

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

I. THERE IS WIDESPREAD AGREEMENT THAT RECLASSIFICATION WOULD IMPOSE BURDENSOME REGULATION AND FRUSTRATE THE FCC’S BROADBAND GOALS..... 3

 A. Even With Forbearance, the “Third Way” Could Not Restore the Deregulatory Status Quo. 3

 B. Reclassification Would Disrupt Planning, Innovation, and Investment..... 5

 C. A Comprehensive Approach Combining Title I, Congressional Action, and Collaboration With Stakeholders Carries No Comparable Risks..... 7

II. THERE IS NO BASIS TO ABANDON THE COMMISSION’S CORRECT CONCLUSION THAT INTERNET ACCESS IS NOT A TELECOMMUNICATIONS SERVICE, BUT AN INFORMATION SERVICE. 9

 A. The Record Does Not Show that ISPs Offer “Telecommunications Service” to Subscribers. 9

 B. The Record Shows that Internet Access Continues to Incorporate Information Storage, Processing, and Retrieval Capabilities. 11

 C. The Enhanced Features of Internet Access Service Cannot be Dismissed as Mere “Management” or “Adjunct to Basic” Services. 14

III. THE COMMISSION SHOULD NOT RECLASSIFY BROADBAND SERVICE, BUT IF IT DOES, IT MUST MINIMIZE THE DISRUPTIVE EFFECT OF ANY TITLE II CLASSIFICATION..... 16

 A. The Commission Must Forbear Broadly, Including from the Title II Damages Provisions. 17

 B. Any Reclassification Must Be Contingent on and Not Severable From Successful Forbearance. 20

 C. The Commission Must Use Blanket Preemption, Not Merely Case-by-Case Preemption, to Prevent States and Localities from Imposing Burdensome Regulations and Fees..... 21

 D. Any Reclassification Decision Must Preserve Regulatory Parity Among Different Platforms and Technologies. 24

CONCLUSION..... 26

inviting aggressive attempts at regulation by third parties and exposing broadband providers to waves of litigation, regulation, and uncertainty about the legality of even basic aspects of their businesses. This would likely hamper private innovation and investment for years to come.

Nothing in the comments submitted in this proceeding provides any assurance that these concerns are overblown. To the contrary, the record now shows that anxiety about the FCC's inability to cabin the consequences of a Title II approach is justified, that there are no cures for the legal defects in the reclassification approach, and that various pro-regulatory groups are eagerly awaiting the opportunity to use Title II to subject ISPs to their preferred regulatory requirements – including those having nothing to do with the particular issues the FCC seeks to address through the NOI. The record thus confirms that the Commission should not proceed with reclassification, and that alternative means of pursuing the Commission's goals, such as working with stakeholders on consensus-based solutions, proposing clarifying legislation to Congress, and, where necessary, relying on Title I authority, would be an effective, and less disruptive, way forward.

While the Commission cannot fix the fundamental legal infirmities of a Title II reclassification, if it nonetheless proceeds down that path it should at least take steps to contain the damage that such a move would cause. The limited measures contemplated by the NOI are insufficient in that respect, and underestimate the persistence of third parties who would seek to take advantage of any departure from the FCC's present legal framework. At the very least, the FCC must prevent reclassification from becoming a regulatory free-for-all by forbearing from the damages and private-right-of-action provisions of Title II, broadly preempting new regulation and fees from state and local regulatory bodies, preserving regulatory parity among different

broadband platforms, and ensuring in advance that reclassification cannot proceed if the Commission's forbearance decisions are struck down by the courts.

I. THERE IS WIDESPREAD AGREEMENT THAT RECLASSIFICATION WOULD IMPOSE BURDENSOME REGULATION AND FRUSTRATE THE FCC'S BROADBAND GOALS.

As many commenters have recognized, there is a fundamental disconnect between what the FCC wants to achieve through a Title II reclassification and what such a reclassification would actually accomplish. The objective of such a move would be to reinforce the Commission's legal authority to implement a particular set of policies in the wake of the *Comcast* decision. But reaching for the legacy, monopoly-era provisions of Title II in order to do so, if such a move were to succeed despite its significant legal problems, *see Part II infra*, would have much broader consequences. Common carrier regulation under the Communications Act involves the imposition of regulatory requirements designed to address issues altogether absent from today's Internet marketplace, and which have little or nothing to with the discrete jurisdictional gaps the FCC seeks to fill. As many of the commenters in this proceeding have noted, even if the Commission tried to limit the impact of such an approach through forbearance, Title II would create a host of new legal and regulatory problems for ISPs, which would only undermine the FCC's goals.

A. Even With Forbearance, the "Third Way" Could Not Restore the Deregulatory Status Quo.

Cablevision cautioned in its initial Comments that reclassification – even if tempered by extensive forbearance as contemplated by the "Third Way" approach – is likely to result in the imposition of substantial new regulatory burdens on ISPs. *See Cablevision Comments at 21-25, 30-32.* The record developed in this proceeding confirms that this concern is justified.

