

**Before the
Federal Communications Commission
Washington D.C. 20554**

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

REPLY COMMENTS OF MOTOROLA, INC.

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I. INTRODUCTION AND EXECUTIVE SUMMARY

Motorola Inc. (“Motorola”) submits these reply comments in response to the Notice of Inquiry (“NOI”) that seeks input on the appropriate legal framework for regulating broadband Internet service.¹ Fundamentally, the Commission, the industry, and consumers share the same goals—to foster a vibrant Internet ecosystem where broadband providers are motivated to invest and innovate and consumers are adequately protected. The record evidence firmly establishes that regulating broadband Internet service under Title II—even with the exercise of forbearance authority as proposed in the NOI—would not satisfy these shared goals.² In addition to being legally questionable, the antiquated regulatory regime urged by proponents of Title II regulation would place broadband innovation and investment at risk, with no offsetting benefits. There have been no public harms or market failures that Title II regulation is necessary to correct.

Even if regulating the transmission component of broadband Internet service under Title II were good policy—which is not the case—there is no factual basis for concluding that broadband transmission is functionally separate from the data-processing components that

¹ *Framework for Broadband Internet Service*, Notice of Inquiry, GN Docket No. 10-127, FCC 10-114 (June 17, 2010) (“NOI”).

² Unless otherwise indicated, all comments referenced herein were filed in GN Docket No. 10-127 on July 15, 2010.

customers expect to and in fact receive when they purchase broadband Internet service. The Commission should follow its own advice and refrain from “[i]nventing and extracting a regulated common carrier service from a deregulated information service,” which “is precisely the type of ‘radical surgery’ that the Commission expressly rejected” in its original classification decisions.³

II. A REGULATORY APPROACH PREMISED ON THE CLASSIFICATION OF THE TRANSMISSION COMPONENT OF BROADBAND INTERNET SERVICE AS A TITLE II SERVICE WOULD JEOPARDIZE FUTURE BROADBAND INNOVATION AND INVESTMENT.

The record demonstrates that Title II regulation—in addition to being legally suspect⁴—would undermine future innovation and investment in the broadband market. The record also clearly demonstrates that there is no market failure that Title II regulation is necessary to correct, nor is there any justification for government intrusion. Furthermore, Title II regulation is not required in order for the Commission to implement the National Broadband Plan. As detailed below, the Commission possesses sufficient authority—both express and ancillary—to implement its broadband agenda.

³ Comments of Charter Corporation at 4-5 (“Charter Comments”) (quoting *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶ 43 (2002) (“*Cable Modem Declaratory Ruling*”) (rejecting proposals to “find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated”).

⁴ See, e.g., Comments of AT&T Inc. at 67-82 (“AT&T Comments”); Comments of Comcast Corporation at 28-29 (“Comcast Comments”); Comments of the National Cable and Telecommunications Association at 6-8 (“NCTA Comments”); Comments of Time Warner Cable Inc. at 73-76 (“Time Warner Comments”); Comments of the United States Telecom Association at 44-48 (“USTA Comments”); Comments of Verizon and Verizon Wireless at 29-41 (“Verizon Comments”).

A. Commenters Widely Agree that Title II Regulation—With or Without Forbearance—Would Severely Threaten Broadband Innovation and Investment.

Broadband providers, equipment suppliers, and other industry representatives widely agree that any form of Title II regulation of broadband Internet services would fundamentally establish a policy presumption in favor of heavy-handed regulation—reversing over a decade of bipartisan policy consensus—and create significant uncertainty that would undermine future investment and innovation.⁵ Indeed, by imposing anachronistic common carrier regulations on broadband services, Title II regulation would scare away private capital investment and, in turn, stymie broadband deployment. As Cablevision recognizes, the “constant threat of additional regulation of broadband would cast a cloud over investment for years to come.”⁶ Indeed, “[m]any investors will delay or limit investment—which necessarily depends on predictions of future performance—when such serious consequences are so uncertain.”⁷ And this impact on investment may last for years. Industry-watchers “estimate at least two years before the first appellate decisions appear, and much longer if the Supreme Court is involved.”⁸

⁵ Time Warner Comments at 6-7 (quoting *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 46 (1998) (“Indeed, for well over a decade. . . the Commission has recognized that regulating broadband Internet access providers as common carriers could ‘seriously curtail the regulatory freedom that . . . was important to the healthy and competitive development of the enhanced-services industry.’”) (emphasis added); *see also* Verizon Comments at 1 (explaining that the “third way” is a return to “antiquated common carriage regulation. . . developed in the 1800s for monopoly transportation and utility services”); Comments of Cablevision System Corporation at 29-33 (“Cablevision Comments”); Charter Comments at 5; AT&T Comments at 39-44; Verizon Comments at 11-20.

