project, and New America Foundation Comments at 8 (“Public Interest Commenters Comments”). The Public Interest Commenters (at 8) also point to section 254(e), which states that “only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support.” 47 U.S.C. § 254(e). But this section is in tension with the other provisions of the statute as much as section 254(c), and the same arguments support a reading that harmonizes the different provisions.

Nation.” *Id.* § 254(b)(2) (emphasis added).<sup>31</sup> As we have explained, the Commission has broad discretion to reconcile the competing terms of section 254, and reading section 254 in conjunction with the universal service principles of section 1 and section 706 should remove any doubt about the scope of its authority.<sup>32</sup>

In any event, the Commission does not even need to rely on section 254 to extend USF funding to broadband, because section 706(b) plainly authorizes such funding on its own. Even Free Press concedes (at 133-34) that “section 706(b) likely does provide direct authority for the Commission” because it “commands the Commission directly to ‘take immediate action’ if it finds that advanced telecommunications capability is not being deployed in a reasonable and timely fashion.” Free Press’s main concern is that, “[b]y statute, the FCC must revisit that determination annually,” *id.*, and the Commission could therefore “only be assured that the policy would remain in effect for a year” at a time. *Id.* at 134.<sup>33</sup> While Free Press may find such

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<sup>31</sup> See AT&T Comments at 22-23; see also Cisco Comments at 8; NCTA Comments at 38. Although (as Free Press notes at 26-27) the Fifth Circuit found that the section 254(b) principles are not binding “statutory commands,” *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 421 (5th Cir. 1999), the Tenth Circuit disagreed, finding that the principles impose “mandatory dut[ies] on the FCC.” *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199-1200 (10th Cir. 2001). In the end, it does not matter whether these section 254(b) principles are mandatory or hortatory; either way, they reveal Congress’s support for an appropriately inclusive reading of section 254.

<sup>32</sup> See AT&T Comments at 24-25; see also Verizon Comments at 21-22; Comcast Comments at 10 (“The policies articulated in Section 1 of the Act and Section 706(a) of the 1996 Act properly guide the Commission’s exercise of authority under Section 254.”); TIA Comments at 28-29 (“[P]roviding universal service funding for broadband services would be consistent with the statutory directives expressly set forth in Section 254, as informed by Sections 1 and 706 of the Communications Act.”); see also *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1101-02 (D.C. Cir. 2009) (“Since the principles outlined [in § 254(b)] use vague, general language, courts have analyzed language in § 254(b) under *Chevron* step two. . . . We will uphold the agency’s interpretation as long as it is reasonable, . . . even if there may be other reasonable, or even more reasonable, views.”) (internal citations and quotation marks omitted).

<sup>33</sup> See also Public Knowledge Comments at 4 (the Commission would find its regulations “subject to new challenges once the Commission determined deployment of advanced telecommunications capability was again ‘timely’”).

congressionally mandated annual reviews inconvenient, that is hardly a basis for *the Commission* not to rely on section 706. The Commission already makes similar section 706 determinations on a yearly basis, and no one could plausibly object to a requirement that the Commission annually reexamine whether it is indeed necessary to continue spending the public’s money on particular programs.<sup>34</sup>

As we have discussed (AT&T Comments at 30-31), the Commission also has existing authority under section 257 to ensure *transparency* in the provision of broadband Internet access services, to the extent such intervention is needed to supplement market forces and FTC oversight. The D.C. Circuit all but confirmed that section 257 authority in its *Comcast* decision (*see* 600 F.3d at 659), and no commenter appears to contest it. Reclassification is thus no more necessary to pursue this objective than any other.

Nor do any of the other policy concerns expressed in the NOI—disabilities access, privacy, and cybersecurity—present any basis for reclassification. All three of these concerns implicate the practices of application and content providers as much as (if not more than) those of broadband providers, and they are thus generally best addressed by other federal agencies with broader jurisdiction over the full range of Internet-related industries. For example, the FTC is the primary government agency engaged today in overseeing Internet privacy. As Free Press concedes (at 86 n.253), Title II reclassification would presumably divest the FTC of any jurisdiction over broadband Internet access services by placing them clearly within the scope of the FTC’s “common carrier exemption.” 15 U.S.C. § 45(a)(2). And it would thereby splinter

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<sup>34</sup> Without elaboration, Free Press and Public Knowledge warn that the Commission’s authority to impose substantive rules under section 706 is “untested and risky” and that the Commission would need “to pursue this uncertain strategy for several years before getting any conclusive guidance from the courts as to whether that strategy is sustainable.” Free Press Comments at 131, 14; *see also* Public Knowledge Comments at 1. But that objection applies with much greater force to proposals for Title II reclassification.

privacy regulation into two artificially separate spheres: one governed by the FCC, and the other by the FTC.<sup>35</sup> That artificial dichotomy would leave consumers facing inconsistent and unpredictable requirements that turn on obscure regulatory classifications—hardly the pro-consumer solution one might expect from “consumer advocacy” groups.<sup>36</sup> In all events, the FTC’s *current* oversight initiatives, together with Congress’s efforts to further solidify and unify that oversight within the FTC,<sup>37</sup> undermine any argument that privacy interests could somehow justify Title II reclassification.

Cybersecurity concerns similarly fall within the jurisdiction of other agencies—in this case, various intelligence and national security agencies. Thus, any new involvement by the Commission would be neither necessary nor particularly useful; indeed, as we have explained, it could be affirmatively counterproductive.<sup>38</sup> And as recognized in pending legislation, a solution

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<sup>35</sup> See Free Press Comments at 86 n.253 (“[T]he privacy obligations for broadband service providers would be set by rule at the FCC, whereas the FTC would oversee protecting consumers in their use of websites and e-mail.”).

<sup>36</sup> See AT&T Comments at 34-37; see Verizon Comments at 25 (“Title II classification would do nothing to protect the privacy of consumer information obtained by innumerable websites and other content and application providers. Indeed, the Commission would accomplish little but to substitute itself for the FTC . . . and result in a patchwork approach to privacy that would increase customer confusion.”). See also Julia Angwin, *The Web’s New Gold Mine: Your Secrets*, Wall St. J., July 30, 2010, [http://online.wsj.com/article/NA\\_WSJ\\_PUB:SB10001424052748703940904575395073512989404.html](http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748703940904575395073512989404.html) (“[T]he nation’s 50 top websites on average installed 64 pieces of tracking technology onto the computers of visitors, usually with no warning. A dozen sites each installed more than a hundred.”).

<sup>37</sup> See Boucher/Stearns Privacy Bill, Staff Draft (rel. May 3, 2010), [http://www.boucher.house.gov/images/stories/Privacy\\_Draft\\_5-10.pdf](http://www.boucher.house.gov/images/stories/Privacy_Draft_5-10.pdf); Rush BEST PRACTICES Act of 2010, H.R. 5777, <http://thomas.loc.gov/cgi-bin/bdquery/z?c111:h.r.05777>.

<sup>38</sup> AT&T Comments at 37-39. For example, the latest malicious cybersecurity event, announced just two weeks ago, involved the theft of data from millions of users through an application that Android customers downloaded onto their phones from the Internet, which then sent their subscriber and phone identification information, text messages, and browsing history to a server whose domain is registered in China. Jared Newman, *Android App Data Theft: Advantage Apple?*, PCWorld, July 29, 2010, [http://www.pcworld.com/article/202165/android\\_app\\_data\\_theft\\_advantage\\_apple.html?tk=hp\\_new](http://www.pcworld.com/article/202165/android_app_data_theft_advantage_apple.html?tk=hp_new). The Commission would have no

to disabilities-access concerns must extend far beyond any Commission-regulated activity (no matter how broadly defined) to include the many diverse equipment manufacturers, software developers, and application and content providers whose cooperation is needed to keep the Internet ecosystem disabilities-friendly.<sup>39</sup>

In sum, while all of these policy concerns are important, none could plausibly justify the proposed Title II reclassification, and no commenter makes any plausible case to the contrary.

**B. Reclassification Would Not Support Any Ban on Paid Prioritization.**

The pro-regulation interest groups support reclassification mainly because they assume that it would support an extreme form of “net neutrality” regulation: a ban on paid prioritization for performance-sensitive applications and content. That assumption is false, and the Commission should not likewise proceed on the mistaken premise that Title II would authorize such a ban, because it would not.<sup>40</sup>

Section 202(a) prohibits “unjust or unreasonable discrimination” in the provision of Title II telecommunications services. 47 U.S.C. § 202(a). Under decades of common carrier precedent, it is not even “discriminatory,” much less “unreasonably” so, for the owner of a transmission resource to sell different tiers of service to different purchasers, even though buyers

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apparent authority to address such malicious applications under any interpretation of the Communications Act.

<sup>39</sup> See Equal Access to 21st Century Communications Act, S. 3304 (introduced May 4, 2010), <http://thomas.loc.gov/cgi-bin/query/z?c111:S.3304;>; see also Brian Hurh, *Congress Takes Action on Broadband Accessibility for the Disabled*, Broadband Law Advisor, May 25, 2010, <http://www.broadbandlawadvisor.com/2010/05/articles/accessibility-persons-with-dis/congress-takes-action-on-broadband-accessibility-for-the-disabled/>.

<sup>40</sup> We refer the Commission to our more detailed discussion of this issue in the net neutrality proceeding. See, e.g., Reply Comments of AT&T Inc., *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191 & WC Docket No. 07-52, at 29-34, 164-66 (filed Apr. 26, 2010) (“*AT&T Net Neutrality Reply Comments*”). To ensure a complete record, AT&T is contemporaneously filing in this docket its comments and reply comments in the net neutrality proceeding.

of the higher-tiered services receive greater priority than other users to the same shared resource.<sup>41</sup> Such arrangements are not “discriminatory” because, even though the purchasers of different service tiers are treated differently, they are by definition not buying “like” services and are by choice not similarly situated.<sup>42</sup> Thus, if Title II applied here, it would not prohibit Internet content providers from purchasing packet-prioritization or other QoS-enhancement services from broadband providers in order to ensure the proper performance of real-time high-definition video and other performance-sensitive content. Instead, Title II would entitle a content provider that has purchased such a service to complain, at most, that the seller (a broadband provider) has “unreasonabl[y] discriminat[ed]” against it under section 202(a) if the seller has sold the *same* service to another, similarly situated provider at a lower price.<sup>43</sup>

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<sup>41</sup> See *AT&T Net Neutrality Reply Comments* at 30-32 (discussing (1) the legacy special-priority services that telcos offer enterprise customers today as tariffed or otherwise commercially available Title II services, and the lack of any “discrimination” objection to them; and (2) judicial and administrative precedent concerning similar practices); see also *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1309 n.5 (D.C. Cir. 1991) (“‘Firm’ sales service is provided under rate schedules or contracts that expressly obligate the gas company to deliver specific volumes of gas within a given time period. . . . Firm service differs from ‘interruptible’ service which provides gas on a ‘when available’ basis and may be interrupted after notice to the subscriber.”) (citations omitted); *Fort Pierce Util. Auth. v. FERC*, 730 F.2d 778, 785-86 (D.C. Cir. 1984) (“Electric utilities often distinguish between ‘firm’ service, under which customers can demand power or transmission at any time, and ‘interruptible’ service, which the utility is entitled to shut off at any point when there is not enough excess capacity beyond that required to guarantee the needs of the utility’s firm customers.”).

<sup>42</sup> See, e.g., *Competitive Telecommc’ns Ass’n v. FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993) (“An inquiry into whether a carrier is discriminating in violation of § 202(a) involves a three-step inquiry: (1) whether the services are ‘like’; (2) if they are, whether there is a price difference between them; and (3) if there is, whether that difference is reasonable.”).

<sup>43</sup> Even Google’s Vint Cerf agrees as a policy matter that regulators should not prohibit such priority tiering under the guise of “net neutrality.” He recently remarked: “With regard to net neutrality, *the term has been vastly distorted*. Our concern has been with *anti-competitive behavior*. Our biggest concern[] is *not* that all packets be treated identically, and it’s *not* that you have to pay more for certain packets. It’s to ensure that there is a level playing field.” Jason Kincaid, *Google’s Top Innovators on the Cloud, Net Neutrality, and More*, TechCrunch, Apr. 12, 2010, <http://techcrunch.com/2010/04/12/googles-top-innovators-on-the-cloud-net-neutrality-and-more/> (emphasis added); see also Stacey Higginbotham, *Google on Net Neutrality, Its Fiber*

Quite apart from that point, if the Commission isolated and “reclassified” the last-mile transmission component of broadband Internet access services, as it has implausibly proposed to do (*see* Section II.B, *infra*), it would leave the remaining Title I ISP service outside the scope of any Title II authority. Yet that is where any breach of “net neutrality” principles would presumably occur. The Commission could not plug that hole by invoking its “ancillary” authority to impose Title II-type regulation on that Title I ISP service. The final sentence of 47 U.S.C. § 153(44) provides that a “telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services.” And that provision would preclude the Commission from trying to impose any broad “nondiscrimination” or other common-carrier-type rules on that non-Title II service. Although we have made this observation before, *see AT&T Net Neutrality Reply Comments* at 165-66, no advocate of reclassification offers any response.

In short, the Commission should not try to reclassify broadband Internet access service under Title II—and thereby throw the entire industry into turmoil—on the flawed assumption that reclassification would support a ban on paid prioritization, because any such ban would in fact be as inconsistent with Title II as it is with Title I.

