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December 7, 2010

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW – Lobby Level  
Washington, D.C. 20554

Re: *Preserving the Open Internet*, GN Docket No. 09-191

Dear Ms. Dortch:

To ensure the completeness of the record in the above-referenced proceeding, AT&T hereby submits the comments and reply comments it previously filed in the Commission's proceeding titled *Framework for Broadband Internet Service*, GN Docket No. 10-127.

If you have any questions or need additional information, please do not hesitate to contact me. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,

/s/  
Jack Zinman

Attachments

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )  
 )  
 )  
Framework for Broadband Internet Service ) GN Docket No. 10-127  
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**COMMENTS OF AT&T INC.**

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## INTRODUCTION AND EXECUTIVE SUMMARY

As the *Broadband Plan*<sup>1</sup> recognizes, the nation’s overriding communications policy objective for the 21st century is to promote universal broadband deployment and adoption. Private investment, not prescriptive regulation, is the key to achieving that goal. According to the *Plan*, “the American broadband ecosystem has evolved rapidly” over the past decade, and this evolution has been “[f]ueled primarily by private sector investment and innovation.”<sup>2</sup> Broadband providers are continuing to invest tens of billions of dollars each year in America’s broadband future, creating thousands of new jobs—all despite the worst economic downturn since the Great Depression. But achieving the next phase of broadband deployment envisioned by the *Broadband Plan* will require more—according to the Commission’s own estimates, \$350 billion more.<sup>3</sup> The *Broadband Plan* thus wisely endorses “actions government should take to encourage more private innovation and investment,” while emphasizing that “the role of government is and should remain limited.”<sup>4</sup>

If the Commission adheres to these conclusions, it will reject proposals to inflict legacy common-carrier regulation on the very sector of the Internet ecosystem—broadband Internet access providers—that it expects to undertake this massive \$350 billion investment of private risk capital. Reclassification of those providers as Title II “common carriers” would be unnecessary to advance any valid policy objective, would present risks and harms that dwarf any putative benefits, and would all but scuttle the Administration’s ambitious broadband agenda.

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<sup>1</sup> FCC, *Connecting America: The National Broadband Plan* (2010), <http://download.broadband.gov/plan/national-broadband-plan.pdf> (“*Broadband Plan*”).

<sup>2</sup> *Id.* at XI.

<sup>3</sup> Staff Presentation, *September 2009 Commission Meeting*, at 45 (Sept. 29, 2009), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-293742A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf) (“*September 2009 Staff Presentation*”).

<sup>4</sup> *Broadband Plan* at 5.

And there is a far *better way* to achieve that agenda than trying to cram today’s broadband Internet access providers into an ill-fitting 20th century regulatory silo, as the NOI’s “third way” proposal would do.<sup>5</sup> The Commission should work with Congress to bring the Communications Act into the 21st century, while using its existing statutory authority, where necessary, to make more broadband spectrum available, reform the universal service program to support broadband, and encourage greater consumer-oriented transparency by broadband providers.

***Title II Reclassification Would Harm Broadband Investment and Job Creation.*** In report after report, industry analysts have warned that Title II reclassification proposals, even when accompanied by forbearance and portrayed as “third way” alternatives to maximal dominant-carrier regulation, would create enormous investment-detering regulatory uncertainty.

For example:

- Craig Moffett of Bernstein Research observed, on the day the Commission aired its “third way” proposal, that: “Markets abhor uncertainty. ***Today we got uncertainty in spades.***” He added that “it is unclear what, precisely, this means for [other] information service providers, including Google”; that he “expect[s] a ***profoundly negative impact on capital investment***”; and that the “third way” is “***an unequivocal negative development***[.]”<sup>6</sup>
- Jonathan Chaplin of Credit Suisse explained, also in the aftermath of the “third way” proposal, that “[t]he ***biggest disconnect between Washington and Wall Street is on how the competitiveness of the industry is viewed.*** . . . Competition is doing its job and regulations would make it very difficult for companies to get reasonable return on investment. . . . The threat of regulation could ***discourage investment and cost jobs***[.]”<sup>7</sup>

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<sup>5</sup> Notice of Inquiry, *Framework for Broadband Internet Service*, GN Docket No. 10-127, FCC 10-114 (rel. June 17, 2010) (“NOI”).

<sup>6</sup> Craig Moffett, *Quick Take—U.S. Telecommunications, U.S. Cable & Satellite Broadcasting: The FCC Goes Nuclear*, Bernstein Research, May 5, 2010 (“Moffett, *Quick Take*”) (emphasis added).

<sup>7</sup> Yu-Ting Wang & Howard Buskirk, *Reclassification Said to Pose Broad Risk to U.S. Economy*, Communications Daily, at 1 (June 14, 2010) (some emphasis added and some omitted).

- Mike McCormack of J.P. Morgan agrees that investors are “*extremely nervous* about what’s coming” out of this proceeding, and added that “[b]roadband is a *very competitive place so there’s no point [in] fixing it*.”<sup>8</sup>
- Anna-Maria Kovacs of Regulatory Source Associates notes that it would “*take years to know whether [any reclassification decision] is upheld in court*. . . . [W]e would expect the industry—telco, wireless, and cable—to *assess capital investments from this point in light of the potential for new and more extensive regulations*.”<sup>9</sup>
- Stanford tech analyst Larry Downes claims that a reclassification “would be the worst example in history of a tail wagging the dog” and perhaps “the *worst idea in communications policy to emerge in the last 75 years*—that is, since the [FCC] was first created in 1934.”<sup>10</sup>
- PC Magazine commentator and MarketWatch analyst John Dvorak describes the proposed Title II reclassification as “the worst possible outcome” of the net neutrality debate and “a terrible idea” that would “*destroy the Internet as we know it*.”<sup>11</sup>
- Former Chairman Michael Powell, now with Provident Equity Partners, “fear[s] a prolonged period of uncertainty and instability” in the wake of any Title II reclassification decision that would “*undermine the shared goal of intensifying our nation’s investment in broadband*.”<sup>12</sup>
- The Washington Post editorial page explains that any attempted reclassification under Title II would be “a *legal sleight of hand* that would amount to a *naked power grab*” and “could *damage innovation* in what has been a vibrant and rapidly evolving marketplace.”<sup>13</sup>

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<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> Anna-Maria Kovacs, *Telecom Regulatory Note: D.C. Circuit vacates FCC’s Comcast network-management order*, Regulatory Source Associates, LLC, at 2 (Apr. 7, 2010) (emphasis added).

<sup>10</sup> Larry Downes, *What’s in a title? For broadband, it’s Oz vs. Kansas*, CNET News, Mar. 11, 2010, [http://news.cnet.com/8301-1035\\_3-20000267-94.html](http://news.cnet.com/8301-1035_3-20000267-94.html) (“*Oz vs. Kansas*”) (emphasis added).

<sup>11</sup> John Dvorak, *Net neutrality becomes a dangerous issue*, MarketWatch, Apr. 16, 2010, <http://www.marketwatch.com/story/story/print?guid=2012C86A-55C5-4CA0-821F-F203C21E2B6E> (emphasis added).

<sup>12</sup> Michael K. Powell, *My Take on the Appeals Court Decision*, Broadband for America, Apr. 7, 2010, <http://www.broadbandforamerica.com/blog/michael-powell-my-take-appeals-court-decision> (“Powell, *My Take on the Appeals Court Decision*”) (emphasis added).

<sup>13</sup> Editorial, *Internet oversight is needed, but not in the form of FCC regulation*, Wash. Post, Apr. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041604610.html> (emphasis added).

And just yesterday, a panel of financial experts held at New York University law school agreed with all of these concerns:

- Height Analytics Managing Director Tom Seitz warned that “the FCC could be inhibiting investment through its net neutrality and reclassifications investigations” because “[i]nvestors hate uncertainty and clearly what is being created right now is uncertainty in the marketplace[.]”
- Citigroup Managing Director Mike Rollins expressed concern that reclassification would open the door for “a later FCC to . . . limit the number of Title II provisions from which it will forbear[.]” This risk, he added, would have an investment impact today, because “[w]hen investors are looking at policy decisions *they’re not just looking at what the FCC wants to accomplish today but what those policies can do over time.*”
- Wise Harbor founder Keith Mallinson noted that “people are hungry to have more capabilities [in their broadband connections] and the market has the capability to deliver that, but *increasing regulation has the risk of stifling that through the uncertainties but also by limiting some basic economic freedoms.*”<sup>14</sup>

Given these concerns, it should come as no surprise that a majority of the combined membership of the U.S. Senate and House of Representatives has urged the Commission not to pursue the NOI’s reclassification proposal.<sup>15</sup> As the 74 Democratic Members signing one of the

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<sup>14</sup> Howard Buskirk, *Regulatory Uncertainty Created by FCC Seen Limiting Network Investment*, Communications Daily, July 15, 2010 (“Buskirk, *Regulatory Uncertainty*”) (emphases added); see also John Curran, *Panelists: Neutrality, Title II Broadband Issues Breeding Investor Uncertainty*, TR Daily, July 14, 2010 (“Curran, *Panelists*”).

<sup>15</sup> See Letter from Representative Gene Taylor, Representative Gene Green, et al., to Julius Genachowski, Chairman, FCC (May 24, 2010), [http://netcompetition.org/House\\_Democrat\\_Letter.pdf](http://netcompetition.org/House_Democrat_Letter.pdf) (“*House Democrat Letter*”); Letter from Senator Sam Brownback, Senator Kay Bailey Hutchison, et al., to Julius Genachowski, Chairman, FCC (May 24, 2010), [http://netcompetition.org/Senate\\_Republican\\_Letter.pdf](http://netcompetition.org/Senate_Republican_Letter.pdf) (“*Senate Republican Letter*”); Letter from Representative Joe Barton, Representative Cliff Stearns, et al., to Julius Genachowski, Chairman, FCC (May 28, 2010), <http://www.reclaimthemedial.org/files/GOPBroadbandletter-28May10.pdf> (“*Barton/Stearns Letter*”). Governors of eighteen states, and the Lieutenant Governor of a nineteenth state, have also sent letters to Chairman Genachowski explaining the detriments of classifying broadband services under Title II. See Letters from Gov. Haley Barbour (R-MS) (May 25, 2010), Gov. Mike Beebe (D-AR) (May 17, 2010), Gov. Steven L. Beshear (D-KY) (June 15, 2010), Gov. Janice K. Brewer (R-AZ) (June 15, 2010), Gov. Donald L. Carcieri (R-RI) (June 17, 2010), Gov. Brad Henry (D-OK) (May 20, 2010), Lt. Gov. Brian K. Krolicki (R-NV) (June 11, 2010), Gov. Theodore R. Kulongoski (D-OR) (June 25, 2010), Gov. Jack A. Markell (D-DE) (June 11, 2010), Gov. Robert F. McDonnell (R-VA) (June 15, 2010), Gov. Jeremy W.

House letters explained, reclassification would mark an unprecedented break from the deregulatory Title I framework for broadband Internet access “first adopted in 1998 by the Clinton Administration’s FCC”; would “create regulatory uncertainty” and thus “serve as a distraction from what should be our Nation’s foremost communications priority,” ubiquitous broadband deployment; and, perhaps most important, would “jeopardize jobs and deter needed investment for years to come.”<sup>16</sup> They further admonished that reclassification is “not something that should be taken lightly and should not be done without additional direction from Congress. *We urge you not to move forward with a proposal that undermines critically important investment in broadband and the jobs that come with it.*”<sup>17</sup> And just two days ago, House Majority Leader Steny Hoyer announced that “lawmakers”—and not the FCC—“have the authority on this critical matter[.]”<sup>18</sup> In his view, concern about whether the Commission could walk the “very careful legal path” necessary to “develop[] a reclassification plan” starkly “underscores the utility of . . . having Congress . . . legislate a consensus approach[.]”<sup>19</sup>

The concerns expressed by both Wall Street and Congress about long-term, investment-detering regulatory uncertainty are, if anything, understated. First, by themselves, the threshold legal challenges to the Commission’s reclassification decision could consume much of the next

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(Jay) Nixon (D-MO) (June 4, 2010), Gov. Martin O’Malley (D-MD) (June 16, 2010), Gov. C.L. “Butch” Otter (R-ID) (June 9, 2010), Gov. Tim Pawlenty (R-MN) (June 9, 2010), Gov. Beverly Eaves Perdue (D-NC) (June 1, 2010), Gov. Sonny Perdue (R-GA) (June 16, 2010), Gov. Bob Riley (R-AL) (June 11, 2010), Gov. Mark Sanford (R-SC) (May 20, 2010), and Gov. Arnold Schwarzenegger (R-CA) (May 11, 2010), to Julius Genachowski, Chairman, FCC.

<sup>16</sup> *House Democrat Letter* at 1.

<sup>17</sup> *Id.* at 1-2 (emphasis added).

<sup>18</sup> Sara Jerome, *Hoyer: Congress has the authority on broadband* (July 13, 2010), <http://thehill.com/blogs/hillicon-valley/technology/108495-hoyer-congress-has-the-authority-on-broadband>.

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

decade, depending on the number of judicial remands. The communications industry suffered through similar regulatory chaos following the Commission’s effort in 1996 to shape the industry around the UNE-P model of synthetic intramodal “competition” for voice telephony services. That model ultimately succumbed to judicial challenges—but only eight years later, in 2004, after multiple and increasingly skeptical remands by the Supreme Court and the courts of appeals.<sup>20</sup>

Second, quite apart from direct legal challenges to the Title II regime itself, any reclassification decision would ignite multi-year regulatory controversies on a variety of issues, including (1) the precise extent of forbearance from particular Title II requirements, including the many regulations that are based in whole or in part on sections 201 and 202; and (2) how the various provisions from which the Commission suggests it may *not* forbear (such as sections 222 and 255) would apply in this novel context. For example, the NOI is studiously silent on the question of whether those section 201/202 standards, from which the Commission does not propose to forbear, would apply for the first time to retail prices and the other terms and conditions of retail Internet access services. If the answer is yes, it belies the Commission’s recent assurances that reclassification would merely preserve the pre-*Comcast* Title I regime,<sup>21</sup> which never purported to address retail pricing or other terms of service.

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<sup>20</sup> See *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 810-12 (8th Cir. 1997) (upholding Commission’s application of “impairment” standard), *rev’d in relevant part, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389-92 (1999); *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 425-26 (D.C. Cir. 2002) (remanding Commission’s determination that switching element met impairment standard); *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (vacating same determination after remand).

<sup>21</sup> Julius Genachowski, Chairman, Federal Communications Commission, *The Third Way: A Narrowly Tailored Broadband Framework*, May 6, 2010, <http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html> (“*Genachowski “Third Way” Statement*”) (“The goal is to restore the broadly supported status quo consensus

The NOI similarly disregards the fact that Title II reclassification would trigger *self-executing* prohibitions that could expose broadband providers to liability for any business practice they undertake today that some future Commission finds “unjust” or “unreasonable,” despite general assurances from *this* Commission about what the section 201/202 standards mean. This stands in stark contrast to the pre-*Comcast* Title I regime, where providers could not be held liable for any conduct that the Commission had not affirmatively proscribed. Thus, even if the Commission forbore from all substantive provisions of Title II besides sections 201 and 202, broadband providers could still face potential liability under those provisions whenever they engage in new anti-piracy measures, network-management techniques, or commercial arrangements with particular applications and content providers. That potential liability could deter such initiatives to the detriment of broadband providers, application and content providers, and ultimately consumers.

And finally, any forbearance determinations the Commission makes would undoubtedly be appealed by those with a vested interest in or ideological bent towards more regulation. And those decisions may in all events be reversed by subsequent Commissions. The Commission tries to downplay these concerns, but its insistence that its forbearance determinations would be essentially irreversible is belied by its failure to dismiss several pending proceedings that seek “unforbearance” from prior Commission decisions—and by proposed new wireless regulations that, if adopted, would depart from the bi-partisan, market-based policies of past Commissions. No issue would ever be settled, leaving the Internet ecosystem in a state of perpetual uncertainty.

The Commission also cannot simply ignore disquieting concerns about how broadly its reclassification decision would sweep throughout the Internet ecosystem. As an initial matter,

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that existed prior to the court decision on the FCC’s role with respect to broadband Internet service.”).

when end users purchase Internet access service, they do not purchase a “last mile” service from their ISP, as the Commission seems to suggest. Instead, they obtain connectivity to the entire Internet. If the Commission were to reclassify such Internet connectivity service as a “telecommunications service,” its decision would necessarily extend to *IP-based communications through the Internet backbone to all points on the Internet*. Any suggestion that this “third way” proposal would address only the “on-ramps” to the Internet, rather than “the Internet itself,” is incoherent.

More broadly, the Commission’s apparent attempt to confine Title II reclassification to owners of last-mile transmission facilities would crash headlong into the statutory language, Supreme Court precedent, and 75 years of Title II jurisprudence. The classification of any provider as a Title II “common carrier” has never depended on whether the provider owns transmission facilities, let alone last-mile facilities. That is why standalone long-distance telephone companies, such as the legacy AT&T Corp., MCI, and Sprint, were always treated as Title II carriers even though they depended on local exchange carriers for their last-mile connectivity, and why even long-distance *resellers* are treated as Title II carriers even though they often own no facilities at all. Here, the retail service that ISPs offer to consumer and business users encompasses end-to-end access to all points on the Internet, even though each user’s ISP must generally rely on other providers to supply some of the links to each of those points (for example, through peering and transit arrangements among Internet backbones).

The key legal rationales for any Title II reclassification decision that are set forth in the NOI would thus logically extend to any Internet provider that holds itself out to customers as *arranging* for the transmission of data from one point on the Internet to another, whether or not it *owns* transmission facilities. As discussed below, this category would extend to ISPs such as

Earthlink and AOL that do not own last-mile transmission facilities; to content delivery networks (“CDNs”) such as Akamai that hold themselves out to the commercial public as transporters of data to distant points on the Internet; to providers of e-readers like Amazon.com, which provides Internet access through the Kindle; to companies like Google that provide advertising-supported Internet search services and, on behalf of countless commercial customers, arrange for the transmission of advertising content to end users; and to a variety of other online transport providers ranging from Netflix to Level 3 to Vonage. In short, Title II reclassification would be a sledgehammer, not a scalpel.

The Commission apparently hopes to avoid comment on these issues by arbitrarily deeming them “outside the scope of this proceeding.” NOI ¶ 107. But the Commission cannot lawfully ignore these concerns and punt them to some future day or the next Commission. The Commission proposes to change the legal foundations of American telecommunications policy in ways that logically create self-executing legal consequences for providers far beyond those the Commission apparently wishes to regulate. Basic tenets of reasoned decisionmaking require the Commission to face up to that concern now, *before* triggering those consequences through “reclassification” of the entire broadband industry.<sup>22</sup>

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<sup>22</sup> The term “reclassification” is often used improperly to suggest that the NOI’s proposal would “return” Internet access to a mythical regulatory status it supposedly occupied before it was purportedly “deregulated” by the prior Administration. As AT&T and others have pointed out, however, Internet access has *always* been treated as a Title I information service—through both Democratic and Republican Administrations—ever since the Commission first addressed the matter in 1998. See Letter from National Cable & Telecommunications Association, CTIA—The Wireless Association, United States Telecom Association, Telecommunications Industry Association, Independent Telephone and Telecommunications Alliance, Verizon, AT&T Inc., Time Warner Cable, and Qwest to Chairman Julius Genachowski, FCC, GN Docket No. 09-191 (filed Feb. 22, 2010) (“*First Industry Title II Letter*”) (attached as Exh. A); Letter from Seth P. Waxman, Counsel for United States Telecom Association, to Julius Genachowski, Chairman, Federal Communications Commission, GN Docket No. 09-51 & WC Docket No. 07-52 (filed Apr. 28, 2010) (“*USTA Letter*”) (attached as Exh. B); Letter from National Cable &

## *Title II Reclassification Is Unnecessary to Achieve the Broadband Plan’s Core*

**Objectives.** Against this backdrop, the Commission has identified no *need* for reclassification that could possibly justify the ensuing regulatory instability and suppression of broadband investment incentives. Instead, it has based its claim of need on a false trichotomy: (1) case-by-case exercises of ancillary authority in perpetuity; (2) implausibly intrusive, dominant-carrier-style regulation under Title II; and (3) a so-called “third way” approach, which would forbear from dominant-carrier rules but nonetheless subject broadband Internet providers for the first time to legacy “common-carrier regulation” under the exceptionally indeterminate standards and prohibitions of sections 201 and 202. This false trichotomy overlooks the *best way* forward: maintaining the regulatory status quo while seizing this uniquely auspicious opportunity to work with Congress in updating the Communications Act for the broadband era.

For the past dozen years, the Commission has treated all Internet access services as what they are: paradigm-shattering information services that cannot and should not be shoehorned into the legacy service-category silos of the Communications Act. Any concern about the Commission’s existing legal authority results not from that longstanding legal and policy judgment, but from the failure of the Communications Act itself—frozen in the pre-broadband world of 1996—to keep pace with technological change.

In the wake of the *Comcast* decision,<sup>23</sup> and for the first time in nearly a generation, a broad consensus is emerging among many diverse stakeholders in support of targeted congressional action. The Commission should not squander the momentum for legislation by

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Telecommunications Association, CTIA—The Wireless Association, United States Telecom Association, Telecommunications Industry Association, Independent Telephone and Telecommunications Alliance, Verizon, AT&T Inc., and Time Warner Cable to Chairman Julius Genachowski, FCC, GN Docket No. 09-191 (filed Apr. 29, 2010) (“*Second Industry Title II Letter*”) (attached as Exh. C).

<sup>23</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

rushing to “reclassify” broadband Internet access services as though they were legacy voice telephone services subject to regulation under Title II of the Communications Act. Instead, the Commission should focus on supporting and informing those legislative efforts.

The Commission also does not need to throw American Internet policy into turmoil through Title II reclassification in order to accomplish the two core objectives of the *Broadband Plan*—spectrum and universal service reform. *First*, Title III unquestionably authorizes the Commission to begin implementing the *Plan*’s strategy for “unleashing 500 Mhz of spectrum for wireless broadband.”<sup>24</sup> No one suggests that the Commission’s spectrum initiatives somehow hinge on reclassification of wireless broadband Internet access as a Title II service. *Second*, the Commission also has existing authority to support its universal service funding objectives for broadband, both under section 254 and directly under section 706(b). The Commission would increase, not reduce, anti-investment regulatory uncertainty by trying to achieve the same objective through the far clumsier tool of Title II reclassification.

In addition, as to *transparency* in the provision of broadband Internet access, the *Comcast* decision itself affirms the Commission’s significant authority under section 257 to require disclosures by broadband providers about their network-management and consumer-oriented practices. Other policy concerns, such as *privacy* and *cybersecurity*, already fall well within the active jurisdiction of other agencies, including the FTC, DHS, and NSA. In fact, those agencies are institutionally better positioned than the Commission to address these issues in the first place,

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<sup>24</sup> Federal Communications Commission, Press Release, *Chairman Genachowski Statement on Obama Administration’s Wireless Broadband Initiative*, June 28, 2010, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-299209A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-299209A1.pdf); see also Austin Schlick, *Implications of the Comcast Decision on National Broadband Plan Implementation*, Blogband-broadband.gov, Apr. 12, 2010 (“The Comcast/BitTorrent opinion has no effect at all on most of the Plan. Many of the recommendations for the FCC itself involve matters over which the Commission has an ‘express statutory delegation of authority.’ These include critical projects such as making spectrum available for broadband uses.”).

because they have broader jurisdiction over providers of Internet-based products and services; over application, software, and equipment-manufacturing providers; and in related markets where privacy and cybersecurity issues typically arise. For similar reasons, *disabilities access*, while an essential component of broadband adoption policies, requires a particular focus on applications providers and equipment manufacturers, not broadband providers. In all of these cases, Title II reclassification would achieve very little benefit, if any, for the American public, even as it imposed great costs.

Finally, despite the NOI's pervasive yet unsupported assumption to the contrary, no exigent circumstances support a sea-change in regulatory policy to address *net neutrality* issues now, while Congress considers legislation. In the dozen-year history of broadband, the Commission has intervened exactly twice to address net neutrality-related matters, and both times the relevant provider discontinued the disputed practice promptly and voluntarily. They did so, moreover, even though there has always been legal uncertainty about the Commission's authority to enforce the principles of the *Internet Policy Statement*, which until recently did not even purport to be binding. Indeed, broadband Internet access providers are following the letter and spirit of those principles because doing so makes obvious business sense.

There is no plausible basis for fearing that broadband Internet access providers en masse will suddenly start violating the existing principles to the detriment of their consumers and their own competitiveness. To the contrary, since the *Comcast* case was decided, broadband Internet access providers have shown their commitment to those principles by working with key Internet players such as Google, Microsoft, Cisco, and others to develop a self-governance structure for the broadband industry, known as the Broadband Internet Technical Advisory Group ("BITAG"). Under the supervision of Dale Hatfield—one of the most respected, experienced,

and fair-minded technology experts in this industry—this private initiative will seek consensus on best practices for network-management techniques. And it may also support private resolution of disputes about such techniques and help shine a public spotlight on any controversial practices.

Moreover, in the exceedingly unlikely event that regulatory intervention is needed in the interval preceding congressional action, there would still be no vacuum the Commission could reasonably justify filling with precipitous Title II reclassification. First, the Commission has not explored the full extent of its authority under Title I and other provisions of the Act, as discussed. Second, despite the NOI's myopic fixation on *this Commission's* powers in isolation, the FTC has considerable authority to eliminate “unfair business practices” under section 5 of the FTC Act, and it has expressed its intent to use that authority to address net neutrality and transparency issues should the need arise. Ironically, the proposed reclassification could divest the FTC of any jurisdiction over broadband Internet access providers by presumably placing them squarely within the “common carrier” exception to the FTC's section 5 jurisdiction. The Commission has not explained why, without congressional approval, it could or should commandeer regulatory authority from a sister agency. And even apart from the Commission and the FTC, the Justice Department, private litigants, and generally applicable state laws provide more than ample authority to protect consumers against any harmful network practices.

In sum, the proposed reclassification would:

- Ignore the express will of more than half of the combined membership of the U.S. Senate and House of Representatives;
- Upset decades of bipartisan consensus against common-carrier regulation of any aspect of the Internet;
- Be unnecessary to serve any legitimate policy goal of the Commission in particular or the government in general;

- Seize authority from the FTC in an effort to expand the FCC’s own power to regulate the Internet;
- Threaten to impose government regulation, for the first time, on unpredictably broad swaths of the Internet ecosystem;
- Trigger years of legal and economic uncertainty and litigation; and
- Chill investment, innovation, and job creation.

For all that, this proposed “reclassification” would ultimately come to naught because it would rest on an untenable legal foundation. In particular, as discussed within Part Two of these comments, the reclassification proposal described in the NOI would:

- Rest on fundamental misconceptions about how the Internet works, and would substitute contrived wordplay (“broadband Internet connectivity service”) for a genuine examination of how consumers actually purchase and use access to the Internet (Section I);
- Wrongly presuppose that the enhanced data-processing functionalities of broadband Internet access services are somehow less integrated with transmission services today than they were on all the previous occasions in which the Commission deemed those services integrated “information services,” whereas in fact those features are, if anything, *more* integrated (Sections II.A and II.B);
- Independently violate section 230 of the Communications Act, which (among other things) establishes a federal policy favoring an unregulated Internet and guarantees Internet access providers broad discretion to limit access to “obscene,” “excessively violent,” and other “objectionable” material (Section II.C);
- Be arbitrary and capricious because the proposed reclassification would impose significant harms while serving no legitimate governmental interest (Section III);
- Raise substantial Takings Clause concerns (Section IV); and
- In the case of wireless broadband Internet access, violate Section 332(c)’s ban on treating non-CMRS services as common carrier services (Section V).

Finally, Section VI of Part Two explains why, as the Commission itself concluded as long ago as 1998, forbearance could not eliminate the radical regulatory uncertainty created by Title II reclassification, and why the CMRS regime the Commission cites as its exemplar for the “third way” approach is a source of concern rather than comfort.

## PART ONE: THE BEST WAY FORWARD

As the NOI recognizes, the *Comcast* decision raises questions about the extent of the Commission’s ancillary jurisdiction to regulate broadband Internet access service. NOI ¶ 9. But the NOI is wrong to assume that those questions leave a regulatory vacuum that the Commission must immediately fill with its so-called “third way” proposal. Broadband consumers are not without protection today, any more than they have been for the past decade. Indeed, in the face of the industry’s incipient self-governance efforts and the further growth of competition, broadband consumers are unquestionably better off and more protected now than ever. In assuming the need for an immediate expansion of Commission authority, the Commission’s immodest “third way” proposal thus overlooks the *best* way forward: using its existing authority to address key broadband-related policy goals, as and if necessary, while working with Congress to craft 21st-century broadband legislation and grant the Commission any express authority it needs to effectuate national broadband policy.

As the Commission notes, Congress is actively considering legislation in response to the *Comcast* decision. NOI ¶ 9. A broad bipartisan coalition in Congress—including more than a third of the Senate and a *majority* of the House of Representatives—has urged the FCC to defer acting while Congress enacts new legislation consistent with Congress’s national policy objectives.<sup>25</sup> And it is entirely appropriate to defer to Congress to the extent a regulatory gap emerges where technology has moved beyond what the drafters of the Communications Act may have envisioned. This is also a uniquely favorable time for congressional involvement, given the broad consensus among industry stakeholders about legislation authorizing the Commission to

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<sup>25</sup> See *House Democrat Letter*; *Barton/Stearns Letter*; *Senate Republican Letter*.

address the consumer-oriented principles of the *Internet Policy Statement*.<sup>26</sup> The Commission should avoid taking actions that would slow the momentum for new legislation and squander this opportunity to bring the nation’s communications laws into the broadband era.