⁶ Cablevision Comments at 3.

⁷ *Id.*

⁸ *Id.* (stating that the Commission’s consideration of reclassification “caused broadband stock to tumble from a recent high, accompanied by a flurry of experts recommending only limited investment”). *See also* AT&T Comments at 5 (quoting letters from elected

The “third way” does not avoid these problems. Although intended to protect broadband providers from excessive regulation, Title II regulation with forbearance offers more problems than solutions. First, even if the current Commission successfully implements the proposed forbearance, there is no guarantee that future Commissions or courts will not reverse the forbearance.⁹ Second, future Commissions could use the remaining applicable provisions of Title II to impose the kinds of “excessive regulation” that the current FCC wishes to avoid.¹⁰ Third, this approach would raise the very risks and uncertainty that the “third way” ostensibly is designed to avoid and would stifle broadband deployment and innovation in the process.¹¹

representatives urging the Commission not to act as it would “create regulatory uncertainty” and “jeopardize jobs and deter needed investment for years to come”); Verizon Comments at 99-100.

⁹ Verizon Comments at 99 (explaining that forbearance could be overturned on judicial review or reversed by the current or a future Commission); Comcast Comments at 40-42; Comments of the Independent Telephone and Telecommunications Alliance at 12 (stating that forbearance is not permanent, creating regulatory uncertainty); AT&T Comments at 7 (explaining that forbearance would be “appealed by those with a vested interest in or ideological bent towards more regulation”).

¹⁰ AT&T Comments at 40-41 (stating that the NOI does not propose forbearing from sections 201 and 202, which are broad in scope, and “impose *self-executing* prohibitions on whatever conduct some future Commission might deem ‘unjust’ or ‘unreasonable’ or ‘unreasonably discriminatory’”); Verizon Comments at 99 (stating that forbearance “inevitably would lead to rate and other regulation”); Comcast Comments at 40-42 (expressing concerns about “whether the Commission’s forbearance goes far enough”).

¹¹ Verizon Comments at 100 (stating that the Commission could “unforbear” from any decision, creating ambiguity that would “paralyze innovation and discourage investment, in the same way that reclassification itself would, at precisely the time when economic growth is critical and delivery of broadband to all Americans is a national priority”); AT&T Comments at 6 (explaining that aside from legal challenges, reclassification would also ignite controversies on issues such as “(1) the precise extent of forbearance from particular Title II requirements, including the many regulations that are based in whole or in part on sections 201 and 202; and (2) how the various provisions from which the Commission suggests it may *not* forbear (such as sections 222 and 255) would apply in this novel context”); Comments of T-Mobile USA, Inc. at 9 (“T-Mobile Comments”) (stating that the mere threat of increased regulation could chill investment); Comments of the Information Technology Industry Council at 2 (“ITIC

And this would leave the industry in the same battered state that existed during the legal and regulatory battles over unbundling. In 2003, after a fourteen-month rulemaking that generated thousands of comments,¹² the Commission drastically revised its position on the network unbundling obligations of local incumbent carriers.¹³ Several parties challenged and appealed the FCC's determinations, leading to revised orders and further legal challenges.¹⁴ The unbundling issues were not resolved until nearly a decade of contentious litigation.¹⁵ Industry investment and stability were negatively impacted as a result. One study explains that "the market had an immediate and negative initial response" to the FCC's 2003 Order, due to the weakened incentives to invest in facilities covered by such uncertain rules and reduced cash flow operations available to fund investments.¹⁶ Here, out-dated Title II regulations would lead the FCC, consumers, and the broadband industry down the same tumultuous path.

