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

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

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TABLE OF CONTENTS

I. INTRODUCTION……..3

II. DISCUSSION……...……4

A. Opponents of a limited Title II framework for broadband deliberately and vastly overstate its scope and effect..……4

B. A limited Title II classification will not change the market fundamentals that drive investment in broadband networks……..11

C. Both legal and policy considerations unambiguously support the conclusion that wireless broadband constitutes a telecommunications service……....20

D. Limited Title II classification comports with both administrative and constitutional law principles articulated by the Supreme Court…….....…25

1. Opponents of limited Title II classification cannot demonstrate that today's broadband Internet connectivity is inextricably linked with information services……...25

2. Both recent FCC reports and provider admissions demonstrate that the market for broadband Internet connectivity lacks meaningful competition. There is a real emerging cable modem monopoly problem that the Commission's policy framework must address…….....29

3. Under *National Cable & Telecommunications Association v. Brand X Internet Services*, courts will defer to the Commission's decision to classify broadband Internet connectivity as a telecommunications service…….....34

4. Because classifying broadband Internet connectivity as a Title II service would constitute purely economic regulation, it would not raise First Amendment concerns…….....35

5. Title II classification would not constitute a taking……..39

E. If the Commission wants to achieve critical policies articulated in the National Broadband Plan, it has no other option but to classify broadband Internet connectivity as a Title II service……..43

III. CONCLUSION……...…..51

I. INTRODUCTION

The Commission's Third Way framework proposes a sensible, limited revision to the legal foundation for making critical broadband policy. In this proceeding, broadband service providers and other reflexive opponents of regulation use breathless hyperbole and veiled threats to obscure the basic fact that broadband providers now offer a distinct service which transmits data to and from points of a user's choosing on the Internet. As a result, "after all the . . . cant has been translated, and the smoke . . . blown away, it remains perfectly clear that someone who sells [broadband Internet] service is 'offering' telecommunications."[1]

The rhetoric deployed in the initial round of comments suffers from the following critical flaws:

- It overstates the scope and effect of a limited Title II classification for broadband Internet connectivity service;
- It wildly overestimates the effect, if any, that Title II classification will have on future investment in broadband networks;
- It characterizes wireless services as *sui generis* and fails to recognize that IP data transport is all the same, regardless of whether it travels by wire or radio;
- It conjures legal hurdles to reclassification that can easily be addressed and dismissed; and
- It either obscures or ignores that the Commission has no other options for moving forward with sound broadband policy.

Getting distracted by this misdirection will come at a price. A recent report suggests that the United States now ranks only 23rd in broadband development.[2] As a result, the Commission

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[1] *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1014 (Scalia, J., dissenting) (*Brand X*).

[2] *See* "US Ranks 23rd in Broadband Development, Strategy Analytics," available at http://finance.yahoo.com/news/US-Ranks-23rd-in-Broadband-bw-2999061721.html?x=0&.v=1 (last visited Aug. 6, 2010). "Development" is defined by a "Broadband Composite Index," which

must quickly and decisively assert its authority to implement the National Broadband Plan. To do so, it can and must classify broadband Internet connectivity as a telecommunications service under the 1934 Communications Act.

II. DISCUSSION

A. Opponents of a limited Title II framework for broadband deliberately and vastly overstate its scope and effect.

To discourage the Commission from pursuing the Third Way, opponents of a limited Title II classification make several dubious claims regarding its impact on the Internet ecosystem.

First, opponents of Title II classification misconceive what will and what won't constitute a telecommunications service under the Third Way proposal. Many of these misconceptions stem from a fundamental misunderstanding of the definitions of telecommunication service and information service. A telecommunications service offers to the public the ability to "transmi[t], between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[3] An information service offers "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing," except insofar that capability is used "for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[4]

"examines and scores the broadband development of fifty-seven individual countries in five categories, including household penetration, speed, affordability, value for money, and urbanicity."

[3] 47 U.S.C. § 153(43), (46).

[4] 47 U.S.C. § 153(20).

Several commenters argue that content delivery networks must be classified as offering a telecommunications service under the framework set forth by the Commission.[5] But that claim is fundamentally mistaken. A content delivery network offers content providers two principal functions: (1) It offers data storage closer to the edges of the network -- for example, if Apple's main iTunes server were in Cupertino, California, Akamai might store copies of content from that server on a variety of servers across the eastern seaboard, such that a potential iTunes user in New Jersey can access Apple content from a server in Hoboken rather than the Cupertino server. (2) A content delivery network also directs users to the stored content closest to them -- following our example, it directs users in New Jersey to the stored content in Hoboken, rather than the stored content in Madison, Wisconsin or Los Angeles, California.

On this issue, the Commission's *Pulverphone Order* provides an instructive analogy. Pulver.com petitioned for a declaratory ruling that its Free World Dialup service (an early peer-to-peer Voice over IP service) was not a telecommunications service as that term is defined the Communications Act.[6] The Commission held that Pulver.com was offering an information service in part because users must "bring their own broadband transmission" to interact with the Free World Dialup server.[7] By the same token, users must "bring their own broadband" to interact with information stored on content delivery networks.

As a result, a content delivery network provides a facility for storing information (in the form of distributed servers) and a facility for acquiring or retrieving information (in form of

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[5] *See e.g.*, Comments of Verizon and Verizon Wireless, *Framework for Broadband Internet Service*, GN Docket 10-127, at 61 (July 15, 2010) (Verizon Comments); Comments of National Cable and Telecommunications Association *Framework for Broadband Internet Service*, GN Docket 10-127, at 55 (July 15, 2010) (NCTA Comments).

[6] *Petition For Declaratory Ruling that Pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd. 3307 (2004) (*Pulverphone Order*).

[7] *Id.* at ¶ 9.

direction to the closest server that stores the content sought by the user), but it does not provide the ability to transmit information of a user's choosing between or among points specified by the user. Such a facility, then, must be classified as an information service[8] rather than a telecommunications service[9], and it would not be affected by a Commission decision to classify broadband Internet connectivity as a Title II service.

Other commenters suggest that devices like the Kindle will be subject to the Title II regulation.[10] But this suggestion also fundamentally misses the mark: the Kindle is a limited functionality *device* that allows you to read books and download them to the device. That is, the Kindle itself is nothing more than a small computer or smartphone without voice capabilities. It is true that one can purchase the Kindle with 3G wireless connectivity.[11] But when a user purchases the Kindle with the connectivity function, he simply purchases a bundle consisting of a device (the reader) and a service (the connectivity). Many, if not most, consumers purchase wireless phones in the same manner.[12] Thus while the connectivity associated with the Kindle

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[8] *See* 47 U.S.C. § 153(20) (defining information service as including the capacity to "acquir[e]," "retriev[e]," and "store" "information via telecommunications").

[9] *See* 47 U.S.C. §§ 153(43), 153(46) (defining a telecommunications service as the offering for a fee to the public of "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.")

[10] *See e.g.*, Verizon Comments at 60-61; Comments of United States Telecommunications Association *Framework for Broadband Internet Service*, GN Docket 10-127, at 39 (July 15, 2010) (USTA Comments).

[11] *See, e.g.*, Kindle Wireless Reading Device, Free 3G + Wi-Fi, 6" Display, Graphite, 3G Works Globally - Latest Generation, http://www.amazon.com/Wireless-Reading-Display-Graphite-Globally/dp/B002FQJT3Q (last visited July 31, 2010).

[12] *See, e.g.*, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*; *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, Fourteenth Report, 2010 WL 2020768, ¶ 307 (2010) (*Fourteenth Report*) ("The prevailing model for the distribution of [wireless phone] handsets to U.S. consumers is a provider-as retailer model in

may well be a telecommunications service, that classification does not and should not imply that the device itself would be subject to the strictures of Title II of the Communications Act. For example, even the though the transmission service offered by the Kindle might be subject to Title II's nondiscrimination provisions, nothing would prevent Amazon from deciding that it would not support specific applications such as e-mail or streaming video on the device itself.

Indeed, this distinction should be easy to recognize and maintain -- the Kindle, as well as the iPad and the Nook, all contract with AT&T for their wireless connectivity service.[13] Amazon essentially packages AT&T connectivity with the Kindle device when it sells the device to the end user. Because a third party, AT&T, provides the underlying connectivity service, it should be easy to maintain a functional separation between the device and connectivity. That connectivity as provided by AT&T to all end users (whether they connect via Kindle or Nook or Blackberry or iPhone) would be subject to Title II obligations. Similarly, though Amazon might be the direct retailer of connectivity to the end user, it seems likely that any costs associated with compliance with Title II obligations would fall largely, if not exclusively, on AT&T. As a result, adopting the Third Way proposal would not lead to greater regulation of devices like the Kindle anymore than existing Title II regulations impose obligations on the manufacturers of cordless phones.

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which manufacturers sell handsets in bulk quantities to service providers and then service providers sell them to consumers in handset-service bundles.").

[13] *See, e.g.*, Todd Ogasawara, *Amazon Switching from Sprint to AT&T for Kindle 3G Service in the US*, Mobile Content Today (Oct. 23, 2009), http://www.mediabistro.com/mobilecontenttoday/mobile_content/amazon_switching_from_sprint_to_att_for_kindle_3g_service_in_the_us_141067.asp; Priya Ganapathi, *American iPad Users Pay Among the Highest for Data Worldwide*, Wired (July 30, 2010), http://www.wired.com/epicenter/2010/07/ipad-users-data-chart/comment-page-1/ ("In the United States, AT&T is the exclusive data service provider for the iPad."); Nook FAQ & Support, http://www.barnesandnoble.com/nook/support/index.asp (last visited July 31, 2010).

Some commenters even contend that search engines like Google would be regulated under the Commission's proposed Third Way framework.[14] This last, most implausible example exposes the "Third-Way-Will-Regulate-Everything" argument for what it is: a scare tactic to discourage the Commission from pursuing a sensible, limited policy that is faithful to the plain language of the Communications Act.. To understand the implausibility of the argument, consider what Google's search engine offers to the public: an ability to "find information in many different languages (and translate between them), check stock quotes and sports scores, find news headlines and look up the address of [the] local post office or grocery store."[15] It also offers the ability to "find images, videos, maps, patents and much more" on the World Wide Web.[16] Thus, Google search plainly offers the ability to "retriev[e]" or "mak[e] available" information via telecommunications, making it a classic information service.[17] Google does not "offer telecommunications for a fee directly to the public": whether or not Google uses internal networks to transport its own data, it does not offer that service to users of its search capabilities. As in the case of Pulver Free World Dialup, users of google.com must "bring their own transmission."[18] Because Google does not offer the ability to transmit data between and among points of a user's choosing and instead uses transmission to provide a distinct service, it offers an information service and not a telecommunications service.

The Commission's Third Way proposal correctly distinguishes between connectivity on one hand and content and applications on the other -- just as the Communications Act does.

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[14] Comments of AT&T, *Framework for Broadband Internet Service*, GN Docket 10-127, at 109 (July 15, 2010) (AT&T Comments).

[15] Google Corporate Information, http://www.google.com/intl/en/corporate/ (last visited July 31, 2010).

[16] *Id.*

[17] 47 U.S.C. § 153(20).

[18] *Pulverphone Order* at ¶ 9.

