

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

**REPLY COMMENTS OF THE OPEN INTERNET COALITION**

Markham C. Erickson  
Holch & Erickson LLP  
And  
Executive Director  
Open Internet Coalition  
400 N. Capitol Street, NW  
Suite 585  
Washington, DC 20001  
Tel.: +1 202 - 624 - 1460  
Facsimile: +1 202 - 393 - 5218  
Email: merickson@holcherickson.com

August 12, 2010

## SUMMARY

Against a backdrop where the Internet is understood to be a key tool for economic growth and democratic and cultural discourse, the Commission finds itself asking two remarkable yet fundamental questions: (1) Does the Federal Communications Commission have the authority under the current legal framework to fulfill its charter with respect to the most important communications network of our time? (2) If so, what is the basis for its authority?

The Open Internet Coalition believes that the Commission does indeed have such authority. After review of the comments filed in the initial period, the Coalition continues to believe that the Commission can take the relatively straightforward, technical step of revising its regulatory framework to put its legal authority on a solid foundation. We continue to support the ultimate goal of the “third way” approach outlined by Chairman Genachowski on May 6, 2010 and as described in the NOI.

A “third way” regulatory approach is a conservative regulatory option that would not automatically result in regulation of the Internet; rather, this approach would result in appropriate and needed regulation only of the essential transmission input that makes it possible for users to access the content and services available through the Internet. The Commission can and should reclassify the Internet connectivity of broadband Internet access services, along

with appropriate forbearance from unnecessary Title II provisions, in order for it to resume its work in establishing rules to protect the open Internet. Such a step also would ensure that the Commission has the authority to promote broadband deployment and to implement critical elements of the National Broadband Plan.

The landscape for broadband Internet access has changed significantly since the Commission issued the *Cable Modem* and *Wireline Broadband* classification orders. As the Coalition discussed in its initial comments, the Commission's earlier predictions about the amount of intermodal and intramodal competition have not been realized. Moreover, the facts underlying the Commission's rulings classifying broadband Internet access services have changed – no longer are Internet applications and services inseparable from the underlying last-mile transmission component of broadband access services.

The Commission made clear in the *NOI* that this proceeding involves “the bundle of services that facilities-based providers sell to end users in the retail market,” and that it did not intend to address Internet applications or services. The Commission's proposed approach rightly focuses on services offered by facilities-based providers of broadband access services, as it is control over such broadband facilities that raises the need for oversight to protect consumers and the Commission's other important broadband policy goals. The Commission's proposed “third way” approach outlined in the *NOI* would simply be revisiting its decision to classify broadband Internet access services in the *Cable Modem Declaratory Ruling* and subsequent orders, and just as those earlier decisions by

the Commission did not address the classification of Internet applications and services, neither should the Commission's ruling in this proceeding.

The network operators' claims that the "third way" proposal will lead to a lack of investment in broadband are speculative and not supported by history. Investment decisions are driven by a complex variety of factors, but in the telecommunications industry, regulation plays only a very minor role. In fact, recent data strongly indicates that proscriptions on discrimination would not deter internet service provider investment. Moreover, the Commission should consider the investment incentives of the entire broadband ecosystem, not simply those of broadband network operators. Without assurances that the Commission has oversight over last-mile, bottleneck broadband access facilities, companies producing innovative Internet applications, content and services lack the certainty needed to fully invest in developing such applications, content and services.

The Commission should act quickly to establish a common-sense, predictable framework that ensures that the connections to the Internet remain open and free from discriminatory or anticompetitive practices, and that ensures that the Commission can adopt its other important broadband policies. Moreover, while the Coalition will of course work with Congress in any efforts to update the Communications Act, it would be irresponsible for the Commission to wait for such efforts. Congress has given the Commission the authority to modify its regulatory treatment of broadband Internet access to protect

consumers. We urge the Commission to embrace its mandate and expeditiously adopt the outcome proposed by the “third way” proposal.

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. THE COMMISSION’S THIRD WAY PROPOSAL WOULD NOT – AND SHOULD NOT – APPLY TO EDGE-BASED INTERNET APPLICATIONS OR SPECIAL PURPOSE DEVICES.....4

III. THE NETWORK OPERATORS’ FEARS OF DISINCENTIVES TO INVESTMENT IN BROADBAND ARE OVERBLOWN, AND PRESENT AN INCOMPLETE PICTURE OF OVERALL BROADBAND INCENTIVES.....6

IV. BROADBAND INTERNET ACCESS SERVICES AS OFFERED AND USED TODAY JUSTIFY THE RECLASSIFICATION OF BROADBAND INTERNET CONNECTIVITY SERVICES AS TITLE II SERVICES.....14

V. THE LAW DOES NOT PRECLUDE A WELL-REASONED, FACT-BASED DECISION REGARDING THE APPROPRIATE CLASSIFICATION OF BROADBAND ACCESS OR CONNECTIVITY SERVICES.....18

VI. THE FIRST AND FIFTH AMENDMENTS DO NOT PRECLUDE THE COMMISSION’S PROPOSED “THIRD WAY”.....23

    A. The “Third Way” Approach is Consistent with the First Amendment.....23

    B. The “Third Way” Approach is Consistent with the Fifth Amendment.....28

VII. CONCLUSION.....33

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

**REPLY COMMENTS OF THE OPEN INTERNET COALITION**

The Open Internet Coalition (“OIC”) submits the following reply comments in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION.**

Against a backdrop where the Internet is understood to be a key tool for economic growth and democratic and cultural discourse, the Commission finds itself asking two remarkable yet fundamental questions: (1) Does the Federal Communications Commission have the authority under the current legal framework to fulfill its charter with respect to the most important communications network of our time? (2) If so, what is the basis for its authority?

Put another way, this docket asks stakeholders whether the Commission has the authority to do its job.

---

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

The Open Internet Coalition believes that the Commission does indeed have such authority. After review of the comments filed in the initial period, the Coalition continues to believe that the Commission can take the relatively straightforward, technical step of revising its regulatory framework to put its legal authority on a solid foundation. We continue to support the ultimate goal of the “third way” approach outlined by Chairman Genachowski on May 6, 2010 and as described in the NOI.

A “third way” regulatory approach is a conservative regulatory option that would not automatically result in regulation of the Internet; rather, this approach would result in appropriate and needed regulation only of the essential transmission input that makes it possible for users to access the content and services available through the Internet. The Commission can and should reclassify the Internet connectivity of broadband Internet access services, along with appropriate forbearance from unnecessary Title II provisions, in order for it to resume its work in establishing rules to protect the open Internet. Such a step also would ensure that the Commission has the authority to promote broadband deployment and to implement critical elements of the National Broadband Plan.

