

**Lee Selwyn**

---

**To:** Michael.Copps@fcc.gov  
**Cc:** Margaret.McCarthy@fcc.gov  
**Subject:** "Open Internet" NOI, GN Docket No. 09-191  
**Attachments:** Selwyn-Golding FCLJ article Dec 2010 Pre-Publication.pdf; IcarusFall2010-Selwyn-Golding.pdf

Dear Commissioner Copps:

We support and applaud your position that reclassification of broadband Internet access as a Title II Telecommunications Service provides the best means for assuring an Open Internet and for providing the Commission with the regulatory tools it needs to promulgate and enforce effective net neutrality regulations.

We believe that as a factual matter broadband Internet access IS a telecommunications service, and that any putative "information services" that may be bundled with Internet access when offered to consumers at retail are incidental and of limited importance, and do not alter the primary telecommunications function of this service.

ILEC and cable MSO providers of broadband Internet access passively transmit data between their end user customers and the websites and other Internet-based services those customers contact. The Internet access provider does not modify or act upon the content of such transmissions; its sole function is to route and to transport traffic in both directions between its customers and third-party sources of Internet-based content. Those who suggest that such functions as packet switching and routing, Domain Name Services, error detection and correction, and similar aspects of Internet Protocol (IP) constitute "information services" simply misunderstand or deliberately misdescribe the fundamental basic telecommunications functions that IP supports.

In that regard, we have recently authored two papers addressing precisely this issue. The first of these, "The Comcast Decision and the Case for Reclassification and Re-regulation of Broadband Internet Access as a Title II Telecommunications Service," was published in the Fall 2010 newsletter of the Communications & Digital Technology Industries Committee of the American Bar Association Section of Antitrust Law, a "Symposium" edition focusing specifically upon "Broadband Reclassification and Net Neutrality."

Our second paper, to be published later this month in the *Federal Communications Law Journal*, is entitled "Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and an Open Competitive Internet."

We attach both of these papers with the hope that they may be of assistance to you.

In particular, we call your attention to several specific points we address in the two articles:

(1) That IP transmission is basic telecommunications was considered and decided several decades ago, in the Commission's "Communications Protocols" order (*Protocols Under Section 64.702 of the Commission's Rules and Regulations, Memorandum Opinion, Order, and Statement of Principles*, 95 F.C.C.2d 584) (1983), at para. 28: "Clarification is warranted that protocol processing involved in the initiation, routing and termination of calls (or subelements of calls, e.g., packets) is inherent in switched transmission [sic] and is not within the definition of enhanced service, and we have done so herein. ... Such protocol processing or conversion may be associated either with basic or enhanced service without affecting the classification of such service under Section 64.702(a) of our rules." (citation omitted)

(2) Internet access involves, principally, "the initiation, routing and termination of calls (or subelements of calls, e.g., packets)." The inclusion of certain miscellaneous "throw-away" "information services" within the retail bundle by the Internet access provider does not and cannot alter this fundamental telecommunications

12/6/2010

attribute of the service.

(3) Retail Internet access services are described and sold by their providers in telecommunications terms -- e.g., uplink and downlink mbps -- and not in terms of any "information" content. Wireless and wireline Internet access services are or will shortly be priced based upon bytes transmitted. These are basic common carrier type services, and need to be regulated as such.

(4) The Commission has jurisdiction over the underlying transmission component of bundled Internet access services under Section 201, and where a facilities-based dominant incumbent service provider combines such underlying telecommunications services with "enhanced" or "information" services, the Commission has the authority to, and should, require that those underlying telecommunications services be made available to competing providers at just and reasonable rates and on a nondiscriminatory basis vis-a-vis its own use of such services within the Internet access bundle.

(5) The treatment of the underlying telecommunications transmission, routing and switching functions as basic Title II common carrier services in no way constitutes "regulation of the Internet." To the contrary, by regulating the underlying telecommunications services, the Commission would be promoting precisely the open, competitive Internet it seeks to achieve, but without the need for micro-regulation of net neutrality compliance.

Recent attempts by certain providers of last-mile consumer broadband Internet access to impose what amount to "access charges" upon third-party content providers for the ability to reach those end-user consumers underscores the need for such regulation. In fact, there is a direct and obvious parallel with a matter that the Commission confronted nearly a decade ago, in its "CLEC Access Charge Order" [*Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, *Seventh Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 9923 (2001)]. There, the Commission recognized that "IXCs are subject to the monopoly power that CLECs wield over access to their end user" and "given the unique nature of the market in which IXCs purchase CLEC access, however, we conclude that it is necessary to constrain the extent to which CLECs can exercise their monopoly power and recover an excessive share of their costs from their IXC access customers -- and, through them, the long distance market generally." *Id.* at paras. 38-39. In a similar vein, the broadband Internet access provider takes on the role of gatekeeper with respect to the delivery of Internet traffic to its end user customers and, like those CLECs of the last decade, is in a position to exploit that relationship by imposing monopoly rents upon third-party content providers for access to its customers. The need for regulation in this area is further underscored when the content being offered by third-party providers competes directly with content being offered by the dominant Internet access provider itself as, for example, with the case of streaming video competing with cable or telco video services.

This letter and the accompanying attachments were prepared by us and are being sent on our own behalf and not on behalf of any client or interested party or group. We wish you success in convincing your colleagues of the importance of Title II reclassification of the underlying telecommunications functions as the best means for assuring an open and competitive Internet.

Thank you.

Lee L. Selwyn  
Helen E. Golding

Economics and Technology, Inc.  
One Washington Mall, 15th Floor  
Boston, Massachusetts 02108  
+1-617-598-2222

THIS MESSAGE MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION,

12/6/2010

**COPYING OR COMMUNICATION OF THIS MESSAGE IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY ME IMMEDIATELY BY TELEPHONE AND DELETE THE MESSAGE.**