

Before the
Federal Communications Commission
Washington, DC, 20554

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

REPLY COMMENTS OF PUBLIC KNOWLEDGE

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Introduction¹

¹ These reply comments were prepared with the assistance of Public Knowledge law clerks Jodie Graham and Anne Halsey.

Many commenters have suggested that, by reclassifying broadband Internet access as a telecommunications service, the FCC would be subjecting a 21st century technology to regulations designed for the 1930s telephone system.² This is false: principles of common carriage (which much of Title II of the Communications Act enacts) are much older than the 1930s. For hundreds of years, certain professions—particularly those that involve a party taking charge of the goods, messages, or safety of another—have been recognized as having a “public calling.”³ Blackstone recognized that under this calling there is an “implied engagement to entertain all persons.”⁴ As one commenter put it,

It is not denied that anciently a common carrier was liable for refusing to carry goods; a common innkeeper for refusing to receive a guest; a common ferryman for refusing to carry a passenger; and generally, perhaps, that there was an implied obligation upon every one standing before the public in a particular profession or employment to undertake the duties incumbent upon it...⁵

There are generally two ways to engage in this public calling. One might simply offer a service to the public, and thus voluntarily take on the other duties of a common carrier. As the *NARUC* court put it, “[t]he common carrier concept appears to have developed as a sort of *quid pro quo*, whereby a carrier was made to bear a special burden of care in exchange for the privilege of soliciting the public’s business.”⁶ Additionally, a competent authority might direct a carrier to hold itself out to the public, giving it a “legal

² See e.g., Comments of Comcast Corp. in Framework for Broadband Internet Service, GN Docket No. 10-127, at 32 (filed July 15, 2010) [hereinafter Comcast Comments] (asserting that the 1934 Communications Act was designed solely as a curb on monopoly power, and seeing the principle of common carriage as originating in the Interstate Commerce Act of 1887, Pub. L. No. 49-41, 24 Stat. 379 (codified at 49 U.S.C. §1 (2006)). The 1934 Act does borrow specific phrases from the 1887 Act, but the underlying principles are much older, and are distinct from market power concerns.

³ See JOSEPH HENRY BEALE, JR., A SELECTION OF CASES ON THE LAW OF CARRIERS (1898), at pp. 35-184, for numerous examples from the common law.

⁴ SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (VOLUME II) (William E. Dean 1853), at p. 133 (Book III, Chapter VIII).

⁵ *Bennet v. Dutton*, 10 N.H. 481 (1839) (introductory material).

⁶ *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir. 1976) (*NARUC*).

compulsion thus to serve indifferently,” thereby subjecting it to the panoply of common carrier rights and obligations.⁷ In both cases a carrier becomes a *common* carrier by virtue of its undertaking: common carriage is not a label that the state gives to a service, but a kind of service that is performed and its attendant legal obligations.⁸

As new technologies have been developed—from railroads⁹ to the telegraph,¹⁰ then to telephony and now broadband—this time-tested principle of common carriage has been applied. Like due process, trespass, and the right to habeas corpus, common carriage is an old legal principle that is vital today. Commenters are therefore wrong to suggest that Title II, and the classification of broadband access as a common carriage service, is somehow “outdated.”¹¹ On the contrary, the survival of common carriage over so many years is an indication of its vitality.

⁷ *Id.* at 642.

⁸ *Id.* at 644. The Commission has discretion to interpret ambiguous statutes and make findings of fact, and it should do so to find that broadband Internet access is a telecommunications service. *See infra* Section VI.B. However, within a given legal framework, and with a particular set of facts, whether or not a service is a telecommunications service is not purely a policy decision. That is, the Commission does not have discretion to find that a service otherwise meets the definition of a telecommunications service, but then choose not to apply that label to it.

⁹ Interstate Commerce Act of 1887, Pub. L. No. 49-41, 24 Stat. 379 (codified at 49 U.S.C. §1 (2006)).

¹⁰ In “the first comprehensive telegraph legislation,” the state of New York enacted legislation declaring that:

§ 11. It shall be the duty of the owner or the association owning any telegraph line, doing business within this state, to receive dispatches from and for other telegraph lines and associations, and from and for any individual, and on payment of their usual charges for individuals for transmitting dispatches, as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith, under penalty of one hundred dollars for every neglect or refusal to do so...

§ 12. It shall likewise be the duty of every such owner or association, to transmit all dispatches in the order in which they are received, under the like penalty of one hundred dollars . . . provided, however, that arrangements may be made . . . for the transmission of [newspaper dispatches] out of [their] regular order.

William Jones: The Common Carrier Perspective as Applied to Telecommunications: A Historical Perspective (1980), *available at* <http://www.cybertelecom.org/notes/jones.htm>, (quoting New York Act of April 12, 1848, NY Laws, c. 265, p. 392).

¹¹ *See, e.g.*, Comments of Verizon and Verizon Wireless in Framework for Broadband Internet Service, GN Docket No. 10-127, at 2 (filed July 15, 2010) [hereinafter Verizon Comments].

In furtherance of these principles, Public Knowledge replies to comments addressing several particular areas. First and foremost, there is nothing in the record to suggest that the Commission can achieve its wide-ranging goals for broadband access service without Title II. The National Broadband Plan, access programs such as the Universal Service Fund, and public safety regimes all require the firm legal ground that only Title II classification can provide. Other commenters' tortured statutory reading vividly illustrate that their priorities lie in increasing their access to obligation-free taxpayer funds, not protecting consumers in the Internet.

Attempts to confuse the issue of the Commission's approach to broadband access service with technology-specific objections does little to provide meaningful insight into the vital public policy question at hand. Public Knowledge provides clear evidence that Title II classification can be used to establish bright-line distinctions based on service offered. More importantly, straightforward, technology-neutral rules will help provide critical certainty to future innovation.

Finally, Public Knowledge once again argues that forbearance must be implemented carefully and selectively. Overly broad forbearance decisions, or attempts to tie forbearance to future judicial reaction to Commission action, will destabilize the broadband access market and further delay the Commission's ability to provide clear rules to all parties who use, offer, or rely on broadband access. The Commission must act under its clear authority and properly classify broadband access service under Title II.

ARGUMENT

I. Commenters Have Failed to Make a Case that the Commission Can Achieve Its Goals Without Title II

Following the *Comcast* decision, it is clear that Title I ancillary authority is insufficient to achieve the Commission’s various broadband goals. Although commenters have tried to show how the Commission may use Title I to implement their preferred programs, even those arguments fail to provide any certainty upon which the Commission may rely.

A. The National Broadband Plan Must Be Implemented as a Unified Plan

In the National Broadband Plan, the Commission recognized that, just as a “thoughtful approach to the development of electricity, telephone, radio and television transformed the United States,” a thoughtful approach to broadband access is required to prepare the nation for a connected future.¹² Below three umbrella categories, the NBP set out scores of individual recommendations designed to bring broadband access—access that “is essential to opportunity and citizenship”¹³—to everyone. Although all of these recommendations are important, each of them starts with a single goal: giving every American “access to broadband capability.”¹⁴

With so many recommendations touching on so many parts of society and the economy, the Commission cannot rely on patchy, ad hoc authority to achieve the goals of the NBP. Enhancing public safety through guaranteed interconnection, protecting consumers from abuse at the hands of broadband access providers, and even ensuring a

¹² FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, Introduction (2010) [hereinafter *NBP*].

¹³ *Id.*

¹⁴ *Id.*

free and open Internet are each distinct challenges. However, together they form the foundation of universal, accessible broadband for all Americans. Each of these elements must be firmly grounded in order for the Commission to achieve the goals of the National Broadband Plan and meet “*the* great infrastructure challenge of the early 21st century.”¹⁵

The NBP goals do not stand alone. Instead, they are connected and mutually dependent on one another. Attempting to construct a separate, legally suspect justification for each element of the NBP, and for each challenge that appears as broadband access evolves, virtually guarantees that some (if not all) of the Commission’s goals will go unmet. This, in turn, will prevent the NBP from being realized. In order to do the important work that will guarantee broadband access for all Americans, the Commission must focus on a single, unified basis of authority. Only Title II can provide such a foundation.

B. Even Title I Justifications for Universal Service Fund Expansion into Broadband Remain Suspect

Many commenters, eager to discredit Title II, are just as eager to export the Commission’s Title II ability to transfer money to them into Title I. To that end, commenters create elaborate structures to justify the expansion of the Universal Service Fund into broadband access under Title I. However, even a brief examination of this justification should satisfy the Commission of the inadequacy of these theories.

Commenters ask the Commission to overlook what they euphemistically describe as “tension” between express statutory language and an attempt to modernize the Universal Service Fund.¹⁶ Usually confident commenters describe their theories as

¹⁵ *Id* (emphasis in original).

¹⁶ Comments of Time Warner Cable Inc. in Framework for Broadband Internet Service, GN Docket No. 10-127, at 80 (dated July 15, 2010) [hereinafter TWC Comments].

“plausible.”¹⁷ In light of the *Comcast* decision,¹⁸ they urge reliance on precedent that they suggest would allow the Commission to act “notwithstanding the textual limitations in the statute.”¹⁹ The Commission cannot rest USF reform on a legal foundation that even its proponents regard as uncertain.