Comments") (explaining concerns about unintended consequences that could threaten investment in critical sectors of the U.S. economy and threaten U.S. competitiveness); Telecom Manufacturers Comments at 3-5 (pointing out that "one investment analyst has concluded that the potential for lower investment is likely if the Third Way plan is implemented, with negative ramifications not just in telecom and cable, but potentially in the vendor sector as well").

¹² Jeffrey A. Eisenach, Paul S. Lowengrub, and James C. Miller III, "An Event Analysis Study of the Economic Implications of the FCC's UNE Decision: Backdrop for Current Network Sharing Proposals," 17 *Comm. Law Conspectus* 47 (2008) ("Eisenach").

¹³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Report on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (Aug. 21, 2003).

¹⁴ *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report and Order, 19 FCC Rcd 13494 (July 13, 2004); *Unbundled Access to Network Elements*, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783 (Aug. 20, 2004); *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533 (Feb. 4, 2005).

¹⁵ *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

¹⁶ Eisenach at 58.

B. The Purported Justifications for Title II Regulation Are Not Compelling.

None of the purported justifications for Title II regulation are compelling. Commenters astutely recognize that “[t]he Commission here has not supplied any good reason for its proposed policy change; to the contrary, the obvious reason for the reclassification proposal is that the Commission has simply failed in its recent attempt to impose net neutrality mandates.”¹⁷ CTIA agrees that “the Commission fails to identify any policy justification—such as consumer harms, market failures or any other legitimate change in circumstances—that warrants regulating broadband Internet access services under Title II rather than Title I.”¹⁸ Indeed, “the only change has been the *Comcast* decision,¹⁹ which did nothing more than apply the proper legal test for the . . . Commission’s exercise of its ancillary authority.”²⁰

Reclassification proponents argue that the data-processing and transmission components of broadband Internet access are no longer “integrated.” They point out that certain functions, such as DNS lookup or email, are now available from parties other than broadband Internet

¹⁷ Time Warner Comments at iii.

¹⁸ CTIA – The Wireless Association Comments at 45-46 (“CTIA Comments”). “In its *Open Internet NPRM*, the Commission cited two examples as evidence of the need for rules—Madison River Communications’ blocking of VoIP and complaints regarding Comcast’s network management practices. But both of these matters were resolved under the current regulatory regime, as the carriers involved promptly ceased the practices at issue.” *Id.*

¹⁹ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (“*Comcast*”).

²⁰ CTIA Comments at 47; *see also* Comments of Qwest Communications International at 26-27 (“Qwest Comments”) (stating that *Comcast* does not justify reclassification as the D.C. Circuit ruled that the Commission “must satisfy the Title I ancillary jurisdiction standard. Similarly, the Commission could not reverse its prior classification orders based on some observation about the current state of competition for broadband.”); Comments of Cox Communications at 1 (“Cox Comments”) (stating that *Comcast* is not sufficient justification for reclassification).

access providers themselves.²¹ But, as Time Warner Cable explains, this argument misses the mark: “The question under the statute is what broadband Internet access providers *actually offer* end users, not what they *could offer*, or what *others* may offer.”²² Furthermore, “[i]t has long been the case that functions identified by the Commission as ‘integrated’ components of broadband Internet access are also available from third parties.”²³ For example, caching, “which was one of the core information-service functions identified by the Supreme Court in *Brand X*, is available from content delivery networks such as Akamai and Limelight, and email of course was available from various sources other than ISPs well before the Commission adopted the *Cable Modem Order*.”²⁴ The fact that companies now offer stand-alone email on an unbundled basis is irrelevant because broadband providers continue to offer that functionality on an integrated basis, and the vast majority of subscribers continue to make use of it.²⁵

Equally irrelevant is the argument that some broadband Internet access providers also offer pure transport to certain customers. As commenters explain, “[w]hile that service might properly be classified as a telecommunications service. . . , that classification—and the provider’s choice to provide such a service that fundamentally differs from broadband Internet access service—does not affect the regulatory status of that broadband Internet access service or its integrated transmission component.”²⁶ Indeed, the broadband Internet classification orders

²¹ Comments of the Center for Democracy and Technology at 8-12; Comments of the Open Internet Coalition at 21-27.