On the merits, Congress is also better suited than the FCC to adopt a comprehensive solution. Any solution by the Commission must apply legacy legal and regulatory categories—such as the existing distinction between “information services” and “telecommunications services”—that originated in the 1970s and early 1980s, two decades before the rise of the broadband Internet. Only Congress can free the Commission from these regulatory silos and authorize the Commission to enforce the policy choices that make sense for American consumers, irrespective of obsolescent legal classifications. In addition, Congress’s involvement may be necessary to address a variety of interrelated issues—including privacy, cybersecurity, disabilities access, and various consumer-protection issues—that require solutions that go beyond the Commission’s current jurisdiction.

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<sup>26</sup> See Tim McKone, AT&T Executive Vice President, Federal Relations, *AT&T Response to the Internet Protection, Investment, and Innovation Act*, AT&T Public Policy Blog (May 11, 2010), <http://www.att.com/gen/public-affairs?pid=17881&goback=group01&article=broadband> (“We applaud Representative Stearns for drafting a bill designed to address the dynamism of the Internet while protecting consumers from harm . . . . New legislation is needed and this is an encouraging first step.”); Tom Tauke, Verizon Executive Vice President, Public Affairs, Policy and Communications, Verizon PolicyBlog, *Internet Ecosystem and FCC’s Net Neutrality Proceeding* (Apr. 26, 2010), <http://policyblog.verizon.com/BlogPost/725/InternetEcosystemandFCCsNetNeutralityProceeding.aspx> (“We urge Congress to pass new legislation and adopt a policy that is designed for the Internet. The last time Congress looked at this issue, it decided, wisely, to keep the Internet separate from the traditional modes of regulation designed for telephony, cable and broadcast. Now it’s time to take the next step—to construct the right policy to encourage the growth and use of the technologies of modern communication.”); Kyle McSlarrow, President, National Cable & Telecommunications Association, *Statement Regarding the FCC Proceeding on Broadband Internet Access Legal Framework*, NCTA Media Center (June 17, 2010), <http://www.ncta.com/ReleaseType/Statement/2010bbandFCCNOI.aspx> (“We . . . very much appreciate and agree with the Chairman’s statement of support for legislative efforts to provide much needed certainty. We believe that is the right next step, and we can preserve our ability to protect consumers, maintain an open Internet, and encourage continued investment and innovation through carefully targeted legislation.”).

**I. THE INDUSTRY’S SELF-GOVERNANCE INITIATIVE AND EXISTING LAW MAKE IMMEDIATE COMMISSION ACTION UNNECESSARY AND UNWISE.**

While Congress considers the best path forward, the Commission should maintain the status quo, under which Internet access is properly characterized as an unregulated, integrated information service. There is no pressing need for the Commission to upend the current regime to address short-term concerns about a supposed regulatory “vacuum” pending congressional action.

As an initial matter, there is no actual problem that calls for Commission action. As AT&T has detailed in pleadings filed in many other Commission proceedings, the broadband marketplace is robustly competitive, broadband providers are investing billions of dollars to deploy facilities and improve their services, broadband speeds are increasing dramatically even as the prices for service plummet, the industry is creating thousands of jobs, and innovation is flourishing.<sup>27</sup> Moreover, during the twelve-plus years of broadband service in America, the Commission has found the need to address the practices of broadband Internet access service providers only *twice*: once in 2004 (Madison River) and once in 2007 (Comcast). The rarity of Commission intervention alone belies any claim of exigent circumstances requiring immediate Commission action. Nor has there been any sudden rash of abuse in the wake of the *Comcast*

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<sup>27</sup> AT&T has described the robustly competitive nature of the broadband Internet access marketplace on many occasions. Rather than repeat that discussion again here, we incorporate by reference our prior filings on this topic. See Comments of AT&T Inc., *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 100-02, 108-09, 115-19, 128-31 (filed June 8, 2009); Comments of AT&T Inc., *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191 & WC Docket No. 07-52, at 5-6, 78-87, 145-56 (filed Jan. 14, 2010) (“*AT&T Net Neutrality Comments*”); Comments of AT&T Inc., *Fostering Innovation and Investment in the Wireless Communications Market; A National Broadband Plan for Our Future*, GN Docket Nos. 09-157 & 09-51, at 12-52 (filed Sept. 30, 2009).

decision, despite the sky-is-falling rhetoric favored by some advocates.<sup>28</sup> To the contrary, that decision has prompted the industry to develop expert-driven, voluntary norms for the broadband industry. Just last month, a broad cross-section of the industry—including AT&T, Verizon, Comcast, Level 3, Cisco, Google, Microsoft, and others—announced the formation of the Broadband Internet Technical Advisory Group (BITAG or TAG).<sup>29</sup> The TAG will bring together engineers and other technical experts to develop consensus on network management practices and related technical issues affecting users’ Internet experiences. Participants agree that the TAG’s mission could also include (1) educating policymakers on such technical issues; (2) addressing specific technical matters in an effort to minimize related policy disputes; and (3) serving as a sounding board for new ideas and network management practices.

The development of the TAG illustrates a broad industry commitment to resolving net neutrality concerns openly and cooperatively. It also undermines any claim of a net neutrality crisis requiring immediate FCC intervention. In a recent blog entry entitled “BITAG Brings Hope to Net Neutrality Debate,” BitTorrent—the putative victim in the *Comcast* case—noted approvingly that “innovation and collaboration with ISPs where all parties participate[] in some self-regulation [is] a more ideal approach than heavy-handed policy.”<sup>30</sup> CNET News likewise

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<sup>28</sup> See, e.g., Liz Rose (Free Press), *FCC Leaves the Internet Unprotected: 21 Days and Counting* (Apr. 27, 2010), <http://www.freepress.net/press-release/2010/4/27/fcc-leaves-internet-unprotected-21-days-and-counting> (insisting that “the clock is ticking at the FCC” and that “Internet users [are] in jeopardy”).

<sup>29</sup> *Initial Plans for Broadband Internet Technical Advisory Group Announced* (June 9, 2010), <http://www.prnewswire.com/news-releases/initial-plans-for-broadband-internet-technical-advisory-group-announced-95950709.html>.

<sup>30</sup> See *BITAG Brings Hope to Net Neutrality Debate*, BitTorrent blog, June 11, 2010, <http://blog.bittorrent.com/2010/06/11/bitag-brings-hope-to-net-neutrality-debate/>; see also *Three Cheers for New Broadband Internet Technical Advisory Group*, The Progress & Freedom Foundation Blog, June 9, 2010, [http://blog.pff.org/archives/2010/06/three\\_cheers\\_for\\_new\\_broadband\\_internet\\_technical.html](http://blog.pff.org/archives/2010/06/three_cheers_for_new_broadband_internet_technical.html).

hailed the TAG process as evidence that “a cooling of hostilities over Net neutrality rules is underway.”<sup>31</sup> The Commission should give this self-regulatory initiative its due and defer any new regulatory actions unless and until it has clear evidence of a real problem requiring government intervention.

In the interim, existing government oversight will continue to protect consumers. First, despite the NOI’s peculiarly FCC-centric view of government, the Federal Trade Commission, the Department of Justice, private litigation, and states acting under existing laws of general application will all continue to supplement the Commission’s own role in checking any anticompetitive net neutrality-related or other abuses that could possibly arise as Congress considers legislation.<sup>32</sup> Of particular significance, the FTC has consistently asserted jurisdiction over net neutrality and broadband practices generally on the ground that the FCC’s existing classification of broadband Internet access—as an “information service”—takes that service outside the scope of the “common-carrier exemption,” which limits the FTC’s jurisdiction under section 5 of the FTC Act, 15 U.S.C. § 45(a)(2).<sup>33</sup> The FTC has also vowed to “continue to

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<sup>31</sup> Declan McCullagh, *Net neutrality group signals cooling of hostilities*, Internet Freedom Coalition, June 11, 2010, <http://www.internetfreedomcoalition.com/?p=726>.

<sup>32</sup> Despite *Comcast*, the Commission retains full subject matter jurisdiction over broadband Internet access under 47 U.S.C. § 151. See *AT&T Net Neutrality Comments* at 208. Although the *Comcast* decision constrains the Commission’s authority to impose the most highly interventionist forms of “net neutrality” regulation, the court withheld any ruling on the merits of key Title I theories that the Commission itself had formulated on appeal as bases for ancillary authority to address core violations of the *Internet Policy Statement*. See *Comcast*, 600 F.3d at 660 (citing *Chenery* issues). AT&T expresses no view here on the ultimate validity of those legal theories because it believes that the self-governance structure of the BITAG and oversight by other federal agencies is more than sufficient to protect the integrity of the broadband marketplace pending congressional action.

<sup>33</sup> See Comments of the Federal Trade Commission before the Federal Communications Commission, *A National Broadband Plan for Our Future*, GN Docket 09-51, at 9 n.25 (filed Sept. 4, 2009) (“Because the provision of broadband Internet access is not a common carrier service, . . . the FTC and FCC have concurrent jurisdiction over the provision of broadband service. So that consumers can benefit from the FTC’s competition and consumer protection

devote substantial resources to maintaining competition and protecting consumers in the area of broadband Internet access.”<sup>34</sup> And no agency has more relevant expertise than the FTC in ensuring the transparency and accuracy of broadband provider disclosures to consumers, as discussed further below. Yet, ironically, the proposed Title II reclassification could *divest* the FTC of any authority in this area by holding that broadband Internet access service is subject to “common carrier” regulation after all—and thus may fall squarely within the section 5 common-carrier exemption. In short, that proposed reclassification would not even augment the federal government’s oversight of broadband practices; it would arguably just indulge one federal agency’s wish to take regulatory authority away from another without Congressional approval.

## **II. THE COMMISSION ITSELF ALREADY HAS THE AUTHORITY IT NEEDS TO ADDRESS ITS TWO MOST PRESSING BROADBAND CONCERNS: BROADBAND SPECTRUM AND UNIVERSAL SERVICE.**

Two of the chief objectives that the Commission articulated in the *Broadband Plan* include “[e]nsur[ing] efficient allocation of . . . spectrum” for broadband services, and “[r]eform[ing] current universal service mechanisms to support deployment of broadband and

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expertise, national broadband policies should preserve the FTC’s jurisdiction over broadband Internet access.”) (emphasis added). *See also* FTC, *Staff Report: Broadband Connectivity Competition Policy*, at 38 (2007), <http://www.ftc.gov/reports/broadband/v070000report.pdf> (“*FTC Net Neutrality Report*”) (“[B]ecause most broadband Internet access services are not provided on a common carrier basis, they are part of the larger economy subject to the FTC’s general competition and consumer protection authority[.]”); Letter from Deborah Platt Majoras, Chairman, Federal Trade Commission, to Hon. F. James Sensenbrenner, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives, at 1-2 (Apr. 14, 2006) (“To the extent an entity provides non-common carrier services such as ‘information services,’ the Commission considers the provision of those services to be subject to the FTC Act’s prohibitions against engaging in deceptive or unfair practices and unfair methods of competition.”); *id.* at 3 (“[T]he FTC has authority over the provision of wireline broadband Internet services on a *non-common carrier basis*.”) (emphasis added); *id.* at 4 (“We believe that the FTC has jurisdiction to investigate and bring cases involving broadband Internet access services, including cable modem and DSL services.”).

<sup>34</sup> *FTC Net Neutrality Report* at 12.

voice in high-cost areas.”<sup>35</sup> The Commission’s “2010 Broadband Action Agenda” lists as its top two goals (1) “Promot[ing] World-Leading Mobile Broadband Infrastructure and Innovation,” which includes allocation of “an additional 500 megahertz (MHz) of spectrum . . . for mobile broadband,” and (2) “Accelerat[ing] Universal Broadband Access and Adoption” through “once-in-a-generation transformation of the Universal Service Fund . . . to support broadband service.”<sup>36</sup> The Commission does not need Title II reclassification to achieve either of these important objectives. It has all the authority it needs under the existing Communications Act. Indeed, if anything, the reclassification dispute risks impeding the Commission’s pursuit of these goals.

**A. Reallocation of Spectrum for Broadband.**

The Commission has undisputed authority to reallocate spectrum for broadband purposes. While some of the Commission’s particular proposals may require legislation or modifications to existing rules, Title III of the Act broadly authorizes the Commission to allocate spectrum and assign bands of frequencies, grant wireless licenses, and auction spectrum. *See, e.g.*, 47 U.S.C. §§ 303, 307, 309. Nothing in Title III requires reclassification of broadband Internet access to ensure that the Commission can utilize its Title III authority in pursuit of broadband policies. And indeed, without expressing any purported need for reclassification, President Obama just directed NTIA to work with the Commission “to make available a total of 500 MHz of Federal and nonfederal spectrum over the next 10 years, suitable for both mobile and fixed wireless broadband use.”<sup>37</sup>

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<sup>35</sup> *Broadband Plan* at xi; 9.

<sup>36</sup> *See* Broadband.gov, <http://www.broadband.gov/plan/broadband-action-agenda.html>.

<sup>37</sup> *Presidential Memorandum: Unleashing the Wireless Broadband Revolution*, § 1(a) (June 28, 2010), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution>.

## **B. Universal Service.**

The Commission also has the authority it needs to transition the universal service program from subsidizing legacy telecommunications services to supporting tomorrow's broadband infrastructure and services in unserved high-cost areas, and nothing in the *Comcast* decision impedes that transition. That is so for two independent reasons. *First*, as summarized in the NOI itself (*see* NOI ¶ 32), section 254—viewed in light of the principles of section 1 (47 U.S.C. § 151) and section 706(b) of the 1996 Act (47 U.S.C. § 1302(b))—gives the Commission direct authority to promote broadband with universal service support. *Second*, section 706(b) contains additional, independent authority that empowers the Commission to adopt a broadband universal service funding mechanism.

### **1. Section 254(b).**

Section 254(b) directs the Commission to use federal universal service programs to promote access to information services. 47 U.S.C. § 254(b). It provides that “the Commission shall base policies for the preservation and advancement of universal service on” six principles, two of which concern information services. Specifically, section 254(b)(2) states that “[a]ccess to advanced telecommunications *and information services* should be provided in all regions of the Nation.” *Id.* § 254(b)(2) (emphasis added). Section 254(b)(3) provides that “[c]onsumers in all regions of the Nation, . . . should have access to telecommunications *and information services*, including interexchange services and *advanced telecommunications and information services*, that are reasonably comparable to those services provided in urban areas . . . .” *Id.* § 254(b)(3) (emphasis added).<sup>38</sup>

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<sup>38</sup> Section 254(b) provides that universal service policies “shall” be based on those principles. 47 U.S.C. § 254(b). Citing this statutory text, the Tenth Circuit has held that the principles are not merely aspirational: “This language indicates a mandatory duty on the FCC,” requiring the Commission to “work to achieve each [principle] unless there is a direct conflict

As the NOI notes (at ¶ 32), there is some tension between these principles and section 254(c)(1), which provides that “[u]niversal service is an evolving level of telecommunications services[.]” 47 U.S.C. § 254(c)(1). The same is true of section 254(e), which states that “only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support.” *Id.* § 254(e). *See* NOI ¶ 33. But these sections should not be read to bar the Commission from using universal service funds to support broadband. Section 254(c) itself rejects a static focus on legacy technologies. It refers instead to an “*evolving* level of telecommunications services that the Commission shall establish periodically under this section.” 47 U.S.C. § 254(c)(1) (emphasis added). Section 254(c) also expressly authorizes the Commission to “modif[y] . . . the definition of the *services* that are supported by Federal universal service support mechanisms.” *Id.* § 254(c)(2) (emphasis added).<sup>39</sup>

This interpretation comports with the Fifth Circuit’s decision in *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999). There, the court held that the language of section 254, combined with the Commission’s ancillary authority, “permit[ted] the FCC to expand the

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between it” and another principle or statutory obligation. *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199-1200 (10th Cir. 2001).

<sup>39</sup> This direction to “modif[y] . . . the definition” of universal service refers not to the “telecommunications services” that are to be supported—as in section 254(c)(1)—but instead to the “services” that are to be supported. As the Commission explained in connection with section 254(h), which sets out the framework for the schools and libraries program, “the varying use of the terms ‘telecommunications services’ and ‘services’ . . . suggests that the terms were used consciously to signify different meanings.” Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 439 (1997). Just as the Commission concluded that the use of the broader term “services” in section 254(h)(1)(B) authorized the Commission to support *non*-telecommunications services for schools and libraries even though section 254(h) itself is entitled “*Telecommunications Services for Certain Providers*,” *see id.* (emphasis added), so too does Congress’s use of that same broad term in section 254(c)(2) authorize the Commission to “modif[y] . . . the definition” of universal service to include *non*-telecommunications services, even though section 254(c)(1) refers to “telecommunications services.”

reach of universal [service] support to non-telecommunications carriers,” notwithstanding the textual limitations in the statute. *Id.* at 443-44. The court further noted that “Congress intended to allow the FCC broad authority to implement” section 254. *Id.* at 444.

Like many portions of the 1996 Act, section 254, with its apparently competing directives, is not “a model of clarity.” *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). But this compels the Commission to give the statute the most rational meaning, consistent with the intentions and policy choices expressed by Congress. And a reading of the statute that single-mindedly focuses on the “telecommunications service” language in section 254(c)(1) and the “telecommunications carrier” language in section 254(e) over the other statutory evidence would improperly elevate those portions of the statute and negate others in violation of congressional intent.

In particular, section 1 of the Communications Act and section 706 of the Telecommunications Act of 1996 both manifest congressional support for broadband funding, and that intent should inform the Commission’s interpretation of section 254.<sup>40</sup> First, the Commission’s core statutory mission—as expressed in the first sentence of the Communications Act—is “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” 47 U.S.C. § 151. In today’s world, a universal service funding plan that does not support the broadband Internet access services that most consumers use would have no chance of meeting this objective. Thus, section 1 supports reading section 254 broadly to permit the Commission to use universal service programs to promote broadband service.

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<sup>40</sup> *Comcast*, 600 F.3d 642 at 654 (“statements of congressional policy can help delineate the contours of statutory authority”).

Similarly, section 706(a) of the Telecommunications Act of 1996 provides that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” 47 U.S.C. § 1302(a). Section 706(b) further states that if the Commission finds that advanced telecommunications capability is not being deployed to all Americans, it “shall take immediate action to accelerate deployment of such capability.” *Id.* § 1302(b). Given the Commission’s findings regarding the obstacles to deployment of broadband in rural and high-cost areas, this provision clearly supports a broad interpretation of the FCC’s authority under section 254.

## **2. Section 706(b).**

Quite apart from section 254, the FCC also may rely on section 706(b) as a *direct* source of authority for adoption of a broadband support mechanism. *Cf.* NOI ¶ 37. The *Comcast* court rejected the Commission’s reliance on section 706 to enforce net neutrality requirements on the ground that the Commission had ruled in the 1998 *Advanced Services Order* (13 FCC Rcd 24,012) “that section 706 ‘does not constitute an independent grant of authority.’” *Comcast*, 600 F.3d at 658. In the order underlying the *Comcast* decision, however, and in the *Advanced Services Order*, the FCC had relied solely on section 706(a).<sup>41</sup> But the Commission has never addressed the limits of section 706(b), and that provision is precisely suited to authorize FCC support for broadband universal service.

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<sup>41</sup> See Memorandum Opinion and Order, *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028, 13038, ¶ 18 (2008); *Advanced Services Order*, 13 FCC Rcd at 24,044-45 (“[W]e agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods. Rather, we conclude that section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services.”).

Section 706(b) directs the Commission, if and when it concludes that “advanced telecommunications capability” is not “being deployed to all Americans in a reasonable and timely fashion,” to “*take immediate action* to accelerate deployment of such capability by *removing barriers to infrastructure investment* and by promoting competition in the telecommunications market.” 47 U.S.C. § 1302(b) (emphasis added). Section 706(d) defines “advanced telecommunications capability” as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” *Id.* § 1302(d)(1). Section 706(b) thus provides a clear, discrete grant of authority for the Commission to address “barriers to infrastructure investment” in order to “accelerate [broadband] deployment.” Most, if not all, of the Commission’s USF-related initiatives could be described as “action to accelerate deployment of such capability” by “removing barriers to infrastructure investment.” Funding providers in unserved areas would certainly fit this bill.<sup>42</sup>

The direct grant of authority in section 706(b) is fully consistent with the goals that Congress articulated in section 254. As section 254 reveals, Congress expected universal service support to fund “advanced telecommunications and information services” in all regions of the country, and Congress enacted section 706(b) with that goal in mind. *See* 47 U.S.C. § 254(b)(2). Of course, as the Commission noted in the *Advanced Services Order*, it would be inappropriate

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<sup>42</sup> Lifeline and Linkup support should also qualify as mechanisms that remove barriers to infrastructure investment, since those programs would ensure that more residents in a given area ultimately subscribe to broadband Internet access (in industry terms, a higher “take rate”), which is a critical factor that providers consider in assessing whether broadband investment in an area can be justified by its projected returns.

As the NOI recognizes (at ¶ 37), section 706(b) authorizes action only insofar as the Commission has made a negative determination as to the “reasonable and timely deployment” of broadband. Thus, universal service programs based exclusively on section 706(b) authority would have to be targeted to unserved areas of the country subject to such a determination, which is the appropriate approach in all events.

to use the grant of authority in section 706 to *evade* explicit congressional policy choices embodied in other sections of the Act. For example, it would be untenable to view that provision as a basis for imposing regulatory *obligations* on broadband providers, given that section 706(b) specifically directs the Commission to *remove* barriers to infrastructure investment and expresses an explicit preference for *deregulation*.<sup>43</sup> The affirmative grant of authority in section 706(b) must be read consistently with the text of that provision and the rest of the Act. But certainly nothing in section 254 could be construed as an affirmative congressional policy choice *against* funding broadband.

In all events, Congress is already moving to give the Commission even more express authority to fund broadband services, regardless of their classification.<sup>44</sup> It would be perverse for the Commission to upend the legal framework for Internet policy in the name of funding broadband when (1) the Commission already has existing authority to do so, *and* (2) Congress is (and has been since before the *Comcast* decision) working on legislation to reinforce that authority. If the Commission is uncertain about its authority under *existing law* (which it need not be), the answer is to work with Congress to produce a clear answer.

### **III. RECLASSIFICATION IS LIKEWISE UNNECESSARY TO ADDRESS TRANSPARENCY, DISABILITIES ACCESS, PRIVACY, AND CYBERSECURITY.**

The Commission also suggests that reclassification is necessary to address concerns about the transparency of broadband Internet access services, as well as broadband disabilities

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<sup>43</sup> 47 U.S.C. § 1302(b) (mandating that the Commission to “determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion” and, directing that, “[i]f the Commission’s determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”).

<sup>44</sup> *See, e.g.*, Twenty-first Century Communications and Video Accessibility Act of 2009, H.R. 3101, 111th Cong. (2009); Equal Access to 21st Century Communications Act, S. 3304, 111th Cong. (2010).

access, privacy, and cybersecurity. Each of these goals is undeniably important, but none presents a plausible rationale for reclassification.

**A. Transparency.**

The NOI expresses concern about the Commission's ability to police Internet service providers' "failure to disclose practices to consumers." NOI ¶ 50. No FCC regulation is needed to address this issue, but even if such regulation were needed, section 257 already authorizes the Commission to adopt it.

AT&T has consistently supported transparent, consumer-oriented disclosure as a fundamental requirement for full consumer participation in the communications marketplace. But there is no pressing need for the Commission to adopt rules to *enforce* such transparency because the marketplace is already producing increased and enhanced disclosure. Providers such as AT&T offer broadband customers extensive, detailed, and accessible disclosures concerning the terms and conditions of service and have adopted various tools to make usage limitations and other details of the service transparent to consumers.<sup>45</sup> These include tools that allow customers to compare the key details of Internet service plan options;<sup>46</sup> information on maximum speed capabilities and minimum speed floors for each tier of wireline broadband service and similar

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<sup>45</sup> See, e.g., AT&T U-verse Terms of Service, <http://www.att.com/u-verse/att-terms-of-service.jsp#internet>; AT&T Mobility, Plan Terms – Wireless from AT&T, <http://www.wireless.att.com/cell-phone-service/legal/plan-terms.jsp#data>; AT&T, Answer Center – How can I estimate my data usage?, <http://www.wireless.att.com/answer-center/main.jsp?t=solutionTab&solutionId=KB109365>; Saul Hansell, *A New List of How Much AT&T Knows About You*, NY Times Bits Blog, June 11, 2009, <http://bits.blogs.nytimes.com/2009/06/11/a-new-list-of-how-much-attknows-about-you/> (explaining AT&T's revised, explicit industry-leading privacy policy). See also Comments of AT&T Inc., *Consumer Information and Disclosure; Truth-in-Billing and Billing Format; IP-Enabled Services*, CG Docket No. 09-158, CC Docket No. 98-170, & WC Docket No. 04-36, at 21-22 (filed Oct. 13, 2009) (“*AT&T TIB NOI Comments*”).

<sup>46</sup> In addition to the service-comparison tools offered by providers, third parties such as Consumer Reports and various other entities now offer services and information designed to help consumers compare and understand their broadband service options. See *AT&T TIB NOI Comments* at 26-27.

information about expected upload and download speeds for wireless broadband customers; and maps of wireless service coverage, among other things. *See AT&T TIB NOI Comments* at 18-20; *AT&T Net Neutrality Comments* at 189.

Third-party tools such as Cisco’s Network Magic and Speed Meter Pro, as well as the M-Lab platform, further empower consumers by allowing them to monitor their services and their providers’ network management practices. Network Magic and Speed Meter Pro provide reports about Internet speeds so users can effectively monitor and address any service or performance issues they may have.<sup>47</sup> Similarly, M-Lab states that it enables a user to test his connection speed and identify issues slowing his connection, determine whether his provider is blocking or throttling specific applications or traffic, and test whether his broadband provider is differentiating applications or services, among other functions.<sup>48</sup> These tools create an additional and powerful incentive for transparent disclosures by providers.

Furthermore, there already is government oversight over transparency in the Internet ecosystem. The FTC has and regularly exercises its enforcement authority with respect to transparency and consumer disclosures relating to Internet services.<sup>49</sup> And the FTC has

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<sup>47</sup> *See* Cisco, Network Magic Pro Features, <http://www.purenetworks.com/product/pro.php>; Cisco, Speed Meter Pro, <http://www.purenetworks.com/product/speedmeterpro/>.

<sup>48</sup> *See* M-Lab, Use tools running on M-Lab to test your Internet connection, <http://www.measurementlab.net/measurement-lab-tools>.

<sup>49</sup> *See, e.g.*, Letter from Lydia P. Parnes, Director, Bureau of Consumer Protection, FTC to John Villafranca, Esq. and Lewis Rose, Esq., Kelley Drye Collier Shannon, Counsel for Sprint Nextel Corporation, Aug. 8, 2007, [http://www.ftc.gov/os/closings/staff/070808\\_sprintnextelclosingltr.pdf](http://www.ftc.gov/os/closings/staff/070808_sprintnextelclosingltr.pdf) (closing an investigation of Sprint Nextel’s claims regarding “unlimited web usage” for its Blackberry smartphones); FTC, Press Release, *Sears Settles FTC Charges Regarding Tracking Software*, June 4, 2009, <http://www.ftc.gov/opa/2009/06/sears.shtm> (settling charges that “Sears failed to disclose adequately that software collected consumers’ sensitive personal information”) (“*FTC Sears Settlement*”); FTC, *2007 FTC Workshop “Ehavioral Advertising: Tracking, Targeting, and Technology”*, <http://www.ftc.gov/bcp/workshops/ehavioral/index.shtml> (announcing a town hall meeting to “address consumer

specifically expressed its intention to monitor such disclosures with respect to broadband services in particular, which makes Title II reclassification in pursuit of that same objective not only unnecessary but counterproductive, since it could strip the FTC of any such authority. *See* Section I, *supra*.

If, notwithstanding all of these vehicles for ensuring transparency, the Commission believes that more should be done, it has the necessary tools already at its disposal. As AT&T explained in the *Truth-in-Billing* proceeding, the Commission could bring all stakeholders together to work out best practices and a code of conduct, similar to the CTIA Code of Conduct. *AT&T TIB NOI Comments* at 35-36. Such an approach would allow for a collaborative process akin to the one being employed by the TAG—one that appropriately takes into account all of the various considerations at issue.

Finally, if the Commission deems it necessary to go even farther and adopt transparency rules, it does not need to reclassify broadband services to accomplish that goal. Section 257 already gives the Commission all the authority it needs for this purpose. Section 257(c) requires the Commission to report to Congress every three years concerning market-entry barriers for entrepreneurs and other small businesses in the provision and ownership of, among other things, “information services.” 47 U.S.C. § 257(c). Although the *Comcast* court rejected the Commission’s reliance on section 257 to support substantive non-discrimination obligations, it nevertheless made clear that “certain assertions of Commission authority could be ‘reasonably ancillary’ to the Commission’s statutory responsibility to issue a report to Congress [under section 257]. For example, the Commission might impose *disclosure requirements on regulated*

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protection issues raised by the practice of tracking consumers’ activities online to target advertising”) (“*FTC ‘Behavioral Advertising’ Workshop Announcement*”).

*entities in order to gather data needed for such a report.” Comcast*, 600 F.3d at 659 (emphasis added).

The court’s observation underscores the availability of section 257 as a basis for the Commission to impose transparency requirements, to the extent they are needed. The Commission is required to report on, among other things, any statutory measures it believes Congress should adopt in order to promote small business entry into the information services marketplace. *See* 47 U.S.C. § 257(c)(2). Under the *Comcast* court’s rationale, this reporting mandate would authorize the agency to require broadband Internet access providers to report their service terms and conditions, so that the Commission can evaluate (1) whether those terms and conditions are hospitable to small business entry and, (2) if they are not, whether to recommend legislation that would address any potential problem. Thus, *Comcast* makes clear that the Commission could require broadband Internet access providers to publicly post transparent, easy-to-understand terms and conditions online, so that the Commission could easily access and assess information concerning conditions for marketplace entry.