As other commenters have emphasized, extending Title II to Internet access would subject ISPs for the first time to sections 201 and 202 of the Communications Act, which impose both an affirmative obligation that all “charges” and “practices” be “just and reasonable” and a prohibition against “unjust or unreasonable discrimination.” 47 U.S.C. §§ 201 & 202; *see, e.g.*, AT&T Comments at 95-96. The NOI does not propose to forgo these requirements. But even for telephone companies, which have long been subject to Title II, and for which the Commission has issued an immense number of regulations and orders over decades clarifying what these requirements mean, the precise boundaries of these obligations are not always clear. Extending them for the first time to the market for broadband Internet access would confront the industry with expansive statutory requirements, but without the same body of settled law providing guidance on how they apply in the very different context of the Internet. This would inevitably create years of doubt about whether various service models, promotions, existing commercial arrangements, pricing, and customer service practices comply with the statute. The resulting litigation and fears of potential liability, moreover, risk substantially chilling ISPs’ willingness to innovate. As Cablevision explained in its opening comments, that result would only undermine the Commission’s core goals of encouraging broadband deployment and innovation. *See* Cablevision Comments at 30-32.

While the NOI seeks to limit the effect of reclassification using the FCC’s forbearance authority, the comments show substantial agreement that such a course is woefully inadequate. Forbearance as proposed would not even seek to address the substantial problems created by imposing the core common carrier requirements of sections 201 and 202 on ISPs. And with respect to the other provisions of Title II, forbearance provides little comfort. Forbearance decisions can be challenged in court, and even commenters supporting reclassification agree that

the Commission can reverse a forbearance decision with relative ease, leaving broadband providers saddled with burdensome new requirements in the future. *See, e.g.*, Comments of Comptel at 5-6. Forbearance, therefore, will not stop a Title II reclassification from dramatically changing the regulatory landscape facing ISPs and ending the deregulatory status quo that has long been successful.

B. Reclassification Would Disrupt Planning, Innovation, and Investment.

The comments submitted in this proceeding also confirm that reclassification would have a disruptive effect on broadband providers' ability to make business and investment plans for the future. *See, e.g.*, Comments of Verizon at 11-20; Comments of Time Warner Cable at 58; Comments of Comcast Corp. at 36-38; Comments of U.S. Telecom Association at 42-43. It is counterproductive for the FCC to throw the market into such a state of disarray, and risk chilling innovation and private investment, at the very moment when its National Broadband Plan recognizes that billions of dollars in private capital and innovation are needed to realize the country's goal of successful broadband deployment.

As part of their efforts to urge increased regulation, some commenters have tried to minimize the disruptive effect that reclassification would have on private planning and investment. For instance, they have pointed to isolated data, such as stock prices of various industry participants on hand-picked days, as well as the investments made by Bell Operating Companies subject to evolving Title II regulations during the 1990s and 2000s, to argue that imposition of Title II regulations would not affect broadband investment. *See, e.g.*, Comments of Open Internet Coalition at 34-35; Comments of Free Press at 92-95. While it is always easy to cherry-pick such data points, these arguments neglect the common-sense conclusion that investors are wary of making large capital commitments when major legal questions affecting the broadband business remain unsettled.

Moreover, analogizing reclassification to investments made by Bell Operating Companies under evolving Title II regulations is inapt – telephone carriers have long been subject to Title II requirements and the changes at issue were incremental. The much closer, and more appropriate, analogy is what happened the last time the FCC attempted a fundamental regulatory shift for cable companies. As NCTA has convincingly shown, the FCC’s effort to impose rate regulation on video programming caused a disastrous drop-off in investment and substantially slowed the adoption of cable by new households. It was only after the Commission lifted its rules, and Congress largely eliminated rate regulation with the Telecommunications Act of 1996, that investment in cable systems resumed. *See* Comments of National Cable & Telecommunications Association, *In re Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, at 21 & n.25-26 (Jan 14, 2010).² That example highlights what should be plain as a matter of common sense: that imposition of a new regulatory regime, no matter how well intentioned, can have serious adverse effects on capital-intensive industries.

The truth is that we cannot know with certainty what the effects of reclassification would be in advance, and would not know for years after such a decision were made – and it is precisely this uncertainty that poses such significant risks to investment and innovation. While such uncertainty is never desirable, it is particularly problematic now, when the Commission seeks billions of dollars in private investment for national broadband deployment. Because the Commission has available other, constructive options that would advance its broadband policy

² After most rate regulation was eliminated by the 1996 Act, cable operators embarked on their largest investment ever – more than \$150 billion to upgrade and rebuild their systems in a manner that made possible the broadband service that is the focus of this proceeding. *See* Comments of National Cable & Telecommunications Association in *In re Preserving the Open Internet; Broadband Industry Practices*, at 21.

agenda without incurring these risks, *see* Part I.C *infra*, it would be irresponsible to push forward with reclassification.

C. A Comprehensive Approach Combining Title I, Congressional Action, and Collaboration With Stakeholders Carries No Comparable Risks.