## **II. TITLE II RECLASSIFICATION WOULD VIOLATE THE ACT BECAUSE BROADBAND INTERNET ACCESS SERVICE REMAINS AN INTEGRATED “INFORMATION SERVICE.”**

Reclassification would also be unlawful. Since the beginning of the *Computer II* regime, the Commission has always classified services into “basic” and “enhanced” categories on the

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*Buildout and Cloud*, GigaOm, Apr. 12, 2010, <http://gigaom.com/2010/04/12/google-on-net-neutrality-its-fiber-buildout-and-cloud/> (“Cerf reiterat[ed] that *Google isn’t calling for every packet to be treated the same*, but rather making sure the owners of the pipe don’t behave anticompetitively toward content flowing over their pipes. *Prioritizing the flow of information for legitimate network management means is fine, but blocking them to stifle competition isn’t.*”) (emphasis added).

basis of consumer perception, and in 1996, Congress ratified that consumer-oriented analysis in its definitions of “telecommunications service” and “information service.” *See* Section II.A, *infra*. Several key conclusions follow from that analysis, and each illustrates why reclassification would be unwise, unlawful, or both.

*First*, as discussed in Section II.B below, the relevant service in this proceeding—*i.e.*, what consumers understand they are being “offered” when they order broadband Internet access service—includes *end-to-end connectivity with the global Internet*, not a truncated last-mile transmission service that stops at a local switching facility or cable headend. *Second*, as discussed in Sections II.C and II.D below, that relevant service encompasses not only transmission, but a variety of enhanced functionalities that operate in tandem with transmission to form an integrated “offering.” Broadband Internet access is therefore every bit as much an integrated “information service” today as it was in 2002, 2005, or 2007, when the Commission made its Title I determinations for cable, wireline, and wireless broadband Internet access services, respectively.

*Third*, as discussed in Section II.E below, it makes no difference to a service’s classification how a provider obtains transmission inputs behind the scenes (*e.g.*, through ownership in fee simple, leasehold interests, or other wholesale arrangements). What matters is the retail service that the provider offers consumers by means of those inputs. The statutory classification analysis is therefore indifferent to whether (or to what extent) a given provider can be characterized as “facilities-based.” Thus, contrary to the erroneous claims of some commenters, “facilities ownership” would be unavailable as a limiting principle for containing the consequences of a reclassification decision for the broader Internet.

Before we address these issues, however, it is first necessary to rebut one particularly confused argument raised by several of the pro-regulation interest groups. As discussed in our opening comments, the Commission’s longstanding commitment to Internet unregulation has coincided with the proliferation of more and faster broadband offerings, plummeting consumer prices per unit of capacity, and the unparalleled success of the modern Internet. *See* AT&T Comments at 17, 52-55. Nonetheless, the advocates of greater regulation argue that, despite the Commission’s predictive judgments, “[f]acilities based competition has not developed,” and they cite that as a basis for reclassification. *E.g.*, Public Knowledge Comments at 26.

As we have previously explained, these assertions of competitive failure are both legally irrelevant and empirically false. *See, e.g.*, AT&T Comments at 69. They are irrelevant both because the statutory analysis does not turn on the level of competition in a market and because, in any event, the Commission could not sensibly encourage providers to invest more by promising to *increase* their regulatory burdens when they do. And they are false because, as the Commission’s own *Broadband Plan* confirms, facilities-based competition is strong and increasing. In particular, intermodal “competition appears to have induced broadband providers to invest in network upgrades”; “typical advertised download speeds to which consumers subscribe have grown at approximately 20% annually for the past 10 years”; and “[c]onsumers are benefiting from these investments” in particular and “from the presence of multiple providers” in general. *Broadband Plan* at 37-38; *see* AT&T Comments at 17, 52-55.<sup>44</sup>

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<sup>44</sup> According to the Commission’s own findings, roughly 92 percent of U.S. census tracts have *at least* two fixed terrestrial broadband services (*i.e.*, not including satellite and wireless broadband) and 89.5 percent of the population is served by at least two *mobile* broadband providers, and 76.1 percent is served by at least three. *See* AT&T Comments at 53-54 (citing Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2008*, at Tbl. 13 (Feb. 2010) (confirming that 91.9 percent of U.S. census tracts have at least two fixed broadband providers—specifically, aDSL, cable

As the *Broadband Plan* adds, moreover, “[n]ew choices—at new, higher speeds—are becoming available, as well,” as exemplified by Clearwire and other wireless broadband providers.<sup>45</sup> That fact creates a dilemma for the pro-regulation interest groups. On the one hand, they wish they could plausibly argue that, in Public Knowledge’s words, “consumers generally have the same choice between cable modem service and telco-provided access that they had in 2005.” Public Knowledge Comments at 26. On the other hand, they simultaneously wish to argue, as Public Knowledge does just a few pages later, that the Commission should inflict new regulations on wireless broadband Internet access services precisely because they are “designed to replace traditional wired offerings in the home” and “25 million people” use them already “for high-speed ‘full Internet access.’” *Id.* at 30 n.116, 32. But these pro-regulation interest groups cannot have it both ways. In fact, wireless broadband Internet access *is* the “third pipe” into the home (and the fourth, fifth, and sixth in many areas), and the resulting competition precludes any need for new regulation for *any* broadband Internet access platform.<sup>46</sup>

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modem, or FTTP services—and 57.2 percent have at least three), *and* Fourteenth Report, *Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, at 7 (rel. May 20, 2010)).

<sup>45</sup> E.g., News Release, *Clearwire Reports Strong Second Quarter 2010 Results* (Aug. 4, 2010), <http://investors.clearwire.com/phoenix.zhtml?c=198722&p=irol-newsArticle&id=1456458> (“As of today, Clearwire has more than one million wholesale subscribers and just under one million retail subscribers on the country’s first 4G network. By the end of 2010 we now expect to have approximately 3 million total subscribers, a significant increase from our previous guidance of just over 2 million subscribers . . . . The Company’s domestic 4G coverage reached approximately 56 million people as of June 30.”).

<sup>46</sup> Free Press claims that, no matter what the level of competition, regulation of the last mile would still be necessary because “a consumer will have at most one Internet service provider in his home at any given time, and switching costs are significant.” Free Press Comments at 82-83. Both halves of that sentence are empirically false. Any consumer with an Internet-enabled mobile device (such as a 3G-enabled iPad, an Android phone, or a laptop with a wireless card) in addition to a wired Internet connection has multiple “Internet service provider[s] in his home.” Just as important, switching costs turn out to be so low in practice that the annual churn rate for *fixed broadband Internet access alone* is approximately 30-35 percent. See AT&T Comments at 53.

Of course, there will never be an unlimited number of competing broadband Internet access networks for the simple reason that the investment required to build such networks is so risky and substantial. But that is precisely why it would be counterproductive, and inimical to the goals of the *National Broadband Plan*, to subject those who would make such high-risk investments to the further uncertainties and costs of legacy Title II regulation.

**A. The Statutory Classification Question Turns on the Consumer-Perspective Analysis Adopted in *Computer II*.**

At the highest level of generality, there are two relevant issues in determining whether any provider offers a “telecommunications service” subject to common carrier regulation under Title II. Several commenters, such as Public Knowledge and Data Foundry, put misplaced emphasis on the first of these (often referred to as the “*NARUC* analysis”): whether, with respect to a given service, a provider holds itself out as serving anyone in the eligible public (residential or commercial) that might be interested in purchasing its services on generally standardized terms.<sup>47</sup> Most mass market providers of retail broadband Internet access meet this criterion. But that does not make them Title II “telecommunications carriers” unless the service they offer, by its nature, falls within the category of a “telecommunications service” rather than an “information service.” *That* is the question the Commission answered in all of its classification orders over the past twelve years and the Supreme Court addressed in *Brand X*.

As to that question, the *Brand X* Court found that, since the origin of the *Computer II* rules in the late 1970s, the Commission has always “defined both basic and enhanced services by reference to *how the consumer perceives the service being offered.*” *Brand X*, 545 U.S. at 976

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<sup>47</sup> See, e.g., *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (“*NARUC I*”) (holding that, to be characterized as a common carrier, “one must hold oneself out indiscriminately to the clientele one is suited to serve”). A provider can be a common carrier even if it offers special customer-specific terms to win or retain business. See *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

(emphasis added). Congress reaffirmed that approach when it adopted the closely corresponding definitions of “telecommunications service” and “information service” in 1996, *see id.* at 977, and the Commission may not now abandon thirty-plus years of Commission precedent by rejecting this “consumer perception” analysis. Congress conformed the statutory definitions for “telecommunications service” and “information service” to that pre-1996 analysis by making them both turn on what a provider “offer[s]” consumers. 47 U.S.C. § 153(20), (46). As the Supreme Court has explained, “[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,” and “[i]t would, in fact, be odd” to construe that term any other way. *Brand X*, 545 U.S. at 990.

Contrary to what some commenters suggest, the Supreme Court did *not* hold that the statutory language was ambiguous *on this point*. Instead, the Court held that the Commission’s longstanding “consumer-perception” analysis so obviously comported with the statutory language that it was unnecessary to determine whether that language would support a contrary (“odd”) approach that departs from the “common usage” of that language.<sup>48</sup> The Court removed any doubt on that issue when it concluded: “*The entire question* is whether the products [contained in broadband Internet access service] 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 to resolve in the first instance.” *Id.* at 991 (emphasis added).

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<sup>48</sup> See *Brand X*, 545 U.S. at 990 (“*Even if* it is linguistically permissible to say that the car dealership ‘offers’ engines when it offers cars, that shows, *at most*, that the term ‘offer,’ when applied to a commercial transaction, is ambiguous about whether it describes only the offered finished product, or the product’s discrete components as well.”) (emphasis added).

To our knowledge, no commenter in this proceeding seriously argues that the Commission should reject the consumer-oriented definitional analysis in place since the inception of *Computer II*. But that does not stop a number of commenters from all but ignoring that standard when trying to explain how broadband Internet access could be or contain a Title II “telecommunications service.” For example, Free Press implies that a service’s classification somehow depends on whether its enhanced functionalities are *technologically indispensable* to the underlying transmissions. *See* Free Press Comments at 52-55. And on that basis, Free Press suggests that the various features consumers obtain when they purchase broadband Internet access—such as “e-mail, data storage, caching and DNS”—are irrelevant to the classification analysis because “successful data transmission does not depend on the network operator providing any of these services.” *Id.* at 53.<sup>49</sup>

Again, however, the question is not whether the enhanced features of a service are indispensable to transmission, but “what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product.” *Brand X*, 545 U.S. at 990. By analogy, mufflers and windows are integral parts of a car, and are not separately “offered” to consumers in the sale of a car, even though the car could be operated without them. Moreover, any shift to Free Press’s “technological indispensability” standard would not only

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<sup>49</sup> Public Knowledge similarly asserts that “[o]nly when a service is so linked to Internet access that it is *impossible to use the Internet without it* does it become part of the same ‘offer’ as Internet access.” Public Knowledge Comments at 17 (emphasis added). That formulation is incorrect for the same reasons as Free Press’s formulation. In any event, Public Knowledge concedes that “DNS *is* an essential component of Internet connectivity.” *Id.* at 19 (emphasis added and capitalization altered). And the Supreme Court and the Commission have both found that DNS is a sufficient basis for deeming broadband Internet access an integrated “information service.” *See, e.g., Brand X*, 545 U.S. at 999. Public Knowledge nonetheless claims (at 18) that those findings were “incorrect” and that “DNS is not an information service,” reasoning that DNS falls within the “telecommunications management” exception of 47 U.S.C. § 153(20). That is wrong for the reasons discussed in Section II.D below.

contradict the statutory language, but also trigger enormous unintended consequences, because the enhanced features of a great many integrated information services are technologically severable from their underlying transmissions.<sup>50</sup> In sum, there is no sensible or legally permissible alternative to the consumer-perception analysis embraced by the Commission in *Computer II* and reaffirmed by the Supreme Court in *Brand X*.

**B. There Is No “Internet Connectivity Service” Apart from Broadband Internet Access.**

For two reasons, the Commission cannot sensibly pursue its apparent proposal (NOI ¶ 65) to define a “broadband Internet connectivity service” on the basis of last-mile transmission services such as the one described in the NECA DSL tariff. First, as USTelecom explains, few if any retail consumers purchase that service, which is designed instead as a wholesale service sold to ISPs. USTA Comments at 60. Second, the service described in the NECA tariff does not itself connect anyone to the Internet. *See* AT&T Comments at 64-66; ATIS Comments at 10-12; NECA Comments at 6.<sup>51</sup>

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<sup>50</sup> *See, e.g.*, AT&T Comments at 96-101, 107-09; *see also Stevens Report*, 13 FCC Rcd at 11529 ¶ 57 (finding that if the Commission “interpreted the statute as breaking down the distinction between information services and telecommunications services, so that some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category”).

<sup>51</sup> For present purposes, that service is indistinguishable from the service addressed in Memorandum Opinion and Order, *GTE Telephone Operating Cos.*, 13 FCC Rcd 22466, 22466 ¶ 1 (1998), which “permit[ted] Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet.” In 1998, the Commission deemed that service jurisdictionally interstate because, like almost any other special access service, it was an input for retail interstate communications services. *See id.* at 22479-80 ¶¶ 23, 25 (describing and adopting GTE’s argument that “its ADSL service is properly tariffed at the federal level on the ground that it [is] similar to existing special access services that are subject to federal regulation under the mixed-use facilities rule because more than ten percent of the traffic is interstate”). That *jurisdictional* analysis, which focuses on the behind-the-scenes uses of wholesale transmission inputs, has no bearing on the *statutory classification* analysis at issue here, which focuses instead on the consumer’s perception of the finished service.

The service described in the NECA DSL tariff provides fixed connectivity between an end user's premises and a local point of interconnection with an ISP's network. As ATIS explains, however, "the offering in the NECA tariff does not include routing or transport capabilities that would enable the user's data to be carried past [that interconnection point], out onto the Internet, and to other users' computers." ATIS Comments at 11. It therefore "does not qualify as 'Internet connectivity'" and is "very different from the [service] that the Commission appears to have in mind" when it uses that term in the NOI. *Id.* More generally, no "'Internet connectivity' can occur without 'Internet access,'" in the form of higher-layer data-processing functionality, and the NOI's contrary suggestion serves only to "inject confusion into this discussion." *Id.* at 6.