## **B. Disabilities Access.**

AT&T agrees that “disabilities should not stand in the way of Americans’ ‘opportunity to benefit from the broadband communications era.’” NOI ¶ 40 (citations omitted). The Internet offers consumers with disabilities unprecedented access to remote educational, employment, entertainment, and shopping options, as well as a host of flexible communications choices. Nevertheless, the disabilities community has a disproportionately low adoption rate.<sup>50</sup> To address this problem, AT&T, together with the broad-based Coalition of Organizations for

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<sup>50</sup> The *Broadband Plan* indicates that only 42 percent of Americans with disabilities use the Internet at home, compared to two-thirds of the population overall. *Broadband Plan* at 23.

Accessible Technology (COAT) and other stakeholders,<sup>51</sup> supports the Twenty-first Century Communications and Video Accessibility Act of 2009, which was recently the subject of congressional hearings.<sup>52</sup>

As that pending legislation demonstrates, however, broadband Internet access reclassification would not meaningfully address disabilities access concerns. Effective disabilities access requires significant changes by *manufacturers* of PCs, video devices, and smartphones, and by *application* providers—not (at least principally) by *broadband Internet access providers*. Internet access itself, and particularly the “Internet connectivity” service the Commission proposes to regulate, is not a primary source of frustration for consumers with disabilities. The frustration arises because much of the equipment used together with Internet access is not accessible by consumers with certain disabilities or because applications offered *over* that service are not disabilities-friendly.

For example, as AT&T explained in response to NBP Public Notice #4, much of the video offered over the Internet, including YouTube and a host of other sites, is provided without closed captioning.<sup>53</sup> Even when video contains closed captioning (for example, when it is a

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<sup>51</sup> COAT is a coalition of over 300 national, regional, state, and community-based disability organizations advocating for legislative and regulatory safeguards that will ensure full access by people with disabilities to evolving high-speed broadband, wireless, and other IP technologies. See COAT, <http://www.coataccess.org/>.

<sup>52</sup> Twenty-first Century Communications and Video Accessibility Act of 2009, H.R. 3101, 111th Cong. (2009); see also Equal Access to 21st Century Communications Act, S. 3304, 111th Cong. (2010).

<sup>53</sup> Comments of AT&T Inc. — NBP Public Notice #4, *International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act; A National Broadband Plan for Our Future; Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket Nos. 09-47, 09-51, & 09-137, at 5-6 (filed Oct. 6, 2009). Given the explosive growth in YouTube video services, this is a significant issue. AT&T’s mobile traffic to YouTube doubled

retransmitted broadcast program), not all video players can decode the video captioning. As Hulu has observed, “[t]he closed-captioning data that’s used for broadcast TV isn’t easily translated for online use.”<sup>54</sup> Furthermore, the HDMI standard used to attach digital televisions to set-top boxes may strip closed captioning information from the signal due to the incompatibility of captioning with the digital rights management features of HDMI.<sup>55</sup> Similarly, consumers with hearing disabilities seeking to use broadband Internet access for over-the-top VoIP calling with TTY capabilities need accessibility support from their VoIP provider, not their underlying broadband provider. Title II reclassification aimed at regulating accessibility by the *broadband Internet access* provider will do nothing to ensure that providers like Skype, Google Voice, CallCentric, VoIP.com, and others make their services more accessible to consumers with hearing disabilities.

In short, the proposed reclassification would do virtually nothing to advance the interests of the disabilities community, since any effective solution will require the more holistic, industry-wide approach that Congress is currently considering in the pending accessibility bills. Indeed, reclassification could actually derail that legislation, which has significant support across the disabilities community. To serve the interests of Americans with disabilities, the Commission should promote legislation that effectively promotes that community’s needs—not complicate the prospects for its passage.

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within six months between fall of 2009 and spring of 2010, and every minute, more than 24 hours of video are being uploaded to the site. Josh Wei, *Video Traffic on Mobile Networks to Surge, AT&T CTO Says*, Communications Daily, July 13, 2010 (discussing remarks of AT&T Chief Technology Officer John Donovan at the MobileBeat 2010 conference).

<sup>54</sup> Hulu, Programming Info, [http://www.hulu.com/support/content\\_faq](http://www.hulu.com/support/content_faq).

<sup>55</sup> See HDMI FAQ, <http://www.hdmi.org/learningcenter/faq.aspx> (discussing difficulty with closed captioning and HDMI, and recommending that consumers “contact the manufacturers directly for the correct way to enable the CC feature within your product”).

### C. Privacy.

The Commission also suggests that reclassification might help it address the important privacy interests of broadband Internet access users. NOI ¶ 39. But here, as with disabilities access, reclassification is not the answer. The privacy issues raised by the Internet implicate the *entire* Internet ecosystem. Application, content, and search engine providers frequently gather and use deeply personal information about the sites that Internet users visit and even the content of emails. Subjecting a purported “Internet connectivity” service to Title II would do nothing to address those larger issues. In fact, it would be affirmatively counterproductive, because it could interfere with the FTC’s comprehensive efforts to ensure privacy throughout the Internet ecosystem.

There is no question that the privacy interests of Internet users are paramount. Consumers increasingly rely on the Internet for education, business, banking, entertainment, shopping, communication, and even medical care. AT&T has made its commitment to protecting the privacy of its customers clear by adopting a comprehensive privacy policy that applies across all of its services, including broadband Internet access.<sup>56</sup> But most companies’ privacy policies are hard to find and even harder to understand. Privacy practices are inconsistent across providers, sites, and applications, including those offering very similar services. And privacy *obligations* vary based on regulatory and legal distinctions that are beyond the comprehension of most consumers.

Title II reclassification would change none of this. By reaching out for jurisdiction over broadband Internet “connectivity,” the Commission could hope to protect only the information that is maintained by a consumer’s broadband Internet service provider in connection with the

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<sup>56</sup> See AT&T Privacy Policy, <http://www.att.com/gen/privacy-policy?pid=2506>.

consumer's use of that particular service. This may not even be necessary, since relevant federal and state wiretapping laws may provide consumers with considerable protection already. But more important, the FCC's rules would do nothing to address the collection of that same consumer's information by providers of the broadband *applications* that the consumer accesses over the same broadband connection. For example, when a consumer uses AT&T's U-verse Internet access service to access Google's search engine and then visits a shopping website, the Commission's proposed regime would subject AT&T to privacy obligations, but would presumably leave the consumer's even *more sensitive* information unprotected in the hands of Google and the operators of commerce sites.

In contrast, the FTC can protect privacy *throughout* the Internet ecosystem and has been actively overseeing online privacy issues since the FCC first raised these issues (in 2004) and then declined to resolve them.<sup>57</sup> The FTC already has considered the issues of behavioral advertising, ad networks, and the collection of clickstream data, as well as the principles that should guide privacy practices and disclosures online generally.<sup>58</sup> If the FCC does not precipitously impede FTC involvement by deeming broadband Internet access a Title II "common carrier" service that is arguably exempt from the FTC's section 5 jurisdiction, the FTC

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<sup>57</sup> Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4863, 4910, 4915, ¶¶ 71, 77 (2004).

<sup>58</sup> See, e.g., *FTC Sears Settlement*; *FTC 'Behavioral Advertising' Workshop Announcement*. See also FTC, Press Release, *Twitter Settles Charges That It Failed to Protect Consumers' Personal Information; Company Will Establish Independently Audited Information Security Program*, June 24, 2010, <http://www.ftc.gov/opa/2010/06/twitter.shtm> (settling charges that Twitter "deceived consumers and put their privacy at risk by failing to safeguard their personal information"); FTC, Press Release, *Online Privacy and Security Certification Service Settles FTC Charges*, Feb. 25, 2010, <http://www.ftc.gov/opa/2010/02/controlscan.shtm> (settling charges that the online service "misled consumers" about the website privacy certification they provided).

could adopt privacy guidelines that apply in a consistent way to *all* entities in the Internet ecosystem.

Title II reclassification would undermine the effectiveness of this process not only by potentially negating any FTC role, but also by creating regulatory disparities that skew the competitive landscape without any rational policy basis. Indeed, the Commission itself recently recognized that it has been unworkable to have two different sets of rules governing prerecorded advertising calls, and it has initiated a proceeding to conform its rules to the FTC's more comprehensive approach.<sup>59</sup> But even more important, a patchwork approach to regulating online privacy would leave consumers where they are today—uncertain as they navigate the Internet about whether, when, and to what degree their information is protected.

For that reason, the privacy legislation recently proposed by Representative Boucher would give the *FTC*—not the *FCC*—comprehensive authority over online privacy.<sup>60</sup> The Boucher Bill would authorize the FTC to adopt binding rules and apply those rules to all stakeholders in the Internet ecosystem, including broadband providers, regardless of the common-carrier exemption. The *FCC*'s role would be solely an advisory one. In other words, the key pending legislation on privacy recognizes that *FCC* regulation of a limited portion of the Internet ecosystem is not the answer and looks instead to the *FTC* for comprehensive leadership in this area.

At the very least, all of this indicates that Title II reclassification is neither a necessary nor a particularly useful way to address legitimate concerns about online privacy. Nor has anything happened that makes it suddenly imperative for the Commission to step in. Again, the

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<sup>59</sup> Notice of Proposed Rulemaking, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 25 *FCC Rcd* 1501 (2010).

<sup>60</sup> Boucher/Stearns Privacy Bill, Staff Draft (rel. May 4, 2010), [http://www.boucher.house.gov/images/stories/Privacy\\_Draft\\_5-10.pdf](http://www.boucher.house.gov/images/stories/Privacy_Draft_5-10.pdf).

Commission has played essentially no role in online privacy since it first teed up the issue in 2004, and this absence of Commission involvement has not raised any reason for concern. Finally, even if the Commission believes that it *should* play some role in online privacy, in the short term it should defer to the FTC while Congress addresses the appropriate delegation of authority.

#### **D. Cybersecurity.**

Similarly, although cybersecurity is a pressing issue for this nation, it provides no policy basis for Title II reclassification, notwithstanding the NOI's suggestion to the contrary. *See* NOI ¶ 43. Even if Title II could give the Commission some authority over cybersecurity, the FCC has neither the expertise nor the charge to lead cybersecurity oversight for the nation's critical communications infrastructure. Several expert federal agencies and entities—the Department of Homeland Security, the Department of Defense, the National Security Agency, and many others—are already diligently addressing cybersecurity concerns. While the FCC may have some role to play in this area, it would be counterproductive, and possibly even dangerous, for the Commission to get out in front of those other government entities, many of which have access to threat information and other highly classified data that are not available to most policymakers at the Commission.

Congress is, in fact, considering legislation that would further cement the authority of other agencies and federal entities to lead the way in shaping cybersecurity policies. Notably, the Rockefeller-Snowe Cybersecurity Act of 2010 (S. 773) looks to the President, the Department of Commerce, and the National Institute of Standards and Technology to develop cybersecurity standards and collect threat information. The Commission would have an advisory and information-gathering role to play under the proposed regime, but it would not take the lead. Other pending bills similarly assign responsibilities to DHS (S. 3480), NIST (H.R. 4061), or a

new National Office for Cyberspace, advised by a board composed of representatives from agencies such as the DOD and the Office of Management and Budget (S. 921, H.R. 4900).<sup>61</sup>

Finally, and in any event, Title II oversight of broadband “connectivity” service, standing alone, would not be a particularly effective means of improving cybersecurity. Improving the nation’s cybersecurity will likely require holistic efforts by all providers in the Internet ecosystem, by equipment and software manufacturers, and by others that plainly fall outside the Commission’s jurisdiction. Indeed, IBM has reported that *application* vulnerabilities have made up more than half of the disclosed cybersecurity vulnerabilities since 2006.<sup>62</sup> In particular, IBM points to the vulnerability of application plug-ins and document formats, indicating that “[t]hree of the five most prevalent malicious Web site exploits of 2009 were PDFs, one was a Flash exploit, and the other was an ActiveX control that allows a user to view an office document through Microsoft Internet Explorer.”<sup>63</sup> And one of the top ten security threat trends for 2010 identified by software security expert Symantec was the use of “social engineering as the primary attack vector.”<sup>64</sup> As AT&T has previously explained to the Commission:

[T]he network infrastructure is only one facet of the overall operational dynamic of the Internet, which also includes operating systems, applications, devices and human beings. To be effective, cyber security requires the efforts of entities at every layer of the interconnected and interdependent Internet ecosystem, including the individual consumer. Cyber security requires an end-to-end

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<sup>61</sup> In any event, Title II oversight of broadband “connectivity” service, standing alone, would not be a particularly effective means of improving cybersecurity. Improving the nation’s cybersecurity will likely require holistic efforts by all providers in the Internet ecosystem, by equipment and software manufacturers, and by others that plainly fall outside the Commission’s jurisdiction.

<sup>62</sup> IBM Security Solution, *X-Force 2009 Trend and Risk Report: Annual Review of 2009*, at 5 (Feb. 2010), <http://www-935.ibm.com/services/us/iss/xforce/trendreports/>.

<sup>63</sup> *Id.* at 6.

<sup>64</sup> See Kevin Haley, Symantec “Don’t Read This Blog,” November 17, 2009, <http://www.symantec.com/connect/blogs/don-t-read-blog>.

approach that spans from the physical layer and the core IP network up through the application layer and device interface all the way to the users themselves.”<sup>65</sup>

In sum, Title II classification would do little to enhance the government’s efforts to solve the cybersecurity challenge. Further, given the lead role of other government agencies in cybersecurity, and pending legislation to solidify those roles, cybersecurity provides no basis whatsoever for Title II reclassification, even though it is a critical issue for this country.

## **PART TWO: THE WRONG WAY**

If it follows the path discussed above, the Commission can meet its ambitious broadband agenda for America by maintaining the predictable deregulatory environment needed to encourage roughly \$350 billion in new private investment. *See* pp. 1-2, *supra*. Alternatively, it can take a different path by accommodating the Washington-based interest groups—which invest no capital, deploy no networks, and serve no customers—that call for a proliferation of new regulatory burdens under Title II. But the Commission cannot follow both paths at the same time by invoking some elusive “third” way, which would succeed only in sowing more investment-detering uncertainty than any other modern FCC initiative.

Some have suggested that the “third way” would somehow stimulate investment by “eliminating as much of the current [regulatory] uncertainty as possible.”<sup>66</sup> But this view conflates the *Commission’s* uncertainty about its own litigation risks with *investors’* uncertainty about how the Commission will choose to restrict their business plans. If the Commission could lawfully cram the broadband Internet into Title II, that might indeed decrease the *Commission’s* uncertainty regarding its authority to impose new rules, but only at the cost of increasing investment-detering *economic* uncertainty. On the margin, investors will not sink billions of

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<sup>65</sup> Comments of AT&T Inc., *Cyber Security Certification Program*, PS Docket No. 10-03, at 4 (filed July 12, 2010).

<sup>66</sup> *E.g.*, Genachowski “*Third Way*” *Statement* (emphasis omitted).

dollars into already risky business plans that, years hence, regulators might scuttle through unforeseeable new restrictions. In the words of AT&T CEO Randall Stephenson, the broadband industry reasonably fears that it could be just “a 3-2 vote away from the next guy coming in and saying I disagree with [forbearance], . . . take it away,”<sup>67</sup> and Title II reclassification could force broadband providers “to re-evaluate whether we put shovels in the ground.”<sup>68</sup>

More generally, Title II reclassification would create multiple new dimensions of investment uncertainty by radically expanding the universe of potential regulation. For example:

- The NOI proposes forbearance from all but a handful of Title II provisions. But it is by no means clear that the Commission would succeed in squaring its rationale for forbearance with its rationale for subjecting the broadband industry to Title II regulation in the first place. Just as important, the Commission identifies no credible mechanism for tying itself to the mast and resisting the inevitable calls to “unforbear” from whatever regulations come back into fashion.
- The NOI does not even *propose* to forbear from sections 201 and 202. Those provisions are exceedingly broad in scope, and the Commission has cited them as a legal basis for adopting countless regulations. The NOI does not begin to grapple with that concern by identifying which of those regulations might apply to broadband Internet services and, if so, how. Indeed, the NOI studiously avoids any discussion about whether the “third way” would impose *retail* regulation on the rates and terms of Internet access.

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<sup>67</sup> Niraj Sheth, *AT&T Rethinks U-Verse Spending After FCC Move* (June 2010), <http://online.wsj.com/article/SB1000142405274870400980457530874013715962>.

<sup>68</sup> *Id.* See also SBC, Press Release, *Ameritech Requests ICC Rehearing to Expand Broadband Access in Illinois*, April 13, 2001, <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=3022&mapcode=corporate> (describing SBC’s decision to halt deployment of DSL-capable remote terminals in Illinois after the state commission required SBC to “unbundle” DSL line cards in those terminals: “In a filing today, Ameritech asked the Illinois Commerce Commission (ICC) to reconsider recent decisions that could deprive more than one million Illinois consumers and businesses of a choice in high-speed Internet access. . . . Complying with the ICC’s decisions could cost SBC more than one-half billion dollars, making the DSL product uneconomical for both Ameritech and its competitors. . . . As a result of the decisions, the company ceased all broadband deployment through remote terminals in Illinois. More than one million Illinois consumers and businesses could have had DSL access through the remote terminals. The company plans to proceed with Project Pronto in other states and will continue to offer DSL Internet service through its central offices in Illinois. ‘This is a complex issue,’ said [Ameritech’s Jim] Shelley. ‘We know a lot more now than we did before the ICC’s order, specifically the costs of the new regulations. DSL is extremely important to our customers, and it’s important that all parties involved take the time to understand the issues.’”).

- Sections 201 and 202 impose *self-executing* prohibitions on whatever conduct some future Commission might deem “unjust” or “unreasonable” or “unreasonably discriminatory,” no matter what vague assurances the Commission might give today about its light-touch regulatory inclinations. The threat of such unpredictable liability would mark a destabilizing break from the regulatory status quo, where the Commission must spell out what its rules mean before enforcing them.
- As discussed below, the statutory logic of reclassification would extend not only to the providers that the Commission means to regulate, but also to an indeterminate range of other Internet-based providers as well. It would take many years to identify the precise scope of the collateral damage.

AT&T is hardly alone in raising these concerns. In a letter to OMB Director Peter Orszag, the Business Roundtable and the Business Council included Title II reclassification among “examples of pending legislation and regulations that have a dampening effect on economic growth and job creation” and “government initiatives that will cause slower rather than faster growth.”<sup>69</sup> In particular:

The move to classify broadband Internet access as a common carrier service could have broad implications for the regulatory treatment of all online services and applications that are delivered over the Internet, and subject these services to the same common carrier regulation that [the FCC] proposes to impose on broadband access[.] While the FCC chairman has indicated he does not intend to impose pricing or other burdensome regulations on networks or online services, it is unclear whether the 1934 law permits selective or credible forbearance from its requirements. *Uncertainty could reign for years as the substance, scope and legal basis for this proposed regulatory framework is made clear and before its validity or invalidity is confirmed by the courts.*<sup>70</sup>

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<sup>69</sup> Letter from Ivan G. Seidenberg, Chairman, Business Roundtable, and James W. Owens, Chairman, Business Council, to Peter Orszag, Director, Office of Management and Budget, at 1 (June 21, 2010), <http://www.businessroundtable.org/sites/default/files/2010.06.21%20Letter%20to%20OMB%20Director%20Orszag%20from%20BRT%20and%20BC%20with%20Attachments.pdf> (“*Orszag Letter*”) (emphasis added). The membership of the Business Roundtable includes many of the largest companies from across the U.S. economy, including Alcoa, Allstate, American Express, Bank of America, Boeing, Caterpillar, Chrysler, Dow Chemical, Eli Lilly, FedEx, General Mills, Hasbro, Johnson & Johnson, Macy’s, Office Depot, PepsiCo, State Farm, Texas Instruments, Xerox, and many others. Business Roundtable, About Us, Members, <http://www.businessroundtable.org/about/members>.

<sup>70</sup> *Orszag Letter* at 45 (emphasis added and paragraph break omitted).

Analysts who follow this industry have stressed the same concern. Collins Stewart, a leading independent financial advisory group, warns that “[r]eclassification could act as a Trojan horse for greater regulation . . . . [T]he FCC’s plan would . . . provide the FCC nearly unfettered authority to regulate this segment of the economy, should it decide it is necessary to alter its planned forbearance practice on all other aspects of broadband communications.”<sup>71</sup> UBS analyst John Hodulik expresses concern that Title II regulation could involve “regulators . . . in every facet of providing Internet [service] over time[, including] . . . [h]ow wholesale and [retail] prices are set, how networks are interconnected and requirements that they lease out portions of their network[.]”<sup>72</sup> Hodulik emphasizes that this regulatory overhang could cause “cable companies and carriers . . . [to] accelerate their plans to wind down investment in their broadband networks.”<sup>73</sup> Bank of America/Merrill Lynch likewise warns that “jobs and investment . . . . could be threatened by [the FCC’s Title II] move.”<sup>74</sup> Medley Global Advisors counsels that “the FCC’s attempt to reclassify broadband will create a prolonged period of regulatory uncertainty and invite protracted litigation[.]”<sup>75</sup>

Many other industry analysts agree, including Craig Moffett of Bernstein Research, Jonathan Chaplin of Credit Suisse, Mike McCormack of J.P. Morgan, Anna-Maria Kovacs of Regulatory Source Associates, Stanford tech analyst Larry Downes, PC Magazine commentator and MarketWatch analyst John Dvorak, The Washington Post, and former FCC Chairman

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<sup>71</sup> Collins Stewart, “FCC Moving Closer to Some Title II Regulations?” (May 7, 2010).

<sup>72</sup> Amy Schatz, *New U.S. Push to Regulate Internet Access*, Wall Street Journal, May 5, 2010, <http://online.wsj.com/article/SB10001424052748703961104575226583645448758.html>.

<sup>73</sup> *Id.*

<sup>74</sup> Bank of America/Merrill Lynch, “*Internet regulation back on the front burner*” (May 5, 2010).

<sup>75</sup> Medley Global Advisors LLC, “FCC Poised to Reset Broadband Regulation” (May 5, 2010).

Michael Powell, who is currently a Senior Advisor to Providence Equity Partners. *See* pp. 2-4, *supra*. As they explain, Title II reclassification would produce “a prolonged period of uncertainty and instability,”<sup>76</sup> have a “profoundly negative impact on capital investment,”<sup>77</sup> and “damage innovation in what has been a vibrant and rapidly evolving marketplace.”<sup>78</sup>

The drumbeat of concern from analysts and investors has continued right up to the date of this filing. An investment analysis published earlier this week predicts that the “ongoing uncertainty” from the reclassification debate and the prospect of “single-digit returns” that would result if “broadband business [is] subject to monopoly-era phone rules” has already caused the industry to “reconsider[] billions of dollars of new investment to upgrade infrastructure.”<sup>79</sup> And just yesterday, an NYU panel of one investor and two analysts warned that the FCC’s reclassification proposal could undermine investment incentives for an industry that “ha[s] to know with some certainty that they can price appropriately, be able to make a return.”<sup>80</sup> The panelists—Citigroup Managing Director Mike Rollins, Height Analytics Managing Director Tom Seitz, and Wise Harbor founder Keith Mallinson—observed that, in making investment decisions, the industry must now weigh the risk that “a group could come into the commission at a future date and convince the agency that prices charged are not fair and reasonable” or

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<sup>76</sup> *See* Powell, *My Take on the Appeals Court Decision*.

<sup>77</sup> Moffett, *Quick Take*.

<sup>78</sup> Editorial, *Internet oversight is needed, but not in the form of FCC regulation*, Wash. Post, Apr. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041604610.html>.

<sup>79</sup> Eugene Bukoveczky, *Broadband Providers Face More Regulation* (July 12, 2010), <http://stocks.investopedia.com/stock-analysis/2010/Broadband-Providers-Face-More-Regulation-VZTGOOGMCSA0712.aspx>.

<sup>80</sup> Buskirk, *Regulatory Uncertainty*; *see also* Curran, *Panelists*.

otherwise “limit the number of Title II provisions from which it will forbear[.]”<sup>81</sup> As they explained, [i]nvestors hate uncertainty and clearly what is being created right now is uncertainty in the marketplace[.]”<sup>82</sup> That, they concluded, creates a real “risk of stifling” investment and innovation.<sup>83</sup>

The FCC cannot responsibly ignore these concerns. As Kovacs has warned: “Capital ultimately comes from individual investors who, *now more than ever*, want assurance that they will get their money back in full with an appropriate reward for the risks they take. Without that assurance, they exercise their right to walk away from unappealing propositions.”<sup>84</sup> In particular, they will not “provide hundreds of billions of new capital to upgrade the nation’s broadband network in exchange for grossly-inadequate cash flows[.]”<sup>85</sup> Until the Commission reassures them that they need not fear regulatory impediments to their business plans, “investors will continue to shy away from network infrastructure investments.”<sup>86</sup> In short, as these analysts agree, the Commission’s proposed path is precisely the wrong way to pursue the Administration’s ambitious, \$350 billion broadband deployment goals.

#### **I. THE NOI MISCONCEIVES HOW THE INTERNET WORKS.**

In addition to being legally unsupportable (*see* Part Two, Sections II-V), the Commission’s reclassification proposal is fundamentally incompatible with how the Internet actually operates, how providers offer end users access to the Internet, and how consumers and

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<sup>81</sup> Buskirk, *Regulatory Uncertainty*.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Anna-Maria Kovacs, *FCC: Broadband Update*, Regulatory Source Associates, LLC, at 4 (Dec. 17, 2009) (emphasis added).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

businesses use the Internet. Judging from the NOI, the Commission appears to believe that legacy regulatory categories designed for the pre-Internet world somehow enable it to extend legacy common-carrier regulation only to one discrete corner of the Internet ecosystem—“facilities-based providers” of last-mile transmission—without threatening much of the rest of that ecosystem with Title II regulation as well. The Commission apparently hopes to accomplish this feat by contriving a new term—“broadband Internet connectivity service”—to describe a retail “service” that does not exist, which the NOI inexplicably equates with a real NECA-based offering that is primarily designed for *wholesale* uses and *does not even provide Internet connectivity*. Meanwhile, top Commission officials seek to reassure the public that the proposed regulatory scheme would address only the “on-ramps” to the Internet rather than “the Internet itself,” even though the retail service at issue—what consumers purchase from their ISPs—necessarily encompasses end-to-end, IP-based communication through the Internet backbone to all points on the global Internet.

All of these pronouncements rest on basic misconceptions about how the Internet functions and, in particular, how the Internet’s constituent IP networks interact to enable an end user “to communicate with others who have Internet connections, send and receive content, and run applications online.” NOI ¶ 1 n.1 (proposed definition of “Internet connectivity service”). Accordingly, before addressing the legal and policy defects in the Commission’s “third way” proposal, we begin with an overview of the technological underpinnings of “the Internet.”

**A. “The Internet’s” Constituent IP Networks.**

The “Internet” is not a single network, much less a public utility. It is instead a loose, global confederation of thousands upon thousands of networks, most of them built and operated with private risk capital, with no guaranteed returns. Without government compulsion or intervention, each of these constituent networks has voluntarily adopted a common protocol and

addressing scheme—the Internet Protocol (“IP”) at Layer 3<sup>87</sup>—that enables its customers to communicate with customers connected to other networks in the U.S. and around the world for purposes of exchanging higher-layer applications and content.<sup>88</sup> “The Internet,” as that term is commonly used, is a *conceptual aggregation* of these mostly private IP-based networks spread across the world.<sup>89</sup>

The intertwined private networks of the Internet are all part of an evolving global communications ecosystem. A given network’s role in that ecosystem is complex and dynamic, and the network may play several roles at once. Nonetheless, popular discussions of the Internet tend to describe its constituent networks by reference to three overlapping categories, all of which are implicated in the proposed Title II reclassification:

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<sup>87</sup> “To provide structure to the design of network protocols, network designers organize protocols—and the network hardware and software that implement the protocols—in **layers**.” James F. Kurose & Keith W. Ross, *Computer Networking: A Top-Down Approach* 50 (5th ed. 2010). The Internet Protocol occupies “Layer 3”—the “network layer”—of the Internet under the traditional 7-layer “OSI model.” *See id.* at 50-54. It thus rides on top of the “physical” and “data-link” technologies at Layers 1 and 2, respectively, and beneath Layer 4 (“transport”) protocols such as TCP and UDP. *See id.* For a general overview of the Open Systems Interconnection (OSI) model, see [http://en.wikipedia.org/wiki/OSI\\_model](http://en.wikipedia.org/wiki/OSI_model).

<sup>88</sup> *See* Resolution of the Federal Networking Council, Oct. 24, 1995 (quoted in Barry M. Leiner *et al.*, *A Brief History of the Internet*, ISOC, <http://www.isoc.org/internet/history/brief.shtml>) (“‘Internet’ refers to the global information system that—(i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.”).

<sup>89</sup> Precisely because of the Internet’s global nature, some members of the Administration have expressed concern that this Commission’s efforts to regulate broadband Internet access service could lead foreign governments to begin imposing their own onerous new regulations on the Internet as well. *See* John Eggerton, *FCC’s Net Neutrality Proceeding Means More Work for State Department*, Broadcasting and Cable (March 17, 2010), [http://www.broadcastingcable.com/article/450391-FCC\\_s\\_Net\\_Neutrality\\_Proceeding\\_Means\\_More\\_Work\\_For\\_State\\_Department.php](http://www.broadcastingcable.com/article/450391-FCC_s_Net_Neutrality_Proceeding_Means_More_Work_For_State_Department.php) (discussing speech by Ambassador Philip Verveer, Assistant Secretary of State and U.S. Coordinator for International Communications and Information Policy).

