



evolving and dynamic broadband environment and likely reduce innovation and investment in broadband networks. Even with generous exercise of forbearance, this could lead to the commoditization of the service, which would harm competition and could increase market concentration. Rather than act on unfounded fears that could become self-fulfilling prophecies, the Commission can and should continue to exercise its Title I authority to advance the National Broadband Plan.

**I. WIRELINE BROADBAND AND WIRELESS BROADBAND SHOULD BE TREATED THE SAME.**

The Commission has asked about three different regulatory frameworks for broadband Internet service: continued reliance on Title I ancillary authority, full-blown Title II regulation, and “light-touch” Title II regulation with forbearance — the proposed “third way.”<sup>1</sup> Whatever approach is taken, parity between competitors and networks is essential — all broadband providers must play by the same rules as a matter of basic fairness and equity among consumers. This is particularly true at the level of establishing jurisdiction (the classification question) and core principles. These must be the same for all providers or else the Commission will be altering, and ultimately harming, competition, investment and innovation. Disparity in legal rights and obligations will inevitably skew the market away from the most efficient and productive allocation of resources. Indeed, disfavoring one industry sector — *i.e.*, wireline broadband — will harm all consumers generally, and it may also harm mobile and fixed wireless customers specifically by reducing backhaul investment, particularly in rural areas.

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<sup>1</sup> *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, FCC 10-114 (June 17, 2010).

CTIA, Sprint, T-Mobile,<sup>2</sup> and others argue, however, that the Commission can treat wireless broadband differently from wireline broadband, hoping to preserve Title I ancillary treatment even if the Commission inadvisably chooses to impose greater regulation on wireline broadband services than they face today. The Commission cannot take such an approach, however, not only because it would be bad policy to treat competitors differently but because it would be inherently arbitrary to do so, particularly if the Commission were to adopt the so-called Third Way.

As the Commission explained in the NOI, the Third Way is modeled on the regulatory approach to wireless voice services, which are subject to Title II regulation through Section 332 of the Communications Act except as the Commission has determined to forbear from such common carrier regulation.<sup>3</sup> It would be legally unsupportable and, indeed, ironic to treat wireline broadband services the same as wireless voice services while simultaneously affording wireless broadband services more favorable regulatory treatment. The Commission has already concluded that wireline broadband and wireless broadband services share similar characteristics and should be treated the same.<sup>4</sup> Indeed, rural wireline broadband networks exhibit the same scarcity and congestion problems that wireless networks face due to the cost of deployment and limited revenue opportunities. Accordingly, wireless and wireline broadband networks must be treated the same. CenturyLink agrees with CTIA, Sprint, and T-Mobile that the current Title I approach is the best for all broadband services.

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<sup>2</sup> CTIA Comments at 54; Sprint Comments at 20; T-Mobile Comments at 23.

<sup>3</sup> 47 U.S.C. § 332.

<sup>4</sup> *E.g., Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5909-10, 5912-14, ¶¶ 19-26, 29-33 (2007).

## **II. THE INTERNET IS FREE AND OPEN, SO THERE IS NO NEED FOR HASTE IN EVALUATING THE CURRENT FRAMEWORK.**

Broadband markets do not need more regulation. There have been few instances of harm, as should be expected given the extent of competition and growth. Indeed, the Commission's pro-market, de-regulatory approach to broadband has been in effect for the better part of a decade depending on the technology employed yet proponents of greater regulation can point to astonishingly few examples of alleged harms, all of which were quickly resolved.<sup>5</sup> It strains credibility to think that there would have been materially fewer instances of harm, or that they would have been resolved more quickly, had full-blown or partial Title II regulation been in place over the past decade. Accordingly, there is no evidence that the Commission must move hastily to impose additional regulation, or that hasty action would produce any public interest benefits, much less sufficient benefits to offset the substantial public interest harm that would inexorably flow from increased regulation in the form of reduced innovation and investment.

Not only is less regulation superior to more regulation when it comes to broadband investment, but the case-by-case, reactive approach of Title I ancillary jurisdiction is also superior because it is more likely to arrive at the right outcome on any particular issue than would rules written beforehand based on incomplete and often erroneous expectations about how best to protect consumers. The rate of innovation and change in broadband markets make it almost impossible to write effective rules without doing substantial harm. The "Third Way" could theoretically be similar to the case-by-case Title I approach, but it creates substantial risk and uncertainty for investors and network operators, delaying decisions and making investment more costly and dampening innovation.

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<sup>5</sup> *E.g.*, Free Press Comments at 18; Public Knowledge Comments at 2.