Just as important, the NECA DSL tariff does not describe what consumers understand they obtain when they order broadband access to the Internet. They do not buy, or perceive that they are offered, a raw transmission functionality that stops at a nearby central office. Instead, they sign up with ISPs to receive, among other features, *end-to-end communications with all points on the Internet.*<sup>52</sup> And consumers expect ISPs to arrange for such end-to-end connectivity even though ISPs typically have to "outsource" many of those transmission functions to other providers—*e.g.*, through facility leases and peering and transit arrangements with Internet backbone providers. *See* AT&T Comments at 58-62. Analogously, someone who purchases long-distance telephone service expects his interexchange carrier to provide end-to-end connectivity with everyone else on the PSTN outside his local calling area, even though that IXC

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<sup>52</sup> *See* AT&T Comments at 58-62; Letter from Jack S. Zinman, AT&T, to Marlene Dortch, FCC, WC Docket No. 07-52, at 1 (filed June 11, 2010) (attached as Exh. 2 to these reply comments) (providing charts addressing "the physical and logical dimensions of the 'Internet connectivity service' that the Commission has reportedly identified in the NOI").

will likely have to purchase exchange access from the called party's local exchange carrier and sometimes from the originating LEC as well.

Even Free Press acknowledges that any meaningful definition of “Internet connectivity service” must include the “transmi[ssion of] data from *end to end over the Internet*, the international computer network of both federal and non-federal interoperable packet-switched networks. At a minimum, that service includes the sending, receiving, addressing, routing, scheduling, or queuing of data packets *from one end point of a user's choosing to another on the Internet.*” Free Press Comments at 49 (emphasis added).<sup>53</sup> This proposal vividly highlights exactly what Title II reclassification would accomplish: *regulation of the Internet itself*. Public Knowledge likewise does not shy away from encouraging outright Internet regulation. In fact, it urges the Commission to undertake Title II reclassification precisely so that it may impose “interconnect[ion]” obligations on Internet backbone providers, arbitrate Internet “peering dispute[s],” and superintend “the migration to IPv6.” Public Knowledge Comments at v, 27; *see also id.* at 43 (calling for FCC supervision of the IPv6 transition); *id.* at 45 (further elaborating on its call for FCC supervision of peering arrangements). Again, all of these approaches would constitute regulation of “the Internet” under any conceivable definition of that term—and would also be unlawful for the reasons discussed below.

CDT tries out yet another definition of an “Internet connectivity service”: a “retail service that enables a customer to send and receive Internet Protocol communications to and

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<sup>53</sup> Cablevision notes that, in important respects, end users do not “choos[e]” which end points they communicate with on the Internet, and that their ISPs and other Internet providers select many different servers (and end points) that those end users ultimately communicate with, even in the transmission of a single web page. Cablevision Comments at 6-11. That process, Cablevision concludes (at 6, 9-10), makes it untenable to characterize any Internet transmission as “telecommunications,” which, by definition, requires “transmission[] between or among points specified *by the user.*” 47 U.S.C. § 153(43) (emphasis added).

from Internet endpoints of the customer's choosing" by "assigning an Internet Protocol address" to the customer's devices and "providing the customer with the means for Internet Protocol communications . . . between the customer's device and one or more interconnection or peering points that enable further routing, directly or indirectly, to the Internet." CDT Comments at 13. This definition is misconceived in several respects. To begin with, CDT disserves its own avowed purpose "to cabin the definition . . . to entities that provide last-mile connections to retail subscribers." In particular, there is no such thing as "peering points that enable further routing . . . to the Internet," *id.* (emphasis added), because "peering points" are, by definition, where backbone and other IP networks interconnect and are thus *already in the middle of the Internet*. Yet that is where CDT would extend Title II regulation. At the same time, however, CDT's proposed definition would exclude any DSL transmission service such as the one described in the NECA tariff, because that service is rarely (if ever) provided on a "retail" basis, and the telco providers of that service do not "assign[] an Internet Protocol address" to any ISP purchaser, let alone any end user; ISPs do that instead. *See* AT&T Comments at 64-66.

More fundamentally, CDT's approach is untenable because the "service" CDT defines does not describe any actual retail service that anyone obtains. Like the other pro-regulation interest-group commenters, CDT illogically conflates retail and wholesale services throughout its discussion of this definitional issue. Behind the scenes, different wholesale providers do supply the various transmission components needed to reach distant Internet sites. Again, however, the question is what a consumer perceives he or she receives when purchasing a retail service. And retail customers expect their ISPs to provide them with seamless connectivity to all sites on the Internet, not to intermediate points that, like CDT's mythical "retail" service, stop short of those

sites. Consumers do not purchase one retail IP-enabled service to get them part of the way to their Internet destinations and another to carry them the rest of the way.

Ultimately, none of these pro-regulation interest groups is clear about how it conceptualizes the mechanics of Title II reclassification, and some commenters—such as DISH and XO—indicate that they simply have no idea how to define the “connectivity” service they wish to see regulated; they just want “it” regulated. *See* p. 8, *supra*. What *is* clear is that the Commission cannot achieve its regulatory objectives by arbitrarily isolating the last-mile transmission component of end-to-end Internet communications, because no one views that even as “Internet connectivity,” let alone as a severable component of any service consumers actually purchase. Finally, for the reasons discussed in our opening comments, the Commission could not lawfully sidestep that impediment to Title II reclassification by trying to revive the *Computer Inquiry* rules or otherwise force broadband Internet access providers to offer a standalone transmission service on a common carrier basis—steps the Commission has assured the industry it has no intention of taking anyway. *See* AT&T Comments at 102-06.

**C. No Less Than in 2002, 2005, or 2007, Providers Offer Integrated Enhanced Features with Broadband Internet Access Service.**

When consumers purchase broadband Internet access service, they expect to receive not only raw transmission to all points on the Internet, but an inextricable combination of enhanced features that include (among other things) DNS look-up, other DNS functionalities, unique programming content (such as ESPN3.com), email, data storage, parental controls, and user-specific security protections. *See* AT&T Comments at 71-78, 84-90. In findings affirmed by the Third Circuit and the Supreme Court, the Commission has so found, and those findings are all the more inescapable now, with the emergence of ISP-provided, customer-specific cybersecurity measures. *See id.* at 67-70, 76-78, 88-90. As we have explained, moreover, the marketing

practices of AT&T and other providers confirm the integration of these and other “smart” features into broadband Internet access service and the importance that consumers attribute to them.<sup>54</sup>

Although Public Knowledge attaches marketing materials to its comments too in the hope of showing that consumers focus exclusively on throughput speeds, even those materials, hand-picked by Public Knowledge, prove *our* point by confirming the importance of enhanced functionality in the marketplace. For example, Public Knowledge’s exhibits<sup>55</sup> reveal that—

- Comcast entices consumers not only with high speeds, but also with the use of “seven e-mail accounts, each with 10GB of storage,” user-specific security features “at no additional charge,” and access to exclusive sports-related content on “ESPN3.com.”<sup>56</sup>
- Charter offers 10 “[e]mail accounts” per account with “1GB” of “storage” apiece, along with “Charter Security Suite” and content on “ESPN3.com.”
- Cavalier offers “3 email addresses” per account, “[o]ver 7000 MB available email storage,” “FREE Net Guardian Security Suite” (including protection “from viruses, spam and pop-ups”), “FREE Net Medic” (“[s]elf-diagnose and repair problems with your internet connection and email”), and “exclusive web content FREE,” including Disney Connections (“videos, games and fun, family-friendly activities”), Soapnet, ESPN360, and ABC NewsNow.
- AT&T’s “smartphone services” include “Parental Controls” and “Xpress Mail,” which “lets you access wireless email on a number of different devices.”<sup>57</sup>

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<sup>54</sup> See *id.* at 74-75 (citing marketing materials); Verizon Comments, Attach. A (following declaration); Comcast Comments, Appx. A.

<sup>55</sup> Each of the following is contained in Public Knowledge’s comments at Appendices A and B. The screenshots Public Knowledge chose for those appendices, however, are hardly representative. Navigation to other web pages on the relevant providers’ websites will reveal even greater emphasis on enhanced features. See, e.g., AT&T Comments at 74-75 (quoting from AT&T website); Verizon Comments, Attach. A (following declaration); Comcast Comments, Appx. A.

<sup>56</sup> ESPN3.com, formerly known as ESPN360, is a limited-access website containing exclusive content that Disney sells to some ISPs. Only end users who subscribe to an ISP that has entered into such a commercial agreement with Disney can gain access to this exclusive content. See Comments of AT&T Inc., *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191 & WC Docket No. 07-52, at 32-33, 129 (filed Jan. 14, 2010) (“AT&T Net Neutrality Comments”); AT&T Comments at 76.

All of these features inarguably meet the definition of “information services,” and as these advertisements confirm, each is included within the integrated service offering that consumers purchase when they order the corresponding broadband Internet access service.

Even Public Knowledge ultimately acknowledges that “email and other services may be part of the same ‘offer’ in the common use of the term.” Public Knowledge Comments at 18 n.72. Public Knowledge nonetheless contends that they are “not part of the *offer of Internet access.*” *Id.* This makes little sense. Consumers receive—and expect to receive—all of these advertised features as part of the same integrated offering, and both they and ISPs refer to that offering as “broadband Internet access service.” That is the only relevant issue in determining what consumers are offered.

**D. By Itself, the Role of DNS Warrants Characterizing Broadband Internet Access As an Integrated Information Service.**

Although Public Knowledge claims (inaccurately) that email and the other enhanced features of broadband Internet access service are somehow severable from the transmission component of that service, even it acknowledges that “DNS is an essential component of Internet connectivity,” *id.* at 19 (capitalization altered), in that consumer navigation of the Internet without DNS would be practically impossible. This poses a conundrum for the pro-regulation interest groups, because the Supreme Court and the Commission have both found that DNS is a sufficient basis for deeming broadband Internet access an integrated “information service.” *See, e.g., Brand X*, 545 U.S. at 999-1000; *see generally* AT&T Comments at 71-73.

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<sup>57</sup> As discussed in Section IV below, the wireless broadband Internet access service offered by AT&T and others offers yet another integrated feature: conversion of HTML content from the general Internet into the format (WAP) necessary for viewing on certain wireless handsets. By itself, this fundamental “change in the form . . . of the information as sent and received” (47 U.S.C. § 153(43)) removes that wireless service from the definition of “telecommunications” and places it squarely within the definition of “information service.”

Public Knowledge and similar groups thus resort to arguing that those findings were “incorrect” and that “DNS is not an information service.” Public Knowledge Comments at 18. This is untenable. DNS combines a “distributed database” with “an application-layer protocol”<sup>58</sup> and therefore exemplifies (for example) the classic “storing,” “transforming,” “processing,” “retrieving,” and “utilizing” of information described in the statutory definition of “information service.” 47 U.S.C. § 153(20). Overseen by the Internet Corporation for Assigned Names and Numbers (“ICANN”), DNS also lies at the very core of anyone’s definition of “the Internet.”<sup>59</sup> Nonetheless, the pro-regulation interest groups contend that DNS merely “facilitates the operation and management of the network” and thus falls within the “telecommunications management” exception of 47 U.S.C. § 153(20). Free Press Comments at 117-18; *see also* Public Knowledge Comments at 19-23. There are three problems with this argument: it is wrong; the Commission has already explicitly said that it is wrong in a formal representation to the Supreme Court; and the Supreme Court thereafter ruled in favor of the Commission.

**1. Even As an Original Matter, DNS Does Not Fall Within the Telecommunications-Management Exception.**

In their efforts to shoehorn DNS functions into the “telecommunications management” exception, the pro-regulation interest groups all misconceive how even the most basic DNS look-up function operates, and further overlook the still more sophisticated DNS functions discussed in our opening comments (at 87-88). As its name implies, the “telecommunications management” exception was enacted to address the SS7 signaling system and similar computerized features internal to traditional telephone networks. For example, the SS7 system is

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<sup>58</sup> James F. Kurose & Keith W. Ross, *Computer Networking: A Top-Down Approach* 133 (5th ed. 2010) (“Kurose & Ross”).

<sup>59</sup> *See, e.g.*, National Academy of Sciences, *Signposts in Cyberspace: The Domain Name System and Internet Navigation* 25 (2005), <http://www.nap.edu/catalog/11258.html> (“Signposts in Cyberspace”); *see also* AT&T Comments at 52.

indeed designed to “facilitate[] the operation and management of the network” in that it enables *the telephone company* to prescribe, for *its own benefit*, a clear dedicated path for any given call through the company’s network, all without user interaction.

The DNS look-up function provided with any broadband Internet access service performs an entirely different, non-“management” role. When an end user types a domain name into her browser and sends a DNS query to an ISP, the ISP does not, in the course of answering that query, set up any type of path for the subsequent data session. Instead, throughout a complex multi-step process, the ISP interacts with other DNS servers and converts the human-language domain name into a numerical IP address, and it then conveys that information back to the end user (more specifically, the end user’s browser, in the case of web applications).<sup>60</sup> Equipped with this new information, the *end user* (via his browser) thereafter sends a follow-up request for the Internet resources located at that numerical IP address.<sup>61</sup>

Little or nothing in this DNS look-up process is designed to help a provider “manage” its network; instead, DNS look-up functionalities provide stored information to *end users* to help *them* navigate the Internet. That fact alone is fatal to the interest groups’ efforts to shove DNS into the “telecommunications management” exception within the definition of “information service.” And for similar reasons discussed in our opening comments (at 86-88), that fact also undermines the interest groups’ related efforts to fit DNS into the “adjunct-to-basic” doctrine,

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<sup>60</sup> *Kurose & Ross* at 133; *Signposts in Cyberspace* at 25, Fig. 1, 81, Fig. 3.1. “Address translation” functions of this type have always been considered “information services.” See *Stevens Report*, 13 FCC Rcd at 11536-37 ¶ 75 & n.147 (“[T]he functions and services associated with Internet access were classed as ‘information services’ under the MFJ. Under that decree, the provision of gateways (involving address translation, protocol conversion, billing management, and the provision of introductory information content) to information services fell squarely within the ‘information services’ definition.”) (citing MFJ orders).