- *Backbone* networks, including the current so-called “Tier 1” networks (such as, in the United States, AT&T, Verizon, Sprint, Level 3, Qwest, Global Crossing, SAVVIS, and Cogent)<sup>90</sup> and hundreds of backbone networks of smaller size and reach, known as “Tier 2” and “Tier 3” networks;
- *Access/aggregation* networks, such as Comcast, Time Warner, Cox, Cablevision, AT&T, Verizon, Qwest, Sprint-Nextel, T-Mobile, Clearwire, HughesNet, WildBlue, EarthLink, and many others; and
- *Edge/overlay* networks, ranging from the very small (*e.g.*, a home Wi-Fi network) to the very large (Google, Akamai, Limelight, eBay, Amazon.com, and others).

We discuss these various networks in some detail below, but three points warrant emphasis from the beginning. *First*, the distinctions among these categories are increasingly artificial, because networks in each category increasingly perform tasks that are traditionally associated with networks in the other categories. For example, some of the largest edge networks, known as “content-delivery” (or “overlay”) networks, span the globe with dedicated fiber-optic transmission capacity, perform packet-distribution functions similar to those of backbone networks, and use much the same equipment and architecture as backbone networks. *Second*, “Internet connectivity,” properly understood, requires the full use of all three types of networks throughout the global Internet, and an end user certainly could not obtain such connectivity by purchasing a bare last-mile transmission service over an access network. *Third*, the statutory definitions of “telecommunications service” and “information service” are indifferent to the traditional classification of IP networks into these three categories, just as those definitions are indifferent to whether a traditional telecommunications carrier offers purely “local” or purely “long distance” transmission services. As a result, if the Commission tried to

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<sup>90</sup> Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, 22 FCC Rcd 5662, 5730 ¶ 127 (2007) (“*AT&T-BellSouth Merger Order*”); *see also* Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18356 ¶ 123 (2005) (“*SBC-AT&T Merger Order*”).

reconceptualize those statutory definitions to sweep broadband Internet access providers within the scope of Title II, the logic of that reclassification could easily extend Title II common-carrier regulation to operators of backbone and edge/overlay networks as well.

***Backbone networks.*** In this context, the term “backbone network” denotes the highest-capacity portion of a network operator’s facilities, typically consisting of very-high-speed routers and fiber-optic links stretching across large geographic areas. That backbone network serves two main functions. First, it connects the various access/aggregation networks deployed to reach end-user customers, which may range from residential households to large enterprise businesses, including Internet content and application providers. Second, each provider’s backbone network interconnects with *other* providers’ backbone networks. The conceptual accumulation of all network operators’ individual backbones is sometimes referred to collectively (and somewhat misleadingly) in the singular as “the Internet backbone.” As illustrated below, Internet backbone facilities lie at the heart of the “Internet connectivity service” that the NOI proposes to regulate. That fact belies the Commission’s assurance that it “will not address in this proceeding other Internet facilities or services that currently are lightly regulated or unregulated, such as the Internet backbone[.]” NOI ¶ 10.

The bilateral agreements that enable traffic to travel between two different backbone networks commonly follow one of two general business models: *peering* and *transit*. The choice between these two models turns in part on the relative value that each of the two networks brings to the interconnection arrangement. Under *peering* agreements, each network interconnects for the purpose of terminating packets sent from the other peer to *end points served by the terminating peer’s network*. Such arrangements typically anticipate, among other things, that the traffic exchanged between the two networks will be roughly equal in volume, such that

each backbone network will incur roughly the same costs in handling the traffic originated by the other network. To avoid administrative overhead, parties to these bilateral peering agreements typically forgo the mutual exchange of compensation and peer on a *settlement-free* basis. But in some cases, where the traffic volumes exchanged are unequal, or where one network otherwise falls short of the other's peering criteria, the parties may enter into a *paid peering* arrangement. Under paid peering, the networks still exchange traffic through high-capacity peering links, but the "non-compliant" network makes payments to the other network. Under *transit* arrangements, Network X pays Network Y to arrange delivery of Network X's packets *to any destination on the global Internet* and to accept delivery of packets destined for Network X's customers *from any location on the Internet*.<sup>91</sup> Rather than exchanging traffic through peering links with Network Y, Network X typically buys a robust, enterprise-class Internet access service from Network Y, which supplies the interconnection facilities.

From their inception, these peering and transit relationships have been unregulated because the underlying IP backbone services are unregulated information services. As the Commission explained in the *Stevens Report*, "[t]he technology and market conditions relating to the Internet backbone are unusually fluid and fast-moving, and we are reluctant to impose any regulatory mandate that relies on the persistence of a particular market model or market structure in this area."<sup>92</sup> In this unregulated environment, the market for peering and transit has

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<sup>91</sup> See Michael Kende, *The Digital Handshake: Connecting Internet Backbones*, FCC, Office of Plans and Policy, OPP Working Paper No. 32, at 7 (Sept. 2000), [http://www.fcc.gov/Bureaus/OPP/working\\_papers/oppwp32.pdf](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp32.pdf) ("*Digital Handshake*") ("Transit and peering are differentiated in two main ways. First, in a transit arrangement, one backbone pays another backbone for interconnection, and therefore becomes a wholesale customer of the other backbone. Second, unlike in a peering relationship, with transit, the backbone selling the transit services will route traffic from the transit customer to its peering partners.").

<sup>92</sup> Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11535 ¶ 72 (1998) ("*Stevens Report*"). See also *Digital Handshake* at 1 ("Internet backbone

functioned with great efficiency. A key reason is that the larger backbones “compete for the transit business of smaller backbones in order to increase their revenues,” and this competition has driven transit prices down significantly over the last decade, from approximately \$1200/Mbps in 1998 to less than \$12/Mbps in 2008 and less than \$3/Mbps in 2009.<sup>93</sup> The Commission recently reaffirmed that the Internet backbone market remains competitive and efficient, and that any given backbone has little incentive or ability to engage in anticompetitive conduct.<sup>94</sup> As discussed below, however, the Internet connectivity service described by the Commission would necessarily encompass the Internet backbone, and thus—despite the Commission’s empty assurances to the contrary—reclassifying that service under Title II would subject the backbone to regulation for the first time.

***Access/aggregation networks.*** End users—from residential subscribers to enterprise customers, including content providers—connect to the Internet through the “access” portion of an ISP’s network.<sup>95</sup> Broadband access networks perform two key functions within the Internet ecosystem. First, they provide the last mile (or last several miles) of connectivity to end-user locations through a variety of technologies, ranging from DSL or coaxial cable links to wireless spectrum to OCn-level fiber-optic cables. Some broadband ISPs own these last-mile facilities

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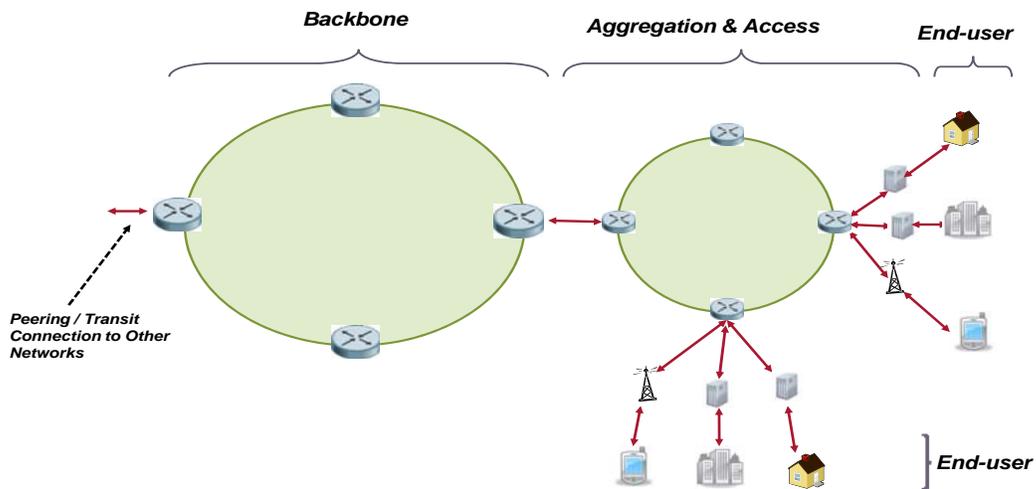
providers are not governed by any industry-specific interconnection regulations, unlike other providers of network services; instead, each backbone provider bases its decisions on whether, how, and where to interconnect by weighing the benefits and costs of each interconnection.”).

<sup>93</sup> See *id.* at 20; DrPeering, Why care about Transit Pricing?, [http://drpeering.net/a/Peering\\_vs\\_Transit\\_\\_\\_The\\_Business\\_Case\\_for\\_Peering.html](http://drpeering.net/a/Peering_vs_Transit___The_Business_Case_for_Peering.html); DrPeering, Transit Prices Race to the Bottom, [http://drpeering.net/a/Ask\\_DrPeering/Entries/2009/4/28\\_Transit\\_Prices\\_Race\\_to\\_the\\_Bottom.html](http://drpeering.net/a/Ask_DrPeering/Entries/2009/4/28_Transit_Prices_Race_to_the_Bottom.html).

<sup>94</sup> *AT&T-BellSouth Merger Order*, 22 FCC Rcd at 5736-38 ¶¶ 144-49; *SBC-AT&T Merger Order*, 20 FCC Rcd at 18354-66 ¶¶ 116-39.

<sup>95</sup> An ISP may also operate a Tier 1 backbone, as described previously, or may operate a Tier 2 or 3 backbone that connects to a Tier 1 backbone. These comments use the terms “broadband Internet access provider” and “broadband ISP” interchangeably.

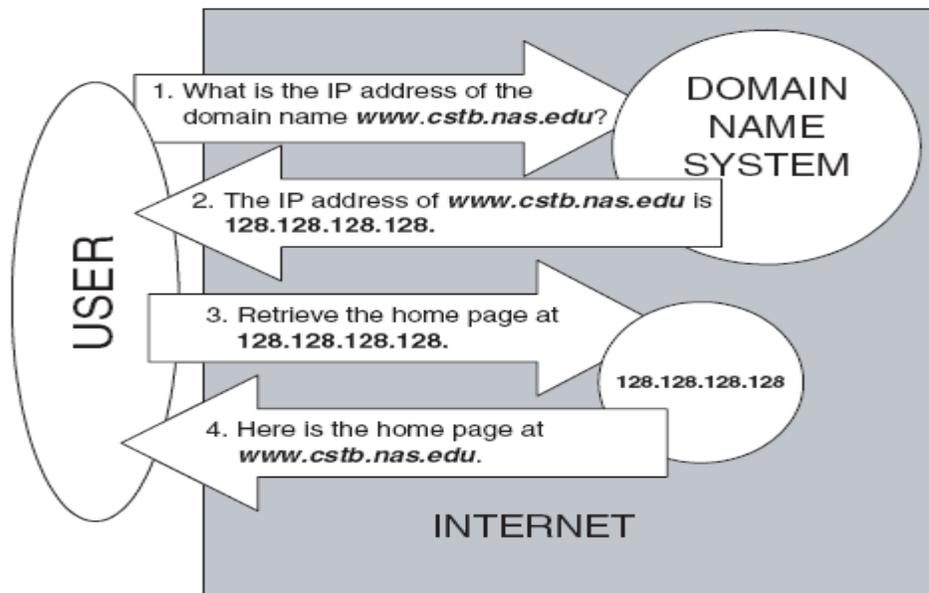
themselves, while others (such as Earthlink and other “independent” ISPs) lease them from third parties, but the functionalities they provide end users over these facilities are the same. Second, at one or more points along the way to the ISP’s backbone network, ISPs *aggregate* the traffic of progressively larger sets of different users and transmit this aggregated traffic over increasingly higher-capacity facilities. This portion of an access network—the bridge between the “last mile” and a backbone network—is sometimes known as an “aggregation” network. The boundaries between access facilities, aggregation facilities, and backbone facilities vary from network to network and are not always easy to identify with precision. But the following diagram provides a general approximation of the three network segments:



**Figure 1: Schematic diagram of ISP network segments**

As discussed below, broadband ISPs provide their customers with a number of information-service functionalities integrated with transmission through access and aggregation networks, including security features and “domain name system” (“DNS”) services. DNS is a highly sophisticated and decentralized mechanism for storing and distributing user- and data-location information throughout the Internet. Because it translates human language (*e.g.*, the

name of a website) into the numerical data (*i.e.*, an IP address) that computers can process, it is indispensable to ordinary users as they navigate the Internet. Moreover, as this simplified diagram (below) from the National Academy of Sciences illustrates, the core “DNS look-up” service provided by all ISPs is part of the “Internet” under any definition of that term.<sup>96</sup>



**Figure 2: Simplified depiction of DNS (from NAS report)**

We address these ISP-offered functionalities, including security features and DNS look-up and related services, in greater detail below.

The Commission has systematically studied Internet access competition for many years. And in report after recent report, the Commission has consistently found the broadband market

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<sup>96</sup> This diagram is taken from National Academy of Sciences, *Signposts in Cyberspace: The Domain Name System and Internet Navigation* 25 (2005), <http://www.nap.edu/catalog/11258.html>. As the NAS report indicates, the summary provided in this diagram “is quite simplified,” and “there are many discrete technical processes that are not articulated here.” *Id.* at 45 n.12 (discussing corresponding verbal description). For a more complete description of those processes, see *id.* at 79-151 and Section II.B.1 below (discussing additional “smart” DNS-related functionalities integrated with broadband Internet access service).

for such services to be competitive.<sup>97</sup> Indeed, the broadband Internet access market is considerably more competitive today than it was in 2002, when the Commission first classified cable modem service as an information service. Competition between *fixed* broadband providers alone is strong, as confirmed by annualized churn rates for such providers of approximately 30-35 percent, along with steadily decreasing prices per unit of capacity sold. *See AT&T Net Neutrality Comments* at 83. And according to the Commission’s most recent broadband report, which reflects market developments as of year-end 2008, roughly 92 percent of U.S. census tracts have *at least* two fixed terrestrial broadband services (*i.e.*, not including satellite and wireless broadband).<sup>98</sup>

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<sup>97</sup> See Fifth Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 23 FCC Rcd 9615, 9645 ¶ 59 (2008) (“Based on our analysis in this Report, we conclude that the deployment of advanced telecommunications capability to all Americans is reasonable and timely. The data reflect the industry’s extensive investment in broadband deployment, including at higher speeds, as evidenced by increased subscribership for those higher-speed services. The record also reflects that providers are continuing to make significant investments in broadband facilities going forward. Further, while section 706 does not require the Commission to report on actual broadband subscribership, we believe that subscribership to broadband services continues to increase steadily as new broadband-dependent services and applications emerge in the marketplace, and that subscribership growth is important due to its relationship with deployment.”); *see also* Report and Order, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14880-81 ¶ 50 (2005) (“*Wireline Broadband Order*”), *aff’d* *Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007); *AT&T-BellSouth Merger Order*, 22 FCC Rcd at 5730 ¶ 127; Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors*, 21 FCC Rcd 8203, 8296-97 ¶¶ 217-18 (2006) (finding that “competition among providers of broadband service is vigorous” and “cable modem service and DSL service are facing emerging competition from deployments of cellular, WiFi, and WiMAX-based competitors, and [BPL] providers”). In 2007, the FTC agreed, finding that broadband was “moving in the right direction.” *See FTC Net Neutrality Report* at 155.

<sup>98</sup> Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2008*, at Tbl. 13 (Feb. 2010) (“*FCC February 2010 Broadband Report*”) (confirming that 91.9 percent of U.S. census tracts have at least two fixed broadband providers—specifically, aDSL, cable modem, or FTTP services—and 57.2 percent have at least three).

As the *Broadband Plan* adds, “[n]ew choices—at new, higher speeds—are becoming available, as well”:

Clearwire . . . plans to have its WiMAX service available to about 120 million people by 2011. Two satellite providers plan to launch new satellites in 2011 and 2012, with ViaSat (WildBlue) expecting to advertise download speeds of up to 2-10 Mbps and Hughes Communications planning to advertise download speeds of up to 5-25 Mbps.

*Broadband Plan* at 38 (internal footnotes omitted). Indeed, Clearwire just announced that it now covers 51 million people in 44 cities in the United States, and already serves 971,000 customers, with average data downloads of 3 to 6 Mbps and peaks of 10 Mbps.<sup>99</sup> On top of these fixed broadband options, 89.5 percent of the population is served by at least two *mobile* broadband providers, and 76.1 percent is served by at least three.<sup>100</sup> And within the next two or three years, mobile wireless broadband networks are expected to offer throughput rates—“between 4 and 12 Mbps, with sustained speeds of up to 5 Mbps”—that rival what fixed broadband providers offer consumers today.<sup>101</sup> Like their wireline counterparts, wireless broadband providers have been

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<sup>99</sup> Clearwire, Press Release, *Clearwire Brings CLEAR 4G to Merced and Visalia, California*, July 1, 2010, <http://newsroom.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1443337&highlight=> (“*Clearwire Press Release*”).

<sup>100</sup> Fourteenth Report, *Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, at 7 (rel. May 20, 2010) (“*Fourteenth Wireless Report*”). All told, there are 46 mobile wireless broadband providers offering competitive alternatives across the United States today. *FCC February 2010 Broadband Report* at 23, Tbl. 10.

<sup>101</sup> *Broadband Plan* at 41 (citing Robert C. Atkinson & Ivy E. Schultz, *Broadband in America, Where It Is and Where It Is Going*, at 23, Figure 8 (Columbia Institute for Tele-Information, Nov. 11, 2009), [http://www.broadband.gov/docs/Broadband\\_in\\_America.pdf](http://www.broadband.gov/docs/Broadband_in_America.pdf)); see Phil Goldstein, *T-Mobile upgrades 3G footprint to HSPA 7.2*, FierceWireless, Jan. 5, 2010, <http://www.fiercewireless.com/story/t-mobile-upgrades-3g-footprint-hspa-7-2/2010-01-05> (reporting that T-Mobile has announced that it plans to deploy technology with peak data speeds of 21 Mbps across most of its network this year).

investing billions in 3G, WiMAX, and 4G (LTE) wireless broadband access and aggregation networks.<sup>102</sup>

*Edge/overlay networks and CDNs.* In the Internet’s early years, the stereotypical “edge” network used by an application or content provider consisted of a server or two operated by a small entrepreneur working in a garage or in low-rent office space. Although that stereotype persists among some net neutrality pundits, today’s leading edge networks have evolved into something radically different: transnational facilities-based networks with an unprecedented combination of transmission capacity, processing power, and data storage. Among the largest are the massive “server farms” and caching networks developed by companies as diverse as service providers Akamai and Level 3, online retailers Amazon.com and eBay, Internet portals Yahoo! and MSN, and—largest of them all—Google. These “overlay” or “content-delivery networks” (“CDNs”) use much the same technology and perform many of the same routing and long-haul transmission functions as Internet backbones and allow application and content providers to direct customer requests to the closest cache server that has both the requested content and the capacity to serve the request at the instant it is received.

Google, for example, maintains a sprawling network consisting of hundreds of thousands of servers, many of them clumped in massive data centers or server farms, connected by high-capacity fiber-optic cable.<sup>103</sup> Building and maintaining this network is enormously capital-

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<sup>102</sup> See *AT&T Net Neutrality Comments* at 84-87; Reply Comments of AT&T Inc., *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191 & WC Docket No. 07-52, at 100 (filed Apr. 26, 2010) (“*AT&T Net Neutrality Reply Comments*”).

<sup>103</sup> See George Gilder, *The Information Factories*, *Wired*, Oct. 2006, <http://www.wired.com/wired/archive/14.10/cloudware.html>. In addition to Google, other major Internet companies, including Microsoft and Yahoo!, are likewise constructing enormous networks of their own and, like Google, are revolutionizing the role of these ostensible “edge” networks within the Internet. See, e.g., Blaine Harden, *Tech Firms Go Mining for Megawatts: Companies Rush to Exploit Region’s Cheap Electricity*, *Wash. Post*, July 9, 2006, <http://www.washingtonpost.com/wp-dyn/>

intensive, and it is transforming the manipulation and routing of data on the Internet. As Google CEO Eric Schmidt has explained, Google has “dozens” of data centers in undisclosed locations, some of which are “very large,” and “in a year or two the very large ones will be the small ones because the growth rate is such that we keep building even larger ones, and that’s where a lot of the capital spending in the company is going.”<sup>104</sup> In addition, “we have not only data centers, but *we have fiber that interconnect[s] those data centers, and connect[s] to the ISPs.* At Google, speed is critical. *And part of the way we get that speed is with that fiber.*”<sup>105</sup> Combined with Google’s multi-billion-dollar investment in data storage and processing power, this “overlay” CDN enables Google to outperform its rivals in the delivery of (for example) split-second search results and paid advertisements to end users throughout the world.

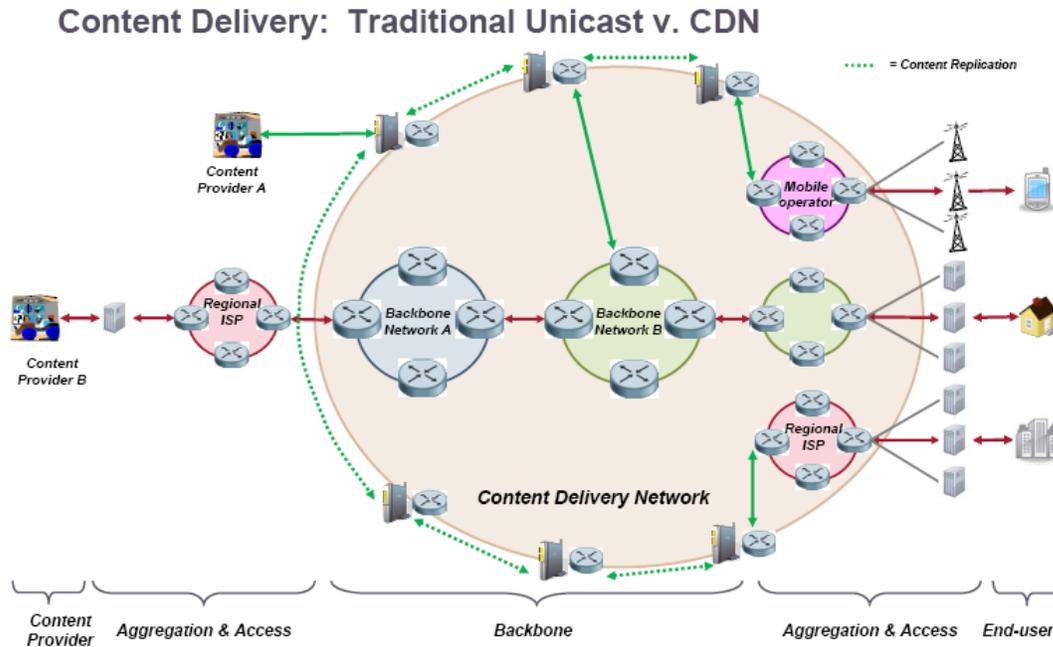
While Google self-provides its own CDN, countless thousands of large and small business customers rely on third-party CDNs such as Akamai and Limelight to distribute and store their Internet data throughout the nation and world. Traditionally known as “caching” networks, CDNs arrange to transmit data throughout the global Internet and store it on servers at multiple locations across the Internet, typically located near ISP backbone networks. This service enables end users to gain access to that content more quickly and reliably than in a conventional “unicast” arrangement, where each end user must communicate directly with a single centralized server. Figure 3 illustrates this function:

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content/article/2006/07/08/AR2006070800973\_pf.html; Rich Miller, *Microsoft Plans \$500M Dublin Data Center*, Data Center Knowledge, May 16, 2007, [http://www.datacenterknowledge.com/archives/2007/May/16/microsoft\\_plans\\_500m\\_dublin\\_data\\_center.html](http://www.datacenterknowledge.com/archives/2007/May/16/microsoft_plans_500m_dublin_data_center.html); Rich Miller, *Yahoo Eyes Washington State for Data Center*, Data Center Knowledge, Nov. 29, 2005, <http://www.datacenterknowledge.com/archives/2005/11/29/yahoo-eyes-washington-state-for-data-center/>.

<sup>104</sup> Fred Vogelstein, *Text of Wired’s Interview with Google CEO Eric Schmidt*, Wired, Apr. 9, 2007, [http://www.wired.com/print/techbiz/people/news/2007/04/mag\\_schmidt\\_trans](http://www.wired.com/print/techbiz/people/news/2007/04/mag_schmidt_trans).

<sup>105</sup> *Id.* (emphasis added).



**Figure 3: The role of CDNs in Internet content distribution**

In this diagram, Content Provider B, which does not make use of a CDN, must send its packets from a centralized server using a long and unpredictable path. The content provider does not know in advance how many router-to-router “hops” each packet will make or whether any of the intermediate points will be congested. In contrast, Content Provider A hires a CDN like Akamai to transmit its content over high-capacity connections to multiple cache (or “proxy”) servers throughout the Internet, thus pre-positioning content close to customers and reducing the distance it must travel when a given customer requests it.

Akamai holds itself out as a provider of this transmission-plus-caching service to the general business community, and stresses that it “helps even the smallest entrepreneurs to expand their presence on the Web by offering a better and faster customer experience.”<sup>106</sup> Although

<sup>106</sup> Comments of Akamai Technologies, Inc., *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191 & WC Docket No. 07-52, at 4 (filed Jan. 14, 2010) (“Akamai Net Neutrality Comments”).

Akamai offers specialized “enterprise” solutions for its largest customers, it sells most of its customers what it calls “Standard Services,” which involve “streamlined implementation of Akamai solutions” and “core services.”<sup>107</sup> Akamai claims that it transmits its customers’ data through facilities that it “lease[s]” rather than owns in fee simple. *Akamai Net Neutrality Comments* at 12. As discussed below, however, that distinction is irrelevant to whether a service constitutes a “telecommunications service.” See Section III.B.1, *infra*.

The drafters of the NOI appear to miss this critical point. According to news reports, the Commission’s General Counsel recently remarked that the NOI’s reclassification proposal would not affect the legal status of content delivery networks because, he believed, “a content delivery network is basically moving a website closer to [the] point where it will be used. It’s a server, *not a transmission*.”<sup>108</sup> That is wrong: transmission is an indispensable component of the service that CDNs like Akamai provide to their customers, which explains why Akamai can boast that it “routinely delivers between ten and twenty percent of all Web traffic, at times reaching more than 650 Gigabits per second.”<sup>109</sup> As discussed in Section III.B.3 below, the Commission’s proposed reclassification of broadband Internet access services would have serious, unintended, and self-executing consequences for a range of other Internet-based services, including CDN services offered broadly to the commercial public, as Akamai’s are.

## **B. Looking Behind the “Cloud.”**

In considering broadband issues, policymakers sometimes focus disproportionately on the role that access/aggregation networks play in serving residential users, and ignore the equally

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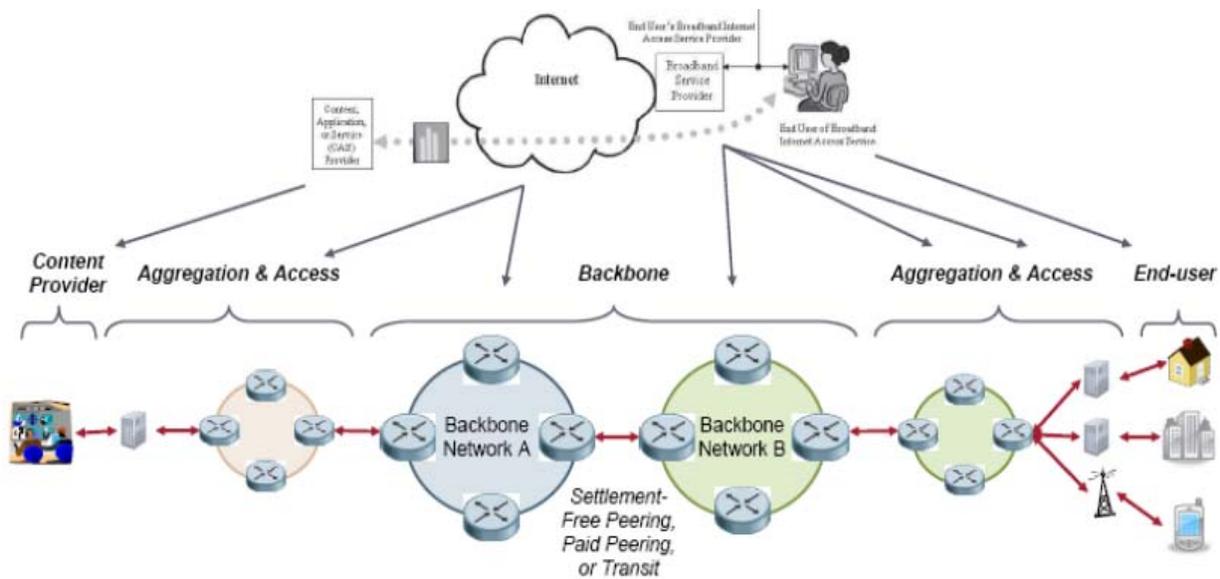
<sup>107</sup> Akamai, Standard Services, [http://www.akamai.com/html/solutions/standard\\_services.html](http://www.akamai.com/html/solutions/standard_services.html).

<sup>108</sup> “Third-Way” Broadband Proposal Won’t Affect Internet Caching, Backbone, FCC’s GC Says, TR Daily, May 13, 2010.

<sup>109</sup> Akamai, Customer Stories, <http://www.akamai.com/html/customers/index.html>.

important role those networks play in serving millions of large and small business customers, including providers of Internet applications and content. Often this confusion arises from the use of a “cloud” in Internet-related diagrams to depict all portions of an Internet communication other than within a residential end user’s access/aggregation network.