This hem and haw is not surprising. Section 254 explicitly defines universal service as “an evolving level of *telecommunications services*,”²⁰ and repeatedly describes the program goals in terms of expanding the reach of telecommunications services.²¹ It may be that a court could uphold the Commission’s ancillary authority to implement some subset of Universal Service Fund reform. However, it will be impossible to determine in advance which parts of reform will be upheld and which will be struck down. The “plausible” theories presented by commenters that urge the Commission to overlook the “tension” and “textual limitations in the statute” will inevitably increase uncertainty and hinder efforts at reform. Reform of something as complex as the Universal Service Fund will require precisely the type of holistic plan that selective judicial appraisal will undermine.

Any carrier connected with the Universal Service Fund can challenge any and every Commission action. Partial theories that might justify some elements of reform may be upheld in some cases and overturned in others. Each rule change, which might very well require its own unique theory to justify Commission authority to be implemented, could and would be challenged in court. Without a unified theory of

¹⁷ Comments of Cablevision Systems Corporation in Framework for Broadband Internet Service, GN Docket No. 10-127 at 36 (dated July 15, 2010) [hereinafter Cablevision Comments].

¹⁸ *Comcast Corp. v. FCC*, 600 F.3d 642, 651 (D.C. Cir. 2010).

¹⁹ Comments of AT&T Inc. in Framework for Broadband Internet Service, GN Docket No. 10-127, at 24 (dated July 15, 2010) [hereinafter AT&T Comments].

²⁰ 47 U.S.C. § 254 (c)(1) (2006) (emphasis added).

²¹ See 47 U.S.C. § 254 (b)(4), (b)(6), (c)(1)(C), (d), (f).

Commission authority, every one of those challenges could be “the one” that brings reform efforts toppling down.

While the justifications put forward by commenters for expanding the scope of the Universal Service Fund under Title I ancillary authority are certainly a testament to deep reservoirs of legal creativity, they are fragile, inadequate, and unlikely to be accepted by a court.

More strikingly, they vividly illustrate commenters’ view of the Commission as a bottomless, obligation-free taxpayer-funded ATM. After torturing Section 706(b) to find a way for the Commission to hand it large sums of money, commenter AT&T quickly pivots to insist that it would be “untenable to view that provision as a basis for imposing regulatory *obligations* on broadband providers.”²²

This demand for no-strings-attached money betrays the true priorities of commenters who argue against Title II. The Commission is tasked with protecting consumers and protecting critical communications infrastructure, not with overseeing massive obligation-free transfer payments to entrenched incumbents.

C. Individual Commenters’ Suggestions for Title I Often Omit Important FCC Policies

Public Knowledge notes that commenters spent the majority of their effort developing their deeply flawed defense of USF reform under Title I. Other crucial elements, as well as the ability of the FCC to address a future *Madison River*-type situation, received a much less thorough treatment. This shortcoming will become increasingly problematic as more and more services migrate to IP-based networks.

²² AT&T Comments at 27 (emphasis in original).

The Commission's recent Public Notice on Public Safety and Homeland Security highlights this transformation.²³ The notice stated that "every sector of our Nation's economy, including the financial market, operations of most enterprises, and all levels of government, rely on broadband and Internet Protocol (IP) for communications."²⁴ The notice goes on to recognize that "Americans are increasingly relying on broadband and IP-based technologies as substitutes for, or compliments to, communications services provided by older, conventional communications technologies."²⁵

In a sign of things to come, the Public Notice requested comment on the Commission's statutory authority to implement programs designed to provide information about network outages in an emergency.²⁶ MetroPCS, a carrier opposed to such regulations, quickly insisted that "the Commission has no authority to adopt outage reporting regulations upon broadband Internet service providers."²⁷ Without secure legal grounding in Title II, the Commission should expect such objections to every program it attempts to implement regarding IP-based communications.

The Commission cannot prepare for this wholesale shift from "conventional communications technologies" to IP-based services with a patchwork of legal theories. Cursory justifications for programs that happen to appeal to individual commenters cannot for the basis of the future of Commission authority.

²³ Public Notice, *Public Safety and Homeland Security Bureau Seeks Comment on Whether The Commission's Rules Concerning Disruptions to Communications Should Apply to Broadband Internet Service Providers and Interconnected Voice Over Internet Protocol Service Providers*, ET Docket No. 04-35; WC Docket No. 05-271; GN Docket Nos. 09-47, 09-51, 09-137 (July 2, 2010).

²⁴ *Id.* at 1.

²⁵ *Id.*

²⁶ *Id.* at 4.

²⁷ Comments of MetroPCS Communications, Inc. in Public Safety and Homeland Security Bureau Concerning Disruptions to Communications to Broadband Internet Service Providers and Interconnected Voice Over Internet Protocol Service Providers, ET Docket No. 04-35; WC Docket No. 05-271, GN Docket Nos. 09-47, 09-51, 09-137, (dated August 2, 2010).

II. Internet Connectivity Service is Rightly Classified As Telecommunications, and the Proposed Classification is Neither Overinclusive nor Underinclusive

If it articulates a cohesive framework that distinguishes telecommunications services from other forms of “communication by wire or radio,” the Commission can clarify many of the more extreme scenarios offered by opponents of broadband reclassification. However, as written, the NOI already draws on precedent to explain exactly what “Internet connectivity” is.

A. Classifying Internet Connectivity As a Telecommunications Service Does Not Sweep In the Entire Internet Economy

The question of what is and what is not a telecommunications service should not be complicated. But years of proceedings and shifting terminology have muddied the waters, making it seem that determining where a basic communications service ends and where other services begin is a philosophical puzzle of the highest order. In this proceeding, companies with a financial interest in avoiding regulation have articulated implausible theories where anything a telecommunications service touches becomes, itself, a telecommunications service, until the entire Internet is regulated on a common carrier basis and every web site operator, eBay seller, and blogger must file a tariff with the FCC and state utility commissions.²⁸ Such arguments are clearly spurious. If this line of reasoning were accepted, any company that does business over existing telecommunications connections such as POTS would also be subject to Title II

²⁸ See, e.g., Verizon Comments at 58-63. This is distinct from another argument that has been repeatedly put before the Commission. Under this argument, which seems to be premised on a kind of regulatory “mutually assured destruction,” when regulation is appropriate for one sector of the economy (even one that has traditionally been regulated), it is appropriate for all the others. Thus some ISPs have begun disingenuously calling for “search neutrality.” See, e.g., TWC Comments at 52; Comments of AT&T, GN Docket 09-191 (filed January 14, 2010), at 199; Comments of Comcast, GN Docket 09-191 (filed January 14, 2010), at 35-26.

regulation, and there would be no way to distinguish 1-800-FLOWERS from CenturyLink and AT&T.

With this proceeding, the Commission has an opportunity to put an end to this kind of specious argument by clearly articulating the general test that divides telecommunications services from non-telecommunications services. This does not require more than quoting the definitions in the Communications Act and citing a few interpretative precedents. Put briefly, “telecommunications” is a service that gives users the ability to transmit their own information without change to a destination of their choice, when this service is offered to the public.

Further analysis is only needed to understand what it means for a service to be “offered.” After all, computers and software are used in the control and management of a telecommunications service, just as they are used operating an e-commerce site. Thus, though whether a service is or is not a telecommunication service is fact-specific, technology alone cannot answer the question. Essentially, the determination involves looking at the specific service being offered, and deciding whether that offer is one *of* telecommunications, or one that *uses* telecommunications.

For example, 1-800-FLOWERS uses telephones, flowers, and trucks as inputs to its flower delivery service. Although telecommunications is an essential input to its business, 1-800-FLOWERS depends on users having pre-existing telecommunications links (i.e., a phone line). Thus, it is clear that its “offer” is not one of telecommunications. Dial-up ISPs are analogous to 1-800-FLOWERS. They “offer” to end-users the ability to acquire information from and make available information to the Internet: an information service. Like with 1-800-FLOWERS, a dial-up ISP depends on the consumer’s pre-

existing transmission capability (again, a telephone line). A dial-up ISP does not “offer” to consumers what they already have. ISPs consume, but do not resell or “offer” middle mile and backbone transmission to their consumers—neither do they offer electricity, office space, parking, or any of their other inputs.²⁹ By contrast, a long distance telephone company actually offers transmission services directly to consumers. The fact that one needs to use another telecommunications service (local phone service) to access long distance services is immaterial—one can use one telecommunications service to access another one, and a telecommunications service does not have to be in the “last mile.” Again, all that matters is what is being offered to consumers, not the location of the physical facilities, or who has title to them.