As many commenters have pointed out, there are ample opportunities for the FCC to further its interests in universal service, broadband deployment, and consumer protection by working with Congress (where there is substantial momentum toward addressing broadband issues legislatively), collaborating with industry and stakeholder groups such as the Broadband Industry Technical Advisory Group, and pursuing targeted use of the Commission's Title I authority. *See, e.g.*, AT&T Comments at 17-25; Verizon Comments at 27.³

These various alternatives to reclassification have been criticized by some proponents of greater regulation on the ground that they might ultimately prove ineffective, or force the Commission to scale back some of its more ambitious policy initiatives. *See, e.g.*, Media Justice Coalition Comments at 12-13; Center for Democracy & Technology Comments at 5-6. Others complain that continued Commission action under Title I might face legal challenges and that the success of Title I theories for advancing particular policies is not guaranteed. *See, e.g.*, Free Press Comments at 47-48. But reclassification itself suffers from even more serious doubts as to whether it would be accepted by the courts, or is at best no less risky on that score. *See* Part II *infra*. Methods such as Congressional action, collaboration with industry groups, and targeted use of Title I arguments that were not addressed by the *Comcast* decision are plausible approaches that have not yet been tried. And unlike reclassification, they can be attempted without substantially disrupting the entire industry. To change fundamentally the FCC's legal

³ Cablevision is disappointed that the Commission's recent round of discussions with stakeholders to achieve consensus on these issues did not prove successful. Cablevision nevertheless believes such efforts are productive and should continue.

framework for broadband without first attempting these more modest options would be needlessly reckless.

The reality is that litigation is likely to accompany any course the FCC now takes, whether it centers around a reclassification decision, a series of forbearance decisions, or the targeted use of the FCC's Title I authority. And since these legal questions are not simple ones, some regulatory questions are likely to remain in flux over the next few years irrespective of the course the FCC chooses now. Indeed, the claim that reclassification can more quickly resolve uncertainty than could continued Title I regulation ignores the fact that, at best, the impact of Title II on broadband would take years to sort out, long after the litigation about the reclassification order itself has ended.

It would also be a grave error to assume, as some commenters do, that the legal doubts that may exist regarding the Commission's Title I authority are somehow equivalent to the regulatory chaos that would ensue from a wholesale shift of the FCC's entire legal framework for broadband. To do so is to conflate doubts the FCC may have concerning the stopping point of its own regulatory authority with ISPs' doubts about fundamental questions regarding the operations of their businesses. Reclassification could leave ISPs without meaningful guidance on matters as basic as their pricing and rate structures, the permissibility of their marketing and promotional efforts, the legality of their existing commercial arrangements, their obligations vis-à-vis State utility commissions, and the management of their networks. This would have particularly devastating consequences for an industry characterized by consistent and widespread technological change. Common sense dictates that opening such a Pandora's box would have a disruptive effect on the industry for years to come and would only hinder the Commission's goals of promoting broadband deployment and affordability.

II. THERE IS NO BASIS TO ABANDON THE COMMISSION’S CORRECT CONCLUSION THAT INTERNET ACCESS IS NOT A TELECOMMUNICATIONS SERVICE, BUT AN INFORMATION SERVICE.

The record developed in this proceeding also confirms that the FCC’s current legal classification of Internet access as an “information service” comports with the statute – and that the NOI is unduly optimistic in assuming that this regime can be overturned as proposed. The present legal framework rests on empirical facts about the nature of Internet access service, and the record in this proceeding does not contain any evidence that would justify revisiting those findings. This is particularly the case given the heightened standard for altering agency decisions that depend upon empirical facts, as opposed to mere questions of law. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Today, as in 2002, the provision of Internet access to subscribers involves the ISP in providing functionality that plainly meets the definition of an “information service” under 47 U.S.C. § 153(20).

A. The Record Does Not Show that ISPs Offer “Telecommunications Service” to Subscribers.

At the outset, the record contains no evidence that the service today’s broadband providers offer to end-users is a “telecommunications service” as that term is defined in the 1996 Act. Among other things, that term requires that users be provided transmission “between or among points specified by the user.” 47 U.S.C. § 153(43). As Cablevision explained in its opening Comments, Internet access service increasingly involves communications in which users do not select the end points of their online communications; rather, users select the information with which they wish to interact, and third parties such as CDNs and ISPs choose the locations from which that information is accessed. *See Cablevision Comments at 6-12.*

Commenters supporting reclassification do not meaningfully address this difficulty with trying to shoehorn broadband service into Title II. For example, Free Press acknowledges the

statutory requirement that users choose the end points of their communications, but finds the requirement met based entirely on an example of a user communicating directly with a third-party webserver, without intervention by the ISP or third-party CDN to redirect the user's communication to other servers. *See* Comments of Free Press at 48-52. As explained in Cablevision's opening comments, however (*see* Cablevision Comments at 7-8), that model of Internet communications is less and less accurate as a representation of how the Internet has evolved and how much of the content on the Internet is delivered by broadband providers today. Today, intervention by ISPs or third-party CDNs to determine sources for information requested by a user is commonplace, and growing. *See* Cablevision Comments at 8.

Proponents of reclassification also cite past Commission decisions for the proposition that ISPs supply "telecommunications" to users, but none of the cited decisions establish this point. For instance, Public Knowledge cites two early orders involving the Commission's regulatory treatment of DSL, *see In re GTE Telephone Operating Cos. GTOC Tariff No. 1*, Memorandum Opinion and Order, 13 FCC Rcd 22,466, 22,476 (1998), and *In re Bell Atlantic Telephone Cos. Bell Atlantic Tariff No. 1*, 13 FCC Rcd 23,667, Memorandum Opinion and Order (1998). But those orders involved the provision of DSL service as it existed over a decade ago, long before advancements in the network "core," and stand only for the proposition that the FCC assesses the end-point of an Internet communication at the point where the information originates, rather than at the customer's ISP. *See* Public Knowledge Comments at 11-12. Those orders thus say nothing about the treatment of Internet communications as they commonly occur today, in which users often do not select the end point from which the information they seek originates. Similarly, Free Press cites *In re Compass Global, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 6125, 6133-34, ¶ 17 (2008) (cited in Free Press Comments at 51