One example is the diagram accompanying paragraph 106 of the Commission’s recent net neutrality NPRM, reproduced as the top of Figure 4 immediately below. To understand how Title II reclassification could affect the Internet as a whole, it is important to look behind the “cloud,” which, in the Commission’s diagram, appears intended to represent an IP network operator such as Level 3, AT&T, Sprint, Akamai, or Limelight:



**Figure 4: End-to-end communications over the Internet’s constituent IP networks**

As this diagram illustrates, Internet access service is offered not just to residential consumers, but also to applications and content providers, such as the entity depicted on the far left side of the diagram. And in any given Internet communication, the user on each end—whether a content provider or recipient—typically hires an ISP to transmit data on an end-to-end basis from itself, through the ISP’s access/aggregation and backbone networks, to the ISP

serving the entity user on the other end of the communication, all by means of the Layer 3 IP routing and addressing scheme and various Layer 4 protocols (such as TCP or UDP). For example, the content provider on the left hires an ISP to send its data to *all points on the Internet* where the recipients of its content obtain access to the Internet. Even though the ISP may well subcontract out a portion of that task to other networks (*e.g.*, through peering and transit arrangements), it still assumes responsibility to make sure that task is completed successfully; indeed, that is the very definition of the service it offers.

The Commission’s proposal to regulate so-called “Internet connectivity” would thus necessarily regulate, for the first time, the guts of the Internet: communications across the *Internet backbone* by means of the Layer 3 Internet Protocol (and often higher-layer functionality as well). The notion that “Internet connectivity” could encompass only the “on-ramps” to the Internet, rather than “the Internet itself,” is nonsensical. To obtain such functionality, users do *not* purchase an “on-ramp” service that “stops” a few miles away from them, at a central office, cable head-end, wireless antenna, or satellite transponder, because such a service would not connect them to the Internet (or anything else of value).

For the same reason, there is no merit to the Commission’s contrived effort to define “the Internet” narrowly to exclude Internet access services for the first time—and thereby evade political criticism of its proposal to regulate the Internet. As Vint Cerf and Robert Kahn explained in 1999, the Internet is much “[l]ike the federal highway system, whose underpinnings include not only concrete lanes and *on/off ramps*, but also a supporting infrastructure both *physical and informational*, including signs, maps, regulations, and such related services and products as filling stations and gasoline, the Internet has its own layers of *ingress and egress*, and

its own multi-tiered levels of service.”<sup>110</sup> Similarly, the Commission has always justified its opposition to “classifying *Internet access services* as telecommunications services” because “we recognize the unique qualities of *the Internet*, and do not presume that legacy regulatory frameworks are appropriately applied to it.”<sup>111</sup> And former Chairman William Kennard forthright explained his opposition to “open access” regulation for cable-based Internet access services on the ground that, “[i]f we’ve learned anything about *the Internet* in government over the last 15 years, it’s that it thrived quite nicely without the intervention of government.”<sup>112</sup> The Commission rightly perceives that any move to “regulate the Internet” would be unprecedented, worrisome, and unpopular.<sup>113</sup> But there are no more accurate terms to describe what the Commission is proposing here.

Finally, as the preceding two diagrams reveal, a content provider may hire more than one IP network to ensure the successful delivery of its data to the many recipients of its content. For example, it may hire an ISP for general-purpose access to the Internet, and it may also hire a CDN like Akamai to arrange for the distribution of its most popular or performance-sensitive data. Although it may use the ISP’s facilities to reach the CDN’s network (just as an ordinary telephone caller uses local exchange facilities to reach its designated long-distance carrier’s network), the content provider purchases a retail service from both the ISP *and* the CDN (just as the telephone customer purchases separate retail services from the local exchange carrier and the

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<sup>110</sup> Robert E. Kahn & Vinton G. Cerf, “What Is The Internet (And What Makes It Work)” (Dec. 1999), [http://www.cnri.reston.va.us/what\\_is\\_internet.html](http://www.cnri.reston.va.us/what_is_internet.html) (emphasis added).

<sup>111</sup> *Stevens Report*, 13 FCC Rcd at 11540 ¶ 82 (emphasis added; footnote omitted).

<sup>112</sup> Remarks of William E. Kennard, Chairman, Federal Communications Commission before the National Cable Television Association, Chicago, Illinois, “The Road Not Taken: Building a Broadband Future for America” (June 15, 1999), <http://www.fcc.gov/Speeches/Kennard/spwek921.html>

<sup>113</sup> See NOI ¶ 10; *Genachowski “Third Way” Statement*.

long-distance carrier). One of the key questions in this proceeding is whether, if the Commission reconceptualizes Title II to encompass *ISPs*, it could somehow leave *CDNs* and other Internet transport providers outside the scope of Title II. As discussed below, the answer is no.

**C. The Arbitrariness of the Newly Created “Internet Connectivity” Definition and the Irrelevance of the NECA Tariff to “Internet Connectivity.”**

The NOI invents a new term, not found in the Communications Act, to describe a putative “service that may constitute a telecommunications service” within a larger “bundle of services” known as “broadband Internet service.” NOI ¶ 1 n.1. It calls this contrived sub-service an “Internet connectivity service” and defines it as something that “allows users to communicate with others who have Internet connections, send and receive content, and run applications online.” NOI ¶ 1 n.1. This is problematic on several levels.

First, any use of this definitional contrivance to set national broadband policy would raise a host of unsettling implementation questions. For example, if the Commission concludes (erroneously) that consumers perceive this supposed “service” as separate from the other functionalities in broadband Internet access service, would providers have to begin identifying these functionalities separately in their marketing and billing materials? Would consumers have to receive two separate bills or perhaps two separate line items on the same bill, even though they have always purchased broadband Internet access as a single service? If not, then how could the Commission plausibly claim that broadband Internet access providers offer—and consumers perceive that they obtain—two separate and discrete services rather than a single, integrated Internet access service? Reclassification would also require substantial and costly changes to the IT systems that Internet access providers currently use for billing, accounting, ordering, and maintenance—changes that would be extremely time consuming and expensive to

implement.<sup>114</sup> The NOI does not recognize any of these concerns, let alone confront them, but they exemplify the unpredictable and anti-consumer consequences any Title II regime could have for how Internet access services are engineered, marketed, and provided to consumers.

Second, the definition of “Internet connectivity service” that the Commission has proposed here is not simply contrived, but also patently overbroad. It would encompass many services other than Internet access, including special-purpose IP services and products such as e-readers like the Kindle, remote heart monitors, Internet-connected GPS devices (such as the Garmin and TomTom<sup>115</sup>), and smart-grid meters. All of these allow the “user” to communicate with “others who have Internet connections, send and receive content, and run applications,” however limited. For example, a remote heart monitor enables a user (the patient) to communicate with others who have Internet connections (*e.g.*, a hospital, clinic, or doctor’s office), send and receive content (*e.g.*, telemetry sent from the heart monitor and commands sent

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<sup>114</sup> If the Commission determines that “Internet connectivity service” is a Title II service, revenues for that regulated functionality would have to be booked separately from revenues for the unregulated information-service functionality. And reconfiguring the accounting systems used by various telco, Internet, and wireless affiliates so that those systems are capable of separately tracking and booking such revenues would be a monumental task. Similarly, if providers are required to display separate charges on their bills for Title I and Title II functionalities, billing systems will need to be reconfigured as well. Further, if the Commission were to entitle consumers to order the broadband transmission component separately from the information-service component, providers would also need to adopt new ordering and provisioning processes. Finally, because maintenance and trouble tickets for regulated and unregulated services would in many cases have to be handled by different personnel for accounting purposes, changes to the customer service and maintenance systems would also be required. Reconfiguring providers’ existing systems to accommodate these many changes would exert upward pressure on rates and would consume considerable time, labor, and capital that could be much better spent on deployment of broadband services to unserved consumers. In addition, given the time that the industry would need to address these and the other practical challenges that would arise in connection with reconfiguring broadband services to comply with Title II, it is quite possible that Congress could act, reverse the Commission, and obviate the need for those extensive modifications, even before they have been fully implemented.

<sup>115</sup> See Garmin, nüLink! Services for nüvi 1690, [http://www.garmin.com/garmin/cms/cache/offonce/us/ontheroad/nulink/nulink\\_1690;jsessionid=2079C7E03594DFCBC423656F721E6103](http://www.garmin.com/garmin/cms/cache/offonce/us/ontheroad/nulink/nulink_1690;jsessionid=2079C7E03594DFCBC423656F721E6103); TomTom, TomTom LIVE Services, <http://www.tomtom.com/services/service.php?id=14>.

by the medical providers), and run applications (*e.g.*, monitoring and diagnostics software in the heart monitor and/or in servers operated by the medical provider or its contractors). This proposed definition thus presents overbreadth concerns similar to those resulting from the corresponding definition of “broadband Internet access service” in last year’s *Net Neutrality NPRM*—concerns that AT&T addressed at length in its January 2010 comments in that docket. *See AT&T Net Neutrality Comments* at 96-102.

Third, and most important, this supposed “Internet connectivity service”—at least as the Commission describes it in one key portion of the NOI—would not *even connect end users to the Internet*. The Commission reveals its confusion on this point when it cites “the [service] definition in NECA’s DSL Access Service Tariff” as a potential formulation of “the functionality of an Internet connectivity service.” NOI ¶ 65.<sup>116</sup> As a preliminary matter, the service described in the NECA DSL Access Service Tariff (NDAST) is primarily designed to allow an *Internet service provider* (such as AOL and Earthlink) to connect its retail end users to the ISP’s service, using the telephone company’s local exchange facilities. Although retail end users are free to purchase out of the tariff (just as anyone is generally free to purchase out of any tariff), the NDAST is not presented in the tariff as a consumer-focused, mass-market service for retail use by individual end users.<sup>117</sup> More important still, the NDAST does not provide “Internet connectivity,” and thus has no discernible relevance to the issues in this proceeding.

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<sup>116</sup> As the Commission notes (NOI ¶ 21 n.53), the overwhelming majority of telcos that offer unbundled DSL transmission service do so through the auspices of the National Exchange Carrier Association, which files tariffs on behalf of small, mostly rural carriers.

<sup>117</sup> For example, the Tariff assumes that the customer using the service has a relationship with a second telecommunications service provider (the “customer’s TSP”), as an ISP might have with Level 3. *See* NECA 8.1.1, 8.2.1 (also referring to “interconnect[ing the service] with a TSP’s network”). The Tariff also provides that the “customer” must supply the telephone company with the customer’s IP address—which an ISP typically would already have, but which an individual end user would typically receive only from an ISP. NECA 8.1.4(A), 8.2.4(A).

Rather than connect end users to the Internet, the service offered in the NDAST consists only of a transmission link (ADSL transport) running from an end user's premises to a network node in the neighborhood (a DSLAM), combined with a transmission link (special access transport) running from the DSLAM to an ISP's (or TSP's) facilities (point of presence). The service stops there. As with dial-up Internet access, it is the unregulated Title I ISP that provides the end user with an IP address and handles all of the routing and other functions necessary for the end user to communicate with other users of the Internet. *See* NECA 8.1.4 at 8-4; 8.2.4 at 8-11. By itself, therefore, the NDAST offering would not allow an end user to communicate with other Internet users, send and receive content, and run applications online. Instead, the *ISP* provides Internet connectivity to end users by arranging to transport their traffic to various destinations on the Internet by means of, among other things, (1) DNS look-up and other information-service functionalities and (2) peering and transit arrangements with various Internet backbones.

In short, contrary to the NOI's suggestion, the NDAST service is *not* an offering of "Internet connectivity." As a result, the tariff cannot support any notion that some broadband providers are providing "Internet connectivity" to end users separate and apart from the "information service" components of broadband Internet access. Rather, the tariffed service is a telecommunications service used mainly by ISPs as a wholesale input, and it does not connect anyone to the Internet.

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Indeed, one portion of the NDAST specifically provides that "[t]he customer"—*i.e.*, the ISP purchaser of this service—"purchases ADSL and/or SDSL Access Service . . . for the purpose of combining these telecommunications services with its own information service(s) *to create a new retail service for sale to its end user customer(s).*" NECA 8.4.1 at 8-19; 8.5.1 at 8-28 (emphasis added).

More generally, far from supporting the Commission’s Title II reclassification proposal, the service described in the NECA tariff underscores the impossibility of defining “Internet connectivity” by focusing solely on the last mile, as the NOI appears at times to do. To provide “Internet connectivity,” a communications service must encompass not only DNS look-up and other Layer 3 (and higher-layer) information-service functionalities, but also Internet backbone transmissions as well as peering and transit arrangements. And this is why, as noted above, the Commission cannot seriously argue that its new regulatory scheme would somehow exclude Internet backbone networks.

Finally, when a “non-facilities-based” ISP purchases the tariffed NECA service, it provides its customers with precisely the same type of service that the underlying “facilities-based” telco would offer that same customer if it decided to act as the broadband ISP. The main distinction is that the “facilities-based” provider owns the last-mile facilities, whereas the “non-facilities-based” provider leases them or resells other providers’ wholesale services. As discussed below, however, that is a distinction without any significance for Title II classification purposes. *See* Section III.B.1, *infra*. Thus, if the Commission were to reverse course and conclude that the integrated offering of broadband Internet access includes a stand-alone, Title II “connectivity” offering, it could not limit that conclusion to “facilities-based” ISPs; it would have to extend the conclusion as well to Earthlink and similar “non-facilities-based” ISPs.<sup>118</sup> Indeed, as further discussed below, the same conclusion would logically apply to a range of other Internet-based providers that hold themselves out as arranging for transmission of data across the Internet. *See id.*

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<sup>118</sup> In addition, even the category of “facilities-based ISPs” would have to include hundreds if not thousands of providers of commercial Wi-Fi services, ranging from Boingo to hotels and coffee shops. The proposed reclassification could subject all of those providers for the first time to Title II regulation as “common carriers.”

## **II. THE COMMISSION LACKS LEGAL AUTHORITY TO RECLASSIFY BROADBAND INTERNET ACCESS WITHIN TITLE II BECAUSE INFORMATION-SERVICE FUNCTIONALITIES REMAIN TIGHTLY INTEGRATED WITH BROADBAND TRANSMISSION.**

On February 22 and April 29, 2010, AT&T, several other companies, and five major trade associations representing the entire broadband industry filed extensive analyses of this reclassification proposal.<sup>119</sup> For the reasons explained in that analysis and below, the proposed reclassification would be not only unwise, but unlawful.

### **A. Twelve Years of Unbroken Commission and Judicial Precedent Support the Title I Characterization.**

A long line of Commission decisions from 1998 to 2007, along with a Supreme Court decision from 2005 and a Third Circuit decision from 2007, confirm that Internet access service is a Title I “information service” with no Title II “telecommunications service” component. Nothing has changed in the meantime to justify the opposite outcome. And if the Commission sought to scuttle twelve years of bedrock regulatory precedent anyway, a reviewing court would view that about-face not as a reasoned response to changed circumstances, but as a purely political effort—as, indeed, the NOI confirms this is—to reverse judicial constraints on the Commission’s Title I authority to regulate the Internet. That type of sea-change in this area of law would have to come from Congress, not the Commission.<sup>120</sup>

A “telecommunications service” subject to Title II common-carrier regulation is defined, in relevant part, as “the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used,” and “telecommunications” in turn is defined as “the transmission . . . of information of the user’s choosing, *without change in the form or content of*

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<sup>119</sup> *First Industry Title II Letter* (attached as Exh. A); *Second Industry Title II Letter* (attached as Exh. C).

<sup>120</sup> *See* Introduction and Executive Summary, *supra* (discussing congressional opposition to reclassification proposal).

*the information as sent and received.*” 47 U.S.C. §§ 153(43), (46) (emphasis added). In contrast, an “information service,” which lies outside the scope of Title II, is the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications.*” *Id.* § 153(20) (emphasis added). In the *Stevens Report*, the Commission confirmed that these two statutory categories are “mutually exclusive.”<sup>121</sup> This “mutual exclusivity position” means that a service offered to consumers on a functionally unified basis cannot be said to consist of both a “telecommunications service” and an “information service.” It must be one or the other, and if it contains data-processing or data-storage/retrieval functionalities, it is a unified “information service.”

Starting in 2002 and continuing through 2007, the Commission applied this statutory interpretation to various broadband Internet access services and concluded that they are all properly construed as integrated “information services” without “telecommunications service” components.<sup>122</sup> That is so, the Commission found, because the service offered to consumers inherently includes a range of integrated data-processing functions, including email, web-hosting, DNS look-up, and often caching.<sup>123</sup> These findings all involved a straightforward application of the “mutual exclusivity” position the Clinton FCC had adopted in 1998. Although many (but not all) ISPs in 1998 were “non-facilities-based” in that they owned no last-mile

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<sup>121</sup> *Stevens Report*, 13 FCC Rcd at 11507 ¶ 13. The *Stevens Report* thereby reaffirmed the Commission’s similar finding in Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9179-80 ¶¶ 788-89 (1997).

<sup>122</sup> See, e.g., Declaratory Ruling, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4822-23 ¶¶ 38-40 (2002) (“*Cable Modem Order*”), *aff’d* *Brand X*, 545 U.S. 967 (intermediate history omitted); *Wireline Broadband Order*, 20 FCC Rcd at 14855-56 ¶¶ 1-3; Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901, 5902 ¶ 2 (2007) (“*Wireless Broadband Order*”); see also *Stevens Report*, 13 FCC Rcd at 11537-39 ¶¶ 76-80.

<sup>123</sup> See *Cable Modem Order*, 17 FCC Rcd at 4822-23 ¶ 38; *Wireless Broadband Order*, 22 FCC Rcd at 5910-11 ¶¶ 25-26.

transmission facilities connecting them to their end users, the emergence of broadband ISPs did not alter the statutory analysis because, again, “the relevant definitions *do not distinguish facilities-based and non-facilities-based carriers.*” *Brand X*, 545 U.S. at 997 (emphasis added). The definitions also do not turn on the degree of competition in any market, as some have suggested.<sup>124</sup> Market competitiveness standing alone *may* affect whether a telecommunications carrier is subject to dominant carrier regulation, with the full suite of tariffing and other obligations,<sup>125</sup> but not the antecedent question of whether a provider is a “telecommunications carrier” in the first place. In any event, even if the degree of competition were a relevant criterion, the broadband Internet access market is dramatically more competitive today than it was in 2002, 2005, or 2007, given the proliferation of fixed and mobile wireless broadband services and churn rates in the neighborhood of 30%-35% per year, as described above. *See* Part Two, Section I.A, *supra*.

The Supreme Court affirmed the Commission’s statutory classification decisions in its 2005 *Brand X* decision. As the Court explained, “[i]t is common usage to describe what a company ‘offers’ to a consumer as what *the consumer perceives to be the integrated finished product*, even to the exclusion of discrete components that compose the product[.]” *Brand X*, 545 U.S. at 990 (emphasis added). In fact, the Court added, it would be “odd” to construe the statutory language any other way. The NOI accepts this approach to the statutory term “offer,” *see* NOI ¶ 53, as indeed it must, since this was a Supreme Court holding.

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<sup>124</sup> *See, e.g.*, Reply Comments of Public Knowledge on NBP Public Notice No. 30, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 10-11 (filed Jan. 26, 2010) (“*Public Knowledge NBP PN #30 Reply Comments*”).

<sup>125</sup> *See, e.g.*, Memorandum Opinion and Order, *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, 23 FCC Rcd 12260, 12262-64, ¶¶ 3-7 (2008).

The Court then held that “[t]he entire question is whether the [broadband Internet access] products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes). That question turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided[.]” *Brand X*, 545 U.S. at 991. In *Brand X*, the Court found that the Commission had properly answered that question by concluding that ISPs offer consumers a unified service consisting of functionally integrated telecommunications and data-processing components, including the DNS look-up and caching services mentioned above.

The Commission could not reasonably reverse course now unless it could somehow find that, in the three years since its last order on this topic, broadband Internet access providers have suddenly stopped providing a functionally integrated combination of transmission and data-processing functions when they offer broadband Internet access to consumers. But the Commission could not credibly make such a finding because there has been, in fact, no such change in the way such services are offered to consumers; as discussed below, the data-processing functions of this service are now, if anything, *more* functionally integrated with broadband transmission than they were in 2002. In short, the Commission was right in 2002, 2005, and 2007, and it would be wrong if it abruptly reversed course now.

**B. Even More Than in 2002, 2005, and 2007, the Data-Processing and Transmission Components of Broadband Internet Access Are Tightly Integrated Components of a Unified Service Offering.**

As the NOI notes, some have argued that the data-processing and transmission components of broadband Internet access service are no longer “integrated” on the theory that consumers no longer rely on their ISPs for email and certain other functionalities.<sup>126</sup> That is

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<sup>126</sup> *Public Knowledge NBP PN #30 Reply Comments* at 8.

untenable for two main reasons. First, these arguments almost invariably ignore the core information-service functionalities, including DNS lookup, that the *Brand X* Court deemed dispositive to its analysis and sufficient to justify characterizing broadband Internet access as a unified “information service.” Second, the transmission component of broadband Internet access is, if anything, even more tightly integrated today than several years ago with indispensable enhanced functionalities, including next-generation security protections.

### **1. DNS Functionality.**

As the Commission explained in 2002 and the Supreme Court affirmed in *Brand X*, Internet access services are integrated information services “*regardless* of whether subscribers *use* all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service.” *Cable Modem Order*, 17 FCC Rcd at 4822-23 ¶ 38 (emphasis added). And the *Brand X* Court indicated that the functional integration of broadband transmission with DNS look-up is sufficient by itself (though not necessary) to make the ensuing service a unitary “information service”:

*A user cannot reach a third-party’s Web site without DNS, which (among other things) matches the Web site address the end user types into his browser . . . with the IP address of the Web page’s host server. See P. Albitz & C. Liu, DNS and BIND 10 (4th ed. 2001) (For an Internet user, “DNS is a must. . . . [N]early all of the Internet’s network services use DNS. That includes the World Wide Web, electronic mail, remote terminal access, and file transfer”). . . . Similarly, the Internet service provided by cable companies facilitates access to third-party Web pages by offering consumers the ability to store, or “cache,” popular content on local computer servers. . . . In other words, subscribers can reach third-party Web sites via “the World Wide Web, and browse their contents, [only] because their service provider offers the ‘capability for . . . acquiring, [storing] . . . retrieving [and] utilizing . . . information.’” “The service that Internet access providers offer to members of the public is Internet access,” “not a transparent ability (from the end user’s perspective) to transmit information.”*

*Brand X*, 545 U.S. at 999-1000 (emphasis added) (citations omitted); *Cable Modem Order*, 17 FCC Rcd at 4822 ¶ 38 n.153.

The NOI notes (at ¶ 66) that unusually tech-savvy consumers can obtain access to third-party DNS look-up services. But that is irrelevant to the statutory characterization issue. Again, the relevant question is “what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product[.]” *Brand X*, 545 U.S. at 990. And virtually all consumers today rely on their broadband ISPs to include DNS look-up functionality as an integral part of broadband Internet access service; indeed, we are not aware of any ISP that provides broadband Internet access service *without* DNS look-up. In short, no less today than a few years ago, broadband transmission and DNS look-up capability “are functionally integrated (like the components of a car),” not “functionally separate (like pets and leashes).” *Id.* at 991. Indeed, as the *First Industry Title II Letter* explained (at 8 n.27), “if broadband Internet access providers suddenly chose to disable DNS functionality, Internet access services would be essentially useless to virtually all of the tens of millions of broadband Internet access customers in the U.S. today.”

In any event, the fact that competitors offer a rival service says nothing about the appropriate classification of integrated services offered to consumers. For purposes of determining what a purchaser is “offered,” it makes no difference that some users could theoretically seek out third-party DNS look-up services in addition to those combined with their broadband services, just as it makes no difference that a consumer could buy a car at a car dealership and then replace the wheels or install custom seats. Just as a car dealer is not properly viewed “as ‘offering’ consumers the car’s components in addition to the car itself,” *Brand X*, 545 U.S. at 990, a broadband provider is not properly viewed as offering consumers the individual

components of broadband Internet access; it is properly viewed as offering them a single integrated service. And because that service includes DNS look-up and other enhanced functionalities, it is properly classified as an information service.

## **2. ISP Functions Other Than DNS, Including Security Functions.**

Quite apart from DNS functionality, broadband Internet access providers offer a host of non-transmission-related ISP functions and offerings as integral components of their broadband Internet access services, and consumers expect those services at no extra charge. AT&T, for example, includes the following as part and parcel of its residential Internet access service: security screening, spam protection, pop-up blockers, parental controls, online email and photo storage, instant messaging, and the ability to create a customized browser and personalized home page that automatically retrieves games, weather, news, and other information selected by the user. The NOI does not deny that these are classic “information services,” but it nonetheless proposes to exclude them from the analysis simply by defining them away—as within the scope of “broadband Internet service” but not “broadband Internet connectivity service.” NOI ¶ 1 n.1. But these definitional games are entirely beside the point if *consumers view* these functionalities as part of an “integrated finished product, even to the exclusion of discrete components that compose the product[.]” *Brand X*, 545 U.S. at 990.

They do. As the NOI recognizes, the way in which broadband service is marketed may be relevant in assessing the degree to which broadband Internet access is offered (and perceived by consumers) as a functionally integrated “transmission plus information service.” NOI ¶ 57. And in fact, AT&T’s marketing materials illustrate that Internet access service is perceived and offered as far more than a pure “connectivity” service. If anything, the data-processing functions of broadband Internet access service that the Commission found relevant in the *Cable Modem*

*Order* have become more complex and more essential to the overall offering than they were in 2002.

On its website, for example, AT&T touts a variety of non-“connectivity” features as essential selling points of its broadband service. Indeed, AT&T describes its high-speed broadband offering as an integrated “combination of broadband access, services and content that provides a unique broadband experience, with speed options up to 18 Mbps” and “virtually unlimited photo and e-mail storage, instant messaging with webcam capabilities, Internet radio and a powerful suite of safety and security tools through our AT&T Internet Security Suite[.]” AT&T, Consumer Services – Bundle up, <http://www.att.com/gen/general?pid=7456>. Each of these capabilities is stressed throughout AT&T’s U-verse marketing and customer information.

For example:

- AT&T promotes the fact that it offers U-verse Internet customers “AT&T Messenger with high-quality video and Enhanced Voice Communication that allows new voice-centric features such as call logs and voice mail.” AT&T U-verse High Speed Internet, <http://www.att.com/u-verse/explore/internet-landing.jsp>.
- AT&T also markets U-verse as empowering customers to “[k]eep annoying ads at bay with pop-up blocker.” *Id.* Similarly, it provides “SpamGuard Plus to separate unsolicited junk email from genuine messages.” AT&T U-verse Online Safety and Security, <http://www.att.com/u-verse/explore/safety-security.jsp>.
- Parental controls have become so important to so many customers today that AT&T stresses this feature as a core advantage of its service. The AT&T U-verse website encourages parents to “[c]ustomize your preferences with Parental Controls,” AT&T U-verse High Speed Internet, <http://www.att.com/u-verse/explore/internet-landing.jsp>, which “let you control and limit what your children see or do on the Web.” AT&T U-verse Online Safety and Security, <http://www.att.com/u-verse/explore/safety-security.jsp>.
- With respect to email, AT&T offers “AT&T Mail Plus at no extra cost with virtually unlimited storage, 10 additional email accounts, POP access, and email forwarding.” AT&T U-verse High Speed Internet, <http://www.att.com/u-verse/explore/internet-landing.jsp>. This service includes “[e]-mail Storage with 2 GB capacity for a main account and 250 MB for each of 10 sub-accounts.” AT&T U-verse Email Storage, <http://www.att.com/u-verse/explore/storage-convenience.jsp>.

- AT&T also offers customers a “[p]ersonalized AT&T home page and customized browser.” AT&T U-verse High Speed Internet, <http://www.att.com/u-verse/explore/internet-landing.jsp>.
- On the security front, AT&T offers its customers numerous data-processing services. Among them is the ability to “[p]rotect your email account with anti-virus software, . . . and Address Guard™.” *Id.* Specifically, AddressGuard uses “Disposable E-mail Addresses (DEA) to protect your privacy and protect your e-mail account from abuse such as junk mail and offensive e-mail content.” AT&T U-verse Online Safety and Security, <http://www.att.com/u-verse/explore/safety-security.jsp>. U-verse customers are also offered the ability to “[s]hield your computer from unauthorized access with Firewall software.” AT&T U-verse High Speed Internet, <http://www.att.com/u-verse/explore/internet-landing.jsp>.
- AT&T’s marketing materials also feature its “Residential Gateway,” which, when paired with “encryption security, safeguard[s] against outside access of your Internet connection” and “[d]efends your home network against common Internet threats such as Distributed Denial of Service attacks.” AT&T U-verse Residential Gateway, <http://www.att.com/u-verse/explore/residential-gateway.jsp>.