Having proposed a straightforward and limited framework for reestablishing basic authority over broadband networks, the Commission should not be deterred by deliberately muddled claims that it must now regulate the entire Internet ecosystem.

Second, applying sections 201 and 202 of the Communications Act to broadband Internet connectivity providers would work a radical shift in agency practice are completely overblown. The Commission has repeatedly assured broadband network operators that it does not intend to impose rate regulation or unbundling requirements on their services.[19] And as a practical matter, the notion that the sections 201 and 202 by themselves impose significant new obligations seems out of step with agency practice. Because broadband Internet connectivity is different than other kinds of telecommunications services, the Commission will likely have to reevaluate which rules should apply to broadband Internet connectivity and whether any additional rules are warranted. At each of these junctures, broadband service providers will be provided with ample notice and opportunity to comment on new substantive obligations. Classifying broadband Internet connectivity merely puts the right framework in place so that the Commission can subsequently make substantive policies that advance the nation's broadband goals. However, it is important to reiterate that what rulemaking activities may or may not follow appropriate legal classification is not relevant to the central question of the appropriate legal classification itself.

Third, the Commission need not require carriers to offer an unbundled stand-alone connectivity service in order to regulate that service. Commenters who make this claim appear

[19] *See, e.g.*, FCC Chairman Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework*, http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html (May 6, 2010).

to base it on the notion that the Commission has defined telecommunications service and information service as mutually exclusive categories.[20]

But one may recognize that the two categories are exclusive without mandating that all telecommunications services must be offered on a stand-alone basis. The information and communications technology sector provides numerous examples where (1) products and services are typically bundled and (2) different regulatory requirements apply to different parts of the bundle. For example, most wireless phones are sold with wireless phone service.[21] Similarly, some cable operators do not offer voice service unless a subscriber also purchases the operator's broadband Internet connectivity service.[22] But no one would argue that an iPhone ought to be subject to the same regulatory regime as AT&T wireless connectivity service simply by virtue of the fact that the iPhone is always sold with AT&T connectivity. Nor would anyone suggest that if some providers offer voice service only with Internet service, that practice should somehow limit the regulatory classification of either service. Indeed, to allow bundling of discrete services to affect the regulation of those disparate services would elevate pricing and marketing practices over the functional definitions prescribed by statute. That is obviously an "undesirable . . . result."[23]

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[20] *See, e.g.*, Comments of Comcast Corp., *Framework for Broadband Internet Service*, GN Docket No. 10-127, at 28-29 (July 15, 2010) (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11501, ¶ 39 (1998)) (Comcast Comments).

[21] *Fourteenth Report* at ¶ 307.

[22] *See, e.g.*, Optimum Products and Services, http://www.optimum.com/ratecard.jsp?serviceType=ov&regionIdnull&searchby=corp&corp=07869 (last visited July 31, 2010) ("To take advantage of this great new home phone service, you must be an Optimum Online subscriber in an area where Optimum Voice is available.").

[23] *See Independent Data Manufacturers Ass'n*, Memorandum Opinion and Order, 10 FCC Rcd. 13717, ¶ 44 (1995); *see also United States v. Western Elec. Co.*, 907 F.2d 160, 163 (D.C. Cir. 1990) (characterizing the same approach as creating "an enormous loophole").

Opponents of limited Title II classification deliberately exaggerate the scope and effect of the Third Way proposal. The Commission should not allow such distortions to dissuade it from reestablishing a sound framework for making broadband policy.

B. A limited Title II classification will not change the market fundamentals that drive investment in broadband networks.

Many opponents of the Commission's proposed approach to Title II classification spend significant time spinning out unfounded doomsday scenarios regarding the effect of a change in classification on investment. A practical analysis of the Commission's proposal, a basic understanding of market economics, and historical evidence all suggest that these arguments are specious. First, as set forth more fully above, the Third Way proposes modest regulation that attempts to preserve the status quo. Indeed, both Chairman Genachowski and various industry analysts agree on this point.[24] This fact alone should call into question the doomsday predictions on network investment that have been put forth by incumbents. The analyses where many of these claims generate their figures are riddled with erroneous assumptions that underlie the analysis itself.

The Telecommunications Industry Association (TIA) hired CSMG to perform a " FCC Reclassification NOI - Economic Impact Assessment".[25] This analysis was subsequently submitted in the instant proceeding by TIA.[26] This analysis is flawed from the outset. CSMG performs parallel analyses looking at the supposed regulations proposed in the NOI and those it

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[24] Statement of Julius Genachowski, FCC, *The Third Way: A Narrowly Tailored Broadband Framework*, p. 5 (May 6, 2010). *See also e.g.* Jessica Reif Cohen, "Pull back is a buying opportunity," Bank of America Merrill Lynch, May 6, 2010.

[25] Comments of the Telecommunications Industry Association, *Framework for Broadband Internet Service*, GN Docket No. 10-127, at Attachment (July 15, 2010) (CSMG Study).

[26] *Ibid.* Beyond the fact that TIA paid for this study, CSMG also notes that the "Likely regulatory actions" that underlie the entire analysis "were identified by TIA analysis". *Ibid.* at Slide 8.

explicitly rejects but that "may be imposed over time should forbearance be lifted by FCC or courts."[27] The claimed economic impact of the former is based on the following:[28]

- Impact of obligations that the FCC is explicitly considering in the NOI:
  - Introduction of formal complaint process and case-by-case analysis of practices **increases G&A costs**
  - Extension of **USF** adds contribution cost to broadband revenues and creates an opportunity to receive funding for broadband
  - FCC may impose an **obligation to resell** broadband access at regulated rates; causes a share of end-users to be **lost to wholesale** at a reduced revenue

The point about extension of USF adding contribution costs to broadband revenues is irrelevant to the current classification debate, as under Section 254(d) the Commission can choose to require contributions from "any other provider of interstate telecommunications," and under the current information services designation, this of course could include any broadband service provider. Thus we will focus on the other two impacts examined in the TIA/CSMG filing.[29]

The assertion that a formal complaint process will increase general and administrative (G&A) costs is questionable and irrelevant to the Commission's consideration of the appropriate legal classification. First, a formal case-by-case complaint process already existed prior to the *Comcast Decision*. Indeed, this is exactly the mechanism that was used to generate the *Order* at

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[27] Given the pure hypothetical nature and the clear intention of this aspect of the study to allow TIA to claim that "with the application of wholesale and other obligations under Sections 201 and 202, the net present value of the FTTH deployment becomes negative -- falling from $7.4 million to (-)$5.3 million" (Comments of TIA at 22). Thus, we will respond to the analysis that has *some* basis in the "third way" proposal set forth in the NOI.

[28] CSMG Study at Slide 8 (emphasis in original).

[29] The fact that the Third Way would place the Commission on solid legal footing to extend the Universal Service Fund to broadband services does indeed offer a potential bottom line benefit to broadband providers.

issue in that decision. Thus, any reduction in these *potential* costs has existed only since the *Comcast Decision* left the Commission without the authority to act on such a complaint. Ironically, this line of argument counsels the Commission to always establish clear *ex ante* rules of the road, not adopt *ex post* case-by-case practices, the latter strongly preferred by incumbents fighting the Third Way. Second, given the enormous resources being expended by incumbents to prevent reclassification, it appears unlikely costs would increase following the Commission's settling of this matter.[30] Furthermore, the matter at issue in this proceeding is whether the Commission will have the ability to protect consumers on the critical communications infrastructure of our time. Such a decision should not rest on whether the operators of such infrastructure will see increased administrative costs.

The analysis also asserts that the Commission "may impose an obligation to resell broadband access at regulated rates."[31] But this proposed regulation is nowhere to be found in the *NOI*. In fact, Chairman Genachowski specifically rejected such an occurrence at the outset stating, "Third, this approach would restore the status quo… it would not change established policy understandings at the FCC, such as the existing approach to unbundling or the practice of not regulating broadband prices or pricing structures."[32] Commissioner Copps noted upon the introduction of the *NOI* that "notable telecommunications analysts at firms such as Bank of America Merrill Lynch, UBS, and Goldman Sachs" have not found the Third Way proposal as increasing the costs to broadband operators.[33] The Commissioner went on to quote one "well-

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[30] For instance, Commissioner Copps told the public to "beware of all the slick PR you hear, and remember that much of it is coming from lavishly-funded corporate interests" *NOI*, Statement of Commissioner Michael J. Copps at 3.

[31] CSMG Study at Slide 8.

[32] Statement of Julius Genachowski, FCC, *The Third Way: A Narrowly Tailored Broadband Framework*, p. 5 (May 6, 2010).

[33] *NOI*, Statement of Commissioner Michael J. Copps at 1.

regarded" analyst who stated "the FCC's "Third Way" reclassification largely keeps the status quo intact with key points being: 1) no rate regulation, 2) no unbundling."[34] We also previously noted the numerous instances in which broadband providers confided to investors that the Third Way proposal would not affect their business.[35] Indeed, the CEO of Harbinger Capital Partners Philip Falcone stated "the FCC's broadband policies continue to actively encourage Harbinger's and others multi-billion dollar investment in broadband innovation."[36] Unlike incumbents positioning, this statement is not mere rhetoric, a recent article notes "Mr. Falcone has sunk some $2 billion of his and his clients' money into the wireless plan."[37] Given these inaccurate assumptions underlying this analysis, not too mention the fact that this analysis included payment and involvement by a vested interest, it can hardly be viewed as an accurate economic assessment of the Commission's *NOI*.

CSMG has produced similarly questionable studies in the past, which should lead the Commission to discount their analysis. In April 2002, Corning, Inc. paid CSMG to assess "the Impact of Regulation on Deployment of Fiber to the Home."[38] The analysis claimed that if the Commission removed unbundling obligations on last mile fiber deployments, "FTTH [Fiber-to-

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[34] *Ibid.*

[35] Comments of Free Press, *Framework for Broadband Internet Service*, GN Docket No. 10-127, at 97-99 (July 15, 2010) (Free Press Comments).

[36] Press Release, Harbinger Capital Partners, Statement on the Federal Communications Commission's Broadband Policies (June 17, 2010), *available at*

http://www.forbes.com/feeds/prnewswire/2010/ 06/17/prnewswire201006170900PR_NEWS_USPR_____NY22520.html.

[37] Jenny Strasburg and Spencer E. Ante, "Wireless Network Races for Funds," *Wall Street Journal*, July 19, 2010.

[38] Comments of Corning, Inc., In the Matter of *Review of the Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Services Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Attachment (April 5, 2002).

the-Home] could be economically deployed in 31 percent of households."[39] The firm went on to state with this deregulatory environment the "CAPEX [Capital Expenditure] per subscriber cut off for deployment…[would be] in the range of $2,800"[40] This analysis was subsequently utilized by numerous incumbents to make the case for deregulation.[41] Eight years later, following the deregulation of last mile fiber deployments,[42] we have the opportunity to assess these predictions.[43] By March 2010, FTTH had been deployed to less than *16 percent* of homes in the United States.[44] The bulk of these deployments came from Verizon. Unlike CSMG predicted, most ILECs made no FTTH deployments following deregulation. The paltry 16 percent deployment number is not poised to increase, as Verizon announced that they will no longer expand their FTTH network to new areas.[45] This announcement comes as Verizon has faced nowhere near the $2,800 per subscriber investment predicted by CSMG. In fact, Verizon's

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[39] *Ibid.* at Slide 3.