<sup>61</sup> *Kurose & Ross* at 133. The routing decisions for that request are then made for each individual packet by each individual router from source to destination on the basis of constantly updated “routing tables.”

which the Commission has suggested is coterminous with the “telecommunications management” exception.<sup>62</sup> Of course, the *statutory* “telecommunications management” exception is now controlling law, not the *nonstatutory*, pre-1996 Act “adjunct-to-basic” doctrine.

By its terms, the “telecommunications management” exception addresses only functions a telecommunications carrier undertakes to “manage” (or “operate” or “control”) its own network. *See* 47 U.S.C. § 153(20). It would make no sense to speak of an end user “managing” (or “operating” or “controlling”) a commercial IP network; those are terms that describe what the network’s owner does, not its customers. The Commission has thus properly refused to apply the “telecommunications management” (or adjunct-to-basic) exception to the provision of “information that is *useful to end users, rather than carriers.*”<sup>63</sup> DNS look-up thus falls outside that exception (and within the definition of “information service”) because it is designed for the convenience of end users, not ISPs. *See* AT&T Comments at 86 & n.146. Indeed, were it otherwise, there would be no niche third-party providers of DNS services, such as OpenDNS.com, that hold themselves out to end users as alternatives to ISP-provided DNS services. Those third-party providers exist precisely because DNS services associated with Internet access are designed to aid end users, not to “manage” the ISP’s own network.

Similarly, those third-party providers exist precisely because DNS services are multifaceted and complex.<sup>64</sup> As we have explained, DNS services encompass both conventional

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<sup>62</sup> First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, 11 FCC Rcd 21905, 21958 ¶ 107 (1996).

<sup>63</sup> Memorandum Opinion and Order, *Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, Bell Operating Companies*, 13 FCC Rcd 2627, 2639 ¶ 18 (Com. Carr. Bur. 1998) (emphasis added) (“1998 272 Forbearance Order”); *see* AT&T Comments at 86-87 & n.146.

<sup>64</sup> Public Knowledge claims (at 20) that DNS functions are “part of plain vanilla, no-frills ‘Internet connectivity.’” That is both false (for the reasons discussed in the text) and legally

DNS look-up functionality as well as a wide range of other “smart” features. *See* AT&T

Comments at 87. The latter include:

- ***Reverse DNS look-up***, which enables a user to access stored information to convert a numeric IP address into a domain name. “The most common uses of the reverse DNS” include, among several others, an “e-mail anti-spam technique”—“checking the domain names in the rDNS to see if they are likely from dialup users, dynamically assigned addresses, or other inexpensive internet services”—and a “Forward Confirmed reverse DNS (FCrDNS) verification,” which, for authentication purposes, can “show[] a valid relationship between the owner of a domain name and the owner of the server that has been given an IP address.”<sup>65</sup> As discussed in our opening comments, these functionalities are analogous to (though far more sophisticated than) “reverse directory assistance” service in the POTS environment, which the Commission has long held to be an information service. *See* AT&T Comments at 87-88.
- ***DNS “error page assist” and “redirect,”*** which, through various means, help an end user find the Internet resource the ISP concludes she is most likely to want to reach when she types a URL that does not properly identify an accessible web page. *See* AT&T Comments at 87.
- ***“DNS sinkhole,”*** which involves “redirect[ing] specific IP network traffic for different security reasons including analysis, diversion of attacks and detection of anomalous activities,” and “has long been deployed by Tier-1 ISP’s globally usually to protect their downstream customers.”<sup>66</sup>

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irrelevant. The statutory definitions classify services according to whether they contain integrated data-processing or storage-and-retrieval functions, and these do. That is as true of “regular” DNS look-up as of the other DNS functionalities discussed here.

<sup>65</sup> *See* Wikipedia, Reverse DNS lookup, [http://en.wikipedia.org/wiki/Reverse\\_DNS\\_lookup](http://en.wikipedia.org/wiki/Reverse_DNS_lookup) (last visited August 11, 2010); Comcast, Customer Central, <http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=PTR> (discussing how Comcast uses reverse DNS lookup to combat spam). End users can obtain reverse DNS look-ups from their ISPs simply by using the look-up command available from the operating system installed on their computers. *See* Wikipedia, nslookup, <http://en.wikipedia.org/wiki/Nslookup> (last visited August 11, 2010); NSLookup Command, *The Living Internet*, [http://www.livinginternet.com/i/ia\\_tools\\_nslookup.htm](http://www.livinginternet.com/i/ia_tools_nslookup.htm) (“You can use the Name Server Lookup (NSLOOKUP) command to query the Domain Name Service for information about domain names and IP addresses. If you enter a domain name, you get back the IP address to which it corresponds, and if you enter an IP number, then you get back the domain name to which it corresponds.”).

<sup>66</sup> Ajit Gaddam, *Sinkholes in Network security: 5 easy steps to deploy a darknet*, AskStudent, Oct. 24, 2006, <http://www.askstudent.com/security/sinkholes-in-network-security-5-easy-steps-to-deploy-a-darknet/>.

- **DNSSEC**, an emerging security technology that “utiliz[es] the powers of recursion and cryptography” to give Internet users “a much higher degree of trust in the hierarchical Domain Name System” by “foreclos[ing] attacks at the domain name-to-IP address stage of requesting a web page.”<sup>67</sup>
- **DNS IPv6 transition aids**. As conventional IPv4 addresses approach exhaustion, the entire Internet industry is transitioning rapidly to IPv6, the successor addressing scheme. During this transition, many end-user devices (“clients”) will choose an IPv6 path in communicating with web servers even though they are not fully IPv6-enabled and will generate “broken IPv6 links due to problematic default behavior and incompatibilities in operating systems, home gateways and customer premises equipment.”<sup>68</sup> This often results in user frustration. ISPs will help solve this problem—and thereby protect users’ interests—by using IPv6 addresses only for certified (“whitelisted”) IPv6 clients and corresponding IPv4 addresses for all non-certified clients.<sup>69</sup>

All of these DNS functions involve data-processing or data-storage; all are thus classic information-service functionalities; and all fall outside the “telecommunications management” exception because they are designed primarily to aid end users rather than manage any network. Tellingly, no pro-regulation interest group even mentions them.

Some of those groups do still argue that the availability of commercial alternatives to DNS is itself a reason to conclude that consumers view DNS as somehow segregable from “the rest” of broadband Internet access services. *See* Free Press Comments at 118. The relevant question, however, is not whether a handful of unusually tech-savvy subscribers *could* use an alternative DNS service, but whether consumers perceive DNS as a functionally integrated part of the service that ISPs actually offer. They plainly do, no less today than in 2002, 2005, or

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<sup>67</sup> Steve Schultze, *A Major Internet Milestone: DNSSEC and SSL*, Freedom to Tinker, Aug. 2, 2010, <http://freedom-to-tinker.com/blog/sjs/major-internet-milestone-dnssec-and-ssl>. *See generally* RFCs 4033, 4034, 4035 (available at <http://www.rfc-editor.org>).

<sup>68</sup> Carolyn Duffy Marsan, *Google, Microsoft, Netflix in talks to create shared list of IPv6 users*, NetworkWorld, Mar. 26, 2010, <http://www.networkworld.com/news/2010/032610-dns-ipv6-whitelist.html?hpg1=bn>. *See generally* Erik Kline (Google), IPv6 Whitelist Operations, [https://docs.google.com/present/view?id=dg356446\\_14fds9jxd2](https://docs.google.com/present/view?id=dg356446_14fds9jxd2).

<sup>69</sup> *See* Igor Gashinsky, *IPv6 & recursive resolvers: How do we make the transition less painful?*, IETF 77 (Mar. 24, 2010), <http://www.ietf.org/proceedings/10mar/slides/dnsop-7.pdf>.

2007. Virtually all end users make use of their ISP’s DNS services, and virtually all of them would be upset and baffled if their ISPs suddenly stopped providing those services and forced them to find alternative DNS providers elsewhere on the Internet or to rely solely on numeric IP addresses in navigating the Internet.<sup>70</sup>

In any event, the availability of third-party alternatives to an ISP’s enhanced functionalities is irrelevant to the classification question even where (unlike here) many consumers know about them.<sup>71</sup> As Time Warner Cable explains by analogy, “[a]utomakers plainly ‘offer’ customers an integrated vehicle despite the fact that various other companies choose to sell discrete auto parts directly to the public. Ford is not reduced to ‘offering’ something more granular than a car (*e.g.*, a muffler) simply because Midas, too, sells mufflers.” Time Warner Cable Comments at 26.

## **2. The Commission and Supreme Court Have Already Resolved This DNS Issue Against the Pro-Regulation Interest Groups.**

The Commission is hardly writing on a blank slate here. In *Brand X*, the Commission argued that DNS—by itself—would suffice to make broadband Internet access a unified “information service,” and the Supreme Court agreed (*see* 545 U.S. at 999-1000). And in making that point, the Commission explicitly rejected a central argument by MCI and EarthLink

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<sup>70</sup> Depending on the circumstances, such third-party DNS offerings may well be inferior to DNS functionalities integrated in an ISP’s own network. First, end users relying on such offerings likely experience extra latency because their DNS queries must generally traverse more “hops” to reach a DNS resolver outside the ISP’s network. Second, content providers often deliver content to end users from one of many cache servers geographically dispersed across the Internet, which the content provider may select based on its proximity to the DNS resolver used by the end user. If an end user selects a third-party DNS provider with a remote resolver, the content provider may select a suboptimal cache server from which to deliver content to that end user, potentially degrading performance.

<sup>71</sup> Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4828 ¶ 51 (2002), *aff’d Brand X*, 545 U.S. 967 (intermediate history omitted).

that DNS was somehow inconsequential because it fell into the “telecommunications management” exception of 47 U.S.C. § 153(20)—the precise argument that the proponents of Title II regulation offer here as a basis for reclassification.

In particular, the Commission explained in its *Brand X* reply brief:

The Act’s definition of “information service” excludes “any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. 153(20). Respondents are correct that use of what EarthLink terms “incidental information management components” in providing traditional telephone service does not convert ordinary telephone service into an information service. See EarthLink Br. 16 n.4, MCI Br. 22-23. *But information-processing capabilities such as the DNS and caching are not used “for the management, control, or operation” of a telecommunications network, but instead are used to facilitate the information retrieval capabilities that are inherent in Internet access. Their use accordingly does not fall within the statutory exclusion.*

*FCC Brand X Reply Brief* at 5-6 n.2 (emphasis added). Again, the Commission was correct on this point. Although Justice Scalia’s dissent (mistakenly) sided with MCI and EarthLink on the “telecommunications management” issue, *see Brand X*, 545 U.S. at 1013, the majority sided with the Commission, concluding that DNS, like caching, is a sufficient basis for concluding that “the service that Internet access providers offer to members of the public is Internet access, not a transparent ability (from the end user’s perspective) to transmit information.” *Id.* at 999-1000 (internal citation and quotation marks omitted); *see also id.* at 1000 n.3.

In briefing this issue, the Commission’s appellate counsel were not merely reporting on some discretionary policy choice the Commission had made and defending its “reasonableness.” Instead, the Commission’s Acting General Counsel was making an extremely narrow and fact-specific (yet highly consequential) representation to the Supreme Court on whether a particular service falls within the “telecommunications management” exception. Having made that representation and secured victory in the Supreme Court, the Commission may not now simply repudiate its own representation. A reviewing court would view this for what it is: a patently

unreasonable about-face occasioned not by an honest reappraisal of this issue, but by the Commission's desire to assume regulatory powers that Congress has not given it. Indeed, as Verizon argues, a reviewing court could and should conclude that the doctrine of judicial estoppel precludes such gamesmanship.<sup>72</sup>

To be clear, we have no reason to believe that the Commission has any inclination to adopt this approach, because the Commission apparently believes that it can achieve Title II reclassification through a different path: (1) defining a nonexistent "service" ("broadband Internet connectivity") that excludes DNS and the other enhanced functionalities that consumers receive when they purchase broadband Internet access service, (2) subjecting *that* contrived "service" to Title II reclassification, and then (3) invoking its Title I "ancillary" authority to impose common-carrier-type rules on DNS and the other enhanced functionalities of broadband Internet access. Again, however, that path is independently foreclosed (1) for the reasons discussed in Section II.B above and in our opening comments (*e.g.*, at 62-66, 102-06), and (2) because the last sentence of 47 U.S.C. § 153(44) independently precludes the Commission from invoking "ancillary" authority to apply common-carrier-type rules to Title I information services. *See* p. 22, *supra*; *AT&T Net Neutrality Comments* at 210-11 (refiled in this docket); *AT&T Net Neutrality Reply Comments* at 165-66 (same).

**E. "Facilities Ownership" Is Not an Available Limiting Principle for Containing the Damage Any Reclassification Decision Would Do to the Broader Internet.**

As we have previously explained, the logic of any reclassification decision would extend Title II regulation to an unpredictably broad variety of other providers in the Internet ecosystem. The most obvious casualties would include "alternative" Internet service providers such as

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<sup>72</sup> Verizon Comments at 39-41 (citing *Comcast*, 600 F.3d at 647; *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953)).

EarthLink, Amazon.com and Barnes & Noble (which bundle a web browser and wireless Internet access into the purchase price of their respective eReaders), and Garmin and TomTom (which bundle web search capabilities into their advanced GPS devices). *See* AT&T Comments at 97-101. The logic of reclassification would likely also extend to any company—such as VoIP providers, content delivery networks, and Internet backbone providers—that broadly offers to arrange for the transport of data through the Internet. *See id.* at 55-58, 107-09. These concerns are hardly new. In *Brand X*, the Supreme Court echoed similar concerns in response to arguments by EarthLink and MCI that any information service offered via telecommunications contains a “telecommunications service,” and cited the logical consequences of that position as a reason for rejecting it. *See* 545 U.S. at 994, 996-97.