Under this framework, it is clear that broadband Internet access is a telecommunications service. Broadband ISPs primarily distinguish themselves from other ISPs on the basis of bandwidth and reliability, which are features of the transmission link between the customer’s home and the ISP’s servers. Broadband ISPs actually provide this transmission capability (whether they own or lease the facilities)—they do not expect their consumers to somehow provide their own raw transmission link to the ISP’s upstream facilities. Broadband ISPs do indeed perform functions that, if offered on a

²⁹ Similarly, 1-800-FLOWERS buys its own telephone and Internet service, but is not “offering.” In the alternative, if market research suggested that dial-up ISPs do indeed “offer” transmission to and from various points on the Internet to the user, then they would be considered telecommunications services under this framework, and would be conceptually more similar to inter-exchange carriers than to Internet applications. But the Commission has determined that “information service” and “telecommunication service” are mutually exclusive categories. Federal State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11,501, ¶ 13 (1998). To maintain this division, the Commission could adopt an interpretation of the Communications Act whereby dial-up Internet access is considered “transmission” to and from points on the Internet, and not, for example, “acquiring” information to the Internet and “making [it] available.” 47 U.S.C. § 153(20). This interpretation would only affect the regulatory classification of dial-up ISPs, and would not require subjecting them to additional regulation. For instance, the low barriers to entry in creating a dial-up ISP (because the last-mile transmission link is already in place) could mean that behavior that would be unreasonable if done by a broadband ISP is reasonable if done by a dial-up ISP. Of course, if dial-up ISPs were telecommunications services, that would provide even more reason for broadband ISPs to be so categorized.

standalone basis, would not be considered telecommunications services. They perform the same services that a dial-up ISP provides. But common sense, the FCC's longstanding "adjunct to basic" doctrine, and the Communications Act itself state that because a broadband ISP's primary offer is telecommunications, other parts of the ISP's service that are required for the customer to actually make use of this raw transmission link are considered part of the telecommunications service of broadband Internet access. This includes any servers, and even applications like DNS that would not be telecommunications if offered on a standalone basis. That is, an ISP still "offers" a telecommunications service even if it improves its usefulness with caching and other features. This ensures that a telecommunications service cannot evade its obligation to avoid unjust or unreasonable practices simply by embedding such practices in advanced servers or switches.

There is little novel in this approach. Carriers have offered broadband telecommunications services before. Special access lines are regulated under Title II today.³⁰ Furthermore, DSL providers were required to offer a "raw transmission" service wholesale to resellers, without any integrated adjunct to basic services.³¹ But contrary to some commenters,³² whether a service is wholesale or resale does not affect whether it is a telecommunications service, nor does the fact that at a wholesale level it may be offered without adjunct to basic services that are essential at a retail level.³³ Furthermore, under

³⁰ *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.2d 903, 905 (DC Cir. 2009).

³¹ See GTE Telephone Operating Cos., GTOC Tariff No. 1, *Memorandum Opinion & Order*, 13 FCC Rcd 22,466 (1999); Bell Atlantic Telephone Cos., Bell Atlantic Tariff No. 1, *Memorandum Opinion & Order*, 13 FCC Rcd. 23,667 (1998).

³² See AT&T Comments at 45.

³³ Though such efforts are outside the scope of this proceeding, PK is on the record as supporting future Commission efforts aimed at spurring competition by requiring unbundling in the future, and is generally in favor of the approach promoted by Data Foundry. See Comments of Data Foundry, GN Docket No. 10-127 (filed July 15, 2010).

this approach, it is clear that Title II will not uncontrollably sweep in all aspects of the Internet and Internet-connected devices. While a complete analysis for any service would require significantly more detail, PK offers the following preliminary understanding of various services under the framework just provided.

Service	Telecom?	Explanation
Broadband Internet Access	Yes	The primary “offer” is of transmission between the customer’s home and the ISP’s facilities.
Dial-up Internet	No	The “offer” does not include transmission, which the user provides to access the ISP’s facilities.
Unbundled broadband Internet	Yes	The “offer” includes transmission; the fact that the ISP does not own the facilities is immaterial. The user does not provide his own transmission.
Local telephone service	Yes	The “offer” is of transmission to and from the local exchange offices. (It is clearest to view voice as the primary "application" of the PSTN, along with data (via modems), teletype, and fax.)
Long distance telephone service	Yes	The “offer” is of transmission from one exchange to another (the customer relies on another, separate telecommunications service to send data to the long distance carrier).
Noninterconnected VoIP	No	The “offer” is to use software to take advantage of a pre-existing telecommunications facility to transmit voice. Voice is just an application of a telecommunications network—this is also true of the telephone network, which has many uses besides voice.
Interconnected VoIP	Yes	An interconnected VoIP provider is reselling PSTN access to its customers, which is pure telecommunications.
Standalone DNS	No	DNS is an application, and does not offer the ability to communicate or transmit data.
Integrated DNS	Yes	When offered alongside broadband transmission, DNS is essential to the useful operation of the transmission and is considered to be part of the overall telecommunications service.
Edge caching (CDN)	No	Caching is physically storing some data in a closer location; this is not offering the

		capability for a user to transmit information between points of his choosing.
Facebook	No	Facebook does offer to its users the ability to communicate with each other, but it does not offer transmission (which must be provided by the customer's ISP).
Email or Instant Messaging	No	Email/IM is an application that uses transmission; an email provider does not "offer" its consumers data transmission.
Backbone and Middle Mile	Depends	Backbone and middle mile services are pure transmission (and thus "telecommunications"); whether they are "telecommunications services" under the law hinges on whether they are "offered" to the public. They are usually private carriers, but some (e.g. special access lines) middle mile connectivity is common carriage. (The Commission does have the authority to direct a private carrier to offer its service on a common carriage basis, but it cannot direct a non-carrier (e.g. an Internet application) to become a common carrier.)
Amazon Kindle (Whispernet)	No	The "offer" is of an information service (the ability to purchase and synchronize ebooks). The communications component (access to Sprint's EVDO network) is provided by Amazon, but only as a means to access the information service and not as a general purpose communications platform. Similar reasoning applies to other "special-purpose IP services and products." ³⁴

Table 1: Communications Services

B. Although the Commission Has Broad Authority to Define Services, "Internet Connectivity" Is Not New

For most people, the difference between "the Internet" and "Internet access" is not too hard to grasp. Verizon intuits this distinction when it compares Internet access services to an "onramp" to the Internet, writing that "[a] highway system is a good analogy for how Internet access works. With FiOS, Verizon provides you with a very

³⁴ AT&T Comments at 63.

large and fast onramp from your home to the Internet highway.”³⁵ It is precisely these onramps that the proposed “third way” seeks to classify as a telecommunications service.³⁶

But many commenters in this proceeding profess not to see the difference. MetroPCS writes that “The Internet is synonymous with access to the Internet.”³⁷ Governors Janice Brewer of Arizona,³⁸ Mark Sanford of South Carolina,³⁹ and others frame the proposed reclassification as Internet regulation. NCTA apparently sees the distinction between Internet access and the Internet, but worries that reclassification “will inevitably lead to broad regulation of the Internet.”⁴⁰ The examples multiply, but they offer little insight.

The FCC and all sides in the reclassification debate are well-versed in the specifics of how the Internet operates. It is not disputed that the Internet is a network of networks, and that any computer that is connected to the Internet becomes *part* of the Internet. That said, it is possible—in fact, it is quite common—to regulate some aspects of Internet access without also regulating “the Internet.” Internet access providers offer a service that allows home users to join the Internet. This service—Internet connectivity—has been separately identified as subject to obligations and privileges in a number of contexts. Slightly different words are sometimes used, but the underlying concept is

³⁵ Verizon, FiOS Internet- How Does Internet Access Work?, <http://www22.verizon.com/residentialhelp/fiosinternet/general+support/getting+started/questionsone/85256.htm> (accessed July 29, 2010. Verizon appears to have changed the page since that date, but Public Knowledge has an archive on file).

³⁶ See Austin Schlick statement, page 2, http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0506/DOC-297945A1.pdf.

³⁷ Comments of MetroPCS at 7.

³⁸ Letter from Governor Janice Brewer to FCC, GN Docket No. 10-127 (filed June 15, 2010).

³⁹ Letter from Mark Sanford to FCC, GN Docket No. 10-127 (filed May 20, 2010).

⁴⁰ Comments of the National Cable and Television Association in Framework for Broadband Internet Service, GN Docket No. 10-127, at 82 (dated July 15, 2010) [hereinafter NCTA Comments].

substantially similar. For example, under the DMCA a “service provider” is “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”⁴¹ (This wording shows the conceptual compatibility between “telecommunications” in the Communications Act⁴² and Internet connectivity.) Congressmen Rick Boucher and Lee Terry have recently introduced a universal service reform bill, which easily defines a “communication service provider” as including Internet access.⁴³ The Broadband Technology Opportunities Program (part of the American Recovery and Reinvestment Act of 2009 (ARRA)), which seeks to improve “access to broadband service,” was not intended to direct funds to online dating services or the Internet backbone.⁴⁴ Nor did the National Broadband Plan, mandated by the ARRA, seem to find it difficult to parse out the distinction between broadband service and the Internet.⁴⁵ Past legal rules that cover Internet access have not spun out of control and inevitably encompassed all communications networks, services, and content. Public Knowledge has confidence that the Commission will be able to craft rules that successfully distinguish residential broadband from websites and Internet-enabled heart monitors.⁴⁶

⁴¹ 17 USC § 512(k).