The landscape for broadband Internet access has changed significantly since the Commission issued the *Cable Modem* and *Wireline Broadband* classification orders. As the Coalition discussed in its initial comments, the Commission’s earlier predictions about the amount of intermodal and

intramodal competition have not been realized. And it does not appear that such competition will happen in the foreseeable future.

With such limited competition, the Commission must have in place a framework to protect consumers, innovators, and venture capitalists from arbitrary and discriminatory business models. There are nearly 80 million households that subscribe to broadband Internet access, and that number is growing quickly. Moreover, the mobile Internet access space is expanding even more rapidly than the wireline Internet access space. Mobile internet infrastructure is increasingly prevalent, and the rate of mobile investment and development continues to increase. Within 5 years, it is probably that mobile Internet access will surpass wireline Internet access.<sup>2</sup>

Consequently, the Commission should act quickly to establish a common-sense, predictable framework that ensures that the connections to the Internet remain open and free from discriminatory or anticompetitive practices. Moreover, while the Coalition will of course work with Congress in any efforts to update the Communications Act, it would be irresponsible for the Commission to wait for such efforts. Congress has given the Commission the authority to modify its regulatory treatment of broadband Internet access to protect consumers. We urge the Commission to embrace its mandate and expeditiously adopt the outcome proposed by the “third way” proposal.

---

<sup>2</sup> Morgan Stanley, The Mobile Internet Report 33-42 (2009).

## II. THE COMMISSION'S THIRD WAY PROPOSAL WOULD NOT — AND SHOULD NOT — APPLY TO EDGE-BASED INTERNET APPLICATIONS OR SPECIAL PURPOSE DEVICES.

In an apparent effort to scare policy makers via discussions of “unintended consequences,” several broadband network operators claim that the Commission’s proposed “third way” would lead to the regulation of “much of the Internet ecosystem,” including “providers” “VoIP and VoIP-related providers,” content delivery networks and caching service providers, Internet transport companies, providers of online video content, providers of cloud computing services, etc.<sup>3</sup> Contrary to these arguments, the Commission’s proposed “third way” approach will not, and certainly should not, lead to Title II regulation of broadband-enabled Internet content, applications and services.

The Commission made clear in the *NOI* that this proceeding involves “the bundle of services that facilities-based providers sell to end users in the retail market,”<sup>4</sup> and that it did not intend to address Internet applications or “other Internet facilities or services that currently are lightly regulated or unregulated, such as the Internet backbone, content delivery networks (CDNs), over-the-top video services, or voice-over-Internet-Protocol (VoIP) telephony services.”<sup>5</sup>

---

<sup>3</sup> See, e.g., Comments of AT&T Inc. at 107-09 (filed July 15, 2010) (“AT&T Comments”); Comments of Verizon and Verizon Wireless at 58-63 (filed July 15, 2010) (“Verizon Comments”); Comments of the National Cable & Telecommunications Association at 82-84 (filed July 15, 2010) (“NCTA Comments”).

<sup>4</sup> *NOI* at 1, n.1. Note that unless otherwise indicated, any references herein to network operators or broadband access providers refers to last-mile facilities-based providers of broadband access services.

<sup>5</sup> *NOI* at 5, ¶ 10.

Though several network operators claim that the Commission's reasoning with respect to broadband Internet access services would apply to such Internet applications and services, the Commission's proposed approach rightly focuses on services offered by facilities-based providers of broadband access services, as it is control over broadband facilities that raises the need for oversight to protect consumers and the Commission's other important broadband policy goals.<sup>6</sup>

In contrast, the market for edge-based Internet applications and services differs significantly from that of the network operator market. First, unlike the market for broadband access services, which is characterized by significant barriers to entry, from rights of way to spectrum licenses to significant capital outlays, the Internet applications and services market has low barriers to entry, with many new entrants being start-ups and characterized by long-tail economics. Second, the market for Internet applications and services is subject to

---

<sup>6</sup> Given the concerns over control of bottleneck facilities that has animated its regulation of network operators, the Commission has long differentiated between facilities-based and non-facilities based providers of information services. See *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67, at 31-32, ¶ 59 (rel. Apr. 10, 1998) ("*Stevens Report*") ("Since Computer II, we have made it clear that offerings by non-facilities-based providers combining communications and computing components should always be deemed enhanced. But the matter is more complicated when it comes to offerings by facilities-based providers."); *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's Interspan Frame Relay Service Is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13723, ¶ 42 (1995) (holding that the "contamination theory," under which an offering of an information service with transmission inputs by a non-facilities based provider renders the entire service an enhanced or information service, does not apply to facilities-based providers). See also Susan Crawford, "*Broadband*" *Blur*, March 29, 2010, at <http://scrawford.net/blog/broadband-blur/1328/> ("The problem is that people often use 'broadband' as an omnibus term meaning *both* the on-ramps and the applications/content online. . . . The FCC has not applied Title II regulations to applications/content – for good reason. The highway is clearly distinguishable from the cars that use its services.").

truly robust competition, with consumers often being able to choose among dozens of applications and services rather than a wireline broadband duopoly or a handful of wireless carriers. Third, users of edge-based Internet applications and services face negligible switching costs. Finally, unlike last-mile broadband network operators, Internet applications and services are not beneficiaries of significant government-granted rights, such as public rights-of-way and leasing of public airwaves.<sup>7</sup>

In summary, nothing in its proposed “third way” approach would move the Commission closer to regulating Internet applications, services, and content. In fact, as some parties noted, it would bring clarity by tracking closely the language of the Communications Act.<sup>8</sup> The Commission would simply be revisiting its decision to classify broadband Internet access services in the *Cable Modem Declaratory Ruling* and subsequent orders based on changed facts and circumstances. Just as those earlier decisions by the Commission did not address the classification of Internet applications and services, neither should the Commission’s ruling in this proceeding.

**III. THE NETWORK OPERATORS’ FEARS OF DISINCENTIVES TO INVESTMENT IN BROADBAND ARE OVERBLOWN, AND PRESENT AN INCOMPLETE PICTURE OF OVERALL BROADBAND INCENTIVES.**

---

<sup>7</sup> See Comments of DISH Network L.L.C. at 13 (filed July 15, 2010) (“DISH Network Comments”).

<sup>8</sup> See, e.g., Comments of XO Communications, LLC at 9 (filed July 15, 2010) (“XO Comments”).