All of these various service components involve investment, ongoing expense, and customer support requirements; yet, notably, they are provided to AT&T U-verse customers at *no extra charge*. This is because consumers view these as core components of their broadband service offering. The market compels broadband providers to supply these applications and capabilities, and the resulting offer is an integrated whole that responds to that consumer demand.<sup>127</sup>

In the years since *Brand X*, broadband Internet access services have become increasingly more integrated with another core information service offering: access to programming

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<sup>127</sup> See, e.g., Verizon, High Speed Internet: Features & Services, <http://www22.verizon.com/Residential/HighSpeedInternet/Features/Features.htm>; Comcast High Speed Internet, Home & Residential Internet Service Provider (ISP), <http://www.comcast.com/Corporate/Learn/HighSpeedInternet/highspeedinternet.html?INTCMP=ILCCOMCOMHS20906>; Time Warner Cable, High-Speed Online, East, <http://www.timewarnercable.com/East/learn/hso/>; Cox, Ultimate Internet Overview, High Speed Wideband Internet serving Northern Virginia, <http://ww2.cox.com/residential/northernvirginia/internet/ultimate-internet.cox>; Optimum - Optimum Online - Faster Internet, <http://www.optimum.com/online/features/index.jsp>; Charter Communications, <http://www.charter.com/Visitors/Products.aspx?MenuItem=39>.

content.<sup>128</sup> For example, AT&T’s broadband Internet access service includes access to a selection of content offerings—at no additional charge.<sup>129</sup> As part of subscribing to AT&T’s service, a customer receives access to ESPN360.com (recently re-branded as ESPN3.com), which contains a wide range of premium sports-related content from ESPN. This content from ESPN, and certain other forms of premium Internet content, are *only* available to broadband Internet access service customers whose ISPs have agreed to purchase the content from the relevant content provider. Thus, the content is necessarily “integrated” with the broadband Internet access service. Indeed, AT&T touts such content as one of the features of its service, calling it an “amazing Broadband Extra[], at no cost.” *Id.*

The development of complex security functionalities also shows that broadband Internet access service has become even more integrated with enhanced functionalities today than it was when the Commission deemed Internet access services all unified “information services.” A significant and growing number of providers now offer broadband Internet access services with various network-oriented, security-related information-processing capabilities that are used to address threats against their networks and their customers. These include processing Internet access traffic flows to check for telltale patterns of worms, viruses, botnets, denial-of-service attacks, and the like; scrubbing email traffic to remove spam; and other techniques that involve interaction with stored information (*e.g.*, databases of known computer threats) to address security and other concerns. In many cases, a consumer cannot even use the Internet access service of her choice *without* receiving the enhanced functionality provided by these security

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<sup>128</sup> See *Wireline Broadband Order*, 20 FCC Rcd at 14868 ¶ 23 n.61 (information or “enhanced” services included “applications that . . . provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.”).

<sup>129</sup> See AT&T, AT&T Broadband Extras, <http://www.att.com/gen/general?pid=8831>.

features. And all of these offerings fall squarely within the definition of an “information service”: “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(20).

For example, AT&T employs an Internet security analysis platform (known as “FLOOD”) that processes detailed network flow data sent to and received by AT&T’s wireline and wireless users (including source, destination, IP protocol, source port, designation TCP flags, packet count, byte count, start/end time for activity) in an effort to detect anomalies and track changes in network activity over time. AT&T uses this platform not only to secure its network as a whole, but also to help individual end users address specific security problems with their computers, personal data, and software. When AT&T’s network analysis detects that a given user’s system is behaving oddly and may be infected by malware, for example, AT&T may directly inform that user by email and, when appropriate, instruct the user on how to download the anti-virus software, provided by AT&T, needed to eliminate the infection. AT&T also forwards system-side threat information to a leading Internet security company, whose services AT&T brands in its own name (“AT&T Security Suite—powered by McAfee”) and includes at no extra charge in many of its most popular broadband Internet access packages. The security company incorporates the new information into its own security measures and then—on AT&T’s behalf—sends security updates to AT&T customers that use its service.<sup>130</sup>

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<sup>130</sup> AT&T complements FLOOD with many additional activities that are not used to help with ongoing real-time communications, but are critical to the overall service AT&T offers its subscribers. These include malware analysis (the process of executing malware in a safe environment to observe its behavior to determine a means by which malware can be identified to prevent further distribution), forensics analysis (determining the root cause—what, when, how and who—of attacks), exploit research (researching the latest exploits and attack techniques used by attackers), vulnerability assessment (determining the susceptibility of networks to attacks through testing and source code analysis), algorithmic research, and general security research.

AT&T is not alone in providing integrated network security features that are readily apparent and highly valuable to individual end users. For example, Comcast has begun introducing a “Constant Guard” security program, under which it notifies end users (via their web browsers) of potential malware infection.<sup>131</sup> It also employs a Customer Security Assurance (CSA) program that contacts customers to respond to issues relating to bots, spam, and virus-infected PCs, as well as other security-related issues. And it provides free, integrated software that aids in spyware detection and removal, as well as a pop-up ad blocker and anti-phishing software. In addition, Comcast’s online security education web portal includes real-time security alerts, tips, tools, and other resources, like Internet safety games, that help educate and protect consumers. And Comcast’s network actively monitors traffic to help fight spam, phishing attacks, and viruses—all to the direct benefit of consumers.

**C. The Commission May Not “Change Its Mind” About Inconvenient Empirical Facts That Limit Its Authority to Regulate Internet Services.**

As discussed, the Commission could not reasonably find that facts have *changed* since its 2002, 2005, and 2007 determinations in ways that could possibly make it easier, rather than harder, to classify broadband Internet access as containing a discrete “telecommunications service” component. The Commission might thus wish to posit that it was somehow “wrong” in the factual determinations that it made in those earlier rulings and that the judiciary subsequently affirmed. But this rationale is unavailable as well. To begin with, the Commission’s factual determinations in 2002, 2005, and 2007 were correct then, for the same reasons they are correct today, as explained above.

Just as important, the *factual* issues central to these statutory definitions are not amenable to a *policy*-based “change of mind.” When Congress directs the Commission to exercise policy

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<sup>131</sup> Comcast.net Security – Constant Guard, <http://security.comcast.net/constantguard/>.

discretion on a particular topic—such as the appropriate beneficiaries of universal service support or the “public interest” standard for broadcasting licenses, the Commission does indeed have broad authority to reverse course to reflect a change in policy priorities or even political orientation.<sup>132</sup> But no agency may “change its mind” about *empirical facts*—in this case, the functional integration of DNS look-up and similar functionalities within broadband Internet access—simply because, under the governing statute, those facts happen to impede whatever policy choices the agency might like to make. Here, if the Commission were to “change its mind” about the integration of broadband transmission services with core information-service functionalities such as DNS look-up, it would rightly be perceived as making up facts in order to justify what the Washington Post aptly describes as a “naked power grab.”<sup>133</sup> But an agency’s desire to expand its own power, in the wake of a judicial defeat that draws its jurisdiction in doubt, is not a legitimate reason for the agency to change its mind about inconvenient facts obstructing that jurisdiction.<sup>134</sup>

Similarly, *Brand X* does not grant the Commission carte blanche to change course on this statutory characterization question, as the Commission assumes it does.<sup>135</sup> The *Brand X* Court held that the statute did not dispositively establish the status of Internet access because that status rests on a factual question: what end users perceive they are offered. The FCC receives some

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<sup>132</sup> See 47 U.S.C. § 303; 47 U.S.C. § 254(b).

<sup>133</sup> Editorial, *Internet oversight is needed, but not in the form of FCC regulation*, Wash. Post, Apr. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041604610.html>.

<sup>134</sup> Cf. Prepared Remarks of Commissioner Mignon L. Clyburn at Media Institute Luncheon, *Broadband Authority and the Illusion of Regulatory Certainty*, June 3, 2010, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-298599A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298599A1.pdf).

<sup>135</sup> See, e.g., Austin Schlick, General Counsel, Federal Communications Commission, *A Third-Way Legal Framework For Addressing The Comcast Dilemma*, May 6, 2010 (section entitled “The Commission’s Options”), <http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html#book-3> (“Schlick “Third Way” Statement”).

deference in resolving that factual issue, not in classifying services simply to suit its policy preferences. And the answer to that factual question is unavoidably the same today as it was in 2002, 2005, and 2007.

In any event, even where a change in policy would not require an agency to make up (or ignore) controlling facts, an agency still faces important constraints on its ability to trigger a sea change in regulatory policy without congressional approval. As the Supreme Court explained in its recent *Fox* decision, 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>136</sup> Here, the Commission could not reclassify broadband Internet access services without both (1) “contradict[ing]” the still-unchanged facts (such as the integrated and pervasive use of DNS look-up) that it and the Supreme Court have correctly deemed sufficient to characterize broadband Internet access as a unitary “information service,” and (2) defeating the “serious reliance interests” that broadband Internet access providers have developed in the maintenance of the existing investment-friendly regime for the past decade—a regime that has fostered multi-billion-dollar investments in broadband networks and services.

Indeed, the Internet has succeeded largely because broadband providers invested scores of billions of dollars into broadband network infrastructure, all on the assumption that the Commission would keep its word. *See AT&T Net Neutrality Comments* at 82. In 2009 alone, AT&T devoted approximately two-thirds of its *roughly 18 billion dollar* capital expenditure

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<sup>136</sup> *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-11 (2009) (emphasis added); *see also id.* at 1824 (Kennedy, J., concurring in part and concurring in the judgment) (an “agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past”).

budget to extending and enhancing its wireline and wireless broadband networks. *Id.* at 5. Wireless providers have been investing billions more in 3G, WiMAX, and 4G (LTE) wireless broadband networks. *Id.* at 84-85. For the twelve months ending June 2009, wireless providers reported capital investments of \$19.5 billion (not including spectrum). *Id.* at 147. Cable companies, too, have invested billions upon billions of dollars to upgrade their best-effort Internet access platforms to DOCSIS 3.0 so that their end users can enjoy download and upload speeds 10-50 times faster than in 2005. *Id.* at 115.<sup>137</sup> Again, an agency’s desire to expand its authority is not an adequate justification for thwarting these reliance interests.

Finally, if the Communications Act were so elastic as to authorize the Commission to decide one day to maintain a deregulatory regime under Title I and the next day to completely transform Internet policy by “reclassifying” the industry under Title II, it would raise serious constitutional concerns under the nondelegation doctrine.<sup>138</sup> The Act should be construed to avoid those concerns.<sup>139</sup> As in other contexts, “such broad and unusual authority through an implicit delegation . . . is not sustainable” because “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say,

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<sup>137</sup> See also Robert E. Atkinson & Ivy E. Schultz, Columbia Institute for Tele-Information, *Broadband in America: Where It Is and It Is Going (According to Broadband Service Providers)*, at 11 (Nov. 11, 2009), [http://www4.gsb.columbia.edu/null/download?&exclusive=filemgr.download&file\\_id=7212786](http://www4.gsb.columbia.edu/null/download?&exclusive=filemgr.download&file_id=7212786) (discussing tens of billions of dollars invested annually in broadband infrastructure).

<sup>138</sup> See, e.g., *Whitman v. American Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001) (“[W]hen Congress confers decisionmaking authority upon agencies, Congress must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.”) (internal quotations and emphasis omitted); see generally *USTA Letter* (attached as Exh. B).

<sup>139</sup> See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1968); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002) (the “constitutional avoidance canon of statutory interpretation trumps *Chevron* deference”).

hide elephants in mouseholes.”<sup>140</sup> For that reason alone, the Commission could not properly regulate broadband Internet access for the first time on the pretext of “filling [statutory] gaps.”

NOI ¶ 18.

**D. The Commission May Not—and Should Not Try To—Overcome These Factual Impediments to Reclassification by Invoking High-Risk Doctrinal Shortcuts Such as Revocation of the “Mutual Exclusivity” Principle or an Overbroad Interpretation of the “Adjunct-to-Basic” Doctrine.**

Faced with the difficulty of changing its mind about the relevant *factual* issue—functional integration of broadband transmission with information-service functionalities such as DNS look-up—the Commission might be tempted to alter the deep structure of American Internet policy by changing its view of the *law* in one of two closely related ways: either by revoking the “mutual exclusivity” position embraced in the *Stevens Report* (see above) or by broadly construing the “adjunct-to-basic” doctrine, mentioned in paragraph 59 of the NOI. These doctrinal shortcuts would themselves be unlawful. Just as important, even if they were upheld in court, they would greatly expand the unintended application of the Commission’s reclassification logic to Internet services other than broadband Internet access.

***Mutual exclusivity.*** As discussed, the Commission concluded shortly after passage of the 1996 Act that “Congress intended the categories of ‘telecommunications service’ and ‘information service’ to be mutually exclusive,” such that an integrated service must be either an “information service” or a “telecommunications service” but not both. *Stevens Report*, 13 FCC Rcd at 11508 ¶ 13. That “mutual exclusivity” conclusion is not only reasonable, but compelled by the plain statutory language, which focuses on what the provider is “*offering*” to consumers. If a provider offers transmission integrated with data-processing, storage, or retrieval functionalities, it is by definition *not* offering the *sine qua non* of a “telecommunications

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<sup>140</sup> *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006) (quoting *Whitman*, 531 U.S. at 468).

service”—“transmission . . . *without* change in the form or content of the information as sent and received.”<sup>141</sup> In passage after passage, the *Stevens Report* found—correctly—that the statutory language, structure, and history all compel that conclusion.<sup>142</sup>

In short, Congress has spoken to this precise issue and confirmed that the concepts of “telecommunications service” and “information service” are mutually exclusive. The *Brand X* Court did not hold otherwise. Instead, the Court held: “*Even if* it is linguistically permissible to say that the car dealership ‘offers’ engines when it offers cars, that shows, *at most*, that the term ‘offer,’ when applied to a commercial transaction, is ambiguous about whether it describes only the offered finished product, or the product’s discrete components as well.” *Brand X*, 545 U.S. at 990 (emphasis added). In other words, the Court upheld an interpretation of the statute that was consistent with the Commission’s “mutual exclusivity” position on the ground that the statute was “at most” ambiguous. The Court did not—and, to affirm the Commission, did not need to—exclude the possibility that the statute *required* that reading. And as discussed, both the statutory text and the broader statutory framework do, in fact, compel that reading, as the Commission has rightly found in order after order since passage of the 1996 Act.

Other passages in *Brand X* strongly support the same conclusion. The parties advocating a broader scope for Title II had urged the Court to reject the Commission’s mutual-exclusivity

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<sup>141</sup> 47 U.S.C. § 153(43) (definition of “telecommunications”; emphasis added); *see id.* § 153(46) (defining “telecommunications service” as “the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used”).

<sup>142</sup> *E.g.*, *Stevens Report*, 13 FCC Rcd at 11520-25, 11529-30, 11534 ¶¶ 39, 41 n.79, 43-45, 57-59, 69 n.138. For example, the *Stevens Report* explained that the “language and legislative history of both the House and Senate bills indicate that the drafters of each bill regarded telecommunications services and information services as mutually exclusive categories,” *id.* at 11522-23 ¶ 43, and concluded that “[a]n approach in which a broad range of information service providers are simultaneously classed as telecommunications carriers, and thus presumptively subject to the broad range of Title II constraints, could seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry,” *id.* at 11524 ¶ 46.

position because they wished to impose Title II regulation on broadband Internet access providers. The Supreme Court rejected their argument. As it explained, if the Communications Act were construed to “classif[y] as telecommunications carriers all entities that use telecommunications inputs to provide information service,” as these parties urged, the Act “would subject to mandatory common-carrier regulation *all information-service providers that use telecommunications as an input to provide information service to the public.*” *Brand X*, 545 U.S. at 994.<sup>143</sup> As the Court suggested, Congress did not intend that absurd result. Similarly, as the Commission previously explained in the *Stevens Report*, “the statute and the legislative history” preclude any conclusion that Congress ever intended to “subject [information] services to regulatory constraints by creating an expanded ‘telecommunications service’ category incorporating enhanced services,” thereby “effect[ing] a major change in the regulatory treatment of those services.” *Stevens Report*, 13 FCC Rcd at 11524 ¶ 45.

***Adjunct-to-basic.*** In the same vein, the NOI asks (at ¶ 59) whether the Commission should recharacterize the core characteristics of broadband Internet access—presumably including DNS look-up—as falling within the scope of the “adjunct-to-basic” doctrine, such that the service as a whole would be characterized as a Title II “telecommunications service” even though it contains integrated “information service” components. This doctrinal approach would contradict the statutory scheme for largely the same reasons as any repudiation of the mutual-exclusivity principle.

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<sup>143</sup> See also Brief for Petitioner Federal Communications Commission, *National Cable & Telecomm’s Ass’n v. Brand X Internet Servs.*, Nos. 04-277 & 04-281, 2005 WL 122088, at \*26 (U.S. Sup. Ct. filed Jan. 19, 2005) (“Given that the Act’s definition of ‘information service’ expressly contemplates a ‘telecommunications’ component, whereas the definition of ‘telecommunications service’ does not similarly contemplate an information service component, the regulatory necessity of placing ‘offering[s]’ in one mutually exclusive category or the other amply justifies the FCC’s decision to place ‘mixed’ or ‘hybrid’ services like cable modem service on the information services side of the line.”).

Under the adjunct-to-basic doctrine, defined long before the rise of the commercial Internet, an enhanced-service functionality integrated with a transmission service may not convert that service into an “information service” if it merely “facilitate[s] establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service.”<sup>144</sup> The Commission has suggested that this doctrine is now embodied in the “telecommunications management exception” in the final clause of 47 U.S.C. § 153(20), which defines “information service.” *Non-Accounting Safeguards Order*, 20 FCC Rcd at 21958 ¶ 107.

As this description suggests, the Commission has exclusively employed the adjunct-to-basic doctrine to exercise Title II jurisdiction over legacy telephone (“basic”) services, and never to Internet-based services. Internet access services, unlike PSTN calls, do not typically involve “the establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service.”<sup>145</sup> And, unlike legacy voice telephone services, they are inherently designed as information services that enable end users to make use of innumerable other information services.

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<sup>144</sup> First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, 11 FCC Rcd 21905, 21958 ¶ 107 (1996) (“*Non-Accounting Safeguards Order*”); see also Order and Notice of Proposed Rulemaking, *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd 4826, 4831 ¶ 16 (2005) (“*Calling Card Order*”) (adjunct-to-basic services are “incidental” to the underlying communications service, do not change the “fundamental character” of the communications service, and, from the consumer’s perspective, either have only a “trivial impact” on the service or are simply “a necessary precondition to placing a telephone call”); see also Declaratory Ruling and Report and Order, *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290, 7295 ¶ 14-15 (2006) (finding that playing an advertisement had at most a trivial effect on the calling capability).

<sup>145</sup> *Non-Accounting Safeguards Order*, 20 FCC Rcd at 21958 ¶ 107; see John Naughton, A BRIEF HISTORY OF THE FUTURE 102 (2001) (noting that Internet communications are generally broken down into individual packets that are routed separately, often through different routes from source to destination).

DNS functionality, for example, certainly cannot be characterized as “adjunct-to-basic.” In the *Brand X* litigation, the Commission characterized DNS, like caching, as a sufficient (but not necessary) feature warranting an “information service” classification for broadband Internet access service as a whole. And the Court thus deemed DNS look-up, like caching, as a full information-service functionality that, when integrated with broadband transmission, produced an integrated information service. *Brand X*, 545 U.S. at 999-1000. The courts would react with deep and well-justified skepticism if the Commission were suddenly to recharacterize DNS look-up in a transparent attempt to assert Title II jurisdiction over broadband Internet access services.

In all events, DNS could not plausibly qualify as “adjunct-to-basic”—or fall within the “management” exception of 47 U.S.C. § 153(20)—even as an original matter. DNS involves highly complex interactions among computers dispersed throughout the Internet and exemplifies the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications.” 47 U.S.C. § 153(20). In addition, DNS uses stored and constantly updated information to convert human language (such as website names) into numerical data (IP addresses). Absent that conversion, subscribers would have to discover, and then type in, a purely numerical IP address whenever they wanted to access any website on the Internet. Thus, broadband Internet access providers use DNS functionality not merely (or even primarily) to run their networks more efficiently, but to make the Internet as a whole easily accessible and convenient *for their subscribers*. By itself, that feature—“useful[ness] to end users” rather than simply providers—excludes DNS functionality from the telecommunications-management category.<sup>146</sup>

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<sup>146</sup> Memorandum Opinion and Order, *Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, Bell Operating Companies*, 13 FCC Rcd 2627, 2639 ¶ 18 (Com. Carr. Bur. 1998) (“1998 272

The DNS functionality that ISPs offer end users does not fit within the adjunct-to-basic category for the independent reason that it is associated with a variety of additional “smart” features. For example, DNS enables users to perform “reverse look-ups”: it enables a user to access stored information to convert a *numeric* IP address into a domain name (*e.g.*, the name of a website), which, among other things, facilitates a user’s ability to perform troubleshooting tasks and to obtain the identity of other users or destinations on the Internet. DNS functionality also enables other similarly “smart” features, like DNS “assist” capabilities. For example, if a user types a URL that does not properly identify an accessible webpage, the ISP’s DNS functionality may respond with a “URL redirect,” which reflects the ISP’s judgment about which webpage the user meant to reach, or may instead present the user with a full-blown menu of alternatives to the original query, based on educated guesses about the type of information the user seeks.<sup>147</sup>

Both of these DNS capabilities (reverse look-up and assist) are analogous to (though far more sophisticated than) “reverse directory assistance” service in the POTS environment, which

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*Forbearance Order*”) (“Although the ‘telecommunications management exception’ encompasses adjunct services, the storage and retrieval functions associated with the BOCs’ automatic location identification databases provide information that is *useful to end users, rather than carriers*. As a consequence, those functions are not adjunct services and cannot be classified as telecommunications services on that basis[.]”) (emphasis added); *see also* Memorandum Opinion & Order, *North American Telecommunications Association Petition for Declaratory Ruling under Section 64.702 of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, 101 FCC 2d 349 (1985) (“NATA Centrex Order”), on recon., 3 FCC Rcd 4385, 4391 ¶¶ 45-46 (1988).

<sup>147</sup> *See, e.g.*, Comcast, *Domain Helper National Rollout Begins*, Comcast Voices – The Official Comcast Blog, Aug. 4, 2009, <http://blog.comcast.com/2009/08/domain-helper-national-rollout-begins.html>; Optimum, *DNS Assistance*, <http://www.optimum.net/Article/DNS>; Verizon, *Help & Support - Opting out of DNS Assistance*, [http://www.verizon.net/central/vzc.portal?\\_nfpb=true&\\_pageLabel=vzc\\_help\\_contentDisplay&case=dns\\_assist](http://www.verizon.net/central/vzc.portal?_nfpb=true&_pageLabel=vzc_help_contentDisplay&case=dns_assist).

the Commission has long held to be an information service,<sup>148</sup> in that they are designed to be “useful to end users, rather than carriers,”<sup>149</sup> and they provide consumers with features and information “far beyond what the [provider] need[s] to ensure the proper transmission of the” user’s original communication.<sup>150</sup> Indeed, DNS and its many capabilities are core information-service functionalities at the heart of broadband Internet access service because, again, they involve “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(20). They therefore fall well outside the “adjunct-to-basic” and “telecommunications management” categories.

The same conclusion follows for the newer security features that are increasingly integrated within Internet access service. In key respects, these features resemble (but are far more sophisticated than) E911 services, which have been deemed *not* “adjunct-to-basic” because they involve the “retriev[al] of information from the [telcos’] automatic location identification databases” and allow third parties (*i.e.*, the public safety organizations) “to store information regarding PSAP assignments and, in some instances, individual telephone subscribers in these databases.”<sup>151</sup> Similarly here, AT&T and other broadband ISPs provide integrated security services that involve complex storage, retrieval, and analysis of information concerning malware and website security, and they share the data with security software companies, which, in turn,

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<sup>148</sup> See, e.g., *Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, As Amended, and Request for Relief to Provide International Directory Assistance Services*, 19 FCC Rcd 5211, 5225 ¶ 23 (2004) (“Electronic and operator-assisted reverse directory assistance services are information services.”).

<sup>149</sup> *1998 272 Forbearance Order*, 13 FCC Rcd at 2639 ¶ 18.

<sup>150</sup> *Id.* at 2638 ¶ 17.

<sup>151</sup> *Id.*

incorporate this information into Internet security software updates and mechanisms that are distributed to consumers. AT&T also identifies users whose computers or software may be infected by malware, individually notifies them of that fact, and sends them downloadable software to help them remedy the problem. These security features help protect consumers' computers, their software, and their confidential data—all of which create benefits for individual end users unrelated to the transmission of any individual Internet-based communication. In that respect, too, these integrated functionalities fall outside the adjunct-to-basic (and “telecommunications management”) doctrine.<sup>152</sup>

Finally, even if the Commission *could* lawfully repudiate the “mutual exclusivity” principle or expand the “adjunct-to-basic” doctrine in an effort to classify broadband Internet access as a Title II service, it *should not* do so, given the larger negative consequences for the Internet as a whole. If DNS look-up or security features were insufficient to maintain a Title I information-service classification for *broadband Internet access* providers even when those features are integrated with transmission functionality, there would be no limiting principle that would prevent Title II regulation from encompassing much of the rest of the Internet ecosystem. The Commission would face some version of that slippery slope problem no matter what rationale it invoked to “reclassify” broadband Internet access providers. To take the most obvious example, any such rationale would automatically impose Title II regulation, for the first time, on so-called “independent” ISPs like Earthlink and AOL that offer functionally the same service to the public even though they lease, rather than own, last-mile transmission facilities. But the sheer breadth of the collateral damage the Commission would inflict on the Internet as a whole would increase with any effort to expand the statutory category of “telecommunications

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<sup>152</sup> See *id.* at 2639 ¶ 18.

service” (or limit the category of “information service”)—as, again, the Supreme Court made abundantly clear in *Brand X*.

**E. Section 230 Further Confirms the Unlawfulness of Title II Reclassification.**

Any Title II reclassification of broadband Internet access service would also conflict with section 230 of the Communications Act—a problem the NOI does not mention, let alone try to resolve. First, section 230(c) states:

Protection for “good samaritan” blocking and screening of offensive material . . .  
(2) Civil liability. No provider . . . of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to *restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable*, whether or not such material is constitutionally protected[.]

47 U.S.C. § 230(c) (emphasis added). Section 230(c) thus authorizes—indeed, encourages—broadband ISPs to eliminate or block “objectionable” content from their services.<sup>153</sup> For example, section 230(c) protects (1) a broadband provider’s right to offer a pornography-free or racism-free Internet access service; (2) a wireless provider’s right to provide a child-friendly service with controlled access to the Internet; and (3) a wireless provider’s right not to include “offensive” applications, such as the notorious “Baby Shaker” application, in the provider’s application store.<sup>154</sup> This statutory provision thus precludes any interpretation of the Communications Act that would create a common-carrier regime at odds with such editorial discretion. And that conflict by itself precludes the proposed Title II reclassification to the extent it would require broadband ISPs to carry any and all Internet applications and content indiscriminately.

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<sup>153</sup> Section 230 defines “interactive computer services” to include, *inter alia*, any “system . . . that provides or enables computer access by multiple users to a computer server, including specifically a . . . system that provides access to the Internet[.]” 47 U.S.C. § 230(f)(2). Broadband ISPs inarguably fall into that category.

<sup>154</sup> See *AT&T Net Neutrality Reply Comments* at 82 n.169, 142-43.

Second, and more generally, section 230 embodies a congressional policy judgment that broadband providers may and sometimes *should* exercise editorial discretion over the content and applications that reach their end users. Indeed, section 230 encourages the exercise of such editorial discretion not only by prohibiting government interference with it, but by categorically preempting any *private* liability that ISPs might otherwise incur. As explained by a sponsor of what ultimately became section 230, Congress enacted that provision to “establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that *we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet* because frankly the Internet has grown up to be what it is without that kind of help from the Government.”<sup>155</sup> Section 230(b)(2) embraces this sentiment in establishing that “the policy of the United States” is for the Internet to develop “unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). That congressional policy judgment forecloses any Commission decision to subject broadband ISPs to common-carrier regulation under Title II.

### **III. TITLE II RECLASSIFICATION FOR ANY BROADBAND INTERNET ACCESS SERVICE WOULD BE ARBITRARY AND CAPRICIOUS.**

Even if the Commission could somehow square its reclassification proposal with the *definitional provisions* of the Communications Act, it still should not adopt that proposal, because doing so would cause enormous industry and consumer harms without any countervailing consumer or other benefit—except for enlargement of the Commission’s own regulatory power, which cannot itself justify this change in course. Any Title II reclassification would thus be invalidated as arbitrary and capricious.

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<sup>155</sup> 141 Cong. Rec. H8460-01, H8470 (1995) (statement of Rep. Cox) (emphasis added).

**A. Reclassification Would Cause Substantial Harms with No Commensurate Benefits.**

In the *Wireline Broadband Order*, the Commission rejected common-carrier regulation in the broadband Internet access context by confirming the “information service” classification of wireline broadband Internet access and by eliminating the unbundling requirement of the *Computer Inquiry* rules. As the Commission explained, such regulation does far more harm than good, given the dynamic and competitive nature of the broadband industry.<sup>156</sup> That determination was not new; it built on the main conclusion drawn by Congress and the Commission itself over its multi-decade history of unregulation: the Internet serves consumers best when the government leaves it alone.<sup>157</sup>

The Commission would have no legal or empirical basis for reversing those findings now. Indeed, even if the Commission were addressing the issue for the first time, any fair reading of the facts would still lead it to conclude that common-carriage regulation would harm the Internet. Common-carrier regulation might have made sense for static, highly regulated industries such as the railroad industry of 1887, for which Congress wrote the Interstate Commerce Act—the eventual model for the Communications Act of 1934. And it might have made sense for the highly static telephone business of 1934. In those days, the Bell System had a vertically integrated, state-sanctioned monopoly over local and long-distance services and telephone equipment manufacturing. Even fifty years later, at the time of its break-up, the Bell

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<sup>156</sup> *Wireline Broadband Order*, 20 FCC Rcd at 14865, 14877-88 ¶¶ 19, 44.

<sup>157</sup> See 47 U.S.C. § 230; Jason Oxman, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31, Office of Plans and Policy, FCC (July 1999); Remarks of William E. Kennard, Chairman, Federal Communications Commission before the National Cable Television Association, Chicago, Illinois, “The Road Not Taken: Building a Broadband Future for America” (June 15, 1999), <http://www.fcc.gov/Speeches/Kennard/spwek921.html> (declining to subject cable modem services to common carrier regulation because, “[i]f we’ve learned anything about the Internet in government over the last 15 years, it’s that it thrived quite nicely without the intervention of government”).

System still owned the overwhelming majority of the nation’s telephone lines, faced essentially no competition in its local exchange markets (often because it held de jure exclusive franchises), dominated the national long-distance market, and ran almost the entire equipment manufacturing industry as well.