⁴² 47 USC § 153(44).

⁴³ See Universal Service Reform Act of 2010, H.R. ____, available at http://www.boucher.house.gov/images/stories/USF_7-10.pdf.

⁴⁴ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5.

⁴⁵ The first goal of the National Broadband Plan is to improve the upload and download speeds available to consumers—functions that are purely in the domain of broadband Internet connectivity. NBP at 9. In its analysis of the “broadband ecosystem,” also, the plan identified “network service providers” as distinct from the rest of the Internet economy. *Id.* at 18.

⁴⁶ See AT&T Comments at 63.

AT&T claims that the NOI “invents” a new service—“Internet connectivity service.”⁴⁷ This is oddly dismissive of the Commission’s attempt to provide terminological clarity—the abbreviated survey above demonstrates that different writers at different times use slightly different terms to refer to broadband Internet access and other services. By adopting a less-common turn of phrase, the Commission saves itself and the public some confusion. As discussed below, this service is in fact not new at all. But even if the Commission *had* defined a new service in the NOI, this would hardly be cause for concern. As the Commission recently explained in the context of denying Qwest’s Phoenix forbearance petition, its threshold market analysis “calls for us to define both wholesale and retail product markets.”⁴⁸ The Commission has broad discretion in making these determinations of market definition.⁴⁹ If anything, it is *more* vital for the Commission to ensure it is using a relevant product market when defining the nationwide broadband regulatory framework than it is when considering a single forbearance request. The Commission’s analysis of “Internet connectivity service” is a step towards doing just

⁴⁷ AT&T Comments at 62. AT&T further claims that “Internet connectivity service” is “patently overbroad,” AT&T Comments at 63, claiming that language that previews later discussion in the NOI is intended to be a comprehensive “definition.” Reading ahead, the later discussion in the NOI (¶¶ 63-65) belies AT&T’s concerns. Furthermore, as has been discussed extensively in this proceeding and in these comments, whether or not a particular service is a “telecommunications service” does not relate only to the pure functionality of the service, but to the way in which it is held out to the public—that is, the kind of offer being made. When AT&T offers a telecommunications service, the fact that it may also provide an information service such as email does not change the character of the telecommunications service. When Amazon offers an information service such as Kindle’s Whispersync, the fact that it may also provide a dedicated communications service to access the information service likewise does not change the character of the information service. As previously discussed, Comments of Public Knowledge, GN Docket No. 10-127 (filed July 15, 2010) at 12-19, when data processing is functionally integrated with a telecommunications service, that data processing is considered to be part of the telecommunications service. This integration does not go the other way: When an information service is itself the offer, the fact that a telecommunications service may be necessary to access it does not turn the telecommunications service into an information service (or, for that matter, the offered information service into a telecommunications service.)

⁴⁸ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, *Memorandum Opinion & Order*, WC Docket No. 09-135, FCC 10-113 (2010), at ¶ 46 [hereinafter *Qwest Phoenix Order*].

⁴⁹ *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.2d 903, 908 (DC Cir. 2009).

that, and isolating those features of broadband service that are relevant from a regulatory perspective. Separating “Internet connectivity” from other features that may be bundled with it is as “broadband service” is entirely consistent with the approach taken in the Qwest Phoenix Order, where the Commission explained “even though telecommunications offerings typically include multiple features that may be relevant when defining product markets, at the most basic level, a consumer demands ‘access’ from a provider to connect to a communications network.”⁵⁰

That said, while unfamiliar to AT&T, a distinct “connectivity” service is hardly new. Like the current NOI, the 2002 Cable Modem Order discusses “Internet connectivity functions”⁵¹ and the “connectivity to the Internet,”⁵² which it distinguished from extra services like email and web hosting.⁵³ The NOI does not hide the ball on this: It cites to, and relies on the reasoning and terminology of the 2002 Order quite heavily.⁵⁴ The purpose of this “contrived sub-service” (as AT&T puts it), is to recognize that broadband access providers sell their customers extra features, such as email, that they bundle along with broadband access, and to provide the Commission with a ready means to distinguish the various services that carriers provide. The fact that carriers may choose to throw in extra services to their consumers as benefits or to bundle various services together with Internet connectivity service is immaterial. Although a fast food restaurant may bundle different items together as a value meal, a cheeseburger with fries is still a

⁵⁰ *Qwest Phoenix Order* ¶ 52.

⁵¹ ¶ 17 [hereinafter Cable Modem Ruling].

⁵² Cable Modem Ruling ¶ 11.

⁵³ The Cable Modem Ruling broke out the technical features of Internet connectivity service in a way that makes it clear why this service is distinct from applications such as email, ¶ 17, and discusses “Internet connectivity **and** services such as e-mail and web-hosting” (emphasis added), making it clear that other services that providers may choose to provide their customers do not somehow become part of Internet connectivity merely because they are bundled together on the same bill.

⁵⁴ NOI ¶ 16.

cheeseburger, and broadband connectivity with email, security and other functions, is still broadband connectivity even if it is only sold as part of a bundle with other services as “broadband service.”⁵⁵

III. The Horror Stories Invoked by Opponents of Title II are Equally Specious

Contrary to the claims of various commenters, Title II will not result in international domination of the Internet, nor will it negatively impact investment.

A. The Classification of Broadband Access Service Under Title II Will Not Allow Foreign Dictators to Control the Internet

The GSM Association (GSMA) has suggested that Title II classification “could serve as a catalyst for a marked increase in international regulation of the Internet,” invoking both the United Nations and the International Telecommunication Union (ITU).⁵⁶ GSMA expressed concern that classification could be used as a pretext by unnamed but ominously titled “non-Internet friendly countries” to expand their own domestic regulation of the Internet.⁵⁷

Commissioner McDowell recently expressed similar concerns.⁵⁸ In a scenario he describes as “by no means far-fetched,” Commissioner McDowell constructs a narrative that flows quickly and inevitably from Title II classification of broadband access service to a “cascade of international regulation of the web,” on to “U.N. jurisdiction over parts

⁵⁵ Some commenters, *see, e.g.* NCTA Comments at 10-11, 15-20, make this everyday, commonsense concept seem impossible to understand. By their reasoning, it is impossible to separately identify or regulate any inputs that go into providing a service—and presumably it would be impossible to isolate the cheeseburger component of a value meal.

⁵⁶ Comments of the GSM Association, GN Docket No. 10-127 at 2 (dated July 15, 2010).

⁵⁷ *Id.*

⁵⁸ *See* Robert M. McDowell, *The U.N. Threat to Internet Freedom*, The Wall Street Journal, July 22, 2010, available at http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704684604575381571670766774.html.

of the Internet,” arriving finally at crackdowns in the style of North Korea, Syria, Thailand, Afghanistan, Venezuela, and, of course, China.⁵⁹

The Commission must recognize that the proponents of these theories, like those who suggest that classification under Title II is some sort of “Fairness Doctrine 2.0,”⁶⁰ or is the first step in a plan to impose government censorship of the Internet,⁶¹ are peddling ludicrous flights of fancy. “Non-Internet friendly countries” are not waiting for Commission approval before cracking down on domestic Internet access. The ITU, a body responsible for such onerous and nefarious regulations as international calling prefixes,⁶² is not secretly controlled by North Korea and Venezuela, who have been waiting for their chance to destroy Internet freedom in the United States through nonbinding standardization and interoperability suggestions. With the exception of fundraisers of fringe political groups, no one has supported any sort of Fairness Doctrine 2.0. Finally, any governmental attempt to censor a Title II service would be prevented by the precedent established in *Sable*.⁶³

Instead, Title II classification would allow the Commission to implement the NBP, protect consumers online, and make good on its goal to give all Americans access to broadband.

⁵⁹ *Id.*

⁶⁰ *See, e.g.* Kelly William Cobb, *Fairness Doctrine 2.0: “Nudging” What You Read Online*, Americans for Tax Reform Blog, May 19, 2010, <http://www.atr.org/fairness-doctrine-point-nudging-read-online-a4958#>.

⁶¹ *See, e.g.* Neil Stevens, *Don’t let them tell you they don’t want to censor the Internet*, RedState.com, May 20, 2010, http://www.redstate.com/neil_stevens/2010/05/20/dont-let-them-tell-you-they-dont-want-to-censor-the-internet/.

⁶² International Telecommunications Union, *National Numbering Plans*, <http://www.itu.int/oth/T0202.aspx?parent=T0202>.

⁶³ *Sable Commc’ns of Cal. Inc., v. FCC*, 492 U.S. 115 at 127-28 (1989).

B. Commenters Failed to Show that Title II Classification Would Negatively Impact Investment

Although Title II opponents insist that Title II is “investment-inhibiting and innovation-curtailling,”⁶⁴ recent developments suggest just the opposite. Historically, network investment actually increased under the Open Internet rules that opponents find most problematic.⁶⁵

Since Chairman Genachowski announced his Third Way proposal on May 6 of this year—an announcement that, at least, put investors on notice that Title II regulation was possible—a number of high profile Internet access-related investments have been announced. Harbinger Capital announced an eight-year, \$7 billion deal with Nokia to create and operate a national wireless network.⁶⁶ Additionally, Clearwire expanded its wireless broadband Internet service to Washington, D.C.,⁶⁷ Kansas City,⁶⁸ Baltimore,⁶⁹ St. Louis,⁷⁰ Salt Lake City,⁷¹ Richmond,⁷² Yakima,⁷³ Rochester and Syracuse,⁷⁴ Eugene,⁷⁵ and Merced.⁷⁶

⁶⁴ TWC Comments at 6.