Free Press criticizes broadband ISPs for pointing out these logical consequences, but in the process it merely reveals its own confusion on the issue. One key example lies in Free Press’s unavailing efforts to avoid the policy consequences that the Supreme Court pointed out in *Brand X* by invoking “facilities ownership” as a supposed limiting principle. Under Free Press’s view of this statutory scheme, “[a] *facilities-based* provider offering an enhanced service always offers a basic service and an enhanced service,” but a “non-facilities-based” provider presumably does not. Free Press Comments at 80 (emphasis added). For at least two reasons, invocation of this “facilities ownership” qualifier would do nothing to prevent Title II reclassification from infecting broad swaths of the Internet ecosystem: facilities ownership is legally irrelevant to the statutory classification of a service, and many providers that Free Press presumably wishes to exempt from Title II regulation are in fact “facilities based.” We address these two issues in reverse order.

*First*, as a preliminary matter, Free Press’s proposed “facilities ownership” qualifier—even if it could be squared with the statutory definitions—would still impose Title II regulation on an extraordinary array of Internet-based companies. For example, Google (like Yahoo!, Microsoft, and others) owns and operates a multi-billion-dollar global fiber transmission network, which it uses to transmit search results and paid advertising to end users and on behalf of countless thousands of advertisers.<sup>73</sup> It uses those same facilities to provide users with an independent DNS service and cloud computing. In short, Google is plainly a “facilities-based provider offering an enhanced service” in each of these cases. And under Free Press’s position, Google, as a “facilities-based provider offering an enhanced service[,] always offers a basic service and an enhanced service.” Free Press Comments at 80. Of course, whenever pinned down on this point, Free Press disavows the logical consequences of its logic, but never quite explains why they do not follow.

Free Press reveals similar confusion throughout its comments. For example, it claims (at 4) that “[t]he Act embodies the principle that one set of obligations applies to the infrastructure that provides the capacity to transmit and receive information, and that a different set of obligations applies to content providers who use that infrastructure to transmit information.” But the Internet is teeming with providers that defy this contrived dichotomy. For example, supposed “content providers” like Google are not passive repositories of “information” that rely solely on the transmission services of others; instead, they transmit that information over their own sprawling transmission networks.

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<sup>73</sup> See *AT&T Net Neutrality Comments* at 27-32. Google CEO Eric Schmidt explains: “[W]e have not only data centers, but we have fiber that interconnect[s] those data centers, and connect[s] to the ISPs. At Google, speed is critical. And part of the way we get that speed is with that fiber.” Fred Vogelstein, *Text of Wired’s Interview of Google CEO Eric Schmidt*, *Wired*, Apr. 9, 2007, [http://www.wired.com/print/techbiz/people/news/2007/04/mag\\_schmidt\\_trans](http://www.wired.com/print/techbiz/people/news/2007/04/mag_schmidt_trans).

*Second*, Free Press’s proposed “facilities-ownership” qualifier cannot be squared with the statutory definitions or, for that matter, with decades of telecommunications law. As the Supreme Court has explained, the legal classification of a retail service does not depend at all on how the service provider obtains its wholesale transmission inputs—*i.e.*, through buying facilities, leasing them, or reselling wholesale services; what matters is how the consumer perceives the finished retail product. *See Brand X*, 545 U.S. at 990-97; AT&T Comments at 69-78; *see also* 47 U.S.C. § 153(46). And that is why—outside the Internet context—the “telecommunications service” characterization has always encompassed, among others, (1) standalone long-distance carriers (such as AT&T Corp., MCI, and Sprint) and CLECs (such as XO and tw telecom) that rely on local exchange carriers for last-mile connections to individual end users and (2) pure resellers, such as calling card providers, that may own no transmission facilities at all. *See* AT&T Comments at 98-100.

A number of parties continue to overlook this incontrovertible point, and one particularly glaring example is EarthLink. EarthLink belongs to the class of so-called “non-facilities-based” ISPs—*i.e.*, ISPs that, like standalone long-distance companies, may own extensive transmission facilities but that lease rather than own the *last-mile* transmission links connecting those networks to individual end users. Without clearly explaining why, EarthLink appears to believe that leasing rather than owning those last-mile links makes all the difference for purposes of statutory classification. It could not be more wrong.

From a consumer’s perspective, the retail service purchased from an ISP like EarthLink is functionally the same as the corresponding service purchased from an ISP that owns the last-mile transmission inputs. EarthLink’s service thus necessarily falls within the same statutory category as any other broadband Internet access service. *See Brand X*, 545 U.S. at 994, 996-97; AT&T

Comments at 99-100 (explaining why the Commission may not adopt Justice Scalia’s incorrect and repudiated contrary view). As the Supreme Court has held, the statutory analysis, which turns on that consumer perspective, “do[es] not distinguish facilities-based and non-facilities-based carriers,” *Brand X*, 545 U.S. at 997, and thus any regime that applies Title II regulation to “facilities-based” ISPs would necessarily “subject to common-carrier regulation non-facilities-based ISPs that *own no transmission facilities*,” *id.* at 994 (emphasis added).<sup>74</sup>

In asserting otherwise, EarthLink makes a common mistake: it conflates the *Computer II* unbundling rule with the statutory characterization issue presented here. As we have discussed, that now-abolished rule required wireline telephone companies (but not cable, satellite, or wireless providers) to “unbundle” the transmission components of any *information services* they offered and sell those transmission functions on a standalone basis to unaffiliated information service providers. *See* AT&T Comments at 102-06. This rule applied only to facilities-based information service providers—or, more precisely, only to a limited subset of such providers (wireline telcos). But that fact is irrelevant to the antecedent question of whether a service fell within the definition of “information service” and thus triggered this obligation in the first place.

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<sup>74</sup> EarthLink claims (at 17) that, as a policy matter, the Commission should not *want* to classify “non-facilities-based” ISPs as “telecommunications carriers” because they supposedly “do not control Internet connectivity” and “have no ability to degrade or block traffic going throughout the broadband network.” That policy rationale is not only legally irrelevant to the statutory classification question, but factually wrong as well. As EarthLink elsewhere acknowledges, it provides all the same enhanced features as “facilities-based” ISPs, and its customers “typically use [its] domain name service (DNS) to resolve URLs.” EarthLink Comments at 9. EarthLink is therefore just as capable as any “facilities-based” ISP of using these enhanced higher-layer functionalities to “control Internet connectivity” and, where appropriate, “block” traffic.

*See id.* As discussed, *that* question has always been answered in exactly the same way for any given type of retail service whether the provider of that service is “facilities-based” or not.<sup>75</sup>

Free Press similarly confuses wholesale and retail services in asserting that Akamai (which sat out the opening comment round) would fall outside the scope of Title II reclassification. According to Free Press, Akamai does not “offer data transmission itself (a prerequisite for a determination that [its services are] telecommunications service).” Free Press Comments at 88-89. In fact, Akamai *does* offer its thousands of business customers “transmission” of their data to servers throughout the Internet; indeed, it boasts that it “routinely delivers between fifteen and thirty percent of all Web traffic, reaching more than 4 Terabits per second.”<sup>76</sup> And it makes no difference that, as Free Press observes (at 89), Akamai “depend[s] on procuring transmission capacity from third-party telecommunications network providers.” The same is true of *every* telecommunications carrier that does not own every single facility that a particular telephone call may traverse from calling to called party, including every IXC, CLEC, or CMRS purchaser of special access services or UNEs. Again, the characterization of a provider as a “telecommunications carrier” or “information service provider” depends on how its customers perceive the retail services that provider offers, not on how the provider arranges for

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<sup>75</sup> EarthLink cites a 1995 order of the Common Carrier Bureau for the proposition that “‘the contamination doctrine,’ whereby the inclusion of an enhanced (information) service with a basic transmission telecommunications service resulted in the entire bundle being treated as an enhanced service, did not apply to facilities-based carriers[.]” EarthLink Comments at 8-9 & n.26 (citing Memorandum Opinion and Order, *Independent Data Communications Manufacturers’ Ass’n, Inc.*, 10 FCC Rcd 13717 (1995) (“*Frame Relay Order*”). In that order, however, the Bureau found only that, to the extent certain AT&T services were properly classified as “enhanced services,” AT&T could “not avoid its *Computer II* and *Computer III* obligations” merely by invoking the “contamination doctrine” and therefore had to “unbundle the basic frame relay service” underlying those services. *Frame Relay Order*, 10 FCC Rcd at 13722-23 ¶¶ 41-45. Again, the operation of these now-defunct *Computer Inquiry* rules has no bearing on the antecedent issue presented here: classification of the retail service itself. *See also* Free Press Comments at 78-79 (similarly misconstruing the *Frame Relay Order*).

<sup>76</sup> Akamai, Customer Stories, <http://www.akamai.com/html/customers/index.html>.

the inputs for those services behind the scenes—and thus not on the extent to which the provider owns transmission facilities in fee simple, leases them from third parties, or purchases wholesale services from other carriers.

Tellingly, even Public Knowledge repudiates Free Press’s position on these issues. Public Knowledge indicates that “backbone transport” and “content delivery networks (CDNs)” like Akamai would be “subject to the same analysis” as broadband ISPs and that, under the logic of reclassification, they would therefore incur Title II obligations unless they could qualify as “private carri[ers]” by virtue of “particularized decisions with regard to provision of service.” Public Knowledge Comments at 6 n.32.<sup>77</sup> The problem for Akamai and similar providers is that, in fact, they *do* hold themselves out to hundreds of thousands of business customers around the world, offering tiers of service that are often highly standardized. *See* AT&T Comments at 57-58. Traditionally that has not exposed them to common carrier regulation because they have an independent basis for remaining outside of Title II: like broadband ISPs, they integrate enhanced features such as caching together with transmission. But if the Commission were to deem caching insufficient to keep broadband ISPs from Title II regulation, it would logically have to draw the same conclusion for CDNs and other non-ISP Internet providers.

Likewise, even Data Foundry, which supports aggressive regulation of broadband networks, warns the Commission against reclassifying retail broadband Internet access service, and urges it instead to resurrect the old *Computer II* unbundling requirement by compelling the provision of a wholesale transmission service to unaffiliated ISPs. *See* Data Foundry Comments

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<sup>77</sup> Public Knowledge’s Harold Feld has similarly acknowledged that “Akamai is moving information from one place to another. That’s plainly ‘telecommunications.’” AT&T Comments at 107 n.182 (quoting Feld blog post). In his (mistaken) view, however, “Akamai does not offer its service to ‘the general public’ or even a distinct class of the general public” because “[a]ny entity that wants to use Akamai’s CDN negotiates its own special deal with Akamai.” *Id.*

at 13-14. Data Foundry claims that this latter approach “has the advantage of clearly NOT regulating ‘the Internet’ because the Commission could decline to regulate the provision of Internet Protocol (IP) based services,” *id.* at 15, whereas reclassification of the retail service—as proposed in the NOI—could “subject to common [carrier] regulation a far larger class of presently unregulated entities,” *id.* at 18. That concern is accurate and compelling, even though Data Foundry’s proposed “solution”—revival of the *Computer Inquiries* regime—is foreclosed as a matter of both law and policy. *See* AT&T Comments at 102-06.

To be clear: no one is arguing that *each* of the various theories proposed to support reclassification would necessarily lead to Title II regulation of the *entire* Internet. But the Commission would create self-executing regulatory consequences for *much* of the Internet if it tried to effectuate Title II reclassification by narrowing the statutory category of “information service” to exclude integrated functionalities such as DNS and caching. Under that approach, the Commission would necessarily extend Title II regulation to, at a minimum, Internet backbone providers such as Level 3 and Cogent, CDNs such as Akamai and Limelight, and any other company that holds itself out to the commercial public as offering some combination of Internet transport and caching. Finally, *any* basis for reclassifying cable and telco providers of broadband Internet access as Title II carriers—whether it involves reconceptualizing the statutory definitions or not—would necessarily extend to all providers of broadband Internet access service, including providers like EarthLink that lease last-mile facilities rather than own them outright and providers like Amazon.com, Barnes & Noble, and others that, through the Internet-enabled devices and Internet access they offer (*e.g.*, the Kindle and the Nook), resell the transmission services offered by others.

**F. Any Reclassification Decision Would Receive No Judicial Deference.**

As we have discussed, Title II reclassification would upend decades of U.S. Internet policy, all without a hint of congressional approval, based on a results-driven reinterpretation of arcane definitional provisions whose meaning and application the Commission appeared to have settled many years ago over the course of at least four separate orders, an appeal to the Third Circuit, and a separate appeal all the way to the Supreme Court.<sup>78</sup> Particularly because “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or . . . hide elephants in mouseholes,”<sup>79</sup> a reviewing court would subject this industry-transforming regulatory decision to exacting scrutiny, and *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), confirms rather than undermines that conclusion.<sup>80</sup>

First, this is *not* an area—like the allocation of spectrum, the targeting of universal service support, or (as in *Fox*) the regulation of broadcast indecency—where Congress has given the Commission discretion to serve the public interest however it deems appropriate, subject only to broadly written, policy-oriented statutory standards. *See* AT&T Comments at 20-27. Instead, Congress has given the Commission specific factual criteria to apply when determining whether a given service should be subject to common carrier regulation. The Commission must apply

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<sup>78</sup> *See, e.g., Cable Modem Order*, 17 FCC Rcd at 4822-23 ¶¶ 38-40; Report and Order, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14880-81 ¶ 50 (2005), *aff’d Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007); Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901, 5902 ¶ 2 (2007) (“*Wireless Broadband Order*”); Memorandum Opinion and Order, *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281, 13285-90 ¶¶ 7-15 (2006).