n.143). But the Notice in *Compass Global* stands solely for the unremarkable proposition that wholesale carriage of point-to-point voice communications is not transformed into an information service merely because Internet Protocol (“IP”) is used as the means of transport. *See id.* The difficulty with attempting to categorize Internet connectivity under Title II, however, is not that the Internet Protocol *itself* constitutes an information service but rather that users increasingly select only the information they want to receive, rather than the end-points of the communications by which they receive it. Accordingly, the record in this proceeding does not establish that today’s broadband providers offer “telecommunications service” to end-users.

B. The Record Shows that Internet Access Continues to Incorporate Information Storage, Processing, and Retrieval Capabilities.

The record does show, however, that the empirical conclusion that originally supported the Commission’s *Cable Modem Declaratory Ruling* remains true today: Internet access service continues to involve enhanced functionalities that are not readily severable from any transmission of data by the providers. In particular, ISPs continue to provide directly or coordinate through third parties caching and DNS, as well as dynamic IP address assignment, each of which is essential to Internet connectivity. *See, e.g.,* Comments of U.S. Telecom Ass’n at 51-52; AT&T Comments at 70-78; Verizon Comments at 47-55; Comcast Comments at 26; Time Warner Comments at 21-22. As many commenters point out, these facts have not changed, certainly not enough to satisfy the heightened standard under *Fox Television Stations* to reverse an agency action predicated upon specific factual findings. *See* 129 S. Ct. at 1811.

Proponents of reclassification have tried in their comments to assert two changed circumstances: first, that ISPs today market their services with a focus on connectivity rather than on features such as email, newsgroups, or content provided by the ISP, and second, that the

market for broadband is insufficiently competitive. *See, e.g.*, Open Internet Coalition Comments at 22-23, 27-28. Neither claim is convincing.

The first claim neglects that even the components of broadband service that the NOI tries to define as “Internet connectivity” – the ability to access third-party content on the web – still involve the ISP in providing DNS, caching, and coordination with third-party cache operators such as CDNs. *See, e.g.*, Cablevision Comments at 12-14. It cannot plausibly be said that those functionalities are separate ancillary services that ISPs are merely packaging with Internet access at the point of sale. To the contrary, they are the core functions performed by an ISP in order to allow users to browse the web.⁴ Free Press argues that some Internet applications that do not use the worldwide web, such as “Internet telephony or *live* streaming video,” can be run without using the caching functionality supplied by or coordinated through an ISP. *See* Free Press Comments at 53-54 (emphasis added). But that is irrelevant. There is no requirement under the 1996 Act that an information service’s functionalities be invoked every time the service is used; the statute requires only that the provider be “offering . . . a *capability*” for the use of such features. *See* 47 U.S.C. § 153(20). Accessing the worldwide web, which invokes such features, is widely recognized as the essence of Internet connectivity. To say that an ISP is not “offering” the functionalities of web-browsing merely because an Internet connection can also be used for more obscure applications is to let the tail wag the dog.⁵

⁴ Also, as explained in Cablevision’s initial Comments, the fact that services such as DNS and caching are offered by some providers without connectivity to the Internet is a *non sequitur*. The relevant fact, which is as true today as it was in 2002, is that connectivity to the Internet is not offered without those enhanced functionalities. *See* Cablevision Comments at 13-14.

⁵ Moreover, the fact that some broadband marketing efforts focus on “speed” is fully consistent with the increased integration of enhanced functionalities like caching and coordination with third-party cache operators such as CDNs. Such enhanced functionalities are designed to increase the speed of information storage and retrieval, which are core components of an

The second claim is equally unconvincing. To begin with, the assertion that the Commission overestimated the extent to which its information service classification would lead to competition in the broadband market is simply wrong. As commenters have demonstrated, and the FCC's own expressed desire to exercise forbearance confirms, competition in the American broadband marketplace is flourishing. *See, e.g.*, Comments of U.S. Telecom Ass'n at 4-11. For example, as compared to 2002 when *the Cable Modem Declaratory Ruling* was issued and even one provider of broadband service in a market was still a relative rarity, more than four-fifths of U.S. households now have a choice among broadband providers. *See* Comments of U.S. Telecom Ass'n at 4-11. More importantly, the extent to which competition would develop did not dictate – and could not have dictated – the Commission's classification decision. As the *Cable Modem Declaratory Ruling* explained, the question of the proper classification of broadband Internet access is one of statutory interpretation and application. *See In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (“*Cable Modem Declaratory Ruling*”), 17 FCC Rcd 4798, 4820, ¶ 34 (2002). The Commission thus faithfully applied the text of the 1996 Act to broadband Internet access service without reliance on the consequences of its decision for competition. *Id.* at 4820-24, ¶¶ 34-41. While the Commission offered predictions on such consequences in subsequent orders, these predictions properly did not guide the Commission's statutory interpretation decisions. Nothing in the statutory definitions of either a “telecommunications service” or an “information service” turns on the number of entities offering the service or the extent to which they compete. Commenters thus

information service. *See, e.g.*, <http://www.optimum.com/online/expresslink.jsp> (describing Cablevision's Optimum Online Express Link Technology).

confuse statements concerning the implications of the FCC’s classification decision with the reasons for those decisions.