⁶⁵ See S. Derek Turner, *Finding the Bottom Line: The Truth About Network Neutrality and Investment*, Free Press, Oct. 2009, available at

http://www.freepress.net/files/Finding_the_Bottom_Line_The_Truth_About_NN_and_Investment_0.pdf.

⁶⁶ See Cecilia Kang, *Harbinger-Skyterra ink \$7 billion deal with Nokia to build 4G LTE satellite mobile broadband network*, Washington Post, July 20, 2010,

http://voices.washingtonpost.com/posttech/2010/07/harbinger-skyterra_ink_7_bln_d.html.

⁶⁷ Clearwire Corporation, *Clearwire Launches Initial Clear(R) 4G Mobile Internet Service in Central Washington, D.C. Area*, June 1, 2010, <http://investors.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1432548>.

⁶⁸ Clearwire Corporation, *Clearwire Launches Initial Clear(R) 4G Mobile Internet Service and Retail Stores in Kansas City*, June 1, 2010, <http://investors.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1432546>.

⁶⁹ Clearwire Corporation, *Clearwire Ramps Up Clear(R) 4G Service in Baltimore*, June 1, 2010, <http://investors.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1432550>.

⁷⁰ Clearwire Corporation, *Clearwire Enters the Gateway to the West Bringing CLEAR4G to St. Louis*, June 28, 2010, <http://investors.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1441984>.

⁷¹ Clearwire Corporation, *Clearwire Brings CLEAR4G to Salt Lake City and the Wasatch Front*, June 28, 2010, <http://investors.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1441985>.

⁷² Clearwire Corporation, *Clearwire Brings CLEAR4G to Richmond, Virginia*, June 28, 2010, <http://investors.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1441986>.

Although the Commission should not base policy decisions on day-to-day fluctuations in stock prices, and the predictive value of current stock prices for future capital investment is quite limited, it bears mention that no meaningful market reaction can be divined from the fluctuations of the stock prices of major Internet service providers since Chairman Genachowski's announcement.⁷⁷

The Commission is charged with protecting the public interest, not feathering the nests of network operators. It should not request a blessing from Wall Street analysts before acting. Even in light of that, it is reasonable to consider the impact policy decisions will have on investment. However, when the Commission elects to engage in such consideration it must view the communications sector as a whole, not just investment by broadband network providers. Allowing existing network operators to extract supracompetitive rents reduces overall investment in every other economic sector that relies on connectivity.

As the Commission recognized in the NBP, the expansion of broadband as a platform is quickly creating a situation where *every* sector relies on connectivity. Whenever the Commission has looked past the demands of incumbent carriers, as it did with the creation of mobile telephone service and unlicensed wireless computer networking, it has created tremendous growth opportunity in the economy as a whole.

⁷³ Clearwire Corporation, *Clearwire Brings CLEAR4G to Yakima and Tri-Cities, Washington*, July 1, 2010, <http://investors.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1443335>.

⁷⁴ Clearwire Corporation, *Clearwire Brings CLEAR4G to Rochester and Syracuse, NY*, July 1, 2010, <http://investors.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1443336>.

⁷⁵ Clearwire Corporation, *Clearwire Brings CLEAR4G to Eugene, Oregon*, July 1, 2010, <http://investors.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1443339>.

⁷⁶ Clearwire Corporation, *Clearwire Brings CLEAR4G to Merced and Visalia, California*, July 1, 2010, <http://investors.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1443337>.

⁷⁷ Between May 5, 2010 and August 11, 2010, AT&T's (T) share price increased 2.50%, Comcast's (CMCSA) decreased 9.36%, Time Warner Cable's (TWC) decreased 2.08%, and Verizon's (VZ) increased 2.81%. All outperformed the Dow Jones Industrial Average (which decreased 5.00%), with the exception of Comcast.

IV. Wireless Broadband Access Services Should Not Be Excluded From Title II

It should not come as a surprise that various commenters' position on the proper classification of wireless broadband access corresponded highly with whether or not the commenter offers wireless broadband access service. Commenters such as T-Mobile,⁷⁸ Sprint Nextel,⁷⁹ and CTIA – The Wireless Association,⁸⁰ who provide or represent those who provide wireless broadband access services, argue that bringing wireless broadband access under Title II would be unwise and unnecessary. In contrast, commenters such as Charter Communications⁸¹ and Cablevision,⁸² who do not provide wireless broadband access, argue that it would be nonsensical to exclude wireless broadband access from Title II.

As Public Knowledge has already established,⁸³ there is no valid legal or policy reason to exclude wireless broadband access from Title II. Although there are some important differences between wireless and wired offerings, and even within wireless and wired offerings, Title II is capable of adapting to those distinctions as they manifest. “Legislative framework proposals”⁸⁴ agreed to by large incumbents do nothing to change this fact. Bringing all broadband access services under Title II will create regulatory

⁷⁸ Comments of T-Mobile USA, Inc. in Framework for Broadband Internet Service, GN Docket No. 10-127, at 3-23 (dated July 15, 2010).

⁷⁹ Comments of Sprint Nextel Corp. in Framework for Broadband Internet Service, GN Docket No. 10-127, at 20-21 (dated July 15, 2010).

⁸⁰ Comments of CTIA – The Wireless Ass’n. in Framework for Broadband Internet Service, GN Docket No. 10-127, (dated July 15, 2010).

⁸¹ Comments of Charter Communications in Framework for Broadband Internet Service, GN Docket No. 10-127, at 11-15 (dated July 15, 2010).

⁸² Cablevision Comments at 37-40.

⁸³ Comments of Public Knowledge in Framework for Broadband Internet Service, GN Docket No. 10-127, at 28-35 (dated July 15, 2010).

⁸⁴ See Verizon and Google, Inc., *Verizon-Google Legislative Framework Proposal*, http://docs.google.com/viewer?url=http://www.google.com/googleblogs/pdfs/verizon_google_legislative_framework_proposal_081010.pdf&pli=1, Aug. 9, 2010.

uniformity while at the same time allowing the Commission to rapidly adapt to changes in technology.

V. The Commission Should Approach Forbearance with Caution

Comments from several parties underscore the need for the Commission to make forbearance decisions carefully and deliberately, rather than immediately forbear from all but the few sections specified in the NOI. Without citing any particular legal authority for the proposition, commenter Verizon specifically noted that the Commission should have a higher burden for an “unforbearance” proceeding than for forbearance.⁸⁵ Absent a specific legal justification as to why the Commission should find its initial forbearance decisions more permanent than a reasoned and articulated decision to the contrary,⁸⁶ Verizon intimates that it would greet any decision by the Commission to unforbear with prolonged litigation. Other carriers, while explicitly disagreeing with Verizon’s assertion that the Commission’s burden of proof in unforbearance is greater than its burden in forbearance,⁸⁷ similarly insinuate that intensive litigation would attend any unforbearance proceeding. The Commission should therefore, mindful of the inevitable court battles that would result from any unforbearance proceeding, exercise the utmost care in deciding to forbear from provisions of Title II in the first place. The threats of such suits should also

⁸⁵ Verizon Comments at 104-05.

⁸⁶ It is not novel for the Commission to forbear from particular rules temporarily. *See, e.g., CTIA v. FCC*, 330 F.3d 502 (D.C. Cir. 2006) (upholding temporary forbearance in number portability *See CTIA’s Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations, Memorandum Opinion and Order*, 14 F.C.C.R. 3092, 1999 WL 58618 (1999) (“*Temporary Forbearance Order*”). Nor was the Commission required to make a particularized showing that the end of its forbearance period was dependent on a dramatic change in circumstances. If the Commission can place a reasonable time limit on forbearance, there is no reason that forbearance should be intended to operate solely as a permanent, regulatory veto of a rule or statute.

⁸⁷ *See, e.g., TWC Comments* at 65 (“[A]ny forbearance ruling reached by this Commission would be subject to change by future Commissions, which would remain free to remove forbearance relief and restore the presumptive application of full Title II regulation”); *AT&T Comments* at 116 (“Accordingly, forbearance would be prone to...attempted reversal by future Commissions making equally context-specific and subjective determinations.”); *NCTA Comments* at 65 (“A decision to forbear does not immunize the decision from future reversal any more than any other ruling.”)

alert the Commission to the fact that no one course of action will spare it from litigation. Whether or not it attempts to forbear *ex ante* or not, its decisions will be challenged by carriers. Other considerations, therefore, should determine the way forward, and caution against granting forbearance primarily for political purposes.