[40] *Ibid.* at Slide 16.

[41] *See e.g.* Reply Comments of SBC Communications, Inc., In the Matter of *Review of the Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Services Capability*, CC Docket Nos. 01-338, 96-98, 98-147, p. 6 (July 17, 2002).

[42] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003).

[43] Similar to their 2010 analysis, CSMG, influenced by their customer, had numerous existing flaws underlying this analysis. For instance, CSMG treated the generation of $20 per month of wholesale revenue as an impediment to investment. Yet, the CFO of SBC, Randall Stephenson, only a few months later told investors that "You know at $20/21, you have good, vibrant competition and it's not at such a level where we cannot earn money or are disincented to invest." Transcript of BAS 32nd Annual Investment Conference, San Francisco, CA, Sept. 23-26, 2002.

[44] RVA LLC, "North American Market Update," FTTH Council, April 2010, p. 9.

[45] *See e.g.* Peter Svenson, "Verizon unlikely to expand FiOS," *Associated Press*, March 27, 2010.

per home cost was $850 per home in 2006, a number they expected to drop to $700 by 2010.[46] AT&T pointed to this announcement by Verizon as validation that they're far *less* expensive deployment of fiber-to-the-node was the right path.[47] Indeed, AT&T has offered estimates that they're per subscriber cost for their U-verse service is in the "low-$300 range".[48] These two analyses illustrate that the Commission should treat CSMG's work with serious skepticism given its checkered past in accurately predicting the benefits of deregulation, let alone the harms of proposed regulation. The Commission should be certain they don't once again "look like Charlie Brown after Lucy pulls the football away."[49]

Beyond these the use of these studies, incumbents also point to the regulatory uncertainty that would be created through reclassification.[50] This asserted uncertainty is then used to project a negative impact on investment. As noted above, it is difficult to understand how the Commission's stated goal of preserving the status quo will "create enormous investment-deterring regulatory uncertainty."[51] This is especially true given the severe legal uncertainty that currently exists following the *Comcast Decision.* Nonetheless, during this time period, dramatic shifts in investment have not occurred. Just a couple weeks ago, Comcast noted that they "are

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[46] Verizon, "Verizon FiOS Product Sheet," 2007, available at http://newscenter.verizon.com/kit/nxtcomm/Product-sheet-FiOS-1Q07.pdf.

[47] Karl Bode, "AT&T: Verizon's FiOS Slowdown Justifies Our U-Verse Plan," *DSL Reports*, Aug. 10, 2010.

[48] *See e.g.* Mitch Shapiro, "Verizon's FiOS vs. AT&T's U-verse: Overview," *The FTTH Prism Magazine*, Vol.5 No.2, February 2008.

[49] Statement of Rep. Edward J. Markey, Hearing before the Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce, U.S. House of Representatives on Health of the Telecommunications Sector: A Perspective From the Commissioners of the Federal Communications Commission, 108th Congress, 1st Session, Feb. 26, 2003.

[50] *See e.g.*, Comcast Comments at 41; Verizon Comments at 12.

[51] AT&T Comments at 2.

continuing to make steady progress deploying All-Digital and DOCSIS 3.0."[52] The operator also had a "modest uptick in the level of CapEx [Capital Expenditure] spend this quarter"[53] When it comes to the Commission proposal, Comcast told investors:[54]

> [W]e feel pretty pleased that there's a constructive dialogue around this area and with the FCC and with a number of stakeholders. On the one hand, the National Broadband Plan needs reasonable rules to allow them to implement a plan that we think many elements that we're very supportive of, and so as the Chairman has talked about a third way proposal and that's one possibility.

Of course, at the same time we have broadband providers saying that it may be the status quo but "I'm a 3-2 vote away from the next guy coming in and saying I disagree with that, I take it away."[55] While the Commission has noted that the hurdles to removing forbearance are considerable, any communication company is always three votes away from something they claim is catastrophic, similar to every other industry that Federal agencies oversee. Indeed, perhaps this is why SEC financial disclosure forms *always* include existing and future regulatory landscape outlooks. For instance, AT&T's 2009 Annual Report states:[56]

> The Commission has issued dozens of notices seeking comment on whether and how it should modify its rules and policies on a host of issues, which would affect all segments of the communications industry, to achieve universal access to broadband. These issues…could have an impact on AT&T's revenues and operations.

These assessments illustrate that the communication companies are constantly subject to uncertainty, with every open Commission proceeding, regulatory rumor and piece of legislation. However, it is difficult claim these uncertainties outweigh the benefits to oversight of powerful

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[52] Comcast, Q2 2010 Earnings Call, Transcript, July 28, 2010.

[53] *Ibid.*

[54] *Ibid.*

[55] *See e.g.* Matthew Lasar, "AT&T: drop net neutrality or U-verse gets it," *Ars Technica*, June 17, 2010.

[56] AT&T Inc. 2009 Annual Report, p. 42.

industry players by the Government.[57] Indeed, a recent article in the New Yorker rebutting Verizon CEO Ivan Seidenberg pointed out that "uncertainty is a fact of business life".[58] The important factor is the *degree* of uncertainty and the likelihood of, and potential magnitude of a drag on return on investment. In this case, the degree of uncertainty in the wake of the *Comcast* decision is already increased, and will be decreased with reassertion of authority. And as we explained in our initial comments, the likelihood of any rules that have a drag on returns is small. The fact remains that underlying market fundamentals drive investment in this business, and those fundamentals remain strong and are expected to remain so far into the future.

With that said, uncertainty can still affect the success of a business plan. However, the uncertainty from *upstream* markets is what poses the most acute risk. This is especially true to the extent those markets can affect a business's ability to reach and serve their customers. This is exactly why phone and cable companies have *requested* more stringent regulation in areas like pole attachments,[59] video franchising,[60] MDU exclusivity,[61] and wireless tower siting,[62] to name

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[57] *NOI*, Statement of Commissioner Michael J. Copps at 2 ("I, for one, am worried about relying only on the good will of a few powerful companies to achieve this country's broadband hopes and dreams. We see what price can be paid when critical industries operate with unfettered control and without reasonable and meaningful oversight. Look no further than the banking industry's role in precipitating the recent financial meltdown or turn on your TV and watch what is taking place right now in the Gulf of Mexico").

[58] James Surowiecki, "Wall Street, the White House, and the weak economy," *The New Yorker*, Aug. 2, 2010.

[59] *See e.g.* Comments of the National Cable & Telecommunications Association, In the Matter of *Petition For Declaratory Ruling Regarding The Rate For Cable System Pole Attachments Used To Provide VoIP Service, A National Broadband Plan for Our Future, Implementation of Section 224 of the Act, IP-Enabled Services*, WC Docket No. 09-154, 07-245, 04-36, GN Docket No. 09-51, p. i (Sept. 24, 2009).

[60] *See e.g.* Comments of Verizon, In the Matter of *Implementation of Section 6219(a) of the Cable Communications Policy Act of 1983 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, p. i-iii (Feb. 13, 2006).

but a few. The companies believe the Commission should ensure they have certainty to gain reasonable access in these areas. For instance, in the recent pole attachment *Order,* the Commission attempts to determine just and reasonable rates, terms, and conditions for pole attachments.[63] The *Order* specifically notes, "that these costs can impact communications service providers' investment decisions."[64] The ability of upstream markets to increase the costs or impede the access of a company undoubtedly weigh on their ability to invest, not too mention succeed in soliciting third party capital. Yet despite this business reality, broadband operators shout in opposition when the Commission proposes to ensure that Internet content and application providers have the same certainty in their upstream market, as ISPs so frequently request from the same regulatory agency. In fact, as evidenced in this proceeding, broadband providers do not even believe the Commission should have the regulatory authority to do anything remotely similar to offer this certainty in the broader Internet market. Only six years ago, AT&T stated "[i]f there is even a serious risk that such access can be blocked by the entities that control the last mile network facilities necessary for Internet access, the capital markets will not fully fund IP-enabled services."[65] What certainty can these businesses expect if the Commission does not even possess the authority to act to protect this critical upstream market?

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[61] *See e.g.* Comments of Verizon, In the Matter of *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, p. 1 (July 2, 2007).

[62] *See e.g.* Comment of Verizon Wireless, In the Matter of *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Proposals as Requiring a Variance*, WT Docket No. 08-165, p. ii (Sept. 29, 2008).

[63] *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, WC Docket No. 07-245, GN Docket No. 09-51, 75 FR 41338 (May 20, 2010).

[64] *Ibid.* at ¶ 10.

[65] Comments of AT&T Corp., In the Matter of *IP-Enabled Services*, WC Docket 04-36, p. 54 (May 28, 2004).

Can one really believe they will receive the same level of support from the capital markets? We urge the Commission to take these factors into consideration, in the same way they have on behalf of broadband providers, and move forward with the proposal to appropriately classify broadband connectivity as a telecommunications service.

C. Both legal and policy considerations unambiguously support the conclusion that wireless broadband constitutes a telecommunications service.

The Commission should reject calls to exempt wireless broadband networks from limited Title II classification. First, both wired and wireless networks offer the same service: the ability to send and receive data between and among points of a user's choosing without change in the form or content of the information. Indeed, the marketing of wireless data plans often focuses exclusively on the amount of data which subscribers can send and receive *without even mentioning* content or applications offered along with the transmission service. For example, an advertisement for AT&T's data plans notes only that the DataPlus plan allows users to send or receive 200 MB of data for $15 per month, while the DataPro plan allows users to send or receive 2 GB of data for $25 per month.[66] Similarly, the main web page advertising Verizon Wireless's data plans focuses exclusively on price and the amount of data usage permitted as the defining characteristics of the service -- no other services are mentioned.[67] Sprint, too, focuses exclusively on the attributes of its transmission service in marketing its mobile data plans: for example, it emphasizes that its unlimited data plan allows you to send and receive as much

[66] Mobilize Everything, AT&T Data Plans with WiFI, http://www.att.com/shop/wireless/plans/data-plans.jsp (last visited Aug. 2, 2010).

[67] Verizon Wireless Mobile Broadband Plans, http://www.verizonwireless.com/b2c/mobilebroadband/?page=plans (last visited Aug. 2, 2010) (listing prices for 5 GB per month, 250 MB per month, and 2 GB per month, among others, and specifying charges for going over these data caps).

content as you like, and it highlights the speed of its downloads as well as the geographic scope of its coverage.[68] The evidence that wireless carriers offer a separable Internet connectivity service is, if anything, stronger than the evidence amassed on the wireline side. Whether using technology that sends data by radio or by wire, broadband companies offer the ability to transmit IP and other data between and among points of a user's choosing, without change in the form or content of that data. As such, they offer a telecommunications service as that term is defined under the Communications Act.[69]

Opponents of a framework that imposes limited Title II authority over broadband networks try to avoid these straightforward definitional conclusions by arguing that (1) "the wireless marketplace [is] different than the markets for, and provision of, cable and wireline broadband service" and (2) that wireless connectivity service is different because it depends on access to spectrum, which is a scarce resource.[70] But the Commission should recognize both of these arguments as red herrings.