C. The Enhanced Features of Internet Access Service Cannot be Dismissed as Mere “Management” or “Adjunct to Basic” Services.

Recognizing that some functionalities of Internet access service are not meaningfully separable from the provision of Internet connectivity itself, some supporters of increased regulation urge the FCC that functions such as DNS, caching, and coordination with third-party CDNs can be rendered irrelevant to the legal classification of Internet access by classifying them under the FCC’s “adjunct to basic” doctrine or under the statutory “telecommunications management” exception. *See, e.g.*, Comments of Center for Democracy & Technology at 11-13; Comments of Public Knowledge at 13; 47 U.S.C. § 153(20) (statutory exception for “any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service”). The Commission should decline the invitation to so twist these doctrines, which have little applicability in this context.

At the outset, such a legal strategy would face two immediate legal hurdles, likely insurmountable. First, with regard to the telecommunications management exception, as numerous commenters have noted, the character of DNS has not meaningfully changed since 2002,⁶ and the Commission would be unable to surmount the hurdle of *Fox Television Stations* that would be necessary to justify a change in its prior conclusion on this point. *See also National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 999 n.3 (2005) (“*Brand X*”) (affirming reasonableness of FCC’s determination that characteristics of DNS supported “information service” designation). Second, as for the “adjunct to basic” doctrine, it was developed under the Commission’s *Computer II* regime and lacks any basis in the text of the

⁶ *See, e.g.*, Time Warner Comments at 20-21; Verizon Comments at 49-50.

1996 Act, which in part codified and in part superseded the pre-1996 *Computer II* regulatory categories. Particularly given that the purpose of the telecommunications management exception was plainly to replace the adjunct-to-basic doctrine, any attempt by the FCC to impose the extra-textual adjunct-to-basic framework on Internet access service in a post-1996-Act environment would be questionable at best.

In any event, whatever their applicability to DNS, neither doctrine fits services such as caching and coordination with third-party CDNs, which are performed by ISPs as part and parcel of basic Internet connectivity. The adjunct-to-basic doctrine encompasses only services that “facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service.” *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, First Report & Order and Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21958, ¶ 107 (1997) (“*Non-Accounting Safeguards Order*”). Adjunct-to-basic services are “‘incidental’ to an underlying telecommunications service and do not ‘alter[] their fundamental character.’” *See In re Federal-State Board on Universal Service, Appeal of Administrator’s Decision Radiant Telecom, Inc.* Filer ID 822268, Order, 22 FCC Rcd 11811, 11813-14, ¶ 9 (2007) (alternation in original). Caching and coordination with third-party CDNs, however, neither facilitate a transmission path for a user’s Internet communications nor are “incidental” to any distinct telecommunications service. Rather, they function as a *substitute* for such a transmission path by locating alternative sources for information the user seeks, both enhancing and providing directly the information storage and retrieval functions that customers purchase Internet access service to obtain. That is a quintessential “information service” under the 1996 Act. *See* 47 U.S.C. § 153(20) (including “storing” and “retrieving” information as

information services); *Brand X*, 545 U.S. at 999-1000 (finding that “[c]acheing [sic] . . . offers the capability for . . . acquiring, [storing], . . . retrieving, [and] utilizing information.”) (internal quotation marks omitted; first and second alterations added).

Moreover, since as demonstrated above a provider of Internet access does not offer telecommunications service to its customers, these functions do not fall within the telecommunications management exception – the enhancement they provide is not to the *transmission* between the user and a third-party web server, but rather to the user’s *retrieval of stored information*. As such, they are plainly outside the scope of the exception, which is limited to services facilitating “telecommunications” – the actual transmission of data. 47 U.S.C. § 153(20).

III. THE COMMISSION SHOULD NOT RECLASSIFY BROADBAND SERVICE, BUT IF IT DOES, IT MUST MINIMIZE THE DISRUPTIVE EFFECT OF ANY TITLE II CLASSIFICATION.

As discussed above, the record only reinforces that reclassification suffers from significant legal infirmities and has far-reaching detrimental consequences. The Commission cannot cure the legal infirmities, but if it nonetheless moves forward with reclassification, it should at least take measures to blunt what could otherwise be disastrous consequences. While such measures could not come close to maintaining the “status quo” or eliminating the significant harms such a move would cause, *see, e.g.*, Part I.A. *supra*, they could limit some of the worst consequences of common carrier regulation. Thus, if the Commission pursues reclassification, it should use its forbearance authority aggressively, take steps to prevent reclassification from moving forward if intervening courts re-impose regulatory requirements from which the FCC has forborne, prevent state and local governments from seizing the opportunity to enact their own hodgepodge of regulations, and preserve regulatory parity among broadband platforms.

A. The Commission Must Forbear Broadly, Including from the Title II Damages Provisions.

Any reclassification must be accompanied by broad forbearance, the importance of which the NOI recognizes. *See, e.g.*, NOI ¶ 86. While forbearance from most of Title II’s requirements is required to avoid imposition of burdensome new regulations, it is particularly critical to protect ISPs from being exposed to damages liability and private actions under sections 206 and 207 of the Communications Act.