<sup>79</sup> *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006).

<sup>80</sup> Letter from Seth P. Waxman, Counsel for United States Telecom Association, to Julius Genachowski, Chairman, Federal Communications Commission, GN Docket No. 09-51 & WC Docket No. 07-52 (filed Apr. 28, 2010) (attached to AT&T Comments as Exh. B).

those factual criteria fairly and dispassionately; it may not reverse-engineer “answers” to factual questions simply to produce desired policy outcomes, let alone to enlarge its own sphere of regulatory authority. In Time Warner Cable’s words, “the Commission cannot manipulate the service classifications[,] . . . toggling back and forth between ‘telecommunications service’ and ‘information service’ labels[,] solely to determine the level of regulation that should apply. . . . [T]he Commission cannot first decide what ultimate power it seeks, and then determine how to conduct a functional analysis in such a manner as to ensure that it obtains its favored consequences.” Time Warner Cable Comments at 17-18.

The Commission has left no room for doubt that it intends to pursue reclassification precisely because, after the *Comcast* decision, it can think of no better way to ensure its own authority to set U.S. Internet policy. *See, e.g.*, Verizon Comments at 37-38 (citing, *e.g.*, NOI ¶¶ 1, 8, 28). Any technical justification the Commission might now devise in an effort to support reclassification would be perceived for what it is: a contrived, ends-driven rationale for assuming regulatory power that Congress has not granted. As Verizon explains, such decisions are entitled to no judicial deference. *See id.* at 34-38.

The Supreme Court’s decision in *Fox* supports that conclusion, despite the contrary suggestions of Free Press and others. As the *Fox* Court held, an agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate” when “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.”<sup>81</sup> Here, as we have explained, the Commission could not reclassify broadband Internet

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<sup>81</sup> *Fox*, 129 S. Ct. at 1811 (emphasis added); *see also id.* at 1824 (Kennedy, J., concurring in part and concurring in the judgment) (an “agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past”).

access services without both (1) “contradict[ing]” its prior “factual findings” (even though the material facts have not changed) and (2) undermining the “serious reliance interests” of broadband Internet access providers in the maintenance of the existing investment-friendly regime. AT&T Comments at 78-80 (quoting *Fox*, 129 S. Ct. 1800).

Free Press argues that “Title II classification should not implicate the kinds of reliance interests discussed in *Fox*” because, it says, “no one has suggested that the Title II classification will apply retroactively,” and “all actors in the broadband marketplace will have ample warning before the new structure goes into effect.” Free Press Comments at 128-30. This makes no sense. Collectively, broadband providers have invested hundreds of billions of dollars over the past decade to deploy broadband facilities and win broadband spectrum licenses, all in reliance on the Commission’s repeated decisions to keep the broadband ecosystem free of legacy common carrier regulation. Free Press does not seek to apply its proposed Title II regime solely to services offered over *new* facilities and to exempt services offered over existing networks embodying those hundreds of billions of dollars in *sunk* investments. If it were feasible, however, this would be the only solution to the problem of defeated investment-backed expectations. Yet even that solution would undermine the Administration’s goal of encouraging *future* investments totaling yet another \$350 billion in private risk capital.

### **III. TITLE II RECLASSIFICATION OF ANY BROADBAND INTERNET ACCESS SERVICE WOULD BE UNLAWFUL FOR ADDITIONAL REASONS INDEPENDENT OF THE STATUTORY DEFINITIONS.**

#### **A. Title II Reclassification Would Violate Section 230 and the First Amendment.**

The NOI proposes this radical restructuring of American Internet policy largely, and perhaps primarily, because the Commission wishes to impose “net neutrality” requirements constraining the editorial discretion of broadband Internet access providers over the services they

provide their customers. *See, e.g.*, NOI ¶¶ 26, 42-50, 76 n.200. And quite apart from the adoption of specific net neutrality rules, the NOI suggests that, upon reclassification, sections 201 and 202 could be interpreted to impose similar requirements by themselves. *See id.* ¶ 76 n.200; *see also* Qwest Comments at 36. If so, reclassification would violate both section 230 of the Communications Act and the First Amendment—or, at a minimum, raise sufficient First Amendment concerns as to invalidate the proposed reclassification under the doctrine of constitutional avoidance.<sup>82</sup>

As discussed in our opening comments, section 230 authorizes—indeed, encourages—broadband ISPs to block, among other things, “filthy, excessively violent, harassing, or otherwise objectionable” content from their services. 47 U.S.C. § 230(c)(2)(A). As that provision confirms, Congress specifically intended that broadband ISPs would exercise editorial judgment over the content of Internet access services, and *not* simply act as common carriers, transmitting all “information of the user’s choosing.” 47 U.S.C. § 153(44). *See also* AT&T Comments at 90-91. Section 230(c)(2) effectuates a more general congressional policy judgment, expressed in section 230(b)(2), that the Internet should continue developing “unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). Whether articulated as net neutrality rules or extreme “common carrier” obligations, broad prohibitions on blocking by an ISP would violate these congressional directives.

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<sup>82</sup> *See* NCTA Comments at 31-34; Qwest Comments at 34-37; Time Warner Cable Comments at 54-57; Verizon Comments at 79-89; USTA Comments at 48 n.127. *See generally* *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002) (the “constitutional avoidance canon of statutory interpretation trumps *Chevron* deference”).

These and other “net neutrality” rules<sup>83</sup>—whether imposed through Title II reclassification or otherwise—would likewise violate the First Amendment. Such requirements would compromise the ability of broadband ISPs to offer tailored services featuring specific content, to partner with specific application and content providers as wireless broadband providers already do today, and to select the means of amplifying or enhancing their own or others’ content or applications.<sup>84</sup> All of these are protected forms of expression.<sup>85</sup> The Commission could not justify such speech restrictions even under intermediate scrutiny, let alone the much more demanding strict scrutiny test that would likely apply.<sup>86</sup>

Specifically, such requirements (1) would not “further[] an important or substantial government interest . . . unrelated to the suppression of free expression,” and (2) “the incidental restriction on alleged First Amendment freedoms” would be “greater than is essential to the furtherance of that interest.”<sup>87</sup> First, the Commission could not identify any market *problem* that such requirements are needed to “fix.” See *AT&T Net Neutrality Comments* at 93-96. As the Supreme Court has explained, when the Commission “defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply ‘posit the existence of the disease

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<sup>83</sup> See, e.g., Notice of Proposed Rulemaking, *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93, at ¶¶ 106-07 (rel. Oct. 22, 2009) (“*Open Internet NPRM*”).

<sup>84</sup> *AT&T Net Neutrality Comments* at 235-44; *AT&T Net Neutrality Reply Comments* at 167-73.

<sup>85</sup> See *AT&T Net Neutrality Comments* at 235-37; see generally *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1987) (holding that content-neutral restrictions on the volume of concert loudspeakers implicate the First Amendment). See also *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 790 n.5 (1988) (a “statute regulating *how* a speaker may speak directly affects that speech”) (emphasis added).

<sup>86</sup> *AT&T Net Neutrality Comments* at 235-44; *AT&T Net Neutrality Reply Comments* at 167-73.

<sup>87</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

sought to be cured.’ It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>88</sup> Indeed, Stuart Benjamin, the Commission’s current Scholar in Residence, suggested in 2000 that subjecting then-dominant cable broadband providers to “open access mandates will trigger [a] First Amendment inquiry” requiring explanation of the “fairly specific and fairly serious harm to the public interest that the [government] is trying to avoid or minimize.”<sup>89</sup> Where, as here, “there is no evidence of any urgent need for preventive action,” the agency is not entitled to the “benefit of the doubt.”<sup>90</sup>

Second, even if the Commission could identify some problem requiring interference with the editorial discretion of broadband ISPs, the proposed requirements would still violate the First Amendment because they would “burden substantially more speech than is necessary to further the government’s legitimate interests.”<sup>91</sup> Again, the federal government can achieve its valid policy goals in this area without Title II reclassification. And any net neutrality-like

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<sup>88</sup> *Turner*, 512 U.S. at 664 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)). See also *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (the burden to show that the state interest is advanced by the regulation on speech “is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree”); *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003) (quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 822 (2000)) (“Where first amendment rights are at stake, ‘the Government must present more than anecdote and supposition’” as a justification for burdening speech).

<sup>89</sup> S. M. Benjamin, *Proactive Legislation and the First Amendment*, 99 Mich. L. Rev. 281, 295 n.64, 289 (2000). Professor Benjamin noted that “most commentators . . . have concluded that cable Internet service does not fit into the category of ‘telecommunications service’ and is not, as a statutory matter, subject to common carrier obligations” and added that, in any event, “the First Amendment concerns . . . would seem to apply to cable Internet service no matter how it was statutorily characterized.” *Id.* at 295 n.64.

<sup>90</sup> *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50, 37 n.60 (D.C. Cir. 1977).

<sup>91</sup> *Turner*, 512 U.S. at 662 (citing *Ward*, 491 U.S. at 799). See also *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) (same).

requirements flowing from Title II reclassification would be impermissibly underinclusive, in that they would ignore the far greater threat to Internet “openness” posed by non-ISP gatekeepers like Google, which, through undisclosed algorithms, manipulates the results generated by its long-dominant search engine to pick the Internet’s winners and losers.<sup>92</sup>

**B. Title II Reclassification Would Violate the Takings Clause.**

As we discussed in our opening comments, Title II reclassification would also violate the Fifth Amendment’s Takings Clause. At the very least, it would exceed the Commission’s authority by exposing the public fisc to a substantial risk of just-compensation liability.

A regulatory taking occurs when government action causes significant economic harm that interferes with settled, investment-backed expectations, particularly where the action is extreme and unjustified.<sup>93</sup> All of these factors are met here.<sup>94</sup> As many commenters note, reclassification would thwart substantial investment-backed expectations. *See, e.g.*, CTIA Comments at 30-31; Qwest Comments at 34; Verizon Comments at 90-94. The industry has invested hundreds of billions of dollars in private capital based on the explicit understanding that the Commission meant what it said when it classified broadband Internet access as an integrated

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<sup>92</sup> *See* AT&T Comments at 63-64, 107-09; *AT&T Net Neutrality Comments* at 239-41; *National Fed’n of the Blind v. FTC*, 420 F.3d 331, 345 (4th Cir. 2005) (regulation of speech “can violate the First Amendment by restricting too little speech, as well as too much”); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-19 (1993) (invalidating a city ordinance banning news racks containing only a certain type of publication because there was not a “reasonable fit” between the government’s stated interest and the means chosen by the government to further that interest).

<sup>93</sup> *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984).

<sup>94</sup> Title II regulation would constitute a physical taking, as well, to the extent it required providers to support services they would otherwise have chosen not to provide over their IP platforms. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982); *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

information service. The proposed reversal in course would substantially and impermissibly devalue those investments.

This constitutional concern is particularly acute in the case of wireless broadband services. Wireless providers such as AT&T have bid and invested billions in spectrum auctions based on the Commission's representations that they could use the acquired spectrum to provide mobile broadband Internet access services as unregulated information services, without the "openness" obligations that the Commission explicitly confined to the upper 700 MHz C-Block alone. *See* AT&T Comments at 111. The Commission adopted those "openness" requirements as part of a controlled regulatory experiment to study the effects of such requirements on wireless broadband services, including what "unanticipated drawbacks" such requirements might present.<sup>95</sup> Because providers have not yet provided broadband Internet access services over the C-Block, that controlled experiment has not yet begun, and applying common carrier rules to *non-C-Block* licensees would nip it in the bud. And it would impermissibly undermine the investment-backed expectations that the Commission gave such licensees, who spent billions more than they otherwise would for spectrum that the Commission made clear would be subject only to Title I oversight. *See* AT&T Comments at 111-12 & n.190.

In any event, whether or not a court would ultimately find a "taking" here, a federal agency may not adopt policies that expose the public fisc to the risk of just-compensation liability unless Congress has explicitly authorized it to do so. *See* AT&T Comments at 109-12. And as we have discussed, Congress has not remotely authorized the Commission to adopt the policies at issue here.

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<sup>95</sup> Second Report and Order, *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, 22 FCC Rcd 15289, 15364 ¶ 205 (2007).

**C. Title II Reclassification on the Basis of a Mere Notice of Inquiry Would Violate the APA.**

The reclassification discussed in the NOI would constitute the most dramatic restructuring of U.S. Internet policy in the Commission’s history. Under the Administrative Procedure Act, a radical reversal of that type, with its myriad regulatory implications, requires more than a mere “notice of inquiry”; it requires formal notice and comment.<sup>96</sup> Simply as a procedural matter, therefore, the Commission could not lawfully reclassify broadband Internet access on the basis of this NOI; it would need to issue a separate NPRM first.

As many commenters explain, the Commission cannot avoid the APA’s notice-and-comment requirement, as it proposes to do here, on the ground that reclassification is merely an “interpretation of the Communications Act” (NOI ¶ 29). “[N]ew rules that work substantive changes in prior regulations are subject to the APA’s [notice and comment] procedures.”<sup>97</sup> Likewise, “[w]hen an agency changes the rules of the game” such that new regulatory obligations are created, or when it “has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule,” and “more than a clarification has occurred.”<sup>98</sup> Thus, “[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation

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<sup>96</sup> See also NCTA Comments at 27-30; Time Warner Cable Comments at 28-29; Verizon Comments at 96-99. As explained in our opening comments (at 91-109), reclassification would violate the APA in independent substantive respects, because the costs—to investment and innovation, and to the regulatory stability of the Internet ecosystem as a whole—would far outweigh the putative benefits.

<sup>97</sup> *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003).

<sup>98</sup> *Id.*; *United States Telecom Ass’n and CenturyTel, Inc. v. FCC*, 400 F.3d 29, 35 n.12 (D.C. Cir. 2005) (quoting *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)).

itself: through the process of notice and comment rulemaking.”<sup>99</sup> And, of course, “labeling a major substantive legal addition to a rule a mere interpretation”<sup>100</sup> does not make it so.