Whether various kinds of telecommunications services compete with one another -- or whether different providers compete to offer the same telecommunications service -- cannot and

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[68] Sprint Mobile Broadband Plans, http://shop.sprint.com/NASApp/onlinestore/en/Action/SubmitRegionAction?isUpgradePathForCoverage=false&currZipCode=&upgradeOption=&nextPage=DisplayPlans&equipmentSKUurlPart= percent3FcurrentPage percent3DratePlanPage&filterStringParamName=filterString percent3DBusiness_Plans_Filter&newZipCode=20009 (last visited Aug. 2, 2010).

[69] 47 U.S.C. § 153(43), (46). The fact that wireless devices are typically sold in conjunction with wireless data service similarly does not alter the regulatory analysis. This type of bundling is a marketing choice, not a functional requirement. *See* Leslie Cauley, "AT&T flings cellphone network wide open," *USA Today*, Dec. 5, 2007 ("AT&T for years kept quiet the fact that wireless customers had the option of using devices and applications other than those offered by AT&T.") In fact, in many if not most other countries, wireless devices can be sold and are sold separately from wireless Internet connectivity. *See* Marguerite Reardon, "Will unlocked cell phones free consumers," *CNet News* (January 24, 2007) ("In Asia, about 80 percent of cell phones are sold independently of a carrier.").

[70] See, e.g., Comments of CTIA -- The Wireless Association, *Framework for Broadband Internet Service*, GN Docket No. 10-127, at iv (July 15, 2010).

does not alter the functional classification of such services. For example, frame relay service is different from plain old telephone service, and yet no one disputes that both those services are clearly telecommunications services.[71] Similarly, under the structure of the MFJ, BOCs offered local exchange service, which was different from long distance services offered by IXCs, but no one would have disputed that both offerings were telecommunications services. By the same token, the fact that AT&T, MCI, Sprint, and a range of facilities-based carriers and resellers offered competing long distance services for a time obviously did nothing to change the fundamental character or the regulatory classification of such services.

The fact that wireless broadband depends on spectrum may have consequences for *how* the Commission regulates wireless networks, but not *whether* wireless broadband connectivity is a Title II service. For example, what constitutes unreasonable discrimination in a legitimately bandwidth constrained wireless network may be different than what constitutes unreasonable discrimination on an unconstrained fiber-optic cable. But the nature of spectrum resources doesn't alter the fundamental nature of wireless broadband connectivity service, and it should have no bearing on how the service is classified under the Act. Indeed, if spectrum-based delivery were the defining factor, then mobile voice service ought not to be subject to Title II obligations because it, too, depends on the same resource.

As a policy matter, consumers need and expect that they will enjoy the same protections on both wired and wireless networks. Many mobile devices now offer seamless transitions between a residential wired connection (via WiFi) and 3G or 4G mobile connectivity.[72] Many

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[71] *See Independent Data Manufacturers Ass'n*, Memorandum Opinion and Order, 10 FCC Rcd. 13717 (1995).

[72] *See, e.g.*, iPhone 4 Technical Specifications, http://www.apple.com/iphone/specs.html (last visited Aug. 2, 2010) (describing both iPhone 4's cellular data and wifi capabilities); Droid --

users can now tether their laptop computers or other portable devices to mobile devices, and thereby connect to the Internet via mobile wireless capacity in addition to using other fixed wireless and wired connections for such machines.[73] Thus, it makes no sense to have a different regulatory framework for wireless as opposed to wireline when consumers view and use both wireless and wired broadband connectivity in the same way -- to transmit and receive data over the Internet.

Practical experience also suggests that limited Title II classification will serve the wireless data market well, as the wireless voice market has flourished under a similar regime. In 1993, when Congress revised section 332 of the Act, there were two major wireless providers in most markets.[74] For the majority of areas, there are now five wireless voice providers.[75] The Commission is no stranger to the developments in the wireless space.[76] The wireless industry has

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WiFi, https://motorola-global-portal.custhelp.com/app/answers/detail/a_id/38320/~/droid---wi-fi (last visited Aug. 2, 2010) (describing how to connect Motorola Droid to WiFi networks).

[73] *See, e.g.*, iPhone 101: How to Tether Your iPhone 4, http://www.iphonedownloadblog.com/tag/tethering/ (last visited Aug. 2, 2010); Review: Sprint Overdrive 3G/4G Mobile Hotspot, http://www.geek.com/articles/mobile/review-sprint-overdrive-3g4g-mobile-hotspot-20100212/ (last visited Aug. 2, 2010).

[74] *See* Pub. L. 103-66, 107 Stat. 31, § 6002(b) (1993); [*See e.g. Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services, First Report*, FCC 95-317, *10 FCC Rcd 8844* (Rel. Aug. 18, 1995]. The fact that the mobile voice market was largely a duopoly at the time that Congress decided to confirm that mobile voice is a telecommunications service puts the lie to the notion that Title II was designed for monopoly networks. Congress consciously imposed sections 201, 202, and 208 on mobile voice even though it was certainly not a monopoly in 1993.

[75] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services*, WT Docket No. 09-66, *Fourteenth Report*, FCC 10-81, Table 5 (rel. May 20, 2010)

[76] *Ibid.*

repeatedly discussed the growth that has occurred over this time period.[77] For instance, wireless subscribers have grown from 33.8 million in December 1995 to 285.6 million in December 2009.[78] In the same time period wireless carrier employment grew from 68,165 to 249,247, semiannual industry revenues increased from $10.3 billion to $76.7 billion, and cell increased from 22,663 to 247,081.[79] Clearly the wireless industry has enjoyed tremendous benefits thanks to its classification under a Title II regime.

Finally, as a legal matter, nothing in section 332 of the Communications Act precludes the Commission from classifying wireless broadband as a telecommunications service. Wireless broadband Internet connectivity is not a "private mobile service" exempt from common carrier regulation under the Act.[80] A private mobile service is "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service."[81] A commercial mobile service is "provided for profit" and "makes interconnected service" (i.e., service that is either directly or indirectly interconnected with the public switched network) available to the public.[82] Even though wireless broadband Internet connectivity may not interconnect directly with the public switched network,[83] at a minimum, it offers at least the functional equivalent such an interconnected service: with the right programs, wireless broadband internet connectivity service allows a user to transmit voice data to the public

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[77] *See e.g.* Comments of CTIA-The Wireless Association, In the Matter of *Wireless Telecommunications Bureau Seeks Comment On the State of Mobile Wireless Competition*, WT Docket No. 10-133, pp. 4-63 (July 30, 2010).

[78] CTIA- The Wireless Association, *CTIA's Semi-Annual Wireless Industry Survey*, March 23, 2010.

[79] *Ibid.*

[80] 47 U.S.C. § 332(d)(3); *cf. See e.g.* Verizon Comments at 73.

[81] *Id.*

[82] *Id.* § 332(d)(1)-(2); 47 C.F.R. § 20.3.

[83] *Id.* § 332(d)(1).

switched network, and it also allows the transmission of voice, video, texts, and e-mail -- all methods of communications that increasingly substitute for the communications that historically took place over the public switched network. Thus, wireless Internet connectivity cannot be classified as a private mobile service. And if that is the case, then it can and should be classified as a telecommunications service under the Act because it meets the Act's functional definition of that term.

D. Limited Title II classification comports with both administrative and constitutional law principles articulated by the Supreme Court.

1. Opponents of limited Title II classification cannot demonstrate that today's broadband Internet connectivity is inextricably linked with information services.

Under *Fox Television Stations v. FCC*, the Commission may revisit a prior policy choice so long as it offers a reasonable explanation, and a change in factual circumstances may provide that reasonable explanation.[84] Here, it is clear that the Commission's 2002 factual finding that broadband Internet service constituted one indivisible service no longer holds true. Broadband providers rely on three principal examples in contending that their connectivity services are inextricably intertwined with other offerings: they argue that DNS resolution service, network security features, and caching all are functionally integrated with their data transmission. But the fact that broadband network operators provide these services does not counsel in favor of concluding that they do not offer a distinct telecommunications service.

First, the marketing materials offered by various broadband network operators in this proceeding itself highlight that they offer multiple services rather than one integrated service. AT&T's filing cites to advertisements that offer a "*combination* of broadband access, services,

[84] 129 S. Ct. 1800, 1811 (2009).

and content."[85] Similarly, Verizon lists the following services offered in a bundle, all with identical billing: FiOS Internet, FiOS TV, Unlimited Nationwide Calling, 50 GB Data Storage, Mobility, and Advanced Internet Security.[86] Thus, Verizon clearly markets data storage and security features in a way that is no more integrated with FiOS Internet than either FiOS TV or unlimited nationwide calling.

Second, as set forth at greater length in our initial comments, DNS resolution service is not inextricably intertwined with a broadband Internet connectivity provider's transmission offering, and even if it were, it would not be considered an information service under the Act.[87] Indeed, many opponents of Title II classification have effectively conceded in this proceeding that DNS is a separable service by acknowledging that it can be obtained easily from third parties.[88]

Third, as also set forth in our initial comments, caching is an information service offered primarily by third parties,[89] and it speeds delivery of content by storing it at the edges of the network. To the extent that broadband Internet connectivity providers also offer caching services, they might be treated by the Commission in two ways. First, if these services are

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[85] AT&T Comments at 77 (emphasis added).

[86] *See* Verizon Comments at Attach. A, 28.

[87] *See* Comments of Free Press, *Framework for Broadband Internet Service*, GN Docket No. 10-127, at 53-54, 117-118 (July 15, 2010) (Free Press Comments).

[88] *See, e.g.*, Comments of Qwest Communications International, *Framework for Broadband Internet Service*, GN Docket No. 10-127, at 22 (July 15, 2010) (Qwest Comments); Comments of Comcast Corporation, *Framework for Broadband Internet Service*, GN Docket No. 10-127, at 23, n. 106 (July 15, 2010).

[89] CDN operators are very secretive about their revenue figures and thus it is difficult to offer specific figures.

Nonetheless, it is clear that third parties make up the overwhelming majority of caching providers. *See e.g.* Dan Rayburn, "CDN Market Share Numbers Are Not Accurate!," *Seeking Alpha*, Aug. 14, 2007; The market is also very volatile but again, third parties dominate throughout this volatility. *See* Dan Rayburn, "CDN Market Improving, But Latest Pricing Data Shows Challenges Still Lie Ahead," Frost & Sullivan, Slide 15-16, 18, Oct. 29, 2009.

offered to content producers and compete with other third-party caching solutions, they should be considered information services because they involve the "stor[ing]" of information.[90] Such caching offerings are clearly not functionally integrated with transmission because content providers can choose from a variety of players in the marketplace to contract for such services,[91] and the Commission should not allow broadband Internet connectivity providers to vertically integrate their way out of regulation. If, however, a broadband service provider self-provisions caching in order to manage traffic across its network, that kind of caching would clearly seem to fall within an exception to the definition of information services. Congress has exempted from the definition of information service any storage service that is used for "the management of a telecommunications service."[92] Indeed, broadband network operators appear to concede this point when they argue that they "cache content . . . to ensure better performance" of the network.[93]

A similar analysis applies to security features. When broadband service providers offer anti-virus software such as Norton Security Software[94] or McAfee Security Suite[95] along with data transmission, these services simply constitute discrete information services that happen to be offered with the primary offering of Internet connectivity. By contrast, if providers deploy network security measures to "protect [their] network[s]" (and of course, network users) from the propagation of viruses, worms, malware, and other threats to the functioning of the transmission

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[90] 47 U.S.C. § 153(20).