While some commenters have questioned the FCC’s authority to forbear from these provisions,⁷ nothing suggests that subjecting ISPs to such liabilities is *needed* or that the extension of such liability is an intended consequence of a Title II reclassification. Moreover, although the Commission’s authority to forbear from these provisions has not been tested, there is a solid and credible basis for anchoring such authority in the Communications Act. Section 10(a) of the 1996 Act directs the Commission to forbear with respect to “*any provision* of this chapter” where the substantive criteria set forth in the statute are met. 47 U.S.C. § 160(a) (emphasis added).⁸ Congress’s use of the phrase “*any provision*” expressly rejects any limits on the Commission’s authority. In other parts of the Communications Act where Congress meant to rule out or limit the Commission’s forbearance authority with respect to specific provisions, it

⁷ *See* Comments of Public Knowledge at 49; Comments of Center for Media Justice, et al., at 27.

⁸ Congress instructed the Commission to forbear if it determines that enforcement is not “necessary” to prevent unreasonable charges, practices, classifications or regulations, or unjust discrimination, by carriers, 47 U.S.C. § 160(a)(1); that enforcement is not “necessary for the protection of consumers,” *id.* § 160(a)(2); and if forbearance is “consistent with the public interest,” *id.* § 160(a)(3). These criteria are easily met with respect to sections 206 and 207. These provisions do not currently apply, and there is no evidence of “unreasonable” practices, “unjust” discrimination, injury to consumers, or any of the other harms identified in section 10. Opening the floodgates of private litigation would not be in the public interest. And if there is any doubt on these points, the Commission has indicated it would retain its own enforcement authority. *See also* Cablevision Comments, at 19-20; *cf. also* *AT&T Corp. v. City of Portland*, 216 F.3d 871, 879-80 (9th Cir. 2000) (noting Commission’s “broad authority” to forbear).

said so explicitly. For example, section 10(d) forbids the Commission from forbearing with respect to sections 251(c) and 271 “until it determines that those requirements have been fully implemented.” 47 U.S.C. § 160(d). Similarly, section 332(c) states explicitly that, for commercial mobile service, the Commission cannot forbear, at least under that section, with respect to “any provision of section 201, 202, or 208.” *Id.* § 332(c)(1)(A). In contrast, section 10(a) contains no limitations whatsoever on forbearance with respect to sections 206 and 207.

Nor is there any merit to the argument that the Commission cannot forbear from provisions like sections 206 and 207 because their application is independent of any action by the Commission. *See, e.g.,* Center for Media Justice, et al. Comments at 27. While the basis for this argument is unclear, these commenters presumably mean to suggest that section 10(a)’s direction that the Commission shall “forbear from applying” provisions of the Communications Act should be read to forestall only actions by the Commission itself. But the statute hardly compels this reading, and is at worst ambiguous. To “forbear” means to “hold back” or to “control” just as much as it can mean to “refrain.” *See* Webster’s Third New International Dictionary (Unabridged) 886 (1986). Similarly, to “apply” means not only to “use”; it also means to “bring into action” or “put into effect.” *Id.* at 105. Thus to “forbear from applying” might mean “refrain from using,” but could just as easily mean “hold back from putting into effect” – *i.e.* bar enforcement by anyone.⁹

⁹ That, indeed, is how forbearance often works in practice now. For example, the Commission has on multiple occasions forbore from application of the unbundling requirements of section 251(c)(3). *See, e.g., In re Qwest Petition for Forbearance Under 47 U.S.C. § 160(C) From Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange*, Memorandum Opinion and Order, 23 FCC Rcd 7257, 7265, ¶ 18 (2008); *In re Petition of ACS Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, For Forbearance From Sections 251(C)(3) and 252(D)(1) In the Anchorage Study Area*, 22 FCC Rcd 1958, 1971, ¶ 20 (2007). Yet, just as with respect to sections 206 and 207, section 251(c)(3)

At the very least, the FCC has discretion under *Chevron* to take a broader view of its forbearance authority than the cramped reading urged by some commenters. *See Brand X*, 545 U.S. at 980 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984)). The broader view is also far more consistent with the basic goals of Congress when it passed the 1996 Act, including the promotion of regulatory flexibility and private sector growth. *See* H.R. Conf. Rep. No. 104-458, at 1 (1995) (describing goals of 1996 Act); H.R. Rep. No. 104-204(I), at 55 (1995) (forbearance intended to eliminate “unnecessary regulation”). The narrow reading of the phrase “forbear from applying” urged by some commenters would leave little to the FCC’s forbearance authority: it would mean not only that the Commission could not forbear with respect to sections 206 and 207, but also that it could not preclude private enforcement, in court, of provisions from which the Commission had already forbore. After all, in those cases as well, the Commission would be going beyond forestalling its own use of a particular provision. Regulatory flexibility would hardly be enhanced if private court actions could effectively deprive the Commission of its discretion as to how particular regulatory requirements should be enforced, or even whether they apply in the first place. Indeed, such a reading would reduce the FCC’s statutory forbearance authority to little more than the enforcement discretion any agency already enjoys as a matter of course. *See generally Heckler v. Chaney*, 470 U.S. 821 (1985). Such a cramped reading would leave the Commission without the means to “tailor [its] policies to evolving markets and technologies.” NOI ¶ 69.

applies only to rights and duties private parties have with respect to each other. *See* 47 U.S.C. § 251(c)(3) (Incumbent LECs have “[t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis . . .”). By forbearing, the Commission has presumably barred these rights and duties from coming into effect, and not simply limited its own enforcement powers.