The network operators' claims that the "third way" proposal will lead to a lack of investment in broadband are speculative and not supported by history. Investment decisions are driven by a complex variety of factors, but in the telecommunications industry, regulation plays only a very minor role.<sup>9</sup> For the most part, the decisions regarding investments are driven primarily by the kinds of factors that influence return on investment (ROI), such as expectations about demand, supply costs, competition, interest rates, corporate taxes, and general economic expectations.<sup>10</sup> In order for broadband reclassification and a nondiscrimination rule to deter investment, the rules would have to impact a broadband access service provider's potential return on investment. Yet no network operator has been offered any sort of specific explanation as to how network neutrality would lower ROI.<sup>11</sup>

Furthermore, recent data strongly indicates that proscriptions on discrimination would not deter Internet service provider investment. In the final days of 2006, AT&T, as a condition of acquiring BellSouth, was required by

---

<sup>9</sup>S. Derek Turner, Free Press, *Finding the Bottom Line: The Truth about Network Neutrality & Investment 4* (2009); Dr. Gregory Rose, "Wireless Broadband and the Redlining of Rural America," New America Foundation, *Wireless Future Program* (April, 2010), available at [http://wirelessfuture.newamerica.net/publications/policy/wireless\\_broadband\\_and\\_the\\_redlining\\_of\\_rural\\_america](http://wirelessfuture.newamerica.net/publications/policy/wireless_broadband_and_the_redlining_of_rural_america).

<sup>10</sup> See, e.g., XO Comments at 15-16.

<sup>11</sup>S. Derek Turner, Free Press, *Finding the Bottom Line: The Truth about Network Neutrality & Investment 4* (2009).

the FCC to maintain a neutral network.<sup>12</sup> For the following two years, while adhering to the four principles of the *Internet Policy Statement* and the fifth of nondiscrimination, AT&T's overall gross investment *increased* by \$1.8 billion – more than any other network operator in the United States.<sup>13</sup> With its wireline segment subject to the four *Internet Policy Statement* principles as well as nondiscrimination, AT&T's gross capital investment increased by \$2.3 billion, and as a percentage of wireline revenues, investments increased from 13.5% in 2006 to 20.2 percent in 2008.<sup>14</sup>

In fact, this rhetoric about a nondiscrimination rule's threat to broadband network operator investment is actually just one manifestation of the common – and misguided – belief that any sort of regulation discourages any investment. Historical trends repeatedly demonstrate that this theory is categorically incorrect, particularly when it comes to telecommunications companies. In the years since the imposition of pro-competitive regulations – under Title II – on the Incumbent Local Exchange Carriers following the Telecommunications Act of 1996, investment as a percentage of revenue by these phone companies rose from nearly 20% before the law was passed, in 1994, to a high of 28% in 2001.<sup>15</sup>

---

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 5.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 7

Following the subsequent dismantling of those same regulations, relative investment levels declined again, falling to under 17% by 2008.<sup>16</sup>

Moreover, an accurate calculation of the numbers indicates that currently most U.S. last-mile facilities-based broadband network operators are actually *disinvesting* in their networks, by depleting more in asset value than they spend on new capital equipment. In the network operator sector and other capital-intensive industries, firms have to continually make huge investments just to maintain their status quo, to replace depreciated equipment. Although depreciated equipment can of course still bring in revenue in theory, this would be infeasible in practice in a competitive market. As a result, it is helpful to look at the network operators in terms of “net investment,” which reveals that most of them are diminishing in asset value at a higher rate than they spend on new capital equipment – they are disinvesting in their networks.<sup>17</sup> Between 2005 and 2008, the top phone and cable providers combined depleted almost \$5 billion more in assets than they made in capital expenditures.<sup>18</sup> Put another way, for every \$1.00 depleted, the largest network operators spent only \$0.97 in new investments, and the average network operators only spent \$0.88 in new

---

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.*

investments.<sup>19</sup> During the same time period, the rest of the companies on the Dow Jones Industrial Average (excluding AT&T and Verizon) spent \$1.33 for every dollar of depleted asset value.<sup>20</sup>

It is also of note that not all telecommunications companies are even making the argument about investment discouragement. The endorsement of network neutrality rules by a number of telecommunications companies, including wireless providers, demonstrates the speciousness of the nondiscrimination-harms-investment arguments and exposes the incumbent operators' underlying motivation to reduce competition. Clearwire, Cellular South, and XO Communications all went on the record supporting the FCC's open Internet notice of proposed rulemaking.<sup>21</sup> Clearwire's support is particularly telling, because of all the companies it would stand to lose the most if the regulation-deters-investment argument were founded. The relatively small company is undertaking a massive capital deployment effort – its capex spending for the first half of 2009 alone was nearly 300% of revenues.<sup>22</sup> This data point drives home the fact that the arguments of AT&T, Verizon, and other dominant service providers that a nondiscrimination rule will somehow discourage investment is “nothing more than a transparent attempt to confuse

---

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 10.

<sup>22</sup> *Id.*

the debate, in order to ensure that they are protected from the very types of competition that network neutrality will promote.”<sup>23</sup>

Furthermore, the network operators who have made these arguments during the network neutrality debates in Washington have been simultaneously telling investors that a Title II nondiscrimination rule will *not* affect investment.

Consider these statements from the industry:

- “It is a light regulatory touch that their focus is really to put them in a position where they can execute around their national broadband plan, not to rate regulate or crush investment in our sector. That’s not at all what we believe. So, I want you to take away as, yes, we will continue to invest, yes, we will participate in the Notice of Inquiries and we will have an open, healthy dialogue with the FCC throughout the whole process.”<sup>24</sup>
- “Sprint appreciates the FCC's statement that any regulation it may assert would be through a light regulatory touch. ...Sprint commends the FCC for the cautious approach it is taking toward this complex subject. The FCC can and should foster similar growth in broadband by focusing its energies on protecting consumers by promoting competition and placing checks and balances on providers with market power.”<sup>25</sup>
- “I honestly don't believe the government is trying to turn the clock back...the government is not a big worry... [I] expect the industry to continue to invest, innovate and work through the government

---

<sup>23</sup> *Id.*

<sup>24</sup> Landel Hobbs, COO, Time Warner Cable, Remarks at Investor Conference, On FCC Proposal of Third Way (May 19, 2010).