[91] Dan Rayburn, "Updated List of Vendors In The Content Delivery Network Business," *Business of Video*, August 11, 2010.

[92] 47 U.S.C. § 153(20).

[93] *See, e.g.*, Verizon Comments, Attach. B. at 6; *see also* Comments of National Cable & Telecommunications Association, *Framework for Broadband Internet Service*, GN Docket No. 10-127, at 15 (July 15, 2010) ("Caching eliminates long transport times").

[94] *See, e.g.*, Comcast Comments at 24.

[95] *See, e.g.*, *id.* at 51.

service, those measures clearly fall into the category of services designed to "manage[], control, or operat[e] . . . a telecommunications system or . . . manage[] . . . a telecommunications service." Thus, in neither case does the fact that a network provider might offer security protections affect the ultimate regulatory classification of broadband Internet connectivity.

Moreover, the increased variety and utility of content and applications available on the Internet has called into serious question the Commission's previous understanding that broadband connectivity "subscribers usually do not need [or presumably want] to contract separately with another Internet access provider to obtain discrete services or applications."[96] In 2002, for example, the number of Internet domain hosts was approximately 162 million.[97] By contrast, in 2010 that figure has grown to approximately 758 million.[98] This proliferation of third-party content dramatically undermines the Commission's thesis that broadband subscribers simply want access to the websites and portals operated by their broadband provider. Similarly, the variety of uses of the Internet has increased exponentially since 2002: indeed, wildly popular applications like Skype, major social networking portals such as Facebook and Twitter, and major repositories of online video content such as Hulu and YouTube were all developed after the Commission classified broadband Internet service as a unitary service that furnished content and applications.[99] It is now clear in 2010 that broadband service providers' proprietary

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[96] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185; *Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶¶ 16-17 (2002) (*Cable Modem Order*).

[97] Internet Systems Consortium, Inc., "Internet Domain Survey," April 2010, available at http://ftp.isc.org/www/survey/reports/current/ (last visited Aug. 11 2010).

[98] *Ibid.*

[99] *See* About Skype, http://about.skype.com/ (last visited Aug. 2, 2010) (noting that Skype was founded in 2003); Facebook Timeline, http://www.facebook.com/press/info.php?timeline (last visited Aug. 2, 2010) (stating Facebook was founded in 2004); David Sarno, *Twitter creator*

offerings constitute only a tiny fraction of the richness and variety of services and applications available via a broadband connection, and the Commission can and should take this factual circumstance into consideration as it revisits the classification orders.

2. Both recent FCC reports and provider admissions demonstrate that the market for broadband Internet connectivity lacks meaningful competition. There is a real emerging cable modem monopoly problem that the Commission's policy framework must address.

Providers continue to insist in the press and before policymakers that the broadband access market is characterized by "vibrant competition."[100] We have repeatedly rebutted the evidence associated with this false claim, while accumulating a large body of evidence illustrating that the market is indeed a cozy duopoly, a fact even more apparent now than it was in 2002 or 2005.[101] Unfortunately, carriers continue to ignore this evidence, choosing instead to simply repeat discredited arguments, as if each new FCC proceeding means a clean argumentative slate. It is clear that regardless of market developments the industry will claim that rampant competition exists and consumers are being well served. Ironically, while the FCC and consumers would be quite pleased for this world to exist, the carriers and Wall St. would not.

Jack Dorsey illuminates the site's founding document, Part I, L.A. Times (Feb. 18, 2009), http://latimesblogs.latimes.com/technology/2009/02/twitter-creator.html (noting Twitter was created in 2006); Hulu Media Info, http://www.hulu.com/about (last visited Aug. 2, 2010) (noting Hulu was created in March 2007); About YouTube, http://www.youtube.com/t/about (last visited Aug. 2, 2010) (noting YouTube was founded in February 2005). As we explained in greater detail in our initial comments, the Commission has not revisited the factual underpinnings justifying the purported integration of transmission and applications since 2002. *See* Free Press Comments at 108-109.

[100] Verizon Comments at 68.

[101] Ex Parte Letter from David L. Lawson, AT&T to Marlene Dortch, Secretary, In the Matter of *Petition for Forbearance of the Verizon telephone Company, SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), CC Docket No. 01-338, WC Docket No. 03-235, WC Docket No. 03-260, p. 7 (April 15, 2004);* FCC Comments of Free Press, In the Matter of *Preserving an Open Internet, Broadband Industry Practices,* GN Docket No. 09-191, 07-52, pp. 49-51 (April 26, 2010).

Phone and cable companies have every incentive to ensure that new competitors do not arise in this space. But clearly the carriers have an incentive to convince the Commission that competition exists where it does not, as is evidenced by the continued citation of satellite and fixed wireless as viable compeitiors despite the paltry marketshare of these technologies.[102]

The market for broadband Internet access has been and continues to be a duopoly, with an increasing number of consumers finding only a single provider can accommodate their data needs.[103] We have previously noted that these companies routinely disclose this reality to investors.[104] It is past time for the Commission to acknowledge this reality. The Commission recently noted that in the past it has wrongly assumed "a duopoly always constitutes effective competition and is necessarily sufficient to ensure just, reasonable, and nondiscriminatory rates and practices, and to protect consumers."[105] This came in a recent order on whether to forbear Qwest from unbundling obligations on certain business lines in the Phoenix area. In that *order* the Commision found their predictions about emerging competition "have not been borne out by subsequent developments, were inconsistent with prior Commission findings, and are not otherwise supported by economic theory."[106] The Commission needs to make a similar conclusion regarding retail broadband market competition.

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[102] *See e.g.,* Verizon Comments at 68-69. ("in addition to fiber, cable, and DSL, there is additional broadband competition from…at least two satellite broadband services…Fixed wireless").

[103] *See* Free Press Net Neutrality Comments at 49-53, n. 81; Reply Comments of Free Press, In the Matter of *Preserving an Open Internet, Broadband Industry Practices,* GN Docket No. 09-191, 07-52, pp. 38-51 (April 26, 2010).

[104] *Ibid.*

[105] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area,* Memorandum Opinion and Order, WC Docket No. 09-135, FCC 10-113, ¶ 29 (Rel. June 22, 2010).

[106] *Ibid.* at ¶ 34.

The Commission's concern over competitive and consumer harms that will result from a duopoly marketplace are well-founded, and the quickly emerging cable modem high-speed monopoly in the majority of the country should give further pause. Comcast noted during a call on their first quarter financial results "in the majority of the country, something like 75 percent of the country, our speed is just so significantly superior to DSL that that really shifts the competitive balance."[107] Indeed, the Commission's most recent Form 477 broadband data shows that cable operators have already dominated these higher speed tiers. When it comes to speeds higher than 6 Mbps downstream and 200 Kbps upstream, cable modem service makes up *92 percent* of connections.[108] Consumer appetite for faster speeds has only increased since this latest report. Cable operators have noted this shift to investors. Time Warner Cable is seeing "almost 70 percent of [their] residential net adds" subscribe to the "premium tier products."[109] Comcast noted that they "continue to add more than 2 ½ times as many higher-tier customers than those on the economy level service."[110]As the broadband market matures from a basic level of broadband to higher-speed broadband, consumers are increasingly migrating to cable modem service:[111]

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[107] Comcast Corp., Q1 2010 Earnings Call, Transcript, April 28, 2010. Similar remarks were made during the Q4 2009 call.

[108] Federal Communications Commission, High-Speed Services for Internet Access: Status as of

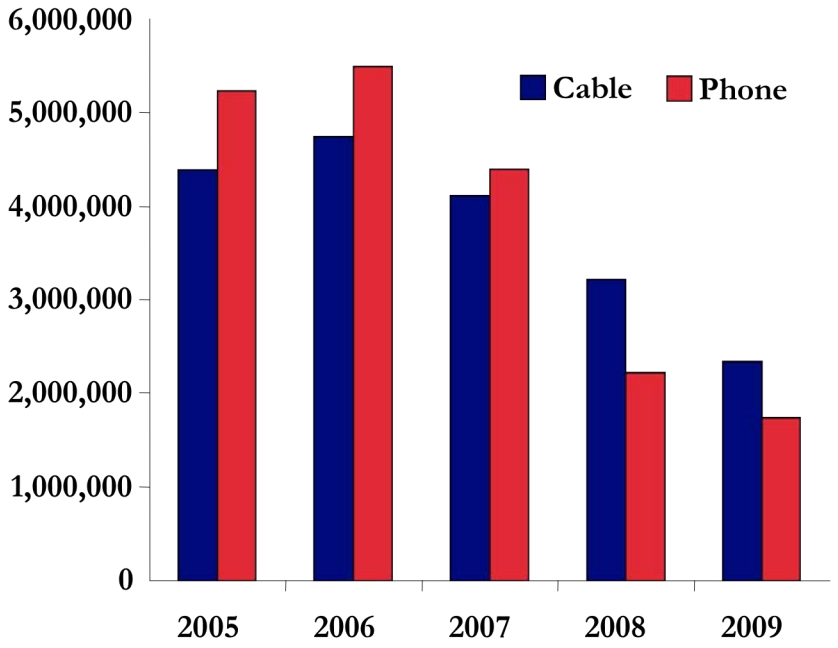
December 31, 2008, Table 7, February 2010.

[109] Time Warner Cable, Q4 2009 Earnings Call, Transcript, Jan. 28, 2010.

[110] Comcast Corp., Q1 2010 Earnings Call, Transcript, April 28, 2010.

[111] Leichtman Research Group.

Figure 1: Phone and Cable Company Net Internet Additions



Source: Leichtman Research Group

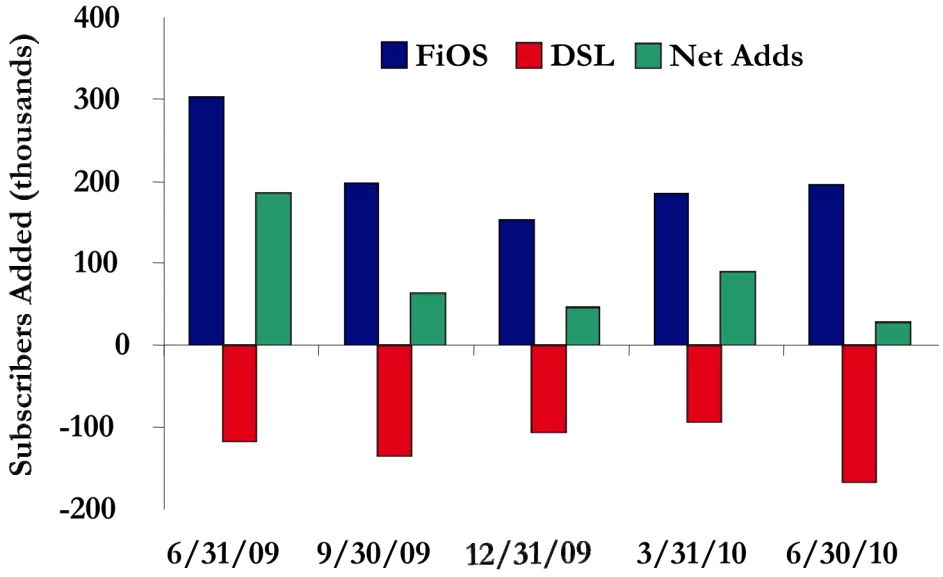
What this chart fails to capture is the legacy duopoly landscape of cable modem service vs. DSL service. The most recent set of financial calls from broadband providers marks the first time a major phone company (AT&T) reported a *net decline* in subscribers.[112] Leichtman Research Group recently reported that in the second quarter of 2010 phone companies as a whole had a *net loss* of more than 7,000 high-speed Internet customers, while cable operators added nearly 344,000.[113] However, these figures don't show the true extent of cable's dominance, due to the fact that they are net losses thus roping in any gains, thanks to the limited FTTx deployments by the largest phone companies. For instance, Qwest had net additions of 7,000, with their higher speed FTTN network gaining 52,000 additions while losing 45,000 DSL

[112] It appears AT&T lost approximately 280,000 DSL subscribers in the quarter. However, given the inclusion of satellite connections in AT&T's overall broadband subscriber figure, we cannot be completely confident in this estimate. AT&T Inc., "AT&T Delivers Double-Digit Earnings Growth in Second Quarter, Raises Full-Year Outlook," Press Release, July 22, 2010.