Since then, however, “the telecoms industry has changed out of all recognition, transformed by a cornucopia of new technologies beyond mere telephone calls, and a herd of robust new competitors.”<sup>158</sup> In the Internet ecosystem, technological change is rapid and unpredictable, competitive entry is the reality, and new alliances continuously arise to satisfy evolving customer needs. As a result, competition is burgeoning. Clearwire already offers 51 million Americans a third fixed broadband option,<sup>159</sup> and two, three, and sometimes four or more mobile broadband operators offer service in the overwhelming majority of U.S. census tracts. It would make no more sense to apply Title II “nondiscrimination” rules and other common-carrier obligations in this competitive environment than to apply such rules to, say, the relationships between computer chip manufacturers and the developers of operating systems, or between those operating system developers and the developers of applications software; or between supermarket chains and their suppliers. In all of these contexts, regulatory intervention is inappropriate because market forces are the best guardians of consumer welfare, and the antitrust laws are available to correct any market failures if and when they arise.<sup>160</sup>

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<sup>158</sup> *Telecoms mergers: Healthy network effects*, The Economist, May 7, 2005, at 53.

<sup>159</sup> *Clearwire Press Release*.

<sup>160</sup> The NOI badly misrepresents AT&T’s position on these issues, suggesting that AT&T “expressed [its] acceptance of the basic standards articulated in sections 201 and 202” for Internet access services. NOI ¶ 76 n.200. That is false. In its *Net Neutrality Reply Comments* (at 33-34), AT&T argued that *if* the Commission adopted a “nondiscrimination” rule to govern business-to-business QoS arrangements, that rule would contradict section 202 unless it contained the “unreasonable” qualifier applicable even to legacy Title II telephone services. And AT&T observed that this “unreasonable” qualifier was both administrable and indispensable to

The Internet has thrived precisely because the absence of government intervention has encouraged a climate of free-wheeling experimentation with new services and one-off business alliances. Common-carrier rules would deter such experimentation by exacerbating its downside risks. Each provider would have reason to fear that, whenever an experimental service or business relationship turns out to be unprofitable, common-carrier rules may nonetheless require the carrier to keep offering the same unprofitable service to additional customers or enter into similar unpromising business relationships with additional partners. This “in for a penny, in for a pound” principle of common carriage is thus inimical to the creative customization integral to the Internet’s success.

Common-carrier rules in this context would also cause unprecedented regulatory uncertainty. As Princeton professor Edward Felten explains, “[a]nti-discrimination rules can be hard to write, and hard to enforce.”<sup>161</sup> As a result, such rules would spawn a new, highly destabilizing round of implementation controversies that could dwarf post-1996 Act litigation in scope and intensity. Even in the most settled industry environments, a ban on “unreasonable discrimination” is inherently indeterminate. “Discrimination” is not a self-defining concept, and there is often room for disagreement about (for example) whether two services are “like” or whether the complainant is “similarly situated” to the customer whose existing business deal it wants the defendant to replicate for the complainant’s benefit.<sup>162</sup> And in part because price discrimination is welfare-maximizing in many contexts, the case law abounds with disputes

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the application of the section 202 “nondiscrimination” rule to those legacy services. AT&T did *not* say that the underlying nondiscrimination rule, even if accompanied by an “unreasonable” qualifier, would be appropriate for *broadband Internet access services*.

<sup>161</sup> Edward Felten, *Nuts and Bolts of Network Neutrality*, at 5-6 (July 6, 2006), <http://itpolicy.princeton.edu/pub/neutrality.pdf> (formatting altered).

<sup>162</sup> See generally *MCI Telecomm’ns Corp. v. FCC*, 917 F.2d 30, 37-46 (D.C. Cir. 1990).

about whether specific instances of discrimination are justified as “reasonable.”<sup>163</sup> Finally, although the indeterminacy of common-carrier rules makes for regulatory uncertainty in any industry, the problem would be particularly intense in the Internet environment, where the rapid evolution of services and business models would defy the efforts of any regulatory body to keep up.<sup>164</sup> The NOI makes no serious effort to address any of these concerns.

Reclassification under Title II would also expose broadband providers, for the first time, to *self-executing* prohibitions that could render them liable for a range of conduct that some future Commission finds “unjust” or “unreasonable,” no matter what abstract assurances this Commission might now try to give about the narrow scope of those prohibitions. This stands in stark contrast to the pre-*Comcast* Title I regime, where providers could not be held liable for any conduct that the Commission had not affirmatively proscribed. Under the proposed reclassification, therefore, even if the Commission forbore from all substantive provisions of Title II besides sections 201 and 202, broadband providers could still face potential and uncertain liability whenever they engage in anti-piracy measures, network-management techniques, or various commercial arrangements with particular applications and content providers. That fear could chill such initiatives, to the detriment of broadband providers, application and content providers, and ultimately consumers.

Nor does the NOI even mention an entire set of regulatory consequences that would flow from a Title II reclassification: potential retail pricing constraints. The Commission has taken pains to assure the industry that its reclassification decision would merely restore the regulatory status quo before *Comcast*. Those assurances are hollow in many respects, but they are particularly oblivious to the predominant role that sections 201 and 202 play in the legacy

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<sup>163</sup> See generally *id.*; *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

<sup>164</sup> *Wireline Broadband Order*, 20 FCC Rcd at 14865 ¶ 19.

telephone world: regulating the relationship between telephone companies and retail end users. Again, the prohibitions of sections 201 and 202 are self-executing, and any reclassification decision might thus expose broadband providers for the first time to the threat of liability when they engage in (for example) creative retail pricing arrangements. That threat, too, could cause broadband providers to err on the side of extreme conservatism and uniformity in their retail offerings, again to the detriment of consumers. The Commission has identified *no* market failure or other problem that could possibly justify this new intervention in retail broadband relationships, *see* Part One, *supra*, but it would impose all the costs and uncertainties of that intervention nonetheless. That, too, would be arbitrary and capricious.

**B. The Commission May Not Reclassify Broadband Internet Access Services Without Facing Up to the Logical Implications for the Internet as a Whole.**

As AT&T explained in its *Net Neutrality Reply Comments* (at 162-64), Title II reclassification would be a clumsy tool for achieving the Commission's policy objectives because it would inflict needless burdens not only on broadband providers, but on many other Internet-based providers as well. The Commission now perversely encourages commenters to *avoid talking about that concern* in their comments here, on the theory that these services are somehow "outside the scope of this proceeding." NOI ¶ 107. This is arbitrary and irresponsible. The Commission is proposing to open a Pandora's Box by altering the legal test for determining whether a provider falls within the scope of Title II. That determination would have self-executing, logical consequences for the rest of the Internet ecosystem, consequences that even some supporters of net regulation now candidly acknowledge.<sup>165</sup> The Commission must face up

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<sup>165</sup> See Letter from Matthew Friendly, Data Foundry, to Marlene Dortch, FCC, GN Docket No. 09-51 (filed June 11, 2010), Attachment at 3 (arguing that, to be effective, reclassification "would sweep in a far larger class of regulated entities" and would "subject[] to potential regulation . . . the non facilities based information service providers that previously were not subject to regulation under Title II").

to those logical consequences before triggering them, not after.<sup>166</sup> “When the government regulates in a way that” adversely affects the public, “it owes them reasonable candor. If it provides that, the affected citizens at least know that the government has faced up to the meaning of its choice. The requirement of reasoned decisionmaking ensures this result and prevents officials from cowering behind bureaucratic mumbo-jumbo.”<sup>167</sup>

**1. A Provider’s Ownership of Facilities Is Irrelevant to the Statutory Classification of the Services It Offers the Public.**

The NOI appears to embrace two regulatory distinctions as a basis for broadband policy: (1) a distinction between “facilities-based” and “non-facilities-based” providers and (2) a distinction between last-mile and non-last-mile Internet providers. *See, e.g.*, NOI ¶¶ 1 n.1, 13, 106. But those *policy-driven* distinctions are entirely irrelevant to the *statutory provisions* that define whether a service is a “telecommunications service” or an “information service”—as the Supreme Court confirmed in *Brand X* (see below). Title II reclassification therefore could not be limited to “facilities-based” providers of “last-mile” broadband services. The proposed reclassification would necessarily threaten to impose common-carrier regulation (whether “light-style” or not) on a broad range of providers that offer to arrange for transmission of data over the Internet as part of the information services they offer, whether over facilities that they own in fee simple or circuits that they lease from others.

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<sup>166</sup> An agency decision is arbitrary and capricious whenever an agency “entirely fail[s] to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *AEP Texas North Co. v. Surface Transp. Bd.*, No. 09-1202, 2010 WL 2431918, at \*7, \*11 (D.C. Cir. June 18, 2010) (vacating and remanding agency decision for failure to consider an important aspect of the problem). Indeed, the D.C. Circuit has cited this rationale in remanding an agency action despite the agency’s protestation that the issue in question was “beyond the scope of th[e] rulemaking.” *Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1367 (D.C. Cir. 1999).

<sup>167</sup> *Competitive Enterprise Inst. v. NHTSA*, 956 F.2d 321, 327 (D.C. Cir. 1992).

First it is important to clear up some threshold semantic confusion. The NOI uses the term “facilities-based” pervasively in an effort to distinguish the providers the Commission proposes to regulate from those it presumably does not. *See, e.g.*, NOI ¶ 1 n.1. But the NOI never defines this term. A great many Internet-based providers other than the ostensible subjects of this proceeding own many of the transmission facilities they use to transmit data on behalf of their customers. For example, Google owns the multi-billion-dollar content delivery network that it uses to transmit (among other things) paid advertisements from its many business customers to end users around the globe. And although the Commission refers to traditional dial-up ISPs such as AOL and Earthlink as “non-facilities-based,” many of them own network facilities indispensable to Internet access, including fiber-optic links connecting their local access equipment to cache servers and Internet backbone networks.<sup>168</sup> The Commission, however, purports to exclude these providers of Internet services from this proceeding by advancing a brand new conception of the term “facilities based provider” that would encompass only the subcategory of providers that own transmission facilities extending all the way to customer premises.

Ultimately, however, it does not matter precisely how the Commission tries to define the category of “facilities-based” providers—because facilities ownership has never been either a necessary or a sufficient condition for Title II classification. Indeed, it is completely irrelevant to that classification. The statutory definitions of “telecommunications service” and “information service” each turn on what functionalities the *customer* receives, not how the *service provider* arranges behind the scenes for the provision of those functionalities. *See* 47 U.S.C. § 153(20), (46). As the *Brand X* majority held, therefore, “the relevant [statutory] definitions do not

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<sup>168</sup> *See Stevens Report*, 13 FCC Rcd at 11534, 11536 ¶¶ 69, 73, & n.138.

distinguish facilities-based and non-facilities-based carriers.” *Brand X*, 545 U.S. at 997. That holding was essential to the Court’s larger decision to affirm the Commission’s classification of broadband Internet access as an “information service.” MCI and the other parties challenging that classification had argued that broadband Internet access should be deemed a “telecommunications service” simply because any broadband provider offers telecommunications to the public as a key component of its service. The Court properly rejected that argument because, as it observed, it would swallow up much of the Internet—and, specifically, would automatically “subject to common-carrier regulation non-facilities-based ISPs that *own no transmission facilities.*” *See id.* at 994 (emphasis added).

Examples outside the broadband context drive this point home. Calling-card providers and other resellers of long-distance services are “telecommunications carriers” subject to Title II even though they (1) may not own or even lease facilities and (2) provide no “local” connectivity.<sup>169</sup> Similarly, standalone long-distance companies (like the legacy AT&T Corp., MCI, and Sprint) are also Title II providers when they sell interexchange services even though they rely on local exchange carriers to bridge the last few miles between their long-haul networks and their subscribers. In the *Brand X* dissent that the NOI appears to cite approvingly (*see* NOI ¶ 106), Justice Scalia missed this point, suggesting that it is indeed appropriate to

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<sup>169</sup> *See, e.g.*, Declaratory Ruling and Report and Order, *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290, 7293-94, 7312 ¶¶ 10, 65 (2006) (“all prepaid calling card providers” “are subject to regulation as telecommunications carriers”), *vacated in part on other grounds by Qwest Servs. Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007); Order to Show Cause and Notice of Opportunity for Hearing, *Nos Communications, Inc., Affinity Network Incorporated and Nosva Limited Partnership*, 18 FCC Rcd 6952, 6953-54 ¶ 3 (2003) (switchless long-distance reseller is subject to regulation under Title II); Report and Order, *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 ¶ 8 (1976) (“[A]n entity engaged in the resale of communications service is a common carrier, and is fully subject to the provisions of Title II.”), *aff’d sub nom, AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978); *see also Trans Nat’l Commc’ns, Inc. v. Overlooked Opinions, Inc.*, 877 F. Supp. 35, 38 (D. Mass. 1994) (discussing 1976 order).

distinguish, for classification purposes, between ISPs that own last-mile facilities and those that lease them. *See* 545 U.S. at 1010-11. That dissenting position is unavailable to the Commission here, both because the *Brand X* majority decisively rejected it, *see id.* at 994, 996-997, and because it was mistaken even as an original matter. Indeed, if Justice Scalia’s analysis had been correct, legacy AT&T Corp., MCI, and Sprint should never have been regulated as Title II common carriers because those long distance providers did not own last-mile facilities.

That point has critical significance for this proceeding. From a statutory-classification perspective, “non-facilities-based” ISPs such as Earthlink are analogous to legacy long-distance carriers: they assume responsibility for transporting an end user’s data traffic throughout the Internet, even though they purchase, as an input, transmission supplied by another provider’s last-mile facilities. Such ISPs are today considered “information service” providers rather than “telecommunications service” providers. That is *not* because they own no last-mile facilities, but because they provide classic information-service functionalities with their services, including DNS lookup, email, and often caching. If the Commission reversed course and deemed those functionalities insufficient to keep “facilities-based” ISPs from Title II regulation, “non-facilities-based” ISPs would necessarily become Title II telecommunications carriers as well. As discussed below, the same conclusion would apply to a range of other providers that assume responsibility for transporting data throughout the Internet, ranging from Akamai to Amazon to Level 3 to Netflix.

These considerations underscore the importance of the *Stevens Report* to the Commission’s analysis here. The NOI mistakenly implies that the *Report*’s analysis can be logically confined to “non-facilities-based” dial-up ISPs: *i.e.*, ISPs like AOL or Earthlink that may own extensive transmission facilities but not the last-mile facilities connecting their

networks to individual customer premises. *See* NOI ¶ 13. The *Stevens Report* was indeed written at a time when most Americans relied on dial-up services for Internet access and most ISPs did not provide last-mile transmission functionality. But the Commission did not purport to limit the conclusions of the *Report* to “non-facilities-based ISPs.”<sup>170</sup> Nor, logically, could it have done so, since facilities ownership is irrelevant for statutory classification purposes. Again, whether these providers owned last-mile transmission facilities had nothing to do with whether they fell inside or outside the “telecommunications carrier” definition. The Commission deemed them “information service” providers not because they relied on other networks to reach end users—as discussed, the same has always been true of independent long-distance carriers, which are all regulated under Title II—but because their services contained integrated information-service functionalities.<sup>171</sup> As a matter of logic, that designation did not change when ISPs provided last-mile broadband transmission to end users in combination with the other services they had always offered them. Thus, although the Commission did not specifically draw that logical conclusion until 2002, the *Stevens Report* had already laid the essential groundwork for the proper classification of broadband ISPs as early as 1998.

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<sup>170</sup> *Stevens Report*, 13 FCC Rcd at 11534 ¶ 69 (observing that even “where an Internet service provider owns transmission facilities, and engages in data transport over those facilities in order to provide an information service, we do not currently require it to contribute to universal service mechanisms”).

<sup>171</sup> *See id.* at 11539-40 ¶ 80 (“The provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers’ own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an ‘information service.’”) (footnotes omitted).

**2. The *Computer Inquiry* Rules Have No Relevance to This Proceeding, and the Commission Could Not Lawfully Resurrect Any Version of Them for Broadband Internet Access.**

In focusing on “facilities-based providers” (*e.g.*, NOI ¶ 1 n.1), the Commission appears to have confused the *statutory classification* issue presented here with the separate regulatory distinctions—between facilities-based and non-facilities-based providers—that the Commission drew in connection with the “unbundling” obligation of the *Computer Inquiry* regime. That obligation required any “facilities-based” wireline telco that offered a retail information service to offer the transmission components of that service as a wholesale “telecommunications service.” As the *Brand X* Court explained, however, that *regulatory* obligation did not alter the characterization of the underlying retail services that triggered the obligation, which were always considered “information services” (known as “enhanced services” before the 1996 Act). In the Court’s words, “[t]he differential treatment of facilities-based carriers was . . . a function not of the definitions of ‘enhanced-service’ and ‘basic service,’ but instead of a choice by the Commission to regulate more stringently, in its discretion, certain entities that provided enhanced service. *The Act’s definitions, however, parallel the definitions of enhanced and basic service, not the facilities-based grounds on which that policy choice was based[.]*” *Brand X*, 545 U.S. at 996 (emphasis added).

In short, the facilities-based/non-facilities-based distinction inherent to the *Computer Inquiry* rules assumed significance only *after* the Commission concluded that a particular service was properly characterized as an “information service.” The distinction had (and has) no logical bearing on the antecedent question of whether a service should be so characterized in the first place. And the Commission has *never* found that the *retail* broadband Internet access services that wireline providers sell to end users are Title II “telecommunications services” or that, in selling those retail services, those providers should be regulated as common carriers. Those

retail services are unitary information services and always have been, and they have always fallen outside the scope of Title II.<sup>172</sup>

In one passage, the NOI, while quite vague on this point, might be construed as asking whether the Commission could or should require providers, as under the *Computer Inquiry* regime, to “unbundle” some component of their now-integrated broadband Internet access services and sell it on a standalone common-carrier basis. *See* NOI ¶ 54. If so, any such requirement would contradict assurances by Commission officials that they have no intent to revive the *Computer Inquiry* unbundling requirement and wish merely to find a new legal rationale for preserving the status quo.<sup>173</sup> And as discussed above, the Commission would severely disrupt the industry—imposing massive new costs and creating widespread consumer confusion—if it imposed new requirements changing how broadband Internet access services are offered and purchased. *See* Part Two, Section III.A, *supra*. Indeed, it is altogether unclear how, simply as an engineering matter, the Commission could force all broadband Internet access providers—including the cable modem systems and wireless networks that have *never* been subject to the *Computer Inquiry* rules—to “unbundle” the transmission components of shared network infrastructure. The NOI does not even begin to grapple with that complex issue.

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<sup>172</sup> *See also Stevens Report*, 13 FCC Rcd at ¶ 69 n.138 (“Under Computer II, and under our understanding of the 1996 Act, we do not treat an information service provider as providing a telecommunications service to its subscribers. *The service it provides to its subscribers is not subject to Title II, and is categorized as an information service. . . . [I]n every case, some entity must provide telecommunications to the information service provider. When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications. That conclusion, however, speaks only to the relationship between the facilities owner and the information service provider (in some cases, the same entity); it does not affect the relationship between the information service provider and its subscribers.*”) (emphasis added).

<sup>173</sup> *See, e.g., Schlick “Third Way” Statement* (section entitled “No New Unbundling Authority”), <http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html#book-9>.

In any event, for several independent reasons, the Commission could not lawfully impose any such requirement in the first place.

First, the *Computer Inquiry* rules were designed in and for the one-wire monopoly environment of the 1980s, and the Commission could articulate no defensible policy rationale for inflicting them on any class of providers in the competitive broadband Internet access market of today.<sup>174</sup> Indeed, longstanding Commission precedent precludes *any* compulsion to provide a service on a common-carrier basis—in the absence of demonstrated market power.<sup>175</sup> The Commission has made no finding that this test is met for any individual broadband Internet access provider or for the industry collectively, and it could not lawfully do so on the record in this proceeding.<sup>176</sup>

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<sup>174</sup> *Cable Modem Order*, 17 FCC Rcd at 4802, 4825 ¶¶ 6, 43-44 (discussing competitiveness of broadband marketplace and explaining why it would be inappropriate to apply the *Computer Inquiry* rules); *Wireline Broadband Order*, 20 FCC Rcd at 14876-98 ¶¶ 42-85 (offering numerous reasons for eliminating the *Computer Inquiry* rules, including the competitiveness of the market); *id.* at 14876 ¶ 42 (“[T]he *Computer Inquiry* obligations are inappropriate and unnecessary for today’s wireline broadband Internet access market. . . . [T]he *Computer Inquiry* rules were developed before separate and different broadband technologies began to emerge and compete for the same customers. Further, these rules were adopted based on assumptions associated with narrowband services, single purpose network platforms, and circuit-switched technology.”) (internal footnotes omitted).

<sup>175</sup> *See Norlight Private Carriage Order*, 2 FCC Rcd 132, 134 ¶¶ 19-20 (1987) (common carriage cannot be required unless the provider “possess[es] sufficient market power to justify such treatment”); *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999) (test involves assessing whether the provider “has sufficient market power to warrant regulatory treatment as a common carrier”); *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21589 ¶ 9 (1998) (“*AT&T Submarine Systems*”) (“[T]he focus of our inquiry here is whether the license applicant has sufficient market power to warrant regulatory treatment as a common carrier.”).

<sup>176</sup> *See State Farm*, 463 U.S. at 43 (Commission must demonstrate a “rational connection between the facts found and the choices made”) (citations omitted). In particular, the Commission has consistently found that there is no “compelling reason” for service to be provided on a common-carrier basis when there are “alternative methods of providing similar service.” *Communications, Inc., Commline, Inc. and Cox DTS, Inc.*, 102 F.C.C.2d 110, ¶ 27 (1985), *vacated as moot*, 1 FCC Rcd 561, ¶ 5 (1986); *see also AT&T Submarine Systems*, 13 FCC Rcd at 21589 ¶ 9 (for purposes of the common-carriage test, “we have found that if sufficient alternative facilities . . . are available an applicant would be unable to charge

Second, and just as important, the Commission would lack even the threshold statutory authority to subject broadband Internet access providers to *Computer Inquiry*-type rules or any other compulsion to provide a new common carrier service. As the *Comcast* court recently explained, the Commission derived its Title I authority to impose the *Computer Inquiry* rules in the first place from a regulatory fixture of the 1980s: rate-of-return regulation. The Commission feared that, without the unbundling rules, LECs could more easily cross-subsidize their unregulated and competitive Title I services by misallocating an excessive share of joint and common costs to the rate base for their monopoly, rate-regulated telephone services—thereby harming the consumers of the telephone services by raising their rates.<sup>177</sup> That policy concern made the unbundling rules “ancillary” to a specific statutory responsibility of the Commission: maintenance of just and reasonable rates for those Title II telephone services.<sup>178</sup> Today, however, few major broadband Internet access providers are subject to rate-of-return regulation for any of their services, and thus no cross-subsidization concerns could arise as to them.<sup>179</sup> The

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monopoly rents and hence would not have market power”); *Cable & Wireless, PLC*, 12 FCC Rcd 8516, 8522-23 ¶¶ 15-16 (1997) (noting that whether or not “the public interest requires common carrier operation of the proposed facility” generally rests on an assessment whether alternative facilities are available). The Commission has not even solicited evidence with respect to this test in this proceeding. And in all events, the Commission itself already has found that the overwhelming majority of consumers across the United States have a choice of at least two wireline providers, and consumers increasingly have a choice of at least one fixed wireless provider, not to mention several wireless broadband providers. See Part Two, Sections I.A & III.A, *supra*.

<sup>177</sup> *Computer and Communications Industry Ass’n v. FCC*, 693 F.2d 198, 205 (D.C. Cir. 1982) (“CCIA”).

<sup>178</sup> *Comcast*, 600 F.3d at 656; see also *CCIA*, 693 F.2d at 211.

<sup>179</sup> See *Wireline Broadband Order*, 20 FCC Rcd at 14897 ¶ 83 (finding “no need to retain either the *Computer II* structural separation requirement or the *Computer III* nonstructural safeguards to keep the BOCs from cross-subsidizing their broadband Internet access service operations with revenues from the telecommunications services operations”); Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory*

Commission would therefore have no statutory basis for seeking to reimpose the *Computer Inquiry* rules in this context.

Finally, the Commission could not, on the record in this proceeding, justify the public-interest *costs* of requiring the provision of some new constituent common-carrier service. Those include the risk of decreased innovation and investment and higher prices for consumers—concerns the Commission found relevant in its prior determination that *abandoning* the compulsory common-carriage unbundling requirements in the *Wireline Broadband Order* was in the public interest.<sup>180</sup> The Commission cannot lawfully avoid considering these policy harms when proposing to reverse itself.<sup>181</sup> Yet the Commission has not even solicited comment on these issues.

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*Review -- Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, 16 FCC Rcd 7418, 7441 ¶ 38 (2001) (explaining that “incumbent LECs that are subject to price cap regulation . . . do not have an incentive to [engage in cross-subsidization] because absent a guaranteed rate-of-return on their local exchange investment these carriers cannot expect to recover [their] discounts [on unregulated services] by including them in their regulated rate base”).

<sup>180</sup> *Wireline Broadband Order*, 20 FCC Rcd at 14905 ¶ 97 (rejecting proposals to maintain even a modified compulsory common-carriage requirement on the basis that “continuing to impose such requirements would only perpetuate wireline broadband Internet access providers’ inability to make better use of the latest integrated broadband equipment and would deprive consumers of more efficient and innovative enhanced services. Similarly, a continued obligation to provide any new broadband transmission capability to all ISPs indiscriminately, and provide advance notice thereof, would reduce incentives to develop innovative wireline broadband capabilities and places wireline broadband at a substantial competitive disadvantage vis-à-vis cable modem and other broadband Internet access service providers.”).

<sup>181</sup> *See Competitive Enterprise Inst.*, 956 F.2d at 325 (the agency must “negate or justify” the policy harms of its intended action); *see also, e.g., Verizon Telephone Companies v. FCC*, 570 F.3d 294, 304 (D.C. Cir. 2009) (holding that it was “arbitrary and capricious for the FCC to apply [new competition analysis methodologies] . . . without providing a satisfactory explanation [about why] it has not followed such approaches in the past”).

### 3. The Logic of Reclassification Would Encompass Much of the Internet Ecosystem.

As explained in the previous subsection, any reclassification decision would have to extend, simply as a matter of logic, to so-called “non-facilities-based” ISPs such as Earthlink and AOL, which offer the public the same broadband Internet access services as “facilities-based” ISPs. The same fate would also logically befall a substantial category of other Internet-based providers.

First, the logic of reclassification would extend to CDNs such as Akamai that hold themselves out to countless thousands of large and small business customers to transport data around the globe to cache servers near individual recipients. *See* Part Two, Section I.A, *supra* (describing Akamai’s service). As discussed, it is irrelevant for purposes of Title II classification that Akamai leases, rather than owns, the facilities it uses to discharge its responsibility for data transmission. Public Knowledge’s Harold Feld correctly acknowledges in a recent blog post that Akamai is “moving information from one place to another” and is “offering telecom” when it provides CDN services.<sup>182</sup> Feld is incorrect, however, in suggesting that Akamai could nonetheless avoid Title II regulation on the ground that it enters only into one-off business negotiations and does not hold itself out as a common carrier. As discussed above, Akamai itself has made clear both in its net neutrality comments and on its website that it does indeed offer its services on a standardized basis to many thousands of end-user business customers. *See* Part Two, Section I.A, *supra*. That is more than sufficient to qualify it as a common carrier if the

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<sup>182</sup> Harold Feld, *Want to Play FCC Fantasy Baseball? Follow the Title II Debate*, Wetmachine.com, May 16, 2010, <http://tales-of-the-sausage-factory.wetmachine.com/content/want-to-play-fcc-fantasy-baseball-follow-the-title-ii-debate> (“Akamai is moving information from one place to another. That’s plainly ‘telecommunications.’ But . . . Akamai does not offer its service to ‘the general public’ or even a distinct class of the general public. Any entity that wants to use Akamai’s CDN negotiates its own special deal with Akamai. So while Akamai offers telecom, they do not offer a ‘telecommunications service[.]’”).

Commission determines, for example, that caching services are “adjunct-to-basic” and thus do not prevent an Internet-based transmission provider from falling within the scope of Title II.<sup>183</sup>

In this regard, Earthlink, AOL, and Akamai would hardly be alone. The *First Industry Title II Letter* describes the broad variety of Internet-based service providers that would be swept into this Title II regime as the logical result of this statutory reinterpretation, including:

- Providers of e-readers like Amazon.com (the Kindle) that include integrated 3G connectivity—and, in the Kindle’s case, web-browsing functionality—in the purchase price of their devices.<sup>184</sup>
- VoIP and VoIP-related providers such as Vonage, Skype, and Google Voice, which would suddenly be treated identically to traditional long-distance carriers.
- Internet transport companies like Level 3, Savvis, Cogent, and Limelight, which offer backbone, Internet access, and content-delivery services to thousands of large and small business customers by means of facilities they either own or lease. In a single stroke, the Commission could subject the core of the Internet ecosystem, including all traditionally unregulated peering and transit arrangements, to common-carrier regulation designed for the legacy telephone network.
- Providers of online video services like Netflix and Hulu that self-provide or lease transmission capacity to offer content over the Internet. For example, Hulu has announced the creation of a “Hulu Plus” service that, for a monthly fee of \$9.99, will transmit video to end users in high-definition. See <http://www.hulu.com/plus>. Under

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<sup>183</sup> See Memorandum Opinion and Order, *Salsgiver Telecom, Inc., Complainant, v. North Pittsburgh Telephone Company, Respondent*, 22 FCC Rcd 9285, 9291-92 ¶ 14 (Enforc. Bur. 2007) (explaining that “the Commission has long regulated as common carrier services the provision of ‘private line’ [business-customer-only] services, which the Commission defines as ‘facilities or network transmission capacity dedicated to the use of an individual customer’”) (citations and internal quotations omitted) (citing Memorandum Opinion and Order, *Investigation of Special Access Tariffs of Local Exchange Carriers*, 8 FCC Rcd 4712, 4712 ¶ 2 (1993)); Third Report and Order, *MTS and WATS Market Structure, Phase I*, 93 FCC 2d 241, 249-50 ¶¶ 20-23 (1983); Notice of Inquiry and Proposed Rulemaking, *American Telephone & Telegraph Company; Private Line Rate Structure and Volume Discount Practices*, 74 FCC 2d 226 (1979) (investigating whether the pricing of AT&T’s competitive private line services was consistent with 47 U.S.C § 202, which prohibits unjust discrimination by common carriers).