CenturyLink agrees with the comments demonstrating that the Commission has ample authority to accomplish all of its legitimate broadband goals through the Title I ancillary jurisdiction that it has been exercising and can continue to exercise within the constraints that have always existed and were articulated by the D.C. Circuit in the *Comcast* decision. Specifically, the Commission already has sufficient authority to direct universal service support for broadband, to protect consumer privacy and homeland security, and to accomplish the other purposes set out in the NOI.<sup>6</sup>

### **III. BROADBAND NETWORKS ARE NOT NATURAL MONOPOLIES AND SHOULD NOT BE TREATED AS SUCH.**

Nearly all of the calls for hasty re-classification of broadband transmission reflect either skepticism about markets<sup>7</sup> or a desire to alter market outcomes to favor one class of providers and/or customers at the expense of others.<sup>8</sup> As USTelecom demonstrated with extensive and compelling facts,<sup>9</sup> most broadband markets are quite competitive today. In fact, given the massive sunk cost investments needed to build and operate broadband networks regardless of technology, competition between a relative handful of providers will generate just as much market discipline as competition among tens of providers in the kinds of markets with lower investment requirements that are typical in a modern economy. Therefore, Title II regulation in whole or in part is inappropriate for broadband Internet service as it was created to prevent

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<sup>6</sup> E.g., AT&T Comments at 20, NCTA Comments at 36; Qwest Comments at 38.

<sup>7</sup> E.g., Free Press Comments at 41; Public Knowledge Comments at iv.

<sup>8</sup> E.g., CompTel Comments at 5.

<sup>9</sup> USTelecom Comments at 1-23.

potential abuses by natural monopoly providers of transportation and communications infrastructure.

Not only is any Title II regulation of broadband Internet service inappropriate, it is also likely to be affirmatively harmful for broadband consumers.<sup>10</sup> It does not encourage innovation and investment, and it is ill-suited to competitive markets. In fact, heavy-handed Title II regulation is likely to commoditize broadband networks and lead to increased market concentration as providers will be unable to develop new and different services, and recover the cost of differentiating investments.<sup>11</sup> Such commoditization of broadband connectivity will stifle competition, deter investment, and add yet another layer of regulatory complexity and disparity for present and future providers. Our society was held back by decades of burdensome natural monopoly regulation of the Bell System, although the United States fared far better than most of the world which struggled with government ownership instead of just government control of telecommunications networks through agencies (often called postal, telegraph and telephone operators or PTTs). By the end of the last century, those PTTs typically had substantially higher rates, lower service quality, more limited availability, older equipment and technology, and greater restrictions on consumer use (particularly with respect to terminal equipment) than the

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<sup>10</sup> When CenturyLink refers to Title II regulation of broadband Internet service, this addresses the service as purchased and used by consumers, which is distinct from the local transmission input sold by rate-of-return regulated ILECs to ISPs. The latter is not a finished broadband service, as explained by NECA and others in their comments. CenturyLink is not suggesting that there should be any change in the services offered by rate-of-return ILECs or in the regulatory treatment of those services.

<sup>11</sup> E.g., George S. Ford, Thomas M. Koutsky, and Lawrence J. Spiwak, *Network Neutrality and Industry Structure*, Phoenix Center Policy Paper 24 (April 2006), available at <http://phoenix-center.org/pcpp/PCPP24Final.pdf>.

investor-owned networks in the United States, even where demographics and topography favored the PTT. The same loss of consumer benefits would occur with Title II treatment of broadband.

There also must be regulatory balance across the broadband ecosystem; the rules should not favor producers over distributors as many propose today. In the highly competitive, rapidly evolving broadband ecosystem, the massive network investments necessary to deliver the world-class broadband services our country needs will not occur if network providers must bear most of the risk while being excluded from most of the potential benefit through regulation.

#### **IV. CONCLUSION**

All of the Comments filed in the docket are right on one limited point—the decision the Commission has chosen to address is very important, with potentially momentous consequences. Whatever approach the Commission selects, it is imperative that wireline and wireless broadband be treated the same. Broadband Internet market performance is good with no credible evidence of public interest harms so the Commission should not move hastily on a regulatory classification change that could have severe adverse public interest consequences. Finally, broadband networks are not natural monopolies and they should not be treated as such, which argues against Title II regulation that was created for the express purpose of constraining monopoly power and could lead to commoditization of the service. Rather than act on unfounded fears that could become self-fulfilling prophecies, the Commission can and should continue to exercise its Title I authority to advance the National Broadband Plan.

Respectfully submitted,

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