<sup>25</sup> Statement from Vonya B. McCann, Senior Vice President of Governmental Affairs, Sprint, regarding FCC’s Plans to Apply New Rules to Broadband Services (May 6, 2010).

issues.”<sup>26</sup>

- The *Wall Street Journal* reported that Verizon Wireless Chief Executive Lowell McAdam is saying that that Verizon is continuing to invest in its wireless LTE network and that the company has no plans to slow investment in its wireless broadband network as a result of the FCC’s move.<sup>27</sup>
- “I don't think that there is tremendous financial risk out there with respect to this ... issue. We would prefer less regulation, but as I said I am confident that the chairman understands the issue.”<sup>28</sup>

The bottom line is that the network operators’ claims that reclassifying the transmission component of broadband Internet access service and the resulting application of a nondiscrimination rule will somehow have a detrimental effect on investment are vague conjectures, unsubstantiated either by historical trends or even any theoretical explanations from the very companies making these claims. In the broadband Internet services market, there are many factors that influence investment, and a rule barring discrimination is simply not high on that list.<sup>29</sup> Furthermore, if a nondiscrimination proscription does manage to have any impact at all on investment, the evidence of the past that it is likely to be a

---

<sup>26</sup> Brian Roberts, Comcast Chairman and CEO, Commenting on the Third Way at the Cable Show in Los Angeles (May 12, 2010).

<sup>27</sup> See Niraj Sheth, *Verizon in Talks with Rural Firms*, Wall Street Journal Online, May 13, 2010, <http://online.wsj.com/article/SB10001424052748703339304575240200909761376.html>.

<sup>28</sup> Jeffrey Gardner, Windstream Corp. President and CEO, Comments Regarding Oversight During An Investor Conference (May 18, 2010).

<sup>29</sup> S. Derek Turner, Free Press, *Finding the Bottom Line: The Truth about Network Neutrality & Investment* 4 (2009).

positive one. The FCC must not allow itself to be influenced by unsubstantiated rhetoric in the face of the overwhelming evidence to the contrary.

Of course, the discussion above does not even address the fact that the Commission should consider the investment incentives of the entire broadband ecosystem, not simply those of broadband network operators. If the Commission considers the supposed disincentives to investment on the part of last-mile, facilities-based broadband network operators, it must also consider the fact that without its “third way” approach, its authority over broadband access services is highly questionable, leaving it powerless to address even the most egregious forms of discrimination by broadband network operators or to enact its other important broadband policies. Without assurances that the Commission can reign in such abuses, companies producing innovative Internet applications, content and services lack the certainty needed to fully invest in developing such applications, content and services.<sup>30</sup> And, as the Commission noted in the

---

<sup>30</sup> As Chairman Genachowski has said regarding the need for regulatory certainty with respect to guaranteeing that broadband Internet networks remain open:

[T]he fact that the Internet is evolving rapidly does not mean we can, or should, abandon the underlying values fostered by an open network, or the important goal of setting rules of the road to protect the free and open Internet.

Saying nothing – and doing nothing – would impose its own form of unacceptable cost. It would deprive innovators and investors of confidence that the free and open Internet we depend upon today will still be here tomorrow. It would deny the benefits of predictable rules of the road to all players in the Internet ecosystem. And it would be a dangerous retreat from the core principle of openness – the freedom to innovate without permission – that has been a hallmark of the Internet since its inception, and has made it so stunningly successful as a platform for innovation, opportunity, and prosperity.

*National Broadband Plan*, such innovative “killer apps” and services are what drive demand for broadband and broadband deployment.<sup>31</sup>

**IV. BROADBAND INTERNET ACCESS SERVICES AS OFFERED AND USED TODAY JUSTIFY THE RECLASSIFICATION OF BROADBAND INTERNET CONNECTIVITY SERVICES AS TITLE II SERVICES.**

In their comments, broadband network operators contend that broadband Internet service offerings remain integrated information service offerings, with the broadband Internet service offerings’ information service component still inextricably intertwined with the transmission component.<sup>32</sup> However, the reality is that broadband Internet service offerings today offer a service that is different from the service the Commission first analyzed and deemed as an

---

Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity, Remarks of FCC Chairman Julius Genachowski, The Brookings Institution, Washington, D.C., Sep. 21, 2009.

<sup>31</sup> Federal Communications Commission, *Connecting America: The National Broadband Plan* at 10 (March 2010) (“[U]nleashing the power of new broadband applications to solve previously intractable problems will drive new connectivity demands.”). The National Broadband Plan also addressed the importance of a virtuous cycle of investment throughout the Internet ecosystem.

Networks, devices and applications drive each other in a virtuous cycle. If networks are fast, reliable and widely available, companies produce more powerful, more capable devices to connect to those networks. These devices, in turn, encourage innovators and entrepreneurs to develop exciting applications and content. These new applications draw interest among end users, bring new users online and increase use among those who already subscribe to broadband services. This growth in the broadband ecosystem reinforces the cycle, encouraging service providers to boost the speed, functionality and reach of their networks.

*Id.* at 15-16.

<sup>32</sup> Comments of Verizon at 47-55; Comments of AT&T at 70-78.

integrated information service in 2002.<sup>33</sup> That transmission and information service components are technically and practically severable from one another is demonstrated by the perception of consumers, by the technical qualities of the technology, and even the network operators' own marketing strategies.<sup>34</sup> Consumers now view overlay information services, including email, applications, DNS, blog hosting, and social networking sites as separate from their Internet service, and consider features of the *connection* when determining what to Internet access service to buy.<sup>35</sup> From a technical, engineering perspective, there is a clear demarcation between the transmission function of broadband and the application and content services used by broadband Internet users.<sup>36</sup> Further confirmation of this separation can be gleaned from the fact that broadband Internet service providers' marketing overwhelmingly emphasizes

---

<sup>33</sup> Of course, there were those, including the Ninth Circuit and three Justices in *Brand X* led by Justice Scalia, who reached this conclusion based on the facts as they existed around the time of the *Cable Modem Declaratory Ruling* in 2002. *Nat'l Cable & Telecomms. Assoc. v. Brand X, Internet Svcs.*, 545 U.S. 967, 1005-20 (2005) Scalia, J., dissenting). Still, the manner in which broadband services have evolved since 2002 call upon the Commission to reexamine its conclusions in the *Cable Modem* and *Wireline Broadband* rulings.

<sup>34</sup> See DISH Network Comments at 4-8; see also XO Comments at 9-13; see also Comments of Free Press at 48-55, GN Docket No. 10-127 ("Free Press Comments"); see also Comments of Public Knowledge at 12-14, GN Docket No. 10-127 ("Public Knowledge Comments"); see also Comments of Data Foundry at 11-13, GN Docket No. 10-127, ("Data Foundry Comments").

<sup>35</sup> See Dish Network Comments at 8; see also XO Communications Comments at 11; see also Free Press Comments at 53-54.

<sup>36</sup> See Dish Network Comments at 12-13; see also Free Press Comments at 54; see also XO Communications Comments at 12; see also Data Foundry Comments at 13.

the speed and price of transmission, demonstrating that the fundamental service being “offered” is the transmission.<sup>37</sup>

Moreover, when viewed from the perspective of the consumer, as the Commission analyzed broadband Internet access services in its prior orders,<sup>38</sup> broadband Internet access service today provides a transmission path for, in turn, accessing applications, services, and content on the Internet.