Accordingly, if the Commission takes the unwise step of proceeding with reclassification, it can – and should – forbear with respect to sections 206 and 207.

B. Any Reclassification Must Be Contingent on and Not Severable From Successful Forbearance.

Imposition of the full panoply of Title II regulation on broadband carriers does not appear, from the NOI or public statements by Commissioners, to enjoy meaningful support at the FCC. But even if that is not the policy the Commission wants, the NOI’s “Third Way” proposal creates a very real risk that that is the policy the Commission will get. Judicial decisions could strike down forbearance from crucial Title II provisions and in effect re-impose obligations from which the Commission intended to forbear. Indeed, comments in this proceeding make clear that advocates of greater regulation stand ready to challenge the Commission’s forbearance decisions. *See, e.g.*, Free Press Comments at 73-74; Public Knowledge Comments at 37; Media Justice Coalition at 26-27. The Commission thus must structure any reclassification decision in a way that prevents this worst-case scenario. Legislatures regularly address these exact issues – preventing the enacting body’s judgment from being thwarted if a court strikes down a provision that is necessary to give the remaining clauses proper effect, as well as protecting important compromises that allow legislation to be passed from being undone by subsequent litigation – using nonseverability provisions. *See generally* 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.9.4 (3d ed. 2008). This ensures that laws do not take effect in circumstances where it is “evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not.” *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (quotation marks omitted). The “Third Way” represents precisely the kind of interdependent policy that is vulnerable to being subsequently undercut in this manner.

Contrary to the claims of some commenters, *see, e.g.*, Media Justice Comments at 29-30, the Commission has ample authority to structure any reclassification decision in a manner that effects nonseverability. The FCC enjoys broad discretion when balancing competing statutory objectives. *See Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009). While Cablevision doubts that the text of the 1996 Act *permits* the FCC to classify broadband carriers under Title II, it was firmly established by *Brand X* that the FCC has the discretion *not to do so*. *See* 545 U.S. at 997-1000. But if the Commission has discretion to proceed under Title II at all, it necessarily has control over the time that such a decision would take effect. *See, e.g., Mobil Oil Exploration & Producing Se. Inc. v. United Distribution Cos.*, 498 U.S. 211, 230 (1991) (“An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities.”) (internal citations omitted). At a minimum, the FCC undoubtedly can and should stay the effect of any reclassification decision pending the outcome of judicial review of its forbearance decisions, such that it will have ample time to revisit reclassification *before* any Title II burdens spring into effect as the result of actions of a reviewing court. The Commission should also make such a stay in the event of an adverse court decision on forbearance self-executing. Otherwise, the broadband industry would be facing the very real prospect of automatic imposition, without even a vote of the Commission, of burdensome Title II regulations that the Commission itself had determined were not justified.

C. The Commission Must Use Blanket Preemption, Not Merely Case-by-Case Preemption, to Prevent States and Localities from Imposing Burdensome Regulations and Fees.

As Cablevision and other commenters have explained, reclassification of broadband would lead to widespread attempts by state and local regulatory bodies to take advantage of the regulatory uncertainty to impose new regulatory requirements and fees on broadband services.

See Cablevision Comments at 22-23; Verizon Comments at 107-08; Vonage Comments at 10.¹⁰ The NOI's suggestion that the Commission might entertain petitions to preempt state regulation of Internet services on a case-by-case basis, NOI ¶ 110, would do little to mitigate this damage, as it would merely provide another forum in which ISPs would be forced to fight numerous preemption battles. See Cablevision Comments at 21-22; see also CPUC Comments, at 8-9 & n.27; PPUC Comments, at 3.

To forestall a regulatory free-for-all, the Commission must reaffirm that there is only one national regulatory framework for broadband, and broadly preempt states and local governments *ex ante* from seeking to impose their own regulations on broadband Internet access. There can be no serious dispute that the Commission has authority to broadly preempt regulatory efforts by States and localities. The Commission has jurisdiction over interstate communications, and has long treated as exclusively interstate those "mixed use" services that have both interstate and intrastate components and are impossible or impractical to separate. See *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion & Order, 19 FCC Rcd 22,404, 22,413, ¶ 17 (2004) ("Vonage Preemption Order"); *In re Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, Memorandum Opinion & Order, 7 FCC Rcd 1619, 1623 ¶ 19 (1992). Internet access services indisputably fall within this category. See *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4798, 4832, ¶ 59; *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5911,

¹⁰ The comments of state and local regulators in this proceeding only confirm that reclassification would lead to numerous attempts at regulation on the state and local level. See, e.g., Comments of the Pennsylvania Public Utilities Commission (PPUC); Comments of California Public Utilities Commission (CPUC). See also *Committee Resolutions of the National Association of Regulatory Utility Commissioners*, July 21, 2010, at 20-21.

¶ 28 (2007) (“*Wireless Broadband Order*”); *In re United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13,281, 13,288 ¶ 11 (2006) (“*Power Line Broadband Order*”); *accord Pataki*, 969 F. Supp at 171-72.