This need for caution is further emphasized by the fact that any challenge to a proposed unforbearance proceeding will prevent the Commission from taking whatever action it originally deemed necessary to the public interest, convenience, or necessity. During the pendency of the inevitable litigation, the Commission would be paralyzed and unable to account for whatever abuses led to the need for the Commission to reverse its forbearance decision in the first place.

A. Forbearance Should be Accompanied by a Separate Rulemaking Proceeding

Commenter NCTA argues that, rather than forbearing from the majority of Title II sections at the NOI stage, the Commission should issue a notice of proposed rulemaking on the forbearance.⁸⁸ Public Knowledge agrees. The Commission, in making a forbearance decision, should be able to articulate the bounds of its forbearance just as a petitioner for forbearance would, specifying which provisions are being forborne for which entities, and relevant limitations.⁸⁹ The Commission should also clearly indicate how forbearance from a particular provision will affect consumer protection, the public interest, and its duty to ensure that practices are just, reasonable, and nondiscriminatory.

⁸⁸ NCTA Comments at 72.

⁸⁹ NCTA Comments at 69, *Report and Order*, Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act, 24 FCC Rcd. 9543 at ¶ 11 (2009).

While classification of a service is not legislative action, and therefore does not require a notice of proposed rulemaking,⁹⁰ determinations of what rules and statutes will be enforced by the Commission manifestly are. In past instances of forbearance initiated by the Commission—in the early implementation of section 332⁹¹ and in its interexchange marketplace proceedings in 1996⁹²—the Commission has engaged in rulemakings in order to ensure sufficient process before forbearing. The Commission has itself found that forbearance requires public comment:

We find public comment necessary to identify issues and to help the Commission understand the policy ramifications of a petition from varying points of view. Although we describe here the typical comment cycle for forbearance petitions, we retain the flexibility to ensure that the time for comment on any individual forbearance petition is both adequate and not needlessly long.⁹³

Forbearance decisions, as legislative rulings affecting rights, require notice and comment procedure beyond what is provided in this present proceeding.

B. The Commission Can Institute Interim Provisions to Maintain Stability Before Making Forbearance Decisions

Although Public Knowledge agrees with NCTA that forbearance is not a procedure to be taken lightly, it seems clear that NCTA's motives in emphasizing the potential problems with forbearance are to discourage the Commission from moving forward entirely. NCTA, as well as a number of carriers, seem to suggest that the process of engaging in forbearance analysis would necessarily result in chaos, where the Commission would have to concurrently and immediately engage in numerous

⁹⁰ The Commission in the past has classified services *sua sponte* and without a notice of proposed rulemaking, such as in its classification of wireless services. *Declaratory Ruling*, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 FCC Rcd. 5901 (2007).

⁹¹ *In re Implementation of Sections 3(n) & 332 of the Commc'ns Act*, Second Rep. & Order, 9 F.C.C.R. 1411 (1994).

⁹² *Policy & Rules Concerning the Interstate, Interexchange Marketplace*, Notice of Proposed Rulemaking, 11 FCC Rcd. 7141 (1996).

⁹³ *Pet. to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Commc'ns Act of 1934, as Amended*, Report & Order, 24 FCC Rcd. 9543 (2009).

forbearance proceedings and challenges raised by these same carriers, or else face a situation of complete uncertainty.⁹⁴ Public Knowledge, while acknowledging that the Commission needs to engage in further rulemaking before proceeding with the Third Way, does not think that this additional rulemaking represents much of a barrier to this process or forbearance in particular—indeed, it does not represent much more than what the Commission would face in any scenario. The Commission should not be swayed by parties’ threats to clog the system with vexatious challenges, nor should it ignore the fact that it has sufficient and flexible tools beyond formal determinations of forbearance.

For instance, the Commission is more than capable of implementing interim rules under Title II that would retain current rates on pole attachments. As NCTA points out, immediate forbearance from section 224 could prevent many cable operators from taking advantage of its requirements that attachments be provided on a just and reasonable basis, while immediately applying the telecommunications rates to cable broadband providers could suddenly raise existing pole attachment rates dramatically.⁹⁵ However, the Commission need not choose between the purported horrors of either immediate application or immediate forbearance of every provision of Title II. Instead, interim rules can maintain current rates until a proceeding allows the necessary changes to be made—most likely as a result of the pending rulemaking proceeding on the implementation of section 224.⁹⁶ Nor would such an interim matter need to be couched in terms of the Commission’s forbearance power.⁹⁷ In the Commission’s Wireline Framework Order, the

⁹⁴ NCTA Comments at 70-71; TWC Comments at 66; AT&T Comments at 116.

⁹⁵ NCTA Comments at 74-75.

⁹⁶ WC Docket no. 07-245, GN Docket 09-51, released May 20, 2010
http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298284A1.pdf

⁹⁷ *Contra* NCTA Comments at 76. It is noteworthy that, although some carriers have portrayed the consequences of reclassification, with or without forbearance, as equally dire, that NCTA, in one area

consequences of classifying facilities-based wireline Internet access services as information services were phased in over the course of a one-year transition period, allowing time for providers to adapt their businesses to prevent disruption of service.⁹⁸

Naturally, pole attachment rates are not the only aspect of Title II to which this approach is well suited. In any area of Title II where a sudden change in classification could create significant effects on consumers, providers, or other interests, the Commission can introduce a transitional period, maintaining the status quo until deliberations can be made. This prevents the need to either make an immediate forbearance decision or immediately institute drastic change.

Applying Title II to broadband access services does not have to result in the onrushing parade of horrors foretold by opponents of reclassification, nor is the Commission's only alternative to apply forbearance indiscriminately. The Commission has sufficient flexible power to ease any transition into the Title II classification with no more complication or drama than would be present were it to proceed apace with any other regulatory framework.

C. It is Unnecessary and Unwise to Tie Classification to Forbearance

In the NOI, the Commission sought comment on whether it should make classification contingent upon forbearance, such that a finding that the Commission could not forbear from certain provisions of Title II would undo any classification. Such a proposal is unwise and unnecessary, in addition to raising questions of whether such a link, made purely for political reasons, would be deemed arbitrary and capricious.

where it has significant financial interests, has proposed a means to eliminate these feared consequences and proceed with reclassification.

⁹⁸ *Report and Order*, Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd. 14853 at ¶ 98 (2005).

1. *The Commission Needs Flexibility to Act*

As an initial matter, resting the entire structure of the classification of broadband Internet access services upon forbearance creates countless risks to the process. It is unclear what particular challenges to forbearance might be raised, how a reviewing court would rule on these putative challenges, and what avenues would then be open to the Commission subsequent to such a ruling. Tying the entire outcome of this proceeding to a novel use of the Commission's forbearance power only invites further attacks on the Commission's ability to adequately protect consumers and promote deployment. The Commission should not thus tie its hands in advance of a specific challenge to its ability to reclassify, let alone in advance of any ruling by an unknown court, which could introduce additional complications to the process.

The ability of the Commission to account for changes in telecommunications technology, business models, and market structure depends upon its flexibility in crafting rules to suit new situations. The Commission also needs this same flexibility in order to account for court rulings on the various interrelated aspects of the Communications Act, Commission authority, and many other matters. Conditioning the very tools by which the Commission can exercise this flexibility upon a predetermined, all-or-nothing trigger further restricts the Commission's ability to adequately perform its mission.

2. *Linking Forbearance to Classification Has No Basis in Law*

More fundamentally, the Commission has no legal basis by which it can link the conditions for forbearance with applying the definition of telecommunications services. The plain definition of "telecommunications" contained within section 101 does not incorporate by reference or otherwise turn on whether any given provision of Title II is

forborne or not. Should the Commission determine, based upon the statute's language and upon particular policy considerations, that the definition encompasses broadband access services, it cannot, once that determination is made, reverse itself simply because of a court decision which interprets a separate part of the Act that changes nothing about what services are offered, how they are offered, or how their terms are defined. While a challenge to any particular forbearance provision may affect the political situation, it makes no changes to the underlying definitions of the statute or its interpretations. Therefore, any challenge to forbearance could not justify such an abrupt reversal as the Commission seems to propose here. Though it may be politically expedient to assure potential opponents that forbearance is a precondition of reclassification, the Commission cannot adopt such a statutorily incoherent framework just to achieve a particular favored policy result.

VI. The FCC Has Authority Under the APA To Classify Broadband Access Service Under Title II

Some commenters have also raised objections to classification of broadband access as a Title II service on the grounds that it would violate the Administrative Procedures Act (APA). The record in this proceeding, however, provides an adequate factual basis for the Commission to reclassify. Its legal authority to do so is likewise clear.