Here, Title II reclassification would clearly constitute a “substantive change” under any version of this test. The Commission’s proposed action would reverse at least four orders classifying Internet access service as an information service,<sup>101</sup> decades of deregulatory treatment of information services, and a Supreme Court opinion affirming this longstanding approach. Reclassification would also trigger a host of new regulatory requirements, many of them self-executing under the terms of sections 201 and 202 alone, and would thus impose new obligations on previously unregulated services.<sup>102</sup> It is hard to imagine any neutral forum in which this would pass for mere “clarification” rather than a fundamental change in law. Such procedural gimmickry would further confirm a reviewing court’s sense that the Commission has indiscriminately knocked down all legal barriers in its rush to patch up the D.C. Circuit’s perceived insult to the Commission’s own jurisdiction.

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<sup>99</sup> *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

<sup>100</sup> *United States Telecom Ass’n*, 400 F.3d at 35 (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000)); see *Paralyzed Veterans*, 117 F.3d at 588 (“a stated intent to treat a major substantive legal addition as an ‘interpretative’ rule will not by itself suffice to escape the notice and comment requires of section 553” of the APA, and an “interpretation” will more likely be treated as substantive if it “really provides all the guidance” or is “sufficiently distinct or additive to the regulation”).

<sup>101</sup> Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14862-65 ¶¶ 12-17 (2005); *Cable Modem Order*, 17 FCC Rcd at 4825-26, 4828-31 ¶¶ 44, 52-55; *Wireless Broadband Order*, 22 FCC Rcd at 5916, 5919-20 ¶¶ 40-41, 50-53; Memorandum Opinion and Order, *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service As an Information Service*, 21 FCC Rcd 13281 (2006).

<sup>102</sup> See AT&T Comments at 115-16. The Commission itself recognizes this, noting that “affected providers might need time to adjust to any new requirements.” NOI ¶ 100. And of course, the Commission feels compelled to forbear precisely because it recognizes that reclassification would work a major and immediate change in the substantive status quo, including retail price regulation under sections 201 and 202.

Nor has the Commission somehow fixed the substance of this problem by seeking comment on a diffuse set of competing regulatory proposals. First, the NOI lacks the regulatory flexibility analysis that must accompany any NPRM. That analysis, if conducted, would consider the substantial burdens that any Title II reclassification decision would have on businesses of all sizes, including smaller broadband Internet access providers and their suppliers.<sup>103</sup> Second, the NOI omits the full substantive notice that accompanies genuine notice-and-comment proceedings. The NOI does not set forth any “proposed rules”; instead, it seeks comment, at a very high level of generality, on different types of regulatory regimes. And two of those regimes would massively reshape the entire industry in ways the NOI does not begin to explore; for example, the NOI does not address the potential effects of reclassification on retail rates and other retail terms of service. Third, the NOI does not even establish the full comment period normally associated with an NPRM. In 1993, President Clinton directed federal agencies to generally afford the public a comment period of “*not less than 60 days*” as part of his initiative to “restore the integrity and legitimacy of regulatory review and oversight” and produce “consistent” and “sensible” rules.<sup>104</sup> The Commission’s decision here to give the public *less than 30 days* to comment on this sweeping change in communications policy is indefensible. If the Commission is planning to effect that change on the basis of this NOI, its inattention to these procedural requirements is as inexplicable as it is unlawful.

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<sup>103</sup> See 5 U.S.C. § 601, *et seq.*; see, e.g., ACA Comments at 14-21.

<sup>104</sup> Executive Order 12866 (Sept. 30, 1993), 58 Fed. Reg. 51,738, 51,740 (1993). Section 6(a)(1) of the Executive Order obligates an agency “in most cases . . . [to] include a comment period of not less than 60 days,” and the Commission could not justify affording any less time here. Additionally, the Commission’s proposed reclassification would likely qualify as a “significant regulatory action,” given the billions of investment dollars at stake in the broadband industry, and therefore likely would trigger the OIRA reporting requirement. *Id.* at Section 6(a)(3). The Commission’s end-run around the rulemaking process suggests that it may be trying to skirt this requirement as well.

#### IV. SECTION 332(C) INDEPENDENTLY BARS TITLE II RECLASSIFICATION OF WIRELESS BROADBAND INTERNET ACCESS SERVICES.

Although reclassification advocates insist that the Commission categorize wireless broadband Internet access as a Title II service,<sup>105</sup> not one of them grapples with the fact that Congress has expressly precluded that course of action. As we and others explained (*see, e.g.*, Verizon Comments at 72-74), section 332(c)(2) bars the Commission from treating any wireless provider “as a common carrier for any purpose under this [Act]” except insofar as it is providing a “commercial mobile radio service” (“CMRS”). 47 U.S.C. § 332(c)(2). And under the plain language of the Act and Commission precedent, wireless broadband Internet access service does *not* qualify as “CMRS,” because it does not offer “interconnection with the public switched network.”<sup>106</sup> And that is so whether broadband Internet access service is classified as a “telecommunications service” or an “information service.” *See* AT&T Comments at 112-14. The statutory language is clear on this point, and any attempt by the Commission to evade it (and to reverse yet another precedent) in order to achieve its jurisdiction-enhancing aims would only exacerbate the Commission’s legal risks.

Quite apart from that legal obstacle and the others discussed above, wireless broadband Internet access services fall outside the scope of Title II for an independent reason as well. Many such services routinely alter the basic format of web pages to permit viewing on non-HTML-enabled wireless devices. For example, to support existing wireless devices that use Wireless

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<sup>105</sup> *See, e.g.*, Mobile Internet Content Coalition Comments at 2; Free Press Comments at 55-64; Public Knowledge Comments at 28-35.

<sup>106</sup> *Id.* § 332(c)(1), (d)(1)-(2); *see also Wireless Broadband Order*, 22 FCC Rcd at 5917-18 ¶ 45 (notwithstanding its use to support VoIP and other interconnected services, wireless Internet access “*itself* is not an ‘interconnected service[.]’”).

Application Protocol (WAP) 1.0,<sup>107</sup> AT&T employs a WAP 1.0 gateway that converts the content provider's HTML transmission into a format that WAP 1.0 devices can understand and display. This is a critical service for AT&T subscribers that continue to use WAP 1.0 devices; without it, they could not make use of most complex or interactive websites.<sup>108</sup> For WAP 2.0 devices, the use of a WAP 2.0 gateway likewise optimizes content for a better user experience on more sophisticated WAP 2.0 devices and further allows application providers to offer personalized services to a WAP 2.0 device without implicating the user's privacy.<sup>109</sup> As the AT&T Developer Program website explains, the "AT&T WAP gateway provides over-the-air optimization and compatibility assurance for content delivered over the WAP 2.0 protocol. This includes lossless compression of text content (i.e., markup languages), and *translation of content*

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<sup>107</sup> As one industry expert explains: "On your mobile device, WAP replaces a Web browser with a WAP browser, which can . . . request data from a Web site. The major difference between how you access the data via a browser on your PC and a WAP 1.x browser is that the WAP browser requires a WAP gateway. This gateway functions as an intermediary between the mobile and Internet networks. When placed between a WAP browser and a Web server, it takes care of the necessary binary encoding of content and can also translate WML [wireless markup language] to/from HTML." Harshad Oak, *A Primer on Wireless Application Protocol (WAP)*, TechRepublic, July 3, 2002, [http://articles.techrepublic.com.com/5100-10878\\_11-1045252.html](http://articles.techrepublic.com.com/5100-10878_11-1045252.html). As he adds, WAP 2.0 "moved toward adopting widely accepted Internet standards" including "XHTML Basic[,] the mobile version of XHTML 1.0," thereby making the gateway less critical for WAP 2.0 devices. Nonetheless, even in a WAP 2.0 environment, "deploying a WAP proxy can optimize the communications process and may offer mobile service enhancements, such as location, privacy, and presence based services. In addition, a WAP proxy is necessary to offer Push functionality." WAP Forum, *WAP 2.0 Technical White Paper*, at 6-7 (Jan. 2002), [http://www.wapforum.org/what/WAPWhite\\_Paper1.pdf](http://www.wapforum.org/what/WAPWhite_Paper1.pdf).

<sup>108</sup> This illustrates a broader point made by Verizon: in the wireless broadband ecosystem, broadband Internet access service is also tightly integrated with the end-user device, which further illustrates the extent to which the service is not properly described as including a stand-alone transmission service. Verizon Comments at 54-55.

<sup>109</sup> See also Verizon Joint Declaration ¶ 16 (Attach. B). The gateway provides a randomly assigned but unique id number to the device's HTTP transmissions, so that application providers can respond to the user with personalized service without accessing more identifiable user information such as the device's phone number. See AT&T Developer Program, *Wireless Application Protocol (WAP)*, <http://developer.att.com/developer/index.jsp?page=toolsTechDetail&id=800094> ("AT&T Developer Program Website").

into formats compatible with the target device (i.e., WML [Wireless Markup Language] encoding).”<sup>110</sup> In all these contexts, the “change in the form . . . of the information as sent and received” precludes wireless broadband service from being classified as a telecommunications service. *See* 47 U.S.C. § 153(43).

Nor would there be any way to shoehorn this functionality into the “telecommunications management” exception of 47 U.S.C. § 153(20). The conversion, enhancement, and customer-privacy protection AT&T offers over the WAP gateway has nothing to do with managing or ensuring the *network’s* ability to transmit information. Instead, it is provided solely for the benefit of Internet *users*—the consumers who wish to make the greatest use of Internet resources over their mobile devices, and the application and content providers that wish to give those consumers the best experiences possible.<sup>111</sup>

Finally, as many commenters stress,<sup>112</sup> it would also make no *policy* sense for the Commission to inflict legacy common carrier regulation on this nascent and uniquely dynamic portion of the broadband Internet access marketplace. Wireless services like Clearwire’s are emerging as full competitors to wired broadband Internet access services, as Public Knowledge concedes. *See* Public Knowledge Comments at 30 n.116, 32-33. But that is not a reason to saddle them with new regulatory burdens, as Public Knowledge suggests. It is a reason to preserve a deregulatory regime for *all* broadband Internet access services in this increasingly

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<sup>110</sup> *See AT&T Developer Program Website* (emphasis added).

<sup>111</sup> *See, e.g., 1998 272 Forbearance Order*, 13 FCC Rcd at 2639 ¶ 18 (the “telecommunications management exception” does not encompass functions that are “useful to end users, rather than carriers”).

<sup>112</sup> *See, e.g., CTIA Comments* at 1-48; *T-Mobile Comments* at 1-23; *Leap Wireless Comments* at 2, 6-8; *MetroPCS Comments* at 7-17, 20-28, 37-46.

competitive marketplace.<sup>113</sup> There is similarly no merit to Public Knowledge’s claim that “it is a logical impossibility for the Commission to say that wireless providers *are* offering Internet access service while at the same time insisting that those providers *are not* offering a Title II service.” Public Knowledge Comments at 31. There is no inconsistency here because *no* form of broadband Internet access is “a Title II service.” In any event, even if wired broadband Internet access *could* be lawfully classified as a Title II service and wireless could not be (for the reasons discussed above), these services would still all be competitors in the broadband marketplace, despite the asymmetry in legal treatment. It certainly would not follow that “the Commission must exclude wireless service from any analysis of or planning for the broadband Internet access market,” as Public Knowledge suggests. *Id.* at 31-32.

**V. THE NOI’S FORBEARANCE PROPOSALS WOULD BE GROSSLY INADEQUATE TO PRESERVE INDUSTRY STABILITY AND INVESTMENT INCENTIVES.**

The Commission proposes to deal with the highly regulatory, self-effectuating results of reclassification through forbearance from various provisions of Title II. But that approach would do nothing to assuage the industry’s greatest concerns, and it would sow new seeds of uncertainty due to its inherent instability.

First, even if the Commission could deliver the tailored, reliable forbearance it proposes, the provisions from which the Commission proposes *not* to forbear would be severely problematic in their own right. *See* AT&T Comments at 114-16. The Commission has relied on sections 201 and 202, for example, as the basis for a host of retail and wholesale common carrier regulations, including rate regulation, resale, recordkeeping, billing-related, interconnection, and

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<sup>113</sup> *See, e.g., AT&T Net Neutrality Comments* at 140-82; *AT&T Net Neutrality Reply Comments* at 65-102.

related requirements, to mention only a few.<sup>114</sup> Moreover, even apart from the Commission’s own formal regulations, the nebulous prohibitions in sections 201 and 202 on various forms of “unjust,” “unreasonable,” and “unreasonabl[y] discriminat[ory]” conduct are *self-effectuating*, and reclassification would presumably extend them, for the first time, to the retail terms of broadband Internet access as well as to any wholesale terms. Those prohibitions are often interpreted through the adjudicatory process, and penalties are meted out on a case-by-case basis. Providers could thus find themselves penalized after the fact for violating those statutory prohibitions through new services or products that they believed to be entirely legitimate.

That risk would chill innovation and slow providers’ ability to respond to changes in the marketplace. Providers have good reason to fear that every new network management technique, any commercial arrangement, and any anti-piracy measure—all practices that pro-regulation interest groups reflexively condemn—would become the subject of complaints and litigation. To take one example, content creators have rightfully expressed concern that the Commission’s contemplated action in “enforcing Section 202(a) against [broadband Internet service providers]—based on both past interpretations and uncertain future application—could dramatically inhibit the vast majority of efforts to monitor or prevent the illegal online distribution and performance of copyrighted works.” AFTRA Comments at 6.