The nature of broadband Internet access services today can best be understood from the way so many consumers use such services. A consumer who moves her portable computer from her home to a Wi-Fi network in a coffee shop, and from the office to a hotel room while traveling, accesses the Internet via different broadband networks at each location. Yet, her Internet experience typically remains the same from location to location – she may check her e-mail on Google or Yahoo!, shop online at Amazon.com, access her page on Facebook, buy the latest music on iTunes or Amazon.com, watch online content on Hulu or Netflix, check directions and search for restaurants using Google Maps, and talk to friends via Skype Video. Perhaps the main difference in her broadband Internet experience across different networks is that she may experience faster or

---

<sup>38</sup> See *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, ¶ 38 (2002) (“*Cable Modem Declaratory Ruling*”) (“[T]he classification of cable modem service turns on the nature of the functions that the end user is offered.”), *aff’d*, *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); see also *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67, at 31, ¶ 59 (rel. Apr. 10, 1998) (“*Stevens Report*”) (“[A telecommunications service’s] classification depends on the nature of the service being offered to customers.”).

slower speeds depending on the network used – *i.e.*, differences in the transmission path.<sup>39</sup>

In their comments, network operators claim that the DNS functionality remains integrated with the transmission component of broadband Internet access. While many have rightly argued that DNS no longer remains “inextricably intertwined” with the underlying broadband transmission offering,<sup>40</sup> the network operators’ analysis also misreads the Commission’s *original* analysis classifying cable modem service as an information service. In its 2002 Declaratory Ruling, the Commission focused on e-mail, newsgroups, web hosting and DNS as information services that were associated with Internet access services, and concluded that, “[t]aken together, they constitute an information service ....”<sup>41</sup> In 2002, prior to ubiquitous competitive web-based e-mail, cloud computing services, and edge-based Internet applications and content generally, the Commission no doubt viewed the provision of e-mail,

---

<sup>39</sup> Such typical consumer use patterns also suggest why the Commission should not differentiate among broadband platforms and classify all Internet connectivity of broadband Internet services as falling under Title II – recognizing, of course, that the particular technical characteristics of certain types of broadband networks may result in different application of statutory and regulatory provisions to such networks. *See Stevens Report* at 31, ¶ 59 (“A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure. Its classification depends on the nature of the service being offered to customers.”).

<sup>40</sup> *See* Dish Network Comments at 4-8; *see also* Comments of XO Communications, LLC at 9-13, GN Docket No. 10-127 (“XO Communications Comments”); *see also* Comments of Free Press at 48-55, GN Docket No. 10-127 (“Free Press Comments”); *see also* Comments of Public Knowledge at 12-14, GN Docket No. 10-127 (“Public Knowledge Comments”); *see also* Comments of Data Foundry at 11-13, GN Docket No. 10-127, (“Data Foundry Comments”).

<sup>41</sup> *Cable Modem Declaratory Ruling* at 25, ¶ 38.

newsgroups, and web hosting differently than it should today, and, at the time, concluded that the provision of such information services was not separable from the Internet access service. However, it is doubtful – or, at minimum, unclear – that the Commission would have reached the same conclusion based solely on DNS if it viewed, as it should today, e-mail, newsgroups, web hosting (and similar applications) as separable services, often offered by third parties.

**V. THE LAW DOES NOT PRECLUDE A WELL-REASONED, FACT-BASED DECISION REGARDING THE APPROPRIATE CLASSIFICATION OF BROADBAND ACCESS OR CONNECTIVITY SERVICES.**

Several broadband network operators argue that the Commission may not revisit its earlier decision to classify broadband Internet access as only an information service, and/or that any such decision would face heightened scrutiny that the Commission would not be able to meet. OIC submits that these network operators misinterpret or overstate the relevant precedent, and that the Commission may lawfully proceed with the proposed “third way” approach as long as it properly explains the basis of its decision.

Some opponents of the Commission’s “third way” approach claim that the Commission would not be able to meet the standard expressed in *FCC v. Fox Television Stations, Inc.*, in which, say these opponents, the Supreme Court noted that an agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate” when “its new policy rests upon

factual findings that contradict those which underlay its prior policy” or “when its prior policy has engendered serious reliance interests that must be taken into account.”<sup>42</sup>

First, it is important to remember that *Fox* itself reached the exact opposite result — in it, the Court held that the Commission did not face a higher burden in justifying a change in course.<sup>43</sup> Regardless, even in cases where factual findings are different from a prior agency ruling, all *Fox* says is that the Commission’s analysis must take into account its prior decision and may not pretend as though its prior ruling did not happen.<sup>44</sup> OIC assumes, of course, that the Commission will adequately explain its decision to reclassify broadband Internet access services in accordance with the standards expressed in *Chevron* and *Fox*.

As explained above, the underlying facts have changed since the time the Commission classified broadband Internet access services based on its view that the transmission component of broadband was integrated with such applications as newsgroups, e-mail, and web hosting. At the time of the *Cable Modem Declaratory Ruling*, broadband Internet access services were far different from

---

<sup>42</sup> 122 S. Ct. 1800, 1810-11 (2009).

<sup>43</sup> 129 S. Ct. at 1813 (“[T]he fact that an agency had a prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so.”); see also *id.* at 1810-11; *Brand X*, 545 U.S. at 981 (“An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis . . . for example, in response to changed factual circumstance.”).

<sup>44</sup> *Fox*, 129 S. Ct. at 1811 (noting that in cases where the Commission’s factual findings are different than before, “a reasoned explanation is needed for disregarding facts and circumstances that underlay . . . the prior policy.”).

they are now – in an age of emerging broadband Internet access, consumers were accustomed to integrated offerings, in which a user’s choice of broadband network determined his or her choice of applications such as e-mail, hosting of homepages, etc. This is simply not true today, as users use a variety of edge-based applications – from e-mail from Google, Yahoo!, and others to social media applications such as Facebook, MySpace and Twitter to voice and video communications applications such as Skype – and the broadband access network enables users to access such applications. Note that in 2002, the Commission acknowledged that its decision to classify cable modem services was based on the facts at the time,<sup>45</sup> and the Supreme Court and the Commission have long held the view that such decisions are to be revisited when facts change.<sup>46</sup> The Commission, as an expert agency, is right to re-examine its decision based on new facts, and courts should defer to the Commission’s expertise in this area in the face of a well-reasoned decision.<sup>47</sup>

---

<sup>45</sup> *Cable Modem Declaratory Ruling* at 25, ¶ 38 (noting that, “[a]s currently provisioned, cable modem service supports such functions as e-mail, newsgroups . . . and the DNS.”) (emphasis added); see also *id.* at 22, ¶ 32 (noting that the “technologies and business models used to provide cable modem service are also complex and are still evolving.”).