A. The Commission Retains The Same Delegated Authority It Had In *Brand X*

Commenters have argued that somehow, despite the express finding of the Supreme Court, the Commission lacks the authority to determine the proper classification

of broadband access service.⁹⁹ Unfortunately, many of these arguments blatantly mischaracterize what the Commission has proposed. For example, a formal agency proceeding to assess the appropriate response to a significant court case hardly constitutes an effort to “circumvent” the *Comcast* decision.¹⁰⁰ Surely commenters do not suggest that the D.C. Circuit attempted to exceed its bounds as an Article III court to define the FCC’s authority forevermore. Indeed, such a statement stands in marked contrast to the public statements (and even some of the filed statements) of the carriers themselves, who have argued that the Commission retains full authority over broadband.¹⁰¹

Further, the argument that Congress did not delegate power to the Commission to determine the appropriate classification for broadband access¹⁰² flies in the face of the explicit holding of *Brand X v. FCC*, which expressly found the definitional statutes ambiguous.¹⁰³ Indeed, as explained by the majority opinion, it is precisely *because* Congress delegated power to the FCC to make a determination on classification that the FCC could overrule the Ninth Circuit’s previous determination that cable modem service constituted a “telecommunications service.”

⁹⁹ See, e.g., Verizon Comments at 28-58.

¹⁰⁰ TWC Comments at 59.

¹⁰¹ See, e.g., Verizon Comments at 3 (“[The *Comcast* court] merely found, based on decades of consistent Supreme Court and lower court precedent, that the Commission had failed to tie the exercise of ancillary authority in that case to *any* provision of the Communications Act that assigns the agency substantive responsibility. *Comcast* does not say, as some suggest, that the Commission lacks authority to implement its National Broadband Plan.” (emphasis in original)); Statement of NCTA President & CEO Kyle McSillarow, Apr. 6, 2010 <http://www.ncta.com/ReleaseType/Statement/comcastvfcstatement.aspx> (“Nor does the ruling alter the government’s current ability to protect consumers.”); Statement of Verizon Executive Vice President & General Counsel Randal S. Milch, Apr. 6, 2010, <http://newscenter.verizon.com/press-releases/verizon/2010/appeals-court-decision-on.html> (“The court recognized that the FCC does have Title I ancillary authority over Internet access. In this case, the FCC simply failed to link its actions to its statutory responsibilities.”)

¹⁰² Comments of the United States Telecom Ass’n in Framework for Broadband Internet Service, GN Docket No. 10-127, at 65 (filed July 15, 2010) [hereinafter USTA Comments].

¹⁰³ *Brand X Telecomm. Serv. v. FCC*, 545 U.S. 967 (2005).

B. In Reclassifying Broadband, the FCC Would Be Entitled to *Chevron* Deference Because The Relevant Statutory Terms Are Ambiguous And It Would Be Acting Within Its Delegated Authority to Resolve Them

Contrary to some commenters,¹⁰⁴ reclassification would not involve the kind of statutory interpretation present in *FDA v. Brown & Williamson Tobacco Corp.*¹⁰⁵ That case stands for a simple point: that *Chevron* deference only applies to ambiguous statutes, where Congressional intent is not clear. In *Brown & Williamson*, the FDA had determined that tobacco was a “drug” subject to FDA regulation. In isolation, this may have been a “reasonable” interpretation. But the Court found that if tobacco were a “drug,” the FDA would be compelled to ban it; and that this result would be incompatible with a Congressional policy of regulating and taxing tobacco but not banning it.¹⁰⁶ Because the overall statutory scheme showed that Congress had “directly spoken to the issue,”¹⁰⁷ there was no ambiguity and *Chevron* did not apply. *Brown & Williamson* is not central to the reclassification debate because the Supreme Court has already definitively held that the relevant statutory language is ambiguous,¹⁰⁸ but even applying its analysis shows that Congress intended to delegate to the FCC the authority to make regulatory classifications of communications services.

In *Brown & Williamson*, the Court looked outside of the text of the statute to determine Congressional intent. Applying the same method to reclassification shows that Congress has decided that basic, common carriage telecommunications services should be available to the public. To further that policy it delegated to the FCC (and its

¹⁰⁴ E.g., USTA Comments at 66.

¹⁰⁵ 529 U.S. 120 (2000).

¹⁰⁶ *Brown & Williamson*, 529 U.S. at 137.

¹⁰⁷ *Id.* at 133.

¹⁰⁸ *Brand X*, 545 U.S. at 989.

predecessor agencies) the authority to enact regulations and make expert judgments,¹⁰⁹ like those it made in the *Computer Inquiries*,¹¹⁰ as to which services should be considered Title II telecommunications services and which should not. By using broad terms like “telecommunications services,” Congress delegated to the FCC to determine *how* (not whether) to best ensure access to Title II services, and how to define and delineate those services on a technical level. Congress did not intend for the FCC to write off large portions of the Communications Act as no longer relevant, and it did not intend for a bedrock principle of communications law to sunset. Historically, the FCC has made a distinction between “basic” and “enhanced” services. Congress adopted this distinction in the 1996 Telecommunications Act (with the terms telecommunications and information services),¹¹¹ and it accepted the 1998 *Stevens Report*,¹¹² which assumed that access to information services would take place over a common carriage telecommunications link. When the FCC abandoned this policy, it assumed (along with the Supreme Court¹¹³) that it could still preserve the nondiscriminatory nature of broadband services even without formally categorizing them as common carriage telecommunications services—in essence, it decided it could carry out congressional policy without using the tools Congress gave it. The FCC turned out to be wrong, and should therefore reclassify broadband as a Title II service. Unlike the situation in *Brown & Williamson*,

¹⁰⁹ Congress expressed its intent in the Mann-Elkins Act of 1910, 36 Stat. 539; the Communications Act of 1934, 48 Stat. 1064; and the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56.

¹¹⁰ Reg. and Policy Problems Presented by the Interdependence of Computer and Communications Services, *Final Decision*, 28 FCC2d 267 (1971); Second Computer Inquiry, *Final Decision*, 77 FCC2d 384 (1980); Amendment of Sections 64.702 of the Comm’n’s Rules and Regs., *Report & Order*, 104 FCC2d 958 (1986).

¹¹¹ 47 U.S.C. § 153.

¹¹² Federal State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd. 11,501 (1998).

¹¹³ *Brand X*, 545 U.S. at 976.

reclassification would be an example of an agency acting to further, not thwart, congressional intent.

A *Brown & Williamson*-type analysis of the broader legal context is largely superfluous, however, because the Supreme Court has already decided that the relevant statutory terms are ambiguous and that the FCC is entitled to *Chevron* deference in interpreting them. As the Court discussed at length, the term “offer” (among others) in the Communications Act is ambiguous.¹¹⁴ In *Brand X*, the FCC had determined that cable modem service is comprised of telecommunications service and information service components, but that the telecommunications service was not “offered” to consumers.¹¹⁵ Justice Scalia disagreed and argued that this specialized meaning of the word “offer” was unreasonable.¹¹⁶ In this proceeding, the FCC need do nothing more than adopt Justice Scalia’s reasonable reading of the word “offer” and find that “Internet connectivity service”¹¹⁷ is “offered” to the public as part of “broadband Internet service” (along with such non-telecommunications services as email). It will then have a sufficient legal basis to classify Internet connectivity service under Title II.

Reclassification would not present an issue like that in *American Library Ass’n v. FCC*.¹¹⁸ There, the FCC attempted to regulate something outside its subject matter jurisdiction of “communication by wire or radio,” and thereby exceeded its delegated authority. The D.C. Circuit overturned the FCC, holding that an agency must be acting within its delegated authority for *Chevron* to apply. Other cases cited by opponents to

¹¹⁴ *Id.* at 986-997.

¹¹⁵ *Id.* at 989.

¹¹⁶ *Id.* at 1007 (Scalia, J., dissenting).

¹¹⁷ Which, as PK has explained, includes such data-processing functions as DNS because of the adjunct-to-basic doctrine, which is codified in 47 U.S.C. § 153(20). Comments of Public Knowledge in Framework for Broadband Internet Service, GN Docket No. 10-127, at 19-23 (filed July 15, 2010).

¹¹⁸ 406 F. 3d 689 (D.C. Cir. 2005).

reclassification stand for the proposition that when an agency takes an admittedly vague statute in an unexpected new direction, it may be acting outside its delegated authority.¹¹⁹ But the Supreme Court has already held that Congress has delegated authority to the FCC to classify broadband access as an information service or as a telecommunications service,¹²⁰ and so those cases are inapposite.

For the above reasons, the relevant statutory language is ambiguous, and Congress has delegated to the FCC the authority to adopt the interpretation that best furthers the policy of the Communications Act to ensure that the public has access to telecommunications free of unreasonable discrimination.

C. The FCC Must Account for the All the Facts in Reaching a Classification Decision, But It Faces No Additional Legal Burden When Changing Course

It is now a settled part of administrative law that an agency does not need to provide a more detailed explanation when it changes course than when it grapples with an issue *de novo*.¹²¹ An agency can change its mind for no other reason than it thinks its new approach is better than the old one. Verizon's comments in this proceeding make much of

¹¹⁹ See Verizon Comments at 35 (citing *Gonzales v. Oregon*, 546 U.S. 243, 268-69 (2006) (Attorney General receives *Chevron* deference only when acting within delegated authority)); *id.* at 37 (citing *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005) (an agency only has deference in interpreting an ambiguous statute if Congress has delegated it the authority to do so)).

¹²⁰ *Brand X*, 545 U.S. at 980-82 (because the FCC is regulating a service within its jurisdiction, it is acting within its delegated authority, and *Chevron* deference applies).