[113] Leichtman Research Group, "Under 350,000 Add Broadband in the Second Quarter of 2010," Press Release, August 11, 2010.

customers.[114] Qwest attributed the losses to "customer migrations and competitive market conditions"[115] and stated "our pressure point right now is in our legacy DSL... the slower speeds…[with] an uptick in the complete disconnect."[116] Since early 2009, Verizon's public financial figures offer the ability to determine their broadband additions by type:[117]

Figure 2: Verizon Internet Subscriber Movement



Source: Verizon

This data makes it clear that DSL is quickly losing share to cable modem service. This competitive reality is not lost on financial analysts.[118] The Commission should take heed of these

[114] Qwest, "Qwest Reports Second Quarter 2010 Results," Press Release, Aug. 4, 2010.

[115] *Ibid.*

[116] Qwest, Q2 2010 Earnings Call, Transcript, August 4, 2010.

[117] Figures calculated through Verizon's quarterly financial statements, p. 18. It is worth noting that in the future Verizon's DSL declines will likely ease, due to the sale of the majority of their non-fiber footprint to Frontier. *See e.g.* Verizon, "Verizon to Divest Wireline Businesses in 14 states; Significant Benefits to Verizon Shareholders," Press Release, May 13, 2009.

[118] *See e.g.*, Dave Burstein, "AT&T & Verizon: Worst Broadband Quarter Ever," *DSL Prime*, August 2, 2010; Eric Savitz, "Cable Vs. Wireless: Guess Which Is Growing Faster?" *Barron's Tech Trader Daily*, Aug. 21, 2009.

developments. Verizon, AT&T and Qwest have stated publicly the extent of their FTTx plans.[119] Meanwhile, the Commission required Frontier to deploy DSL to more customers as a condition of their transaction and has not yet determined what, if any, conditions will be placed on the Qwest-CenturyLink merger.[120] Thus, at this time, it appears the majority of consumers increasingly seeking speeds above 6 Mbps will have but a single choice. As the National Broadband Plan recognized "in areas that include 75 percent of the population, consumers will likely have only one service provider (cable companies DOCSIS 3.0-enabled infrastructure) that can offer very high peak download speeds."[121]

3. Under *National Cable & Telecommunications Association v. Brand X Internet Services*, courts will defer to the Commission's decision to classify broadband Internet connectivity as a telecommunications service.

Opponents of reclassification engage in purely wishful thinking when they suppose that a reviewing court would apply heightened scrutiny to a Commission decision to revisit the classification of broadband Internet connectivity. Relying on *United States v. Mead Corporation*, Verizon argues that a decision to classify broadband Internet connectivity would be beyond the scope of the agency's delegated authority and therefore would receive limited deference from reviewing courts.[122] But *National Cable and Telecommunications Association v.*

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[119] *See* Peter Svennson, "Verizon winds down expensive FiOS expansion," *Associated Press*, March 26, 2010; Matthew Lasar, "AT&T: drop net neutrality or U-verse gets it," *Ars Technica*, June 15, 2010; Karen Brown, "Qwest FTTN could reach 6M homes passed," *OneTRAK*, Jan. 5, 2010.

[120] *See Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 09-95 25 FCC Rcd 5972, Appendix C (Rel. May 21, 2010); CenturyLink and Qwest Communications, "CenturyLink and Qwest Agree to Merge," Presss Release, April 22, 2010.

[121] Federal Communications Commission, *Connecting America: The National Broadband Plan*, Omnibus Broadband Initiative, March 16, 2010, p. 42.

[122] Verizon Comments at 34-38.

Brand X Internet Services flatly contradicts Verizon's claim when it holds that the classification question has been delegated to the agency's discretion.[123] In *Brand X*, the court characterized the classification issue as one in which an "ambiguit[y] in [a] statute[] within [the] agency's jurisdiction to administer" had created a "*delegation of authority* to the agency to fill the gap in a reasonable fashion."[124] The ambiguous statute to which *Brand X* refers is none other than the definition of telecommunication service under the Act. Thus, the interpretation of 47 U.S.C. § 153(46) -- the definition of "telecommunications service" -- "involves difficult policy choice that agencies are better equipped to make than the courts."[125]

Brand X effectively precludes reliance on *Mead*. Either the agency has the choice to pick between reasonable interpretations created by an ambiguity in the statute or it doesn't. Either Congress has delegated the authority to make classification decisions to the FCC or it hasn't. Verizon's claim amounts to an argument that the FCC has been delegated authority to interpret the definition of telecommunications service but that it must interpret that statute in only one way. It is Verizon, not the FCC, who practices definitional gymnastics by making a mockery of the concept of delegation.

4. Because classifying broadband Internet connectivity as a Title II service would constitute purely economic regulation, it would not raise First Amendment concerns.

The Chairman's Third Way proposal does not implicate the First Amendment and is not classic speech regulation. Nor does it compel speech. Such findings would be dependent on the notion that (1) broadband network operators speak when they transmit traffic or (2) that they

[123] 545 U.S. at 967.

[124] *Id.* at 980 (emphasis added).

[125] *Id.*; *see also id.* at 992 (holding that the ambiguous construction "leaves federal telecommunications policy in this technical and complex area to be set by the Commission").

exercise editorial control over content on the Internet. Neither of these factual predicates apply to the transmission of data across the Internet.

First, it is well established that the First Amendment protection extends "only to conduct that is inherently expressive."[126] While cable and phone companies do engage in inherently expressive conduct on the Internet when they "speak" for themselves -- for example, using their company websites to publish statements voicing their opposition to policies proposed by the Commission --transmitting traffic does not speech by the carriers themselves.[127] While network operators provide access to a system that hosts the content and applications of others, the mere act of routing data packets is not itself inherently expressive. Nor does the fact that offering Internet connectivity involves the transfer of "content" convert such management into speech. As the Supreme Court has noted, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written, or printed."[128] Because transmitting data does not convey an idea or profess an opinion or viewpoint any more than FedEx conveys an opinion by delivering packages or letters, Title II classification raises no greater First Amendment concern than safety regulations applied to FedEx planes or trucks.[129]

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[126] *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 62 (2006) (citing *Gibony v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

[127] Moreover, the fact that broadband network operators do engage in speech in their distinct information service offerings (such running their proprietary policy blogs or operating their own customer service websites) does not suggest that they cannot be bound by reasonable economic regulation on the non-speech side of their business. A publisher has "no peculiar sanctuary in which he can with impunity violate laws regulating his business practices" merely because he "handles news while others handle food." *Associated Press v. United States*, 326 U.S. 1, 7 (1945).

[128] *Gibony v. Empire Storage & Ice Co.*, 336 U.S. at 502.

[129] To the extent that First Amendment concerns raised by Title II opponents largely stem from an aversion to nondiscrimination rules, these too would not affect expressive activity. A non-discrimination principle affects what Internet access providers must do or refrain from doing

Similarly, Internet access providers cannot credibly claim that classifying broadband Internet connectivity as a Title II service compels them to speak. Compelled speech violations are found only when "the complaining speaker's own message was affected by the speech it was forced to accommodate."[130] By contrast, where an entity can "disavow any connection with the message" expressed, no compelled speech violation results.[131] Here, reestablishing the Commission's basic authority to make broadband policy does not affect the ability of broadband service providers to convey their own messages to as wide an audience as possible -- in fact, applying section 201 of the Act to broadband providers could increase that ability if section 201 were interpreted to prohibit one carrier from blocking the content of another. Nor is it likely that consumers will mistake the data transmitted over broadband networks as speech of the broadband providers themselves.[132]

The FCC should also treat any claims that a Title II classification would harm Internet access providers' editorial discretion with suspicion. This statement presumes that such providers possess and exercise editorial discretion over the content that they transmit across broadband networks. Newspaper publishers, for example, pay for and choose which content and viewpoints will be printed in their periodicals. Conversely, Internet access providers do not exercise any discretion over the opinions and subject matter contained in websites accessed or

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in order to provide non-discriminatory treatment of data flowing over a network. Thus, because a non-discrimination principle would only target the non-expressive conduct of network management and not speech, such a regulation would not violate the First Amendment.

[130] *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 49 (2006) (comparing the Solomon Amendment's regulation of conduct with the actual compelled speech violations found by the Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)).

[131] *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980).

[132] *Cf. Rumsfeld*, 547 U.S. at 64-65 (where there is little concern that a particular message might be attributed to an institution, that institution cannot demonstrate a compelled speech violation).

emails sent by Internet users. To the contrary, members of phone and cable industry consistently have argued that network neutrality regulations are a "solution in search of a problem" because Internet access providers have no interest in monitoring or censoring -- or one must presume, in editing -- the online speech of others.[133]

Additionally, editorial discretion entails not only the exertion of a high level of content-based decision-making but also corresponding responsibility -- responsibility which operators have expressly disavowed for the purpose of avoiding liability for tortious or otherwise unlawful conduct occurring on their networks.[134] Internet access providers cannot have it both ways. They cannot assert editorial discretion in order to claim the benefits of First Amendment protection in order to avoid basic regulatory oversight of broadband while simultaneously denying it to avoid legal responsibility for illegal conduct occurring on network.[135]

Finally, the recent decision in *Citizens United v. Federal Election Commission* does not strengthen the argument that a move to Title II would violate the First Amendment rights of broadband network operators.[136] First, nothing in *Citizens United* transforms the service of transmitting data across the Internet into speech -- thus, *Citizens United*'s affirmation of a corporation's right to speak does not aid Title II opponents. Second, nothing about Title II

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[133] *See, e.g.*, "Does the Internet Need More Regulation? FCC to Decide," *Comcast Voices*, Sept. 21, 2009, *available at* http://blog.comcast.com/2009/09/does-the-internet-need-more-regulation-fcc-to-decide.html.

[134] For example, under the Digital Millennium Copyright Act, an Internet service provider is immunized from liability of the infringing conduct of its customers, so long as it does not exert control, selection or modification of the content it transmits. *See* 17 U.S.C. §512; *see also* 47 U.S.C. § 230(c)(1).