In any event, there is a substantial risk that the Commission could not deliver the forbearance it promises. The primary supporters of the Commission’s reclassification proposal—the pro-regulation interest groups—squarely oppose forbearance from virtually any significant and potentially applicable provision of Title II. They insist that the Commission must

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<sup>114</sup> See, e.g., Verizon Comments at 102; Memorandum Opinion and Order, *Orloff v. Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless*, 17 FCC Rcd 8987 (2002), *aff’d Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

preserve and enforce a litany of the most heavily regulatory provisions of Title II.<sup>115</sup> Indeed, in addition to the provisions that the NOI proposes to preserve, Public Knowledge lists 23 *additional* Title II provisions that it hopes to inflict on broadband Internet access providers.<sup>116</sup> And of course the Commission is internally divided on these issues, with Commissioner Copps openly supporting full-blown Title II regulation of broadband Internet access services.<sup>117</sup>

Arguments for applying a number of these provisions in the broadband context are simply perplexing. For example, Public Knowledge (at 39) resists forbearance from the anti-slamming prohibition of section 258, but it is unclear how “slamming”—the unrequested replacement of one service provider for another—could even arise in the broadband context as a technical matter. In any event, Public Knowledge identifies no instances where such broadband “slamming” (whatever that might be) has in fact occurred, let alone a market failure warranting regulatory intervention. And although Public Knowledge would reflexively apply section 203 against broadband Internet access providers, even it acknowledges that traditional tariffs—the subject of section 203—probably make no sense in this environment.<sup>118</sup> That is an understatement. Under established Commission precedent, neither the tariffing provisions of

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<sup>115</sup> See Public Knowledge Comments at 38-51; Free Press Comments at 64-75.

<sup>116</sup> See Public Knowledge Comments at 39, 44 (advocating retention of sections 203, 205, 206, 207, 209, 211, 212, 213, 214(c), 214(e), 215, 216, 218, 219, 220, 222, 225, 251(a), 254, 255, 256, 257, and 258). Public Knowledge is willing to excuse a few provisions that relate specifically to Bell Operating Companies or facsimile or payphone services, among others.

<sup>117</sup> Remarks of FCC Commissioner Michael J. Copps, *Openness and Innovation in the Digital World?*, Stanford Law School, at 4 (June 9, 2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-298708A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298708A1.doc).

<sup>118</sup> See Public Knowledge Comments at 50 (advocating for applicability of 47 U.S.C. § 203 but conceding that that provision is probably best satisfied through providers’ *advertisements*).

sections 203-205 nor the highly regulatory exit and entry provisions of section 214 make sense in this or any other competitive marketplace.<sup>119</sup>

For the same reason, there is no merit to Free Press’s suggestion (at 67-68, 72) that the Commission enforce sections 251(a) and 256 to oversee broadband “interconnection” or Public Knowledge’s request (at 27) for Commission intervention in Internet peering disputes. There is no plausible policy justification for regulation of Internet peering and transit arrangements among IP networks (including ISPs), for that is one of the most competitive and well-functioning marketplaces in the Internet ecosystem. Free Press and Public Knowledge offer no evidence to the contrary. They simply cannot bear the thought of letting well-functioning markets continue to serve the needs of broadband providers and consumers alike without regulatory intervention.

These forbearance issues—which could occupy scores of pages in a properly crafted NPRM, but which this NOI glosses over in a few scant pages—underscore just how messy any Title II reclassification would be. No matter how much the Commission might profess otherwise, any reclassification would open a Pandora’s box of complex, burdensome, legacy regulations with deeply uncertain application to the broadband Internet, and the Commission

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<sup>119</sup> See Qwest Comments at 11-12; see also, e.g., Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730, 20752-53 ¶¶ 42-43 (1996) (subsequent history omitted) (concluding that “tariffs . . . are not necessary to protect consumers” since “competition is sufficient to ensure that . . . carriers’ charges . . . [as well as] non-price terms and conditions are [just] and reasonable”); Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1480 ¶ 179 (1994) (subsequent history omitted) (forbearing from “permitting tariffs for interstate service offered directly by CMRS providers” because the “presence of competition in the CMRS market, [makes] access tariffs seem unnecessary”); *id.* at 1481 ¶ 182 (concluding that in the competitive CMRS market, “exercise of . . . Section 214 authority is unnecessary to ensure against unreasonable charges and practices, or to protect consumers”); Report and Order, *Streamlining the International Section 214 Authorization Process and Tariff Requirements*, 11 FCC Rcd 12884, 12905 ¶ 49 (1996) (concluding that the level of competition for international carriers has increased to a level where “impairment of service is unlikely and customers will be able to obtain alternative service within” the [60 day] waiting period).

could not easily close that box up again, or let out just the “right” types of Title II requirements but not the “wrong” ones.

Any forbearance decision could also be vulnerable on appeal, because the arguments in favor of forbearance would inevitably clash with (1) arguments the Commission would presumably make to support reclassification in the first place and (2) arguments the Commission has already made in favor of broadband regulation in its net neutrality proceeding. In both contexts, the Commission has suggested that broadband Internet access competition has not developed as it had predicted in the *Cable Modem Order* and that the Commission needs expanded regulatory authority to achieve its public policy goals.<sup>120</sup> Again, those arguments are empirically untenable, given the healthy state of competition. See pp. 24-25, *supra*; AT&T Comments at 52-55. But as NCTA and others note,<sup>121</sup> the Commission has backed itself into an awkward corner by questioning the very competition that would presumably justify forbearance—and thus has raised its risk of reversal for any forbearance decision. And the Commission has further increased the litigation risks for any forbearance decision by adopting ever-more (and excessively) stringent tests for forbearance in other contexts.<sup>122</sup>

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<sup>120</sup> See NOI ¶ 61; *Genachowski ‘Third Way’ Statement* (stating that a lack of Commission action can leave “consumers unprotected and competition unpromoted”); *Open Internet NPRM* ¶ 7 (“In many parts of the United States, customers have limited options for high-speed broadband Internet access service.”).

<sup>121</sup> See NCTA Comments at 65-67; Time Warner Cable Comments at 61-62 (“[I]f the Commission finds that some kind of market failure compels it to reverse its prior policies and subject broadband Internet access service providers to at least some Title II regulation, the Commission in that case would be hard pressed to show that application of specific requirements is *not* necessary to protect consumers.”).

<sup>122</sup> See Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, FCC 10-113, ¶ 41 (rel. June 22, 2010). On the other hand, as Qwest points out, if the Commission *can* make the showing necessary to forbear from *some* provisions of the Act—as indeed a proper empirical analysis would support—the same competition that would protect consumers and the public interest with respect to *those* provisions would also support

If the Commission reclassifies broadband Internet access service but key forbearance determinations are successfully appealed, the Commission and the industry would then face the perfect storm: self-effectuating Title II regulation without necessary forbearance. While that may be what the pro-regulatory advocates want, the Commission professes to understand how catastrophic that outcome would be. Yet the NOI's sole response is to suggest that, to hedge its bets, the Commission might "not . . . ultimately maintain the classification of Internet connectivity as a telecommunications service" if its accompanying forbearance decisions are invalidated. NOI ¶ 99. Even if the Commission could lawfully "toggl[e] back and forth between 'telecommunications service' and 'information service' labels solely to determine the level of regulation that should apply" (Time Warner Cable Comments at 17-18), the weak possibility that the Commission might ultimately follow that route is small comfort to an industry that must, in the words of Citigroup Managing Director Mike Rollins, make investment decisions based "not just" on "what the FCC wants to accomplish today but what those policies can do over time."<sup>123</sup>

Indeed, even if the Commission's forbearance decisions were *upheld*, the industry would have to calculate the risk that later Commissions would seek to reverse those determinations. That concern is exacerbated by the Commission's evident willingness to abandon decades of Title I treatment for broadband Internet access services; its initiatives to consider regulation of

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forbearance from sections 201 and 202 as well. *See* Qwest Comments at 15. For similar reasons, the Commission should grant AT&T's own still-pending petition seeking complete forbearance from all of Title II's common carrier regulations to the extent they may be found to apply to IP-enabled services, including broadband Internet access services. *See* AT&T Comments at 123-24; Public Notice, *Pleading Cycle Established for Comments on Petition of SBC Communications Inc. for Forbearance Under Section 10 of the Communications Act from Application of Title II Common Carrier Regulation to "IP Platform Services,"* 19 FCC Rcd 2640 (2004).

<sup>123</sup> Howard Buskirk, *Regulatory Uncertainty Created by FCC Seen Limiting Network Investment*, Communications Daily, July 15, 2010; *see also* John Curran, *Panelists: Neutrality, Title II Broadband Issues Breeding Investor Uncertainty*, TR Daily, July 14, 2010.

broadly deregulated wireless services;<sup>124</sup> and its willingness to take seriously (and indeed to invite) requests for un-forbearance, even as the Commission insists that its forbearance decisions have an aura of permanence.<sup>125</sup> In short, the so-called “third way” would generate a profoundly unstable regulatory future in which everything is always up for grabs. There could be no regulatory environment more toxic to long-term investment and innovation.

Apart from forbearance, any reclassification decision would also require the Commission to take on the challenge of preempting *state* regulation and enforcement.<sup>126</sup> In part because of jurisdictional criteria under state law, the states have traditionally been much more active in regulating services deemed “telecommunications services” than those deemed “information services.” And they have displayed a strong appetite for regulation of any service whenever the

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<sup>124</sup> See AT&T Comments at 118-21.

<sup>125</sup> See, e.g., AT&T Comments at 116-18. See also NCTA Comments at 48-49; Time Warner Cable Comments at 33; USTA Comments at 41-42; Verizon Comments at 100-01, 106-07. Indeed, Commission forbearance orders issued *even while this proceeding has been pending* have affirmatively invited parties to file “un-forbearance” petitions if, in their view, the Commission’s “predictive judgment proves incorrect.” See Order, *Telecommunications Carriers Eligible for Universal Service Support; Federal-State Joint Board on Universal Service; Head Start Petition for Forbearance; Consumer Cellular Petition for Forbearance; Midwestern Telecommunications Inc. Petition for Forbearance; Line Up, LLC Petition for Forbearance*, WC Docket No. 09-197, CC Docket No. 96-45, FCC 10-134, ¶ 20 (rel. July 30, 2010) (to the extent the Commission’s “predictive judgment proves incorrect . . . parties may file appropriate petitions with the Commission and [the Commission has] the option of reconsidering this forbearance ruling”); Order, *Federal-State Joint Board on Universal Service; Telecommunications Carriers Eligible for Universal Service Support; i-wireless, LLC Petition for Forbearance from 47 U.S.C. § 214(e)(1)(A)*, CC Docket No. 96-45, WC Docket No. 09-197, FCC 10-117, ¶ 20 (rel. June 25, 2010) (same); see also Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, 21508-09 ¶ 26 n.85 (2004); Memorandum Opinion and Order, *Petition of SBC Communications Inc. for Forbearance from Structural Separations Requirements of Section 272 of the Communications Act of 1934, As Amended, and Request for Relief to Provide International Directory Assistance Services*, 19 FCC Rcd 5211, 5223-24 ¶ 19 n.66 (2004).

<sup>126</sup> Section 10 forbearance preempts state enforcement of the preempted *federal* provision, but the Commission must separately preempt *state* laws. 47 U.S.C. § 160(e). See also NCTA Comments at 77-78.

Commission has not explicitly preempted their authority, as in the case of fixed VoIP services.<sup>127</sup> This prospect of state regulation of broadband Internet access services would undermine established federal policy and create a state-by-state hodgepodge of regulation that would undermine anything the Commission hopes to achieve with its forbearance proposal.<sup>128</sup> And as the comments of several state commissions show, the Commission is likely to face serious opposition to any decision to meet that concern through preemption.<sup>129</sup> Each of *those* decisions is likely to be challenged, and broadband Internet access providers will be subjected to additional investment-draining regulatory uncertainty as these issues are litigated for many years into the future. Finally, as several commenters warn, reclassification could expose all broadband ISPs—large and small—to a host of new state and local taxes, which the Commission may lack authority to preempt.<sup>130</sup>

In short, while comprehensive forbearance paired with preemption is clearly preferable to the stricter version of reclassification the Commission has outlined, even the former approach

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<sup>127</sup> See, e.g., Time Warner Comments at 67; Examiner’s Report, Docket No. 2008-421, *In re: Investigation into Whether Providers of Time Warner “Digital Phone” Service and Comcast “Digital Voice” Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service* (Me. Pub. Util. Comm’n May 18, 2010); *Petition for Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Service*, Docket No. DT 09-044, New Hampshire Telephone Association (N.H. Pub. Util. Comm’n Mar. 6, 2009).

<sup>128</sup> See AT&T Comments at 121-22; NCTA Comments at 77-82; Time Warner Cable Comments at 67-69; Verizon Comments at 107-11.

<sup>129</sup> Pennsylvania Public Utilities Commission Comments at 2-3 (supporting the Commission’s approach only to the extent it “does not preempt state law or forbear from state responsibilities”); Public Utilities Commission of Ohio Comments at 9 (“strongly urg[ing] the FCC to avoid forbearing substantive Title II provisions that would result in preemption of State jurisdiction in certain areas”); State of New York Broadband Development and Deployment Council Comments at 3 (noting that it is “important that the Commission not preempt states from addressing issues that arise in their states”); California Public Utilities Commission Comments at 15-19 (advocating that the Commission allow state involvement regarding numbering administration, emergency services, service quality, and small carriers).

<sup>130</sup> See, e.g., Cablevision Comments at 21-25; Charter Comments at 6-10; NCTA Comments at 77-82.

would be, in the words of Congressman Dingell, “fraught with legal risk,” “confound[ing] Congress’s and the Commission’s efforts to encourage further investment in broadband infrastructure, create new jobs, and stimulate broadband adoption[.]”<sup>131</sup> The “third way” is, plainly, very much the “wrong way” for American consumers and the American economy.

## CONCLUSION

The Commission should maintain the current regulatory classification for broadband Internet access services.

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<sup>131</sup> *Dingell Letter* at 1.