¹²¹ As the Supreme Court recently explained,

We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance. . . . [O]f course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.

FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810-11 (2009) (expressly overruling contrary DC Circuit opinion) (emphasis in original, citations omitted).

the fact that an agency must always account for all the facts.¹²² This is true for all agency decisions, whether they involve a change of course or not; accounting for all the facts (including reliance interests) is a prerequisite of engaging in reasoned decision-making and is necessary to comply with the Administrative Procedures Act.¹²³ But the FCC faces no additional legal burden when it changes its mind.

Thus, there do not *need* to be any “new facts” for the FCC to change its mind as to the classification of broadband. There do not need to be any substantial changes to the market structure, the technology, or consumer expectations. The FCC would meet its burden of reasoned decision-making in reclassification if, after accounting for the unchanged facts, it finds a new interpretation of the same facts more persuasive than it did before, or if it announced that it finds that the new classification would better give it the tools it needs to carry out its policy objectives. Nevertheless, there *are* new facts on the ground that should inform the Commission’s judgment. They all point to the wisdom of reclassification.

- *New fact: Title I is insufficient to protect consumers.*

The *Comcast* decision demonstrates that the FCC’s reliance on Title I ancillary authority to protect consumers and promote an open Internet is quite limited. Comcast overcame the FCC’s (and Public Knowledge’s) legal arguments in the D.C. Circuit; it faces no further sanction for its past violations of the FCC’s Open Internet principles. Reclassification would not be an attempt to “evade” the implications of *Comcast*, it would be taking *Comcast* seriously as to the limits of the FCC’s authority over Title I services. This new legal reality must be taken into account, just as the FCC took its

¹²² Verizon Comments at 30-34.

¹²³ 5 U.S.C. § 706.

understanding of its legal authority into account when it first classified broadband services under Title I.

- *New fact: Competition has not emerged.*

The FCC based its initial decision to classify broadband services under Title I in part on a prediction that facilities-based competition would emerge, and that market pressure would prevent broadband service providers from engaging in unreasonable discrimination. While “a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency,”¹²⁴ it has a duty to reexamine its predictions as events unfold.¹²⁵ The evidence shows that facilities-based competition has not emerged in the years since the FCC’s initial deregulatory fury.¹²⁶ The FCC recently concluded that “broadband deployment to *all* Americans is not reasonable and timely.”¹²⁷ Contrary to past predictions, new facilities-based competitors like broadband-over-powerline have been utterly unsuccessful in the marketplace,¹²⁸ and wireless services are mostly complements to (rather than substitutes for) wireline service.¹²⁹

¹²⁴ *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978) (citing *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)).

¹²⁵ *Quincy Cable TV, Inc. v. FCC*, 768 F. 2d 1434, 1442, 1457-58, 1463 (D.C. Cir. 1985).

¹²⁶ Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, *Fifth Report*, 23 FCC Rcd. 9615, ¶ 34 (2008); PEW INTERNET & AMERICAN LIFE PROJECT, HOME BROADBAND ADOPTION 23 (2009).

¹²⁷ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, *Sixth Broadband Deployment Report*, GN Docket No. 09-137, FCC 10-129 (2010), at ¶ 2.

¹²⁸ See, e.g., Karl Bode, *Most Successful U.S. Broadband Over Powerline Network Shut Down*, DSL REPORTS, Apr. 8, 2010, <http://www.dslreports.com/shownews/Most-Successful-US-Broadband-Over-Powerline-Network-Shut-Down-107812>.

¹²⁹ Ex Parte Submission of the United States Department of Justice in A National Broadband Plan for Our Future, GN Docket No. 09-51 (filed Jan. 4, 2010), at 5.

- *New fact: The market is not a check on anti-consumer behavior.*

Because of this lack of competition, there is no market check preventing carriers from engaging in anti-consumer behavior. “Early termination fees” have made the transition from mobile phone service to home broadband, and keep rising.¹³⁰ Comcast and others have interfered with peer-to-peer protocols. One ISP recently experimented with replacing a consumer’s chosen search engine with one of its own.¹³¹ ISPs signaled their willingness to enter into anticompetitive “quality of service” contracts with selected Internet application providers. These are not the signs of a market sufficiently competitive to protect consumers.

The record before the FCC in the Open Internet and Framework for Broadband Internet Service proceedings gives the FCC strong reason to adopt rules protecting consumers.

VII. Classifying Internet Access as a Title II Service Does not Violate the Constitutional Rights of Carriers

Despite the fact that many commenters have attempted to raise Constitutional challenges to reclassification, none of these arguments are ripe under a mere interpretive determination. Furthermore, open Internet proceedings following this reclassification can easily pass Constitutional muster.

A. Any Constitutional Challenge to Title II Classification is Unripe at This Time

In determining whether an administrative action is ripe for judicial review, a court will evaluate “(1) the fitness of the issues for judicial decision and (2) the hardship to the

¹³⁰ Karl Bode, *Verizon's FiOS ETF: \$360 Starting January 17*, DSL Reports, Jan. 6, 2010, <http://www.dslreports.com/shownews/Verizons-FiOS-ETF-360-Starting-January-17-106253>.

¹³¹ Matthew Lasar, *Windstream in Windstorm Over ISP's Search Redirects*, ARS TECHNICA, Apr. 6, 2010, <http://arstechnica.com/telecom/news/2010/04/windstream-in-windstorm-over-dns-redirects.ars>.

parties of withholding court consideration.”¹³² The purpose of this evaluation is “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”¹³³

While there are a number of administrative actions that the Commission might take once it has properly classified broadband access service, the classification itself is not an action ripe for judicial review. Classification is merely the first step in taking a given administrative action. This gives rise to the classic situation where a challenge “would benefit from a more concrete setting”¹³⁴ before being considered by a court.

Title II opponents are largely concerned about the impact of Title II-related regulations or mandates, not simply Title II classification.¹³⁵ In fact, many constitutional challenges raised in the context of Title II classification are merely repurposed challenges from prior, more specific, regulatory proceedings.¹³⁶ While it may be appropriate for a court to consider these constitutional challenges to actual regulation, at this time classification itself is not fit for judicial review.

Similarly, any hardship that classification itself imposes on a provider of Internet access services is minimal. Classification alone does not require that providers act or refrain from acting. If anything, classification will bring added certainty to providers and

¹³² *Nat’l Park Hospitality Ass’n v. DOI*, 538 U.S. 803 (2003) (citing *Abbot Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

¹³³ *Abbot Labs* at 148-49

¹³⁴ *CTIA – The Wireless Ass’n v. FCC*, 530 F.3d 984, 987 (DC Cir. 2008) (internal quotations and citations omitted).

¹³⁵ See, e.g. AT&T Comments at 109-112; Comments of Qwest Communications International, Inc., GN Docket No. 10-127 at 28-37 (dated July 15, 2010) [hereinafter Qwest Comments].

¹³⁶ Compare Qwest Comments at 28-37 to Comments of Qwest Communications International, Inc., GN Docket No. 09-191, WC Docket No. 07-52 at 60-71 (dated Jan. 14, 2010).

therefore reduce their hardship. As such, a constitutional challenge to classification would also fail the second prong of the ripeness test.

B. Title II-Related Rules Will Survive Constitutional Scrutiny

As a result of a lack of ripeness of the claim, a proper constitutional analysis of classification is not possible at this time. However, Public Knowledge hereby incorporates its previous lengthy discussion of the constitutionality of open Internet rules to illustrate why even Title II-related action by the Commission is constitutional, and briefly summarizes them.¹³⁷

Title II-related regulations such as the open Internet rules do not violate Internet service providers' First Amendment rights because providers are not speakers for First Amendment purposes.¹³⁸ Even if providers are considered speakers for First Amendment purposes, the rules would withstand First Amendment scrutiny because they are content neutral, advance important governmental interests related to free speech, and do not burden substantially more speech than is necessary to further important government interests.¹³⁹

These types of regulations will also not violate the Fifth Amendment rights of providers because they are not a physical taking resulting from a physical invasion.¹⁴⁰ Nor do they create a regulatory taking, because they do not destroy the value of providing broadband access service, or interfere with distinct investment-based expectations.¹⁴¹

¹³⁷ Reply Comments of Public Knowledge, Preserving the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52 at 18-36 (dated April 26, 2010).

¹³⁸ *See id.* at 21-23.

¹³⁹ *See id.* at 24-28.

¹⁴⁰ *See id.* at 28-31.

¹⁴¹ *See id.* at 31-36.

These rules are general in character, and therefore outside the scope of a Fifth Amendment taking.¹⁴²

CONCLUSION

The Commission must move quickly to properly classify broadband access service under Title II. A host of critical programs cannot be fully implemented until the Commission had made it clear that broadband access service is a Title II common carrier service. The Commission cannot allow objections from providers who would prefer a free hand to take advantage of customers and unreasonably exploit their position in our nation's critical communications infrastructure to prevent it from acting. As the public moves towards a broadband-centric communications future, the Federal Communications Commission must be willing to come along.

Respectfully submitted,
Public Knowledge
August 12, 2010

¹⁴² *See id.* at 36-37.