[135] To the extent that when they say "editorial control," broadband network operators really mean the ability to enter into pay-for-play business schemes that offer preferential treatment to those who can afford it, those arrangements cannot be sheltered under the First Amendment. If every anti-competitive business decision could be couched as an exercise of free speech, this country's antitrust enforcement capacity would be poor indeed.

[136] 130 S. Ct. 876 (2010).

classification would "identif[y] certain preferred speakers" or "take the right to speak from some and give it to others."[137] At core, *Citizens United* is a case about the government preventing corporations from speaking,[138] and broadband network operators do not and cannot identify any speech that would be suppressed as a result of this regulation. Because "the First Amendment protects speech, not business models,"[139] the FCC should reject broadband network operators' so-called free speech arguments.[140]

5. Title II classification would not constitute a taking.

Grasping at straws, several network operators claim that Title II classification would constitute a taking.[141] The FCC should reject these constitutional canards as a distraction manufactured by network operators to avoid debating policy choices in a rational manner.

"[A] party challenging governmental action as an unconstitutional taking bears a substantial burden."[142] In making the determination as to whether a taking has occurred, the courts consider the economic impact of regulation, the extent to which regulation has interfered with reasonable investment-backed expectations, and the character of governmental action.[143]

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[137] *See id.* at 899.

[138] *See, e.g.*, *id.* at 898 (describing the independent expenditure ban as a "ban on speech"), *id.* at 899 (describing the ban as a "restriction on certain disfavored speakers"), *id.* at 905 (describing the law as a limitation on political speech).

[139] Jack M. Balkin, *The Internet's Greatest Gift*, SavetheInternet.com (Dec. 16, 2009) http://www.savetheinternet.com/blog/09/12/16/internets-greatest-gift-participation.

[140] *Cf. Associated Press*, 326 U.S. at 7 (holding that the First Amendment cannot be used as a shield against otherwise unlawful business practices).

[141] Verizon Comments at 90-94; Qwest Comments at 28-34; USTA Comments at 48, n. 127.

[142] *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998).

[143] *See, e.g.*, *Concrete Pipe & Products of Calif. v. Construction Laborers Pension Trust for So. Calif.*, 508 U.S. 602, 643-48 (1993).

Here, it is clear that regulatory action is not "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[144]

We have explained at length in these comments and in our initial comments that economic impact of this regulation is likely to be minimal. The proposal merely realigns the Commission's regulatory framework with the authority the market had already believed it had prior to the *Comcast* decision. Reestablishment of authority will not bring any substantive new rules, other than those for the Open Internet, universal service and disclosure. As we have demonstrated in this and other proceedings, such rules will promote investment and competition, and will certainly have no negative impact on market fundamentals. Numerous investment analysts also hold this perspective.[145] Moreover, there is widespread consensus both inside and outside the FCC that neither this nor future Commissions is likely to engage in either rate regulation or unbundling, two measures that might have some impact on the profits of broadband network operators.[146] Even if broadband providers believe that specific policies such as rate regulation or unbundling would constitute a regulatory taking, they would have ample opportunity to raise those arguments in any rulemaking proceeding that seeks to develop the policy itself. At this juncture, takings claims directed at particular policies, rather than at the general classification of Internet connectivity, are at a minimum unripe.[147] Given that the

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[144] *Lingle v. Chevron USA*, 544 U.S. 528, 539 (2005).

[145] *See e.g.* "Wall Street Confirms: Modest If Any Investment Effect Of Net Neutrality," *DSL Prime*, July (2010).

[146] Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework for Addressing the* Comcast *Dilemma*, (May 6, 2010); Jessica Reif Cohen, "Pull back is a buying opportunity," Bank of America Merrill Lynch, May 6, 2010; JP Morgan Global Technology, Media and Telecom Conference: Landell Hobbs, Time Warner Cable, Inc. Management Discussion (May 19, 2010). ([The FCC's] focus is really to put them in a position where they can execute around their [N]ational [B]roadband [P]lan, not to rate regulate or crush investment in our sector. That's not at all what we believe.")

[147] Cf. *Verizon Communications v. FCC*, 535 U.S. 467, 523-527 (2002).

Commission has proposed a much more restrained policy -- simply reestablishing its ability to oversee broadband networks to bring broadband to all Americans and preserve the open nature of broadband infrastructure -- it is implausible that simply classifying broadband as a telecommunications service could in and of itself constitute a taking.

Nor would Title II affect settled, reasonable investment-backed expectations.[148] Where an area (like communications by wire or radio), has long been subjected to federal regulation, then courts rarely hold that investment backed expectations are upset by changes in such regulation.[149] Moreover, it would be far from reasonable for broadband providers to have assumed that the FCC would never revisit the determination whether such providers offer a telecommunications service. Indeed, the regulatory status of broadband connectivity has been uncertain over the years, with the Commission always asserting some continuing authority to oversee the provision of the service -- and any attempt to paint either the Commission's or the courts approach to broadband as consistently deregulatory does not square with the relevant history. The following summary amply illustrates this point: In 2000, the Ninth Circuit held that cable broadband Internet providers offered a distinct telecommunications service.[150] That ruling put cable broadband on equal regulatory footing with broadband over DSL, providers of which at the time were also considered to offer both a telecommunications service and an information service.[151] At around the same time, a federal court in Virginia concluded that cable modem

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[148] *See, e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

[149] *Concrete Pipe & Products of Calif.*, 508 U.S. at 645.

[150] *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-79 (9th Cir. 2000).

[151] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, ¶¶ 36-37 (1998); *see generally Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33; *Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337; *Computer III Further Remand*

service was a cable service.[152] In 2002, the Commission disregarded the Ninth Circuit's 2000 precedent and classified cable modem service as an information service.[153] The Ninth Circuit reversed that ruling and reiterated that cable modem service was a telecommunications service.[154] But in 2005, the Supreme Court reversed that determination and the Commission altered the classification of DSL.[155] The Commission did not classify wireless broadband as a Title I service until 2007.[156] Thus, in the last ten years, the Commission and the courts have sent different messages at different times regarding the nature of broadband transmission, and broadband network operators chould not have expected that the process was at an end. Indeed, the voices of six justices of the United States Supreme Court ought to have put them on notice that change might come at any time: in *Brand X*, the Court held that the agency "must" revisit the wisdom of its classification policy on an ongoing basis.[157]

Proceedings: Bell Operating Company Provision of Enhanced Services; *1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10; *Conditional Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(C) with Regard to Broadband Services Provided Via Fiber to the Premises*; *Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242; *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd at 14853, ¶¶ 23-40 (2005) (*Wireline Broadband Order*).

[152] *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000), *aff'd on other grounds*, 257 F.3d 356 (4th Cir. 2001).

[153] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185; *Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

[154] *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (2004).

[155] *Brand X*, 545 U.S. at 967; *Wireline Broadband Order* at ¶ 4.

[156] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007) .

[157] *Brand X*, 545 U.S. at 981.

Nor does the character of the governmental action here weigh in favor of finding a taking. The takings cases instruct that governmental action is more likely to constitute a taking when it can be characterized as a physical invasion by government or when the government appropriates assets for its own use.[158] By contrast, when governmental action adjusts the benefits and burdens of economic life to promote the common good, it is not likely to constitute a taking.[159] Here, reestablishing authority over broadband networks clearly promotes the common good -- it allows the FCC to make policy to promote universal access, competition, interconnection, and openness for broadband networks.

E. If the Commission wants to achieve critical policies articulated in the National Broadband Plan, it has no other option but to classify broadband Internet connectivity as a Title II service.

The Commission opened this proceeding because it rightly recognized that *Comcast v. FCC*[160] cast significant doubt on its ability to continue make broadband policy while broadband Internet service was classified as an information service under the Communications Act. Opponents of a Title II solution to the *Comcast* dilemma propose three different responses to the problem created by *Comcast*, none of which should provide comfort to the Commission as it moves forward with broadband policy.

First, several commenters attempt to argue that the *Comcast* decision does not significantly alter the Commission's ability to make broadband policy in its current framework, which classifies broadband Internet service as an information service regulated under Title I of the Act. In essence, arguments in favor of relying on Title I authority fall into two principal

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[158] *See, e.g.*, *United States v. Causby*, 328 U.S. 256 (1946); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224 (1986).

[159] *Penn Cent. Transp. Co.*, 438 U.S. at 124.

[160] 600 F.3d 642 (D.C. Cir. 2010).

categories: (1) they either merely ignore the implications of the *Comcast* decision and suggest that the Commission may make broadband policy based on the substantive obligations directed at telecommunications carriers (not broadband service providers) in Title II of the Act or (2) they encourage the Commission to settle for piecemeal solutions that will fail to protect consumers and bring broadband to all Americans. Reviewing a selection of these arguments amply demonstrates the perils of ignoring the *Comcast* problem and blithely moving ahead with broadband policy under Title II.

For example, AT&T claims unconvincingly that the Commission could move forward with their plans for the universal service fund by relying on authority found in sections 1 and 254 of the Communications Act and as well as section 706(b) of the 1996 Telecommunications Act.[161] But AT&T is quick to argue that section 706(b) cannot serve as the basis for "imposing regulatory obligations on broadband providers" -- thus, AT&T appears to suggest that the Commission should be satisfied with a tenuous ability to subsidize broadband for those individuals who remain unserved and no ability at all to require the providers who receive those subsidies to comply with basic consumer protection obligations.[162]

Verizon's suggestion that the Commission can pursue privacy protections and disabilities access under Title I authority fares no better. Verizon argues that "the Commission has explicit statutorily mandated responsibilities to protect the privacy of customer information (sections 222

[161] *See* Free Press Comments at 24-34, 131-135 (July 15, 2010) (demonstrating the weaknesses of the arguments set forth in AT&T Comments at 25-27).

[162] Free Press's initial comments set forth at significant length the flaws with relying on section 706(b) to adopt a comprehensive universal service policy, *id.* at 133-135, but it is worth noting that AT&T's reading of section 706(b) is rather self-serving: basic transparency obligations regarding the price and speed of broadband Internet connectivity service would arguably "promot[e] competition in the telecommunications market." 47 U.S.C. § 1302(b).

and 631) and to address disabilities access (section 255)."[163] But the privacy protections and disability access mandates in those sections impose obligations on telecommunications carriers and cable service providers, not broadband Internet connectivity providers. Indeed, the Act contains no direct authority requiring the extension of these mandates to broadband Internet connectivity. If the mere imposition of a mandate on a telecommunications service were enough to translate that duty to a broadband service provider (as Verizon seems to suggest by this argument), the FCC need not have opened this proceeding at all: it could simply proceed to apply nondiscrimination obligations, privacy protections, truth-in-billing requirements, and a host of sensible broadband policies to broadband service providers without further analysis. Verizon's arguments simply ignore the limitations of the Commission's Title I jurisdiction that existed both before and after *Comcast* was decided[164] and provide no meaningful way forward for making broadband policy.[165]

Comcast's suggestion that all the Commission's public safety goals could be achieved simply because the Commission has previously exercised ancillary authority to impose E-911 obligations on interconnected VoIP providers strains credulity and demonstrates the weaknesses of continuing to rely on Title I jurisdiction to make broadband policy.[166] Section 251(e) of the Act authorizes the Commission to establish 911 as a national emergency telephone number, and

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[163] Verizon Comments at at 24.