<sup>46</sup> *Brand X*, 545 U.S. at 981 (“An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis . . . for example, in response to changed factual circumstance.”); *In re Matter of AT&T Corp. et al.*, 13 FCC Rcd 16232, 16237, ¶ 15 (1998) (after ruling that AT&T’s underwater cables would be treated as private carriage and not subject to Title II, noting that the Commission “always ha[s] the ability to impose common carrier or common carrier-like obligations on the operations of this or any other submarine cable system if the public interest requires.”).

<sup>47</sup> In its comments, Verizon argues that the Commission’s decision to reclassify broadband Internet access as a telecommunications service must be based on “neutral principles” or “in accord with the agency’s proper understanding of its authority,” and that a decision to reclassify in the wake of an adverse court decision in *Comcast* is inherently unlawful. Verizon Comments at

Finally, Verizon claims that the Commission’s reclassification decision would not be entitled to *Chevron* deference because its statutory authority over broadband is directly at issue, and that Congress could not have “delegated to the Commission the authority to regulate something as important to the national economy as the Internet merely through supposed statutory ambiguity in the definition of a ‘telecommunications service’ ....”<sup>48</sup> As an initial matter, the Commission is not attempting to “regulate the Internet”; it is attempting to regulate Internet connectivity, which consists of data transport *access* services provided via bottleneck networks – networks which enable “communication by wire and radio.”<sup>49</sup> Such networks and such services lie squarely within the Commission’s jurisdiction.<sup>50</sup>

Moreover, the proposed reclassification of Internet connectivity broadband access services as “telecommunications services” subject to Title II of the Communications Act is not as momentous a change in the Commission’s authority as Verizon would have the Commission believe. As the NOI points out, the transmission component of wireline broadband Internet access service

---

33-34. There is, however, no prohibition on the Commission being spurred to action by an adverse court decision – as long as its decision is grounded in changed facts and circumstances and/or otherwise adequately explained, the Commission is not barred from acting simply because policy interests were at stake.

<sup>48</sup> Verizon Comments at 37.

<sup>49</sup> 47 U.S.C. § 151.

<sup>50</sup> We note that the FCC should identify relevant transmission by applying the definition of “telecommunications services” in the Act, 47 U.S.C. §153(46), rather than attempt a network specific demarcation point. Such an approach most flexibly accommodates network evolution. *See, e.g.,* XO Comments at 8.

was regulated under Title II until the Commission adopted the *Wireline Broadband Order* in 2005, and to this day more than 800 rural telephone companies still offer broadband Internet access on a common carrier basis.<sup>51</sup> Further, until the *Comcast* decision, the Commission had maintained, and most observers agreed, that it possessed authority over broadband access services under Title I of the Act; in fact, many network operators have stated over the years that the Commission could exercise consumer protection and other oversight over broadband services under Title I.<sup>52</sup> Thus, reclassification of broadband access services, and the underlying statutory interpretation, would not determine the Commission's authority over broadband access services, it would merely change the bundle of rules that applied.<sup>53</sup>

---

<sup>51</sup> *NOI* at 9-10, ¶ 21.

<sup>52</sup> *See NOI* at 4 n.14.

<sup>53</sup> The cases cited by Verizon and others to support the argument that *Chevron* deference does not apply when Congress did not expressly delegate authority over the service at issue are inapposite. Verizon Comments at 34-38; *see also* Letter from Seth P. Waxman, Counsel for the United States Telecom Association, to Chairman Genachowski, at 4-5 (Apr. 28, 2010) (attached as Exhibit B to AT&T Comments). Those cases involved the FTC's proposed regulation of attorneys engaged in legal practice as "financial institutions" under the Gramm-Leach-Bliley Act, the FDA's authority over cigarettes under the Food, Drug, and Cosmetic Act, and the regulation of assisted suicide under the Federal Controlled Substances Act. *See American Bar Association v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Gonzalez v. Oregon*, 546 U.S. 243 (2006). Each of those cases represented a clear departure from an agency's historical jurisdiction over entities, products or activities that were not reasonably contemplated as being subject to the agency's authority. That is simply not the case with respect to last-mile broadband access, which has long been subject to the Commission's authority — as an information service if not a telecommunications service. If the Commission were to, say, announce its jurisdiction over all aspects of the electrical grid, the network operators' analysis might apply.

**VI. THE FIRST AND FIFTH AMENDMENTS DO NOT PRECLUDE THE COMMISSION'S PROPOSED "THIRD WAY."**

Not content with arguing based on statutory interpretation and policy grounds, several network operators repeat their tired First Amendment and Fifth Amendment Arguments under which, apparently, any attempt to regulate the control of bottleneck facilities – the *raison d'être* of the FCC with respect to non-broadcast facilities – is constitutionally suspect. The substantive regulatory regime that would result from the proposed "third way" would be, with a few minor differences, identical to the policy framework that existed pre-*Comcast* under Title I. Thus, it is hard to see how the Commission's proposed "third way" approach of classifying broadband Internet access services as Title II services affects the analysis of the Commission's regulation under the First and Fifth Amendments.

**A. The "Third Way" Approach is Consistent with the First Amendment**

Opponents of the proposed "third way" approach argue that reclassifying the transmission component of broadband access services, thereby subjecting broadband access to the traditional unreasonable discrimination standard of common carriage, would be unconstitutional under the First Amendment. These arguments continue a regrettable pattern in which broadband network operators distort the common understanding of First Amendment law and argue for the removal of entire topics from the Commission's purview regardless of the merits

of proposed Commission policies.<sup>54</sup> Such arguments also continue a line of attack in which policies stemming from network operators' control over bottleneck facilities and aimed at countering discrimination for economic reasons are viewed as impermissibly violating the rights of network operators. The Commission should reject such arguments – arguments which, if taken to their logical extreme, would prohibit the Commission from adopting the broadband policies outlined in the National Broadband Plan, from addressing even the most egregious forms of discrimination by a network operator against its competitors and from adopting even the most reasonable limits to address concerns of such discrimination. Under this view, applying an unjust and unreasonable standard to network operators' charges and practices in its provision of broadband transmission – the most basic form of consumer protection embodied in the Communications Act – would be unconstitutional.