²² Time Warner Comments at 25-26.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

consistently explained that a broadband Internet provider has the discretion to offer an integrated information service while separately providing a stand-alone transmission service.²⁷

C. Title II Regulation Is Not Necessary for the Commission to Implement the National Broadband Plan.

Concerns that the Commission must resort to Title II regulation in order to implement the National Broadband Plan are misguided. Commenters outline in detail how—even after the *Comcast* decision—the FCC can implement its broadband agenda within the existing Title I framework.

CTIA explains that “the *Comcast* decision [does not] undermine the appropriate exercise of the Commission’s legal authority to implement the National Broadband Plan.”²⁸ *Comcast* simply held that “the Commission had failed to properly justify the particular Order on review, primarily because that order did not tie the exercise of ancillary authority to any statutorily-mandated duty.”²⁹ The Commission still has plenty of time to develop a record for its implementation of the National Broadband Plan that will withstand judicial review. *Comcast* recognizes that the “Communications Act includes numerous statutory mandates that provide a proper basis for action that is reasonably ancillary to the Commission’s performance of those responsibilities, and the National Broadband Plan provides a solid foundation on which to build a record demonstrating, with substantial evidence, how Commission action is reasonably ancillary to the effective performance of those responsibilities.”³⁰

²⁷ *Id.*

²⁸ CTIA Comments at 48-49.

²⁹ *Id.*

³⁰ Comcast Comments at 5-6.

Commenters also identify express and ancillary sources of authority that will enable the Commission to implement key broadband policy objectives, such as broadband universal service,³¹ disability access,³² customer privacy,³³ and pole attachments.³⁴ These well-defined, subject-specific sources of authority will allow the Commission to greatly expand broadband deployment, without requiring a massive overhaul of the broadband framework. To the extent the FCC disagrees—or believes it needs specific authority in additional areas—legislation would provide a proper avenue for addressing such perceived jurisdictional shortcomings.³⁵

III. THERE IS NO FACTUAL BASIS FOR CONCLUDING THAT TRANSMISSION CAN BE SEPARATED FROM THE INTEGRATED BROADBAND INTERNET SERVICE OFFERED BY BROADBAND PROVIDERS.

Even if the Commission determines that regulating the transmission component of broadband Internet service as a Title II “telecommunications service” would be good policy,

³¹ TIA Comments at 27 (stating the Commission has direct authority to provide universal service funding for broadband services under Section 254); CTIA Comments at 48-49, 52-53 (stating that in addition to express authority under Section 254, the Commission has ancillary authority under Title I to reform universal service as “the exercise of such authority is necessary to prevent frustration of a regulatory scheme expressly authorized by [section 254]”); Comcast Comments at 6-7 (stating that the Commission can rely on Section 254 as express authority or as a basis for exercising ancillary authority to reform USF).

³² CTIA Comments at 53 (explaining that “Congress has in Section 255 tasked the FCC in the area of access to telecommunications services and equipment for the disabled,” giving the Commission a basis for ancillary authority to extend disability-related requirements to interconnected VoIP services).

³³ *Id.* at 53-54 (stating that Section 222 has enabled the Commission to rely upon ancillary authority in requiring interconnected VoIP services to protect consumer privacy).

³⁴ Comcast Comments at 11 (explaining that the National Broadband Plan recognized the important role pole attachment rates play in broadband deployment, particularly to rural areas, and the Commission has express authority to address pole attachment rates in Section 224).

³⁵ TIA Comments at 12 (pointing out that reclassification will cause damage to the marketplace, and the “Commission should heed these concerns and abandon its proposal to impose Title II regulation on broadband services, or at least wait for Congress to act”); ITIC Comments at 6-8; Time Warner Comments at 88.

there is no factual basis for concluding that transmission can be separated from the functionally integrated broadband Internet service offered by broadband providers.³⁶ Since the Commission determined in a string of decisions from 2002 to 2007 that Internet access service is a Title I “information service” with no Title II “telecommunications service” component,³⁷ nothing has changed that would justify a different regulatory approach now. In fact, and as detailed below, the record shows that broadband Internet service has become even more functionally integrated since the Commission first considered the issue