[164] Even before *Comcast*, it was clear that when the Commission exercised its Title I authority, it must demonstrate that such action was "reasonably ancillary to the effective performance" of the Commission's "statutorily mandated responsibilities." *See, e.g.*, *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005); *see also United States v. Sw. Cable*, 392 U.S. 157, 178 (1968).

[165] It is worth noting that Comcast appears to endorse similar reasoning when it notes uncritically that "under Section 222, Congress by statute already has conferred regulatory responsibilities in [the area of privacy] to the Commission." *See* Comcast Comments at 13.

[166] Although the Commission initiated this policy based on ancillary authority, Congress subsequently passed a law codified the E-911 requirement for VoIP providers. *See* Pub. L. 110-283, 122 Stat. 2620, § 101 (2008)

because interconnected VoIP service often substitutes for ordinary telephone service, it seems eminently reasonable that imposing E-911 obligations on interconnected VoIP service would be necessary to "to prevent frustration of a regulatory scheme expressly authorized by statute."[167]

But as for different and more extensive public safety protections, Comcast offers no basis for imposing those obligations at all, save relying on 47 U.S.C. § 151's general pronouncement that the Commission was created in part to "promoting safety of life and property through the use of wire and radio communication."[168] The Commission cannot and should not rely on this section as a basis for making public safety policy or any other kind of broadband policy because the D.C. Circuit has emphatically rejected the notion that section 1 creates "statutorily mandated responsibilities."[169] *Comcast* exposed fundamental weaknesses in the Commission's Title I jurisdiction, and nothing in the initial round of comments in this proceeding suggests otherwise.

Various parties also suggest that the FCC should simply wait for a congressional fix to the dilemma created by *Comcast*.[170] This approach may suit those who do not depend on the FCC to take decisive and efficient steps implement the National Broadband Plan and preserve the open nature of the Internet. But for rural Americans who currently lack access to broadband, for low-income Americans who can't afford it, for Silicon Valley entrepreneurs developing the next killer application, and for middle class Americans who just want to know how much they're paying for broadband and what they're getting for their money, implementation of these policies can't come fast enough. Members of Congress who have traditionally led policy on these issues

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[167] *Comcast*, 600 F.3d at 656.

[168] Comments of Comcast Corp., *Framework for Broadband Internet Service*, GN Docket No. 10-127, at 13 (July 15, 2010)

[169] *Comcast*, 600 F.3d at 656.

[170] *See.e.g*., AT&T Comments at 2, 10; Comments of National Cable & Telecommunications Association, *Framework for Broadband Internet Service*, GN Docket No. 10-127, at 10 (July 15, 2010); Comments of Time Warner Cable, *Framework for Broadband Internet Service*, GN Docket No. 10-127, at vi (July 15, 2010).

recognize that congressional action won't come quickly enough to provide solutions in the timeframe that the American public needs them.[171] As recently as August 5, Senator John Kerry noted a "[c]ongressional stalemate" precluding quick resolution of the issue and encouraged FCC Chairman Julius Genachowski to move forward in concluding this proceeding.[172] If the FCC is serious about getting to work on closing the digital divide and making the country a broadband competitor again, it should not sit on its hands and wait for Congress to act.

Finally, the Commission should view skeptically any suggestion that industry self-regulation or provider promises will suffice to protect consumers in the broadband era.[173] Broadband service providers have a long and detailed history of committing to abide by various principles or conditions only to renege on those commitments when they prove inconvenient. For example, the Commission decided to simply rely on the promises offered by FairPoint to deploy broadband to new areas in approving the transfer of lines from Verizon in 2008.[174] These promises were not upheld. In 2009, Fairpoint stated they would not meet the claimed deadline

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[171] *See, e.g.*, Jason Rosenbaum, *Will the FCC Reclassify Broadband So It Can Do Its Job? So Far, We Don't Know*, The Seminal (Apr. 15, 2010), http://seminal.firedoglake.com/diary/41227 (quoting statements from Senators Byron Dorgan, Jay Rockefeller, and John Kerry all urging the FCC reestablish its authority over broadband networks without waiting for Congress to act).

[172] Gautham Nagesh, *Kerry: Net-neutrality Legislation Unlikely, FCC Must Act*, Hillicon Valley: The Hill's Technology Blog (Aug. 5, 2010), http://thehill.com/blogs/hillicon-valley/technology/112935-kerry-net-neutrality-legislation-unlikely-fcc-must-act; *see also* Joan McCarter, *Net Neutrality Leaders in Congress Call on FCC to Protect an Open Internet*, Daily Kos: State of the Nation (Aug. 6, 2010), http://www.dailykos.com/story/2010/8/6/890872/-Net-Neutrality-leaders-in-Congress-call-on-FCC-to-protect-an-open-Internet (discussing similar calls for FCC action by Representative Jay Inslee, Representative Ed Markey, and Senator Al Franken).

[173] See, e.g., AT&T Comments at 12, 18; Verizon Comments at 27-28.

[174] *Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.*, WC Docket No. 07-22, Memorandum Opinion and Order, 23 FCC Rcd 514, 532 (2008).

for broadband buildout[175] In 2010, Fairpoint is saying they need even more time *and* plan to reduce the number of households they agreed serve.[176] Unfortunately, the Commission is powerless to address these failures.

The merger of AT&T and MediaOne illustrates another example of a network operator failing to follow-through on commitments to the Commission. In that merger, AT&T promised that they would offer customers "a choice of ISPs."[177] The Commission subsequently declined attaching conditions, specifically citing these commitments from AT&T.[178] This continued with the subsequent merger of Comcast and AT&T Broadband. Comcast promised to offer, "high-speed Internet customers a choice of ISPs."[179] In a letter to the Commission, Comcast assured the Commission it was "committed to negotiating mutually beneficial commercial arrangements with independent ISPs."[180] In turn, the Commission declined to adopt any conditions ensuring access for third-party ISPs, specifically citing the "commitment to ISP choice."[181] Less than a year after the Commission's ruling, Comcast completely reversed course, stating they were "no

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[175] *See e.g.* Chelsea Conaboy, "FairPoint to renege on deal," *Concord Monitor*, Sept. 10, 2009.

[176] Karl Bode, "Fairpoint to Try And Weaken Verizon Deal Conditions," *DSL Reports*, May 3, 2010.

[177] Letter from AT&T Corporation, In the Matter of *Applications for Transfer of Control to AT&T Corp. of Licenses and Authorizations Held by MediaOne Group, Inc.*, CS Docket No. 99-251, p. 3 (Dec. 6, 1999).

[178] *Applications for Transfer of Control to AT&T Corp. of Licenses and Authorizations Held by MediaOne Group, Inc.*, CS Docket No. 99-251, Memorandum Opinion and Order, 15 FCC Rcd 9870, paras. 120-121 (2000).

[179] Ex Parte of Comcast Corporation, In the Matter of *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket No. 00-185, p. 1 (Feb. 27, 2002).

[180] Letter from Comcast Corporation, In the Matter of *Applications for Consent to Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70, p. 18 (July 2, 2002).

[181] *Applications for Consent to Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70, Memorandum Opinion and Order, 17 FCC Rcd 23301, para. 137 (2002).

longer so keen on the idea."[182] Today, Comcast customers have no choice amongst ISPs. In fact it appears that the only cable broadband customers who find themselves with a "choice" amongst ISPs is the sole result of the Federal Trade Commission *mandating* that Time Warner Cable provide wholesale access to certain third parties.[183]

The record is littered with numerous other examples of unmet promises and failed self-regulation. For instance, when the Commission originally reclassified ILEC broadband offerings under Title I they "expect[ed] that wireline broadband transmission will remain available to ISPs and others without any *Computer Inquiry* requirements."[184] The reason for this expectation was because "Incumbent LECs have represented that they not only intend to make broadband Internet access transmission offerings available to unaffiliated ISPs in a manner that meets ISPs' needs, but that they have business incentives to do so."[185] Verizon told the Commission:[186]

> Verizon's support for classifying broadband under Title I does not mean that Verizon wants to adopt a closed network like some of its cable competitors. On the contrary, Verizon believes there can be significant value in maintaining a wholesale business that allows other broadband service providers to reach their customers over Verizon's network. Verizon will incur huge fixed costs updating its network. The more traffic there is on the network, the easier it is to recover those costs

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[182] Christopher Stern, "Cable's Closed Connections," *Washington Post*, Oct. 11, 2003.

[183] *See* Comments of Free Press, In the Matter of *A National Broadband Plan for Our Future*, GN Docket 09-51, at pp. 95-98 (June 8, 2009).

[184] Wireline Broadband Order at ¶74.

[185] *Ibid.* at ¶75.

[186] Reply Comments of the Verizon Telephone Companies, In the Matter of *Review of the Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Services Capability*, CC Docket Nos. 01-338, 96-98, 98-147, at 31 (July 17, 2002).

As evidenced by today's residential broadband market where wholesaling is virtually non-existant, these assurances had no merit.[187] They were merely hollow promises made by an industry eager to ensure they would not be obligated to engage in the very behavior they promised to pursue.

Even on Net Neutrality, which was cited specifically as being an area where the Commission should simply rely on the assurances of providers, promises have been broken. Comcast told Congress in 2006 that:[188]

> "If Comcast were to try to "deny, delay, or degrade" the Internet experience that our more than nine million cable Internet customers have paid for, how can we possibly expect to keep them as customers, much less attract new ones? We have a proven track record. We have never blocked our customers' access to lawful content and we repeatedly have committed that we will not block our customer's ability to access any lawful content, application, or service available over the Internet.

Thanks to the Commission's *Order* at the heart of this proceeding, we know that Comcast was denying, delaying, degrading, and blocking, customers' Internet experience *while* this testimony was being given.[189] If the Commission wants to bring fast, affordable, open Internet access to all Americans, it should not turn over broadband oversight to a self-interested group of corporate actors. Rather, it will recognize that it is the Commission's responsibility -- not broadband providers -- to make policy that serves

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[187] Free Press Comments at 124-125.

[188] Testimony of David L. Cohen, Hearing on "Reconsidering Our Communication Laws: Ensuring Competition and Innovation," U.S. Senate Committee on the Judiciary, June 14, 2006.

[189] *See* Letter from Kathryn A. Zachem, Vice President, Regulatory Affairs, Comcast

Corporation to Marlene Dortch, Secretary, Federal Communications Commission, In the Matter of *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52, Attachment A, p. 5 (Sept. 19, 2008).

the public interest, and it will reestablish its authority over broadband as soon as practicable.

III. CONCLUSION

In the wake of the *Comcast* decision, this Commission has no hope of building a sound National Broadband Plan on the failed legal experiment conducted by the previous administration. The record in this proceeding demonstrates clearly that the proposed "Third Way" plan is a legally sound path forward. The history of communications law and policy and the technological and market realities of today's broadband world support the Commission's plan as outlined in the *Notice.* We urge the Commission to stand strong against the cynical money-driven political response to the *Notice* and focus on its duty to faithfully implement the Communications Act. America has already lost too much waiting for the agency to formulate a national broadband policy, and it would be irresponsible to delay further simply because industry wishes for the Federal *Communications* Commission to have no authority over broadband *communications.*

Respectfully submitted,
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