The proposed “third way” would interpret the Communications Act in light of present-day facts and would subject facilities-based broadband network operators with control over bottleneck facilities to what is properly thought of as economic and technical regulation. As such, the Commission's “third way” approach does not implicate First Amendment concerns. The First Amendment does not shield network operators from rules that apply to all facilities-based providers of telecommunications services, including rules designed to foster

---

<sup>54</sup> See, e.g., *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 962 (D.C. Cir. 1995) (rejecting First Amendment challenges to eight of nine different provisions of the 1992 and 1984 Cable Acts, including rate regulation, subscriber limitation, channel occupancy, municipal immunity, etc.).

openness in maintaining a channel of public communication and to guard against economic discrimination by broadband network operators against content or application competitors.<sup>55</sup> A network operator is not engaging in “editorial discretion” when it decides to discriminate against a voice software application that threatens its bottom line, or when it decides to shape traffic on its network during times of congestion in order to conserve resources. Instead, such an operator would be engaging in economic discrimination, or technical network management, that is properly subject to regulatory oversight unconstrained by the First Amendment.

“Network management” and other forms of discrimination that would be subject to oversight under Title II is not an exercise of editorial discretion by the carriers. Unlike the parade organizer who decides who can march in a parade,<sup>56</sup> broadband network operators – and communications networks more generally – facilitate communications between third parties and end users of the networks, and, notwithstanding the references to cases involving newspapers and other media outlets, messages received via broadband networks are not viewed as being crafted or endorsed by, or in any way associated with, the

---

<sup>55</sup> Cf. *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, WT Docket No. 06-150, FCC 07-132, at 87, ¶ 217 (“To the extent that a choice of device or application implicates First Amendment values at all, we think that our requirements promote rather than restrict expressive freedom because they provide consumers with greater choice in the devices and applications they may use to communicate.”).

<sup>56</sup> *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 570-77 (1995).

particular network operator.<sup>57</sup> Under the expansive view urged by the broadband network operators, the Commission potentially would be prevented from addressing anti-competitive behavior on their part, and network operators could freely block content, applications and services under the guise of “editorial discretion.” Under this logic, a telecommunications carrier might argue that interconnection requirements were a form of compelled speech, or that requirements to provide special access services to competing carriers violated the carriers’ First Amendment rights to affiliate with whoever they choose.

A comparison of Title II’s nondiscrimination requirement with the must-carry rules at issue in the *Turner Broadcasting* cases is instructional.<sup>58</sup> The must-carry rules upheld in *Turner* involved mandatory carriage of signals over a private cable network; in contrast, the proposed “third way” approach would apply Title II to networks used to access the public Internet. In this case, network operators do not select what content is carried on the public Internet; when a user visits the *New York Times* website or *TMZ*, the user is viewing content that is not hosted or controlled by the user’s broadband access provider, but rather is delivered via the provider’s network per the user’s selection. Thus, the “speech” delivered via the public Internet is not attributable to the broadband network

---

<sup>57</sup> As discussed above, most broadband users access content, applications and services in a manner that is agnostic to the particular broadband access network they happen to be using at the time — whether at home, at work, or via a Wi-Fi network at a hotel or coffee shop. See Section IV, *supra*.

<sup>58</sup> See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (“*Turner I*”); see also *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”).

operator and there is no issue of editorial discretion or compelled speech or any of the other issues that raise First Amendment concerns. With respect to their provision of last-mile transmission facilities, providers of broadband Internet access are not “speakers” in any meaningful sense, and the First Amendment does not shelter from review their economic decisions having to do with managing resources or protecting legacy revenue streams.

Should the proposed reclassification of broadband Internet access services under Title II be subject to First Amendment scrutiny, it would nevertheless be permissible as a content neutral approach analyzed under intermediate scrutiny analysis. Under such analysis, a content neutral regulation will be sustained if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.<sup>59</sup> Here, the important governmental interests include the Commission’s traditional oversight over network operators that control bottleneck facilities, including the Commission’s ability to adopt its broadband policies and protect consumers from unreasonable discrimination, invasions of privacy and other problematic practices by broadband access providers. The Commission would also preserve the free exchange of ideas and content over an open Internet, maximize consumer choice in the vital broadband marketplace which is playing an increasingly important role in our society and

---

<sup>59</sup> *Turner I*, 512 U.S. at 662 *see also Turner II*, 520 U.S. at 189; *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

economy, and protect competition in the entire Internet ecosystem of network operators, applications developers, device manufacturers, and others. The proposed reclassification of broadband Internet access services, and the resulting application of Section 201 and 202 of the Act to broadband access is unrelated to the suppression of free speech – in fact, the proposed approach promotes free speech by ensuring that network operators’ economic or other incentives do not keep users from accessing the content or using the applications of their choice to communicate with people around the world. Finally, to the extent that the proposed approach burdens speech at all, it does so only indirectly – *i.e.*, nothing in the Commission’s proposed approach would prohibit network operators from “speaking;” network operators will simply be required not to discriminate or otherwise abuse its control over bottleneck facilities. Moreover, nothing in the proposed approach would prevent network operators from engaging in reasonable network management, further ensuring that the rules do not burden any more speech than is necessary to effectuate the goals discussed above.

**B. The “Third Way” Approach is Consistent with the Fifth Amendment**

Despite what some broadband network operators say,<sup>60</sup> the Commission’s proposed “third way” approach does not constitute a “taking” under the Fifth Amendment. The taking clause arguments made by these network operators are

---

<sup>60</sup> See, e.g., AT&T Comments at 109-11; Verizon Comments at 90-93; NCTA Comments at 34-35.

at odds with established law and again mark a disappointing strategy on the part of network operators to attempt to handcuff the Commission by characterizing general economic regulation as being beyond its power.<sup>61</sup>

In the recent Open Internet proceeding, OIC explained that the openness rules proposed in that proceeding do not constitute a physical taking of broadband access providers' property,<sup>62</sup> and the same analysis applies to the application of Title II's nondiscrimination rule and the other provisions of Title II to broadband access networks.

The network operators' primary argument appears to be that reclassifying broadband Internet access as a "telecommunications service" would amount to a regulatory taking as it would upset their settled expectations. However, this contention is not supported by the law. The doctrine of regulatory takings recognizes that in addition to traditional cases of physical occupation, there are times when regulation so diminishes the value of property that it amounts to a taking. The proposed third way approach, however, does no such thing. The Commission's "third way" approach is, substantively, very similar to the Commission's pre-*Comcast* approach under Title I. And with respect to the Title II nondiscrimination provisions, which the network operators seem most concerned about, the best proof that a nondiscrimination requirement does not

---

<sup>61</sup> See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

<sup>62</sup> See Reply Comments of the Open Internet Coalition at 36 (filed Apr. 26, 2010).

constitute a regulatory taking is the network operators own argument that because the market is moving toward open networks, any openness rules are unnecessary.<sup>63</sup> If the network operators claim that their behavior would be substantially the same as it would be absent the proposed regulation, it is hard to understand how the regulation could also constitute a regulatory taking.