Commenters widely agree that the proposed regulation of broadband Internet service under Title II is not supported by changes on the ground, and that the factual predicates for the Commission’s determination that broadband Internet service is a functionally integrated information service remain valid. Cox states that the “key elements of broadband Internet service that supported classification as an information service in 2002 and 2005 remain in place today.”³⁸ Specifically, broadband Internet service is an “information service” because it “contains a range of integrated data-processing functions.”³⁹ And in “stark contrast to an offering that entails only bare transmission between end points of a user’s choosing, broadband

³⁶ Charter Comments at 4-5 (stating that “the Commission proposes to extract from broadband service a separable Title II ‘Internet connectivity’ telecommunications service from what is actually an integrated offering that does not offer passive end-to-end telecommunications service”).

³⁷ See generally *Wireless Broadband Declaratory Ruling*, ¶ 31 (concluding that the “telecommunications” component of broadband Internet service is “sufficiently integrated” with the information processing components to “make it reasonable to describe the two as a single, integrated offering”).

³⁸ Cox Comments at 14.

³⁹ Time Warner Comments at 19. The Commission evaluates the level of integration of the end product by evaluating, *inter alia*, whether the use of one capability “only trivially affect[s]” the other capability, or whether the one capability is “part and parcel” and “integral to [the service’s] other capabilities.” See generally *Cable Modem Declaratory Ruling*, ¶ 39.

Internet access is characterized by its inherent interactive capabilities, the core purposes of which are to retrieve stored data and to process information via telecommunications (the hallmarks of information services).”⁴⁰

If anything, broadband services are more functionally integrated today than in 2002, when the Commission concluded that cable modem service is an information service—a holding that the Supreme Court affirmed.⁴¹ AT&T points out that “even more than in 2002, 2005, and 2007, the data-processing and transmission components of broadband Internet access are tightly integrated components of a unified service offering.”⁴² Verizon agrees that “wireline and wireless broadband Internet access services integrate even *more* information service capabilities as part and parcel of the offerings than they did at the time of the Commission’s initial classification decisions.”⁴³ For Verizon’s individual consumers, “these range from parental controls to various security functions to access to various storage capabilities to specialized content.”⁴⁴ For Verizon’s small business customers, additional capabilities include “online file backup and a Small Business Center portal, which includes professional/social networking forums and access to various types of stored content.”⁴⁵ Similarly, Charter explains that its cable modem service today integrates not only traditional functionalities, but also essential services

⁴⁰ Time Warner Comments at 19.

⁴¹ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (affirming the Commission’s decision to classify cable modem service as an “information service”).

⁴² AT&T Comments at 70-71.

⁴³ Verizon Comments at 51-52.

⁴⁴ *Id.*

⁴⁵ *Id.*

like security screening, spam protection, anti-virus and anti-bot technologies, pop-up blockers, parental controls, online email, instant messaging, and customizable applications, as well as network security-related features that provide essential functionalities of a customer's broadband Internet access service."⁴⁶ Cox explains that since the classification decisions, it has "integrated additional features into its service, many of which enhance the components that already were available."⁴⁷ These enhancements are "organic to the underlying information service that Cox offers" and they "provide the online experience that customers desire and expect."⁴⁸

Broadband Internet service has become more, not less, functionally integrated. The increased degree by which broadband transmission is functionally integrated with data-processing capabilities inherent in broadband Internet service only bolsters the Commission's previous determination that broadband Internet service is an information service.

⁴⁶ Charter Comments at 4-5. Time Warner's integrated product also includes a variety of new functions, including "security screening, spam protection, anti-virus and anti-botnet technologies, pop-up blockers, parental controls, online email and photo storage, instant messaging, and the ability to create a customized browser and personalized home page that automatically retrieves games, weather, news, and other information selected by the user." Time Warner Comments at 24-27.

⁴⁷ Cox Comments at 14-15. Cox has added: anti-virus and anti-spam protection; the capability to have access to dedicated online storage for users' important files, or files they want to transfer to other users; and dynamic content it obtains from ESPN, Nickelodeon, and other content developers. *Id.*

⁴⁸ *Id.*

IV. CONCLUSION

For the foregoing reasons, Motorola urges the Commission not to regulate broadband Internet services under Title II.

Respectfully Submitted,

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