State and local laws and regulations affecting interstate communications are subject to preemption where they inhibit “the accomplishment and execution of the full objectives of Congress.” *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 368-69 (1986). When it enacted the 1996 Act, Congress adopted a broad policy “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal *or State* regulation.” 47 U.S.C. § 230(b)(2) (emphasis added). It specifically instructed the Commission to “encourage the deployment ... of advanced telecommunications capability to all Americans” through various deregulatory, pro-competition measures “that remove barriers to infrastructure investment.” *Id.* § 1302(a); *see also* H.R. Conf. Rep. No. 104-458, at 1 (1995) (noting deregulatory goals of 1996 Act). The Commission has already concluded that the 1996 Act expresses “a clear preference for a national policy” to accomplish the free market objectives of Congress with respect to the Internet, “irrespective of the statutory classification” of Internet-based services as telecommunications or information services. *Vonage Preemption Order*, 19 FCC Rcd at 22,425 ¶ 34.

As explained above and in Cablevision’s opening Comments, the imposition of more than fifty different regulatory and taxation regimes would, without question, discourage innovation and private investment and inhibit broadband deployment. Preemption of such disparate regulation – including by a decision not to impose regulations at the federal level – is well within the Commission’s authority. *See Geier v. American Honda Co.*, 529 U.S. 861, 873-

74 (2000) (when a federal agency has determined to take a hands-off approach to regulation under authority granted by Congress, a state's decision to "fill the void" with its own prescriptive regime has the serious potential to undercut federal objectives).

D. Any Reclassification Decision Must Preserve Regulatory Parity Among Different Platforms and Technologies.

Finally, if the Commission proceeds with reclassifying broadband Internet access services, it must also preserve the existing regulatory parity between wired and wireless platforms. To do otherwise would not only work a basic regulatory unfairness, it would distort the market for both consumption and investment in broadband services.

The wireless carriers claim that the Commission may not reclassify mobile wireless broadband because it is a "private mobile service" exempt from common carrier regulation under 47 U.S.C. § 332(c)(2). But if the FCC is willing to find a "connectivity" service in wired broadband Internet access service and classify it as a "telecommunications service" despite the serious legal obstacles to such an interpretation, *see* Part II *supra*, there is at least as sound a basis for treating wireless broadband the same, notwithstanding Section 332(c)(2).

At the outset, if the Commission determines that the broadband "connectivity" is a "telecommunications service," that is as true for wireless providers as it is for wired providers. And irrespective of whether the transmission element of wireless broadband Internet access is an interconnected "commercial mobile service" under Section 332 or not, the Commission has ample authority to extend Title II requirements to wireless broadband connectivity to preserve regulatory parity with wired broadband by classifying it as a "functional equivalent of a commercial mobile service" and thus excluded from the exemption for "private mobile service." *See* 47 U.S.C. § 332(c)(1), (d)(3). The FCC has already classified a number of other services under this "functional equivalence" test, and thus outside the reach of Section 332(c)(2), even

though they did not satisfy the statutory definition of a “commercial mobile service.” *See* 47 C.F.R. § 20.9(a). There is no reason the FCC could not do the same here.

Moreover, even if all wireless common carrier offerings must meet the definition of CMRS, the connectivity element of broadband Internet access satisfies this test. The Commission’s regulations define “interconnected service” to mean a service “[t]hat is interconnected with the public switched network, *or interconnected with the public switched network through an interconnected service provider*, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network.” 47 C.F.R. § 20.3 (emphasis added). Critically, the definition requires neither that a service *itself* interconnect with the public switched network, nor that interconnection with the public switched network be utilized every time the service is used. The requirement is much more modest: it must merely “make[] interconnected service *available*.” *Id.* (emphasis added). The Internet, of course, is pervasively interconnected with the PSTN, and users of mobile broadband connectivity can use that connectivity to run any variety of applications, such as VoIP, that interconnect with the PSTN. This undoubtedly suffices to “make[] interconnected service available” within the meaning of the statute. The Commission’s previous decision excluding wireless broadband from the definition of an “interconnected service,” therefore, could easily be revisited consistent with the Commission’s broad *Chevron* discretion. *See Wireless Broadband Order*, 22 FCC Rcd 5901, 5917, ¶ 45.¹¹

There are thus no meaningful legal barriers to the FCC’s treating wireless broadband under the same legal framework as it treats wired services. In light of the competitive and public

¹¹ Indeed, the *Wireless Broadband Order* itself acknowledges the possibility that the definition of an “interconnected service” may involve “ambiguity,” and that the Commission has “discretion” to resolve such ambiguity. *Id.*

interest benefits of regulatory parity, *see* Cablevision Comments at 39, Cablevision – while strongly advising against treating any broadband providers as common carriers at all – urges the Commission to, at the very least, apply any legal framework arising out of this proceeding in an evenhanded and technologically-neutral manner.

CONCLUSION

The Commission should not pursue reclassification of broadband Internet service under Title II. However, in the event it decides to proceed with such a change to its legal framework, it must, at minimum, take steps to blunt the disruptive effect such a move would inevitably have on the broadband industry.

Michael E. Olsen
Senior Vice President, Legal Regulatory and
Legislative Affairs
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-2300

/s/ Samuel L. Feder
Samuel L. Feder
Luke C. Platzer
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, D.C. 20001
(202) 639-6000

Howard J. Symons
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND
POPEO, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, D.C. 20004
(202) 434-7300

August 12, 2010