Analysis of whether there has been a regulatory taking is typically fact-based, but focuses on three main factors: (1) the economic impact of the proposed regulation, (2) whether the regulation interferes with distinct investment-backed expectations, and (3) the character of the government regulation.<sup>64</sup> None of these factors favor a finding of a regulatory taking.

First, the economic impact of the proposed reclassification on network operators is not significant enough to approach the level of a taking; as noted above, the substantive difference between the Commission's proposed "third way" approach and the Commission's pre-Comcast approach under Title I, including the provisions of the *Broadband Policy Statement*, are minimal.

Second, the proposed reclassification cannot be said to interfere with any reasonable investment-backed expectations. The appropriate classification of

---

<sup>63</sup> See Comments of CTIA – The Wireless Association at 26 (“Experience since the Commission’s ruling shows only more movement toward openness, not less.”); Comments of AT&T at 145-146 (“The wireless marketplace has become a model of openness and consumer choice without regulatory intervention. ... In other words, the marketplace is thriving in precisely the ways the NPRM advocates, even though the net neutrality principles have *never* been applied to wireless services.”); Comments of Verizon and Verizon Wireless at 28 (“The wireless broadband marketplace also is moving toward increased openness, and network providers are providing mechanisms to facilitate development of third-party content and applications.”).

<sup>64</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

broadband networks has been a subject of significant debate and disagreement over the past decade. Going back to the *Stevens Report* in 1998, the Commission had acknowledged that classification of Internet access services is not straightforward.<sup>65</sup> Prior to the Commission's *Cable Modem Declaratory Ruling* in 2002, the Ninth Circuit had declared that cable broadband services were telecommunications services,<sup>66</sup> and, in *Brand X*, three Justices concluded the same and that the Commission's decision to do otherwise was so erroneous that it did not warrant deference under *Chevron*<sup>67</sup> (while a fourth Justice "just barely" agreed that the Commission was entitled to *Chevron* deference in its conclusion that cable broadband services were information services).<sup>68</sup> Wireline broadband was not classified as an information service until 2005, while wireless broadband was not so classified until 2007. Meanwhile, the Supreme Court in *Brand X* noted that the Commission is obligated to revisit its cable broadband classification decision should facts change, consistent with established Commission practice.<sup>69</sup>

---

<sup>65</sup> *Stevens Report* at 31, ¶ 60 ("We recognize that the question may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service.").

<sup>66</sup> *AT&T v. City of Portland*, 216 F.3d 871, 878 (9<sup>th</sup> Cir. 2000) *reversing* 43 F. Supp. 2d 1146 (D. Ore. 1999).

<sup>67</sup> *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 1005-1020 (2005) ("*NCTA v. Brand X*") (Scalia dissenting, with Souter and Ginsburg joining).

<sup>68</sup> *Id.* at 1003 (Breyer concurring) ("I join the Court's opinion because I believe that the Federal Communications decision falls within the scope of its statutorily delegated authority - though perhaps just barely.").

<sup>69</sup> *Id.* at 981 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing

All the while, certain parties and even FCC Commissioners have expressed their view that the classification of broadband access services as information services was problematic.<sup>70</sup> Given such a live controversy over the appropriate classification of broadband access networks and the knowledge that such classification is inherently fact-based in a rapidly-changing industry, it is implausible to suggest that the Commission's proposal to reclassify broadband Internet access services so upsets network operators' *reasonable* investment-backed expectations as to be *constitutionally barred*.

Finally, the proposed Title II regulation is general in character, which suggests against a finding of a taking; reclassification of broadband access under

---

basis . . . for example, in response to changed factual circumstance.”).

<sup>70</sup> See, e.g., *Cable Modem Declaratory Ruling*, Statement of Commissioner Michael Copps (dissenting) (“The decision the Commission will make today stray far afield from the regulatory construct established by Congress... the statutory provisions accommodate cable system operators’ delivery of ... services, even where those services may not fit neatly into the existing regulatory classifications... a powerful case has been made that cable modem services should also be subject to Title II”); *Wireline Report and Order and Notice of Proposed Rulemaking*, Statement of Commission Jonathan Adelstein (“I was not at the Commission when this reclassification approach was first proposed, but the approach has always given me some grounds for concern. By reclassifying broadband services outside of the existing Title II framework, the Commission steps away from some of the core legal protections and grounding afforded by Congress”); *Wireline Report and Order and Notice of Proposed Rulemaking*, Statement of Commissioner Michael Copps (“I wholeheartedly agree with Justice Scali’s observation that the previous Commission chose to achieve its objectives ‘through an implausible reading of the statute, and has thus exceeded the authority given it by Congress’... In recent years this Commission has irresponsibly reclassified services without addressing the larger implications of its decisions”); Consumer Federation of America and Consumer’s Union, “Brand X: Statement of CFA and CU on the Supreme Court’s Decision, available at [http://www.consumersunion.org/pub/core\\_telecom\\_and\\_utilities/002441.html](http://www.consumersunion.org/pub/core_telecom_and_utilities/002441.html) (July 7, 2005) (“without careful thought, the Federal Communications Commission (FCC) made the decision to exempt cable modem service from the obligation of providing nondiscriminatory access to the telecommunications network. In its action, the agency abandoned a fundamental principle that has applied to all means of communications throughout U.S. history: Communications and transportation networks must be available to all on a nondiscriminatory basis if they are to serve the public interest”).

Title II simply responds to changing facts and subjects bottleneck transmission facilities to the regulation contemplated by the Communications Act – amounting to a “public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>71</sup>

\* \* \*

For the foregoing reasons, the Coalition urges the Commission to classify the Internet connectivity component of last-mile, broadband Internet access services as Title II telecommunications services. The centrality of broadband Internet in our economy and culture require the Commission to move quickly.

---

<sup>71</sup> *Penn. Cent. Transp. Co v. New York City*, 438 U.S. 104, 124 (1978).

Respectfully Submitted,

**OPEN INTERNET COALITION**

/s/Markham C. Erickson

Markham C. Erickson

Holch & Erickson, LLP

and

Executive Director

OPEN INTERNET COALITION

400 North Capitol Street, NW

Suite 585

Washington, DC 20001

Tel.: 202 - 624 - 1460

Facsimilie: 202 - 393 - 5218

[merickson@holcherickson.com](mailto:merickson@holcherickson.com)

Dated: August 12, 2010