<sup>184</sup> See Joanna Stern, *Among E-Readers, Competition Heats Up – Comparing the iPad, Kindle, Nook and Alex E-Readers*, N.Y. Times, June 9, 2010, <http://www.nytimes.com/2010/06/10/technology/personaltech/10TAB.html> (also mentioning that AsusTek, Dell, and Hewlett-Packard will soon be introducing their own e-readers that function as multipurpose devices providing access to the Web and other applications).

the proposed reclassification, that transmission functionality would become a Title II telecommunications service.

- Companies like Google that provide advertising-supported Internet search services and arrange for the transmission of search results and advertising messages to end users. Google charges fees to countless businesses in exchange for a critical service that Google dominates: the paid transmission of advertisements and other content chosen by those businesses to end users who use Internet search engines. Any statutory reinterpretation that rejects the 1998 “mutual exclusivity” conclusion would necessarily convert Google into one of the world’s largest common carriers—indeed, the most globally dominant provider of telecommunications services in history.
- For similar reasons, providers of cloud-computing services, like Amazon.com’s EC2, that enable the transmission of customer data to and from cloud computing server farms.

Of course, there would be room for debate about just *how* expansive a swath the Commission has cut through the Internet with its “third way” proposal, but there is no debating this: if a broadband Internet access provider is deemed to be offering a telecommunications service, there is no principled basis on which the Commission could avoid the conclusion that a very substantial portion of providers in the Internet ecosystem are doing the same. Arbitrary distinctions between facilities-based and non-facilities-based providers or last-mile and other providers will not alter this inexorable result of statutory reclassification. That is an issue the Commission must face up to now, before it lets the genie out of the bottle, not later, after the harm is done.

**IV. RECLASSIFICATION WOULD VIOLATE THE TAKINGS CLAUSE AND, AT A MINIMUM, EXCEED THE COMMISSION’S AUTHORITY BY EXPOSING THE PUBLIC FISC TO A SUBSTANTIAL RISK OF JUST-COMPENSATION LIABILITY.**

Reclassifying broadband Internet access under Title II would also raise serious Takings Clause concerns. The Commission may not adopt policies that expose the public fisc to the risk of just-compensation liability unless Congress has explicitly authorized it to adopt those

policies.<sup>185</sup> For that reason alone, the Commission lacks authority to adopt such a reclassification in the absence of a clearer statement from Congress.

A regulatory taking occurs when government action causes significant economic harm that interferes with settled, investment-backed expectations, particularly where the action is extreme and unjustified.<sup>186</sup> All of the factors for a regulatory taking are met here.<sup>187</sup> First, the proposed reclassification would plainly interfere with substantial investment-backed expectations. As discussed, the industry has long operated on the explicit understanding that the Commission meant what it said when it classified broadband Internet access as an integrated information service. And based on such assumptions, broadband providers have invested hundreds of billions of dollars of private capital in expanding their networks and deploying technology and new services. Indeed, private enterprise is expected to invest some \$23 billion in 2010 *alone* just to build out America’s wireless broadband infrastructure.<sup>188</sup> Changing the rules

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<sup>185</sup> See *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445-47 (D.C. Cir. 1994) (explaining that the constitutional avoidance doctrine, and not *Chevron* deference, should be applied in reviewing the FCC’s decision to require physical collocation, and holding: “Applying the strict test of statutory authority made necessary by the constitutional implications of the Commission’s action, we hold that the Act does not expressly authorize an order of physical co-location, and thus the Commission may not impose it.”). The doctrine of constitutional avoidance limits the Commission’s ability to adopt rules that would raise takings issues in an “identifiable class of cases,” as the proposed rules would. *Id.* at 1445 (“Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions.”). See also *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (doctrine of constitutional avoidance).

<sup>186</sup> See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984).

<sup>187</sup> Title II regulation would constitute a physical taking, as well, to the extent it required providers to support services they would otherwise have excluded—as could be the case, for example, if AT&T were prohibited from exercising discretion concerning the applications that are supported on its IP platform. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982); *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

<sup>188</sup> See Ralph de la Vega, President/CEO, AT&T Mobility and Consumer Markets, Chairman of the Board, CTIA, *United States: Leading the Mobile Broadband Revolution*, CTIA

now would disrupt these expectations and seriously devalue those investments, especially to the extent that Title II regulation prohibits business ventures that providers had every reason to believe were legitimate.

This concern is particularly severe in the context of wireless broadband services. Since classifying wireless broadband as an information service in 2007, the Commission has conducted spectrum auctions—and providers have bid and invested billions—based on the explicit understanding that wireless providers could use their spectrum to provide mobile broadband Internet access services as unregulated information services. Indeed, in the 700 MHz auction, in particular, the Commission rejected proposals to impose common-carrier-like “open platform” rules on wireless broadband providers generally, and it adopted such rules only on a “limited basis,” for the 700 MHz C Block.<sup>189</sup> The Commission—after obtaining the billions of dollars in bids that subsequently followed for the 700 MHz spectrum—cannot now claim that providers had only a “unilateral expectation” that they could provide mobile broadband on a non-common-carrier basis. *Ruckelshaus*, 467 U.S. at 1005.

Imposing such requirements radically affected the value of the C Block spectrum as compared to all other, unencumbered 700 MHz spectrum.<sup>190</sup> And imposing Title II regulation—

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Conference, at 7 (Mar. 23, 2010), [http://www.att.com/Common/merger/files/pdf/RDLV\\_CTIA.pdf](http://www.att.com/Common/merger/files/pdf/RDLV_CTIA.pdf). See also page 81, *supra*, discussing the billions of dollars of infrastructure investment by wireline and wireless broadband providers.

<sup>189</sup> Second Report and Order, *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, 700 MHz Order*, 22 FCC Rcd at 15289, 15364 ¶ 205 (2007).

<sup>190</sup> See, e.g., George S. Ford, Thomas M. Koutsky, & Lawrence J. Spivak, *Using Auction Results to Forecast the Impact of Wireless Carterfone Regulation on Wireless Networks*, Phoenix Center Policy Bulletin No. 20, at 13 (May 2008) (“[W]e predict the Upper C block should have sold for approximately \$7.9 billion . . . . The actual price for the block was about \$4.75 billion, which suggests that the open access regulations trimmed \$3.1 billion from the winning bids, or nearly a 40% loss in revenues. These calculations imply that because of the open platform mandate, the Upper C block licenses were nearly 40% less valuable than they would have been if those regulations had not been in place.”).

and with it, undoubtedly, some new form of “open platform” requirements—would have the same effect on the rest of the 700 MHz spectrum today and on other spectrum more generally. Further, even more than wireline broadband providers, wireless providers have invested in business ventures with application, search, and content providers and various targeted machine-to-machine (M2M) operations that could be found to be legally or practically incompatible with Title II requirements.

Finally, the Commission’s proposed course of action here is suspect not only because it would radically interfere with settled expectations, but also because it is highly questionable. The Title II reclassification cannot be defended as “aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Penn Central*, 438 U.S. at 124. To the contrary, the NOI acknowledges that any reclassification would be motivated by a self-serving desire to expand its jurisdiction in response to the *Comcast* decision. And as the Supreme Court has observed, a governmental “decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions”—particularly where the government’s action is “arbitrary, opportunistic, or undertaken with a confiscatory purpose.”<sup>191</sup>

**V. SECTION 332(C) INDEPENDENTLY FORECLOSES TITLE II RECLASSIFICATION OF WIRELESS BROADBAND INTERNET ACCESS SERVICES.**

The Commission may not reclassify *wireless* broadband services as “telecommunications services” subject to Title II common-carrier regulation for an additional reason, separate and apart from the considerations set forth above. *Whether or not* such services are “information

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<sup>191</sup> *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 527-28 (2002) (citing *Duquesne Light Co. v. Barasch*, 488 U.S. 200, 315 (1989)).

services,” they are not “commercial mobile radio services” (“CMRS”) within the Act’s definition, and therefore section 332(c)(2) precludes treating them “as a common carrier service for any purpose under this [Act].” 47 U.S.C. § 332(c)(2).

Section 332(c)(2) expressly *bars* the Commission from regulating mobile broadband Internet access on a common-carrier basis because, as the Commission has ruled, it is not a “commercial mobile radio service.” By enacting section 332(c), Congress “replaced traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework.”<sup>192</sup> Within that framework, mobile services can be treated as common-carrier services *only* if they qualify as “commercial mobile radio service,” whereas a provider engaged in any non-“commercial” (*i.e.*, “private”) mobile radio service “shall *not*, insofar as such person is so engaged, be treated as a common carrier for any purpose under this [Act].” 47 U.S.C. § 332(c)(2) (emphasis added).<sup>193</sup> And to qualify as CMRS, a service must offer “interconnection with the public switched network.” *Id.* § 332(c)(1), (d)(1)-(2).

Mobile broadband is not CMRS because it is *not* “interconnect[ed] with the public switched network.” Indeed, the Commission has made this precise finding. *See Wireless Broadband Order*, 22 FCC Rcd at 5917-18 ¶ 45. In the Commission’s words, wireless Internet access “in and of itself does not provide th[e] capability to communicate with all users of the public switched network.” *Id.* Further, the Commission has found that mobile broadband is not

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<sup>192</sup> Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1417, ¶ 12 (1994).

<sup>193</sup> All mobile services that do not qualify as CMRS are, by definition, “private mobile radio services.” 47 U.S.C. § 332(d)(3); *see, e.g., Cellnet Commc’ns, Inc. v. FCC*, 149 F.3d 429, 433 (6th Cir. 1998) (“CMRS includes all mobile services operated for profit that solicit for subscribers and are *interconnected with the public switched network, which is the traditional land-line telephone service. . . .* PMRS includes all wireless services that do not meet the definition for CMRS.”) (emphasis added).

“interconnected” even though VoIP and other applications *use* mobile broadband access to offer customers an interconnected service; in its words, wireless Internet access “*itself* is not an ‘interconnected service[.]’” *Id.* That finding, and more broadly the plain language of the Act, preclude the Commission from treating mobile broadband as a Title II telecommunications service. Under section 332(c)(2), whether or not non-CMRS services are “information services,” they “shall not . . . be treated as a common carrier [service] for any purpose under this Act.”

The Commission cannot avoid this express statutory prohibition by invoking the various Title III provisions cited in the NOI (*see* ¶ 103). Those Title III provisions—statements of general purpose (§ 301), provisions that govern initial license conditions or the modification of those conditions with respect to individual licenses (§§ 307(a), 316), provisions that authorize the Commission to limit the uses of spectrum (§ 303(b)), and the general “housekeeping” authority to make rules to implement other expressly delegated powers (§§ 303, 303(r))—are simply general grants of authority that must be read consistently with section 332(c)(2). The Commission cannot plausibly argue that these provisions implicitly authorize it to override an explicit prohibition Congress chose to include in the Act.

## **VI. FORBEARANCE COULD NOT ELIMINATE THE TREMENDOUS REGULATORY UNCERTAINTY THAT TITLE II RECLASSIFICATION WOULD CAUSE.**

The Commission has sought to reassure Internet service providers by proposing to forbear from “all but a handful of core statutory provisions” in Title II. NOI ¶ 68. But this is small comfort to the broadband industry and its investors, as the analyst reports quoted above reveal. *See* pp. 2-4 and 42-44, *supra*. Even if the Commission were to successfully exercise its forbearance authority, the new Title II regime would still be far more regulatory, and create far more regulatory uncertainty, than the pre-*Comcast* Title I regime—as the Commission itself recognized twelve years ago.

In the 1998 *Stevens Report*, the Commission rejected a Title II classification for ISPs and, in the process, rejected claims that forbearance would eliminate the policy harms of such a classification. It explained:

Notwithstanding the possibility of forbearance, we are concerned that including information service providers within the “telecommunications carrier” classification would effectively impose a presumption in favor of Title II regulation of such providers. Such a presumption would be inconsistent with the deregulatory and precompetitive goals of the 1996 Act. In addition, uncertainty about whether the Commission would forbear from applying specific provisions could chill innovation.

*Stevens Report*, 13 FCC Rcd at 11525 ¶ 47.

The Commission has now reinforced these concerns by proposing *not* to forbear from sections 201 and 202. *See* NOI ¶¶ 75-76. As discussed, those sections contain vague and self-executing prohibitions that could make Internet service providers liable for any conduct that some future Commission ultimately deems “unjust,” “unreasonable,” or “discriminatory.” Countless recordkeeping, billing-related, interconnection, and other rules, scattered throughout the Code of Federal Regulations, are based in whole or part on sections 201 and 202, provisions that the Commission routinely cites as grounds for almost all of its Title II orders.<sup>194</sup> The applicability of those sections would create enormous uncertainty for broadband providers, who could be subject to complaints alleging that any number of Commission rules apply to them by virtue of those statutory provisions. In addition, application of sections 201 and 202 to broadband services would appear to require, for the first time, substantive regulation of retail prices and the other terms and conditions of retail services, as discussed above. The NOI does not even discuss that apparent consequence, let alone propose to forbear from retail regulation

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<sup>194</sup> *See, e.g.*, Notice of Proposed Rulemaking, *Schools and Libraries Universal Service Support Mechanism*, 25 FCC Rcd 6872 (2010); Report and Order, *Local Number Portability Porting Interval and Validation Requirements*, 25 FCC Rcd 6953 (2010).

under sections 201 and 202. The Commission also does not propose to forbear from section 208. NOI ¶ 77. Thus, Internet service providers would inevitably face numerous complaints brought by retail and wholesale complainants alleging that those providers have engaged in “unjust,” “unreasonable,” or “discriminatory” behavior in violation of sections 201 and 202.

Even if the Commission were to make the requisite findings to forbear from the application of particular rules to particular Internet service providers, the Commission’s decisions would be context-specific and highly subjective. Accordingly, forbearance would be prone to judicial challenge and attempted reversal by future Commissions making equally context-specific and subjective determinations. No issue would ever be settled, and the Internet ecosystem would be subject to a state of perpetual regulatory uncertainty. As Commissioner McDowell has noted, this would hardly be the “environment needed to attract up to \$350 billion in private risk capital to build out America’s broadband infrastructure.”<sup>195</sup>

Although the Commission suggests that any forbearance decision would likely endure, NOI ¶ 98, that is far from certain. Fueling this concern is the recent spate of petitions to overturn the Commission’s past forbearance decisions—and the Commission’s conspicuous failure to dismiss those petitions promptly. For example, tw telecom and others have urged the Commission to reverse its grant of forbearance with respect to enterprise broadband services such as Ethernet.<sup>196</sup> The *Broadband Plan* likewise expressly contemplates revisiting whether it was appropriate to deregulate those services.<sup>197</sup> Similarly, a number of parties have filed

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<sup>195</sup> Commissioner Robert McDowell, “The Best Broadband Plan for America: First, Do No Harm,” Free State Foundation Keynote Address, at 13 (Jan. 29, 2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296081A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296081A1.pdf).

<sup>196</sup> See, e.g., Letter from Thomas Jones, Counsel, tw telecom inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51 (Oct. 14, 2009), Attach. at 11, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020141918>.

<sup>197</sup> See *Broadband Plan* at 47 (discussing criticisms of broadband forbearance decisions).

petitions requesting that the Commission reverse its grant of forbearance to Qwest in the Omaha MSA.<sup>198</sup> The Commission’s decision to seek comment on these “unforbearance” requests casts doubt on how seriously it takes the permanency of its forbearance decisions.<sup>199</sup>

There is yet another reason to doubt the permanence of the Commission’s forbearance decisions. If the Commission is determined to exercise Title II jurisdiction over all broadband Internet access services, it would as a logical matter have to reverse the broadband forbearance that was granted to Verizon in 2006, since that relief bars the Commission from applying Title II and the *Computer Inquiry* rules to Verizon’s broadband transmission services—even if the latter are used to provide the “connectivity” component of a broadband Internet access service.<sup>200</sup>

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<sup>198</sup> See, e.g., Public Notice, *Pleading Cycle Established for Comments on McLeodUSA Telecommunications Services, Inc.’s Petition for Modification of the Qwest Omaha Order*, DA 07-3467 (July 30, 2007), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3467A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3467A1.doc) (establishing pleading cycle for petition of McLeodUSA to “reinstate[e] Qwest’s section 251(c)(3) unbundling obligations in the Omaha MSA”).

<sup>199</sup> See Paul Mancini, AT&T Senior Vice President and Assistant General Counsel, *The FCC: Having Its Forbearance Cake and Eating It Too*, AT&T Public Policy Blog (June 16, 2010), <http://attpublicpolicy.com/government-policy/the-fcc-having-its-forbearance-cake-and-eating-it-too/> (“If the FCC were really serious about forbearance being a one-way street, it would never have cast doubt on these forbearance decisions in the National Broadband Plan and it would immediately terminate the special access proceeding with respect to optical and packet-switched broadband transmission services so that the communications industry doesn’t need to waste time debating an outcome—“unforbearance”—that the FCC apparently has no intention of pursuing. . . . Unless, of course, the FCC really thinks forbearance isn’t so permanent after all.”).

<sup>200</sup> See *Petition of the Verizon Telephone Companies for Forbearance*, WC Docket No. 04-440 (filed Dec. 20, 2004); News Release, *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, WC Docket No. 04-440 (rel. Mar. 20, 2006); Memorandum Opinion and Order, *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, 22 FCC Rcd 18705, 18712 ¶ 11 (2007) (“*AT&T Forbearance Order*”). See also Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-440 (filed Feb. 7, 2006) (detailing the scope of Verizon’s request for forbearance). Notably, the Commission has refused to grant the same degree of forbearance to other broadband providers. See *AT&T Forbearance Order*, 22 FCC Rcd at 18739-41 ¶¶ 71-75 (refusing to grant AT&T the same extensive forbearance from Title II obligations that Verizon enjoys by virtue of its forbearance grant).

Indeed, this is probably just one of many prior decisions that the Commission would conclude it must reverse in order to achieve its Title II vision. The way “forward” seems to open one door after another for revisitation and amendment of long-settled decisions. And that prospect makes the permanence of any new Commission decisions seem extremely dubious.

The Commission has further sought to justify its pairing of Title II reclassification with forbearance by noting that the end result will resemble the “tried and true” regulatory framework for mobile wireless services.<sup>201</sup> But this comparison offers more cause for concern than comfort. To be sure, wireless forbearance produced one of the Commission’s most successful deregulatory experiments of all time. Today, as the Commission recently found, 98.6 percent of the U.S. population is served by at least two mobile voice providers, and 95.8 percent of the population, or approximately 273 million people, is served by at least three.<sup>202</sup> Moreover, as noted, 89.5 percent of the population is served by two or more mobile broadband providers, and 76.1 percent is served by at least three. *Id.* Despite this highly competitive backdrop, however, regulatory creep is threatening to transform the wireless marketplace into a far more regulated industry than Congress could have ever intended. To begin with, despite the significant number of competitors offering CMRS and mobile broadband in nearly all regions of the United States, the Commission recently refused, for the first time since 2002, to deem the commercial mobile

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<sup>201</sup> *Genachowski “Third Way” Statement; see also NOI ¶ 75* (pairing reclassification with a decision to forbear from all but a handful of “core provisions would comport with Congress’s approach to commercial mobile radio services (CMRS)”). In the official blogs supporting the Commission’s reclassification proposal and the PowerPoint accompanying it, the Commission calls the approach to CMRS a “proven success for wireless communications,” and points to the tremendous growth in wireless services since Congress first mandated that deregulatory approach. *See Schlick “Third Way” Statement; Legal Framework for Broadband Internet Access, PowerPoint Presentation, at slides 24-26* (June 17, 2010).

<sup>202</sup> *Fourteenth Wireless Report at 7.*

marketplace “effectively competitive”—a move widely understood as an effort to set the predicate for more intrusive regulation.<sup>203</sup>

Meanwhile, in just the past year, the Commission has—despite its supposedly deregulatory framework—proposed net neutrality rules for the wireless industry without specifying accommodations to account for spectrum shortages or the unique business models in the wireless broadband marketplace.<sup>204</sup> The Commission also has proposed to adopt, for the first time ever, wireless data roaming obligations.<sup>205</sup> In the *SkyTerra Order*, the Commission effectively reimposed spectrum caps on particular wireless providers.<sup>206</sup> The Commission has also questioned whether to regulate or prohibit exclusive handset deals, even in the face of a huge array of existing devices and the proliferation of new smartphones that are announced almost monthly.<sup>207</sup> And in the “bill shock” proceeding (CG Docket No. 09-158), the

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<sup>203</sup> See, e.g., Miaisie Ramsay, *FCC Issues Mixed Reports on Industry Competition*, *Wireless Week*, May 20, 2010, <http://www.wirelessweek.com/News/2010/05/policy-and-industry-FCC-Issues-Mixed-Report-on-Industry-Competition.aspx>; John Poirier, *U.S. Fails to Describe Wireless Industry as Competitive*, *Reuters*, May 20, 2010, <http://www.reuters.com/article/idUSTRE64J4P820100520> (“The lack of the key phrase could set the stage for U.S. regulators to impose policies and regulations . . . .”); Jeanine Poltronieri, AT&T Assistant Vice President-Federal Regulatory, *Investment: Compared to What?*, AT&T Public Policy Blog, June 24, 2010, <http://attpublicpolicy.com/government-policy/investment-compared-to-what/>.

<sup>204</sup> Notice of Proposed Rulemaking, *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191 & WC Docket No. 07-52, FCC No. 09-93 (rel. Oct. 22, 2009).

<sup>205</sup> Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, FCC 10-59 (rel. April 21, 2010).

<sup>206</sup> Memorandum Opinion and Order and Declaratory Ruling, *SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC*, IB Docket No. 08-184, DA 10-535 (rel. Mar. 26, 2010).

<sup>207</sup> See Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, 23 FCC Rcd 14873 (rel. Oct. 10, 2008).

Commission is seeking—in CTIA’s words—“to micromanage what is an incredible array of choices for consumers,” including “prepaid to postpaid, subsidized handsets to unsubsidized, contracts with ETFs to those without, large, medium or small buckets of minutes and ‘all-you-can-use’ plans,” notwithstanding that the industry “does provide ‘simple and easy to understand’ plans for every type of American consumer.”<sup>208</sup> The Commission also has launched inquiries regarding wireless early termination fees and even the rejection of a *single* application (the 3G Google Voice application) on a *single* device (the iPhone).<sup>209</sup>

In other words, even against a backdrop of competition and nearly total forbearance, the Commission is doing—or sending strong signals that it plans to do—precisely what it promises it will *not* do in the context of broadband Internet access: reassert regulatory oversight over myriad basic features of the marketplace, including wholesale and retail customer relationships. Rather than providing reassurance, the comparison to wireless reaffirms that promises of a regulatory “light touch” under Title II are tenuous and easily reversed.

There is also disagreement within the Commission itself concerning just how far forbearance should go. Commissioner Copps condemns what he describes as a “forbearance

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<sup>208</sup> Matthew Lasar, *One Out of Six Cell Phone Users Suffers from “Bill Shock”*, Ars Technica, <http://arstechnica.com/telecom/news/2010/05/new-shocking-statistics-on-bill-shock.ars> (quoting Steve Largent, President of CTIA).

<sup>209</sup> Letter from James D. Schlichting, Acting Chief, Wireless Telecommunications Bureau, Federal Communications Commission to James W. Cicconi, Senior Executive Vice President-External and Legislative Affairs, AT&T Services, Inc., 24 FCC Rcd 10169 (July 31, 2009); Letter from James D. Schlichting, Acting Chief, Wireless Telecommunications Bureau, Federal Communications Commission to Richard S. Whitt, Esq., Washington Telecom and Media Counsel, Google Inc., 24 FCC Rcd 10171 (July 31, 2009); Letter from James D. Schlichting, Acting Chief, Wireless Telecommunications Bureau, Federal Communications Commission to Catherine A. Novelli, Vice President, Worldwide Government Affairs, Apple Inc., 24 FCC Rcd 10167 (July 31, 2009).

binge,”<sup>210</sup> and has made clear his preference for “plain and simple Title II reclassification through an immediate declaratory ruling,” with only very “limited, targeted forbearance from certain provisions.”<sup>211</sup> Further, some interest groups have already begun to call for sharply reducing the scope of the forbearance proposed in the NOI.<sup>212</sup> Thus, as this proceeding develops, there appears to be fertile ground for opponents of deregulation to achieve a far more heavily regulated Internet ecosystem than the NOI proposes.

In all events, forbearance addresses only *federal* regulation under Title II. Providers would still face the prospect of *state* efforts to regulate their new “Internet connectivity” common-carrier services. Wireless providers have already experienced firsthand the way in which state regulation and litigation can undermine the Commission’s national “deregulatory” regime. Although the Commission can preempt state regulation of broadband providers, *see* NOI ¶ 110, the states have made it clear that they will vigorously oppose such limitations on their authority. In a proposed pending resolution, for example, the Board of Directors of the National Association of Regulatory Utility Commissioners advocates a “fourth way” that would include “bi-jurisdictional regulatory oversight for broadband Internet connectivity service and

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<sup>210</sup> FCC News, *Statement of Commissioner Michael J. Copps on Chairman Genachowski’s Announcement to Reclassify Broadband* (May 6, 2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-297946A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297946A1.pdf).

<sup>211</sup> Remarks of FCC Commissioner Michael J. Copps, *Openness and Innovation in the Digital World?*, Stanford Law School, at 4 (June 9, 2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-298708A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298708A1.doc).

<sup>212</sup> *See, e.g.*, Letter from Chris Riley, Policy Counsel, Free Press, to Marlene H. Dortch, Secretary, FCC, *Framework for Broadband Internet Service*, GN Docket No. 10-127 (filed July 2, 2010), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020514730> (“We stated our position that numerous provisions of Title II are critical to implement Congress’s balanced framework for protecting consumers and promoting competition in the market for telecommunications services, and that the Commission should consider forbearance narrowly, within the framework of section 10 of the Act, and should not lightly set aside statutory provisions that may prove essential for future policymaking.”).

broadband Internet service,” and urges the FCC not to preempt State authority under section 253 of the Act (interpreted broadly) or to “preempt any States’ jurisdiction which would limit the ability of States to influence the advancement of the broadband ecosystem as set forth in the National Broadband Plan.”<sup>213</sup>

In short, the industry has good reason to be concerned that the expansive regulatory regime proposed here would not be nearly as “deregulatory” as the Commission suggests. And in any event, the uncertainty resulting from the Commission’s coupling of Title II reclassification with non-comprehensive forbearance would almost certainly discourage innovation and investment and lead to widespread litigation. At the very least, broadband providers subject to sections 201 and 202 would face potential liability any time they implemented new services, including anti-piracy measures, network-management techniques, or commercial arrangements with particular application and content providers. Again, that potential liability could deter such initiatives, to the detriment of broadband providers, application and content providers, and ultimately consumers. Investment would also be deterred along with innovation. Investors would be less willing to sink risk capital into broadband investments in an environment where the Commission could find—without providing significant guidance, and without precedent to limit its discretion—that the service in question is “discriminatory” or subject to rate regulation under sections 201 and 202.<sup>214</sup>

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<sup>213</sup> NARUC Proposed Resolution before the Committee on Telecommunications: *Resolution Opposing Federal Preemption of States’ Jurisdiction over Broadband Internet Connectivity Services*, Sponsored by Chairman Betty Ann Kane, D.C. Public Service Commission and Co-Sponsored by Commissioner Geoffrey G. Why, Massachusetts Department of Telecommunications and Cable.

<sup>214</sup> See Executive Summary and Part Two introduction, *supra* (discussing investment analyst reports).

Finally, protracted litigation would confront any Commission effort to use forbearance to mitigate the impact of the Title II regime. Forbearance proceedings before the Commission would be fiercely contested, and the resulting orders would inevitably be appealed to various courts. Indeed, forbearance opponents are certain to challenge any new grant of forbearance on the ground that the recent *Qwest Phoenix Order*<sup>215</sup> sets the bar under section 10 extremely high (and in fact the Commission set that bar unreasonably high). While the Commission has found that a “different analysis” should apply in the case of broadband-related forbearance,<sup>216</sup> litigants will surely challenge that assertion as well. As discussed, preemption would likewise be the focus of intense dispute. Litigation at the agency and appellate levels would create huge transaction costs and would waste resources that could be much better spent on broadband adoption programs and deployment of service to unserved areas. And regardless of the eventual outcome in the courts, this prolonged legal uncertainty would stifle innovation and investment.

For these reasons, the notion that the Commission’s ill-defined “third way” regulatory approach somehow reduces uncertainty is sheer folly. Nonetheless, in the event that the Commission proceeds to reclassify broadband Internet access service such that it contains a Title II telecommunications service, the Commission should forbear from applying *all common-carrier* provisions of Title II to that service, as AT&T argued six years ago in a forbearance

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<sup>215</sup> Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, FCC 10-113 (rel. June 22, 2010).

<sup>216</sup> *See id.* ¶ 39 (“Indeed, a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities, such as Qwest’s petition in this proceeding. For advanced services, not only must we take into consideration the direction of section 706, but we must take into consideration that this newer market continues to evolve and develop in the absence of Title II regulation.”).

petition still pending before the Commission on remand from the D.C. Circuit.<sup>217</sup> Only that type of forbearance approach could at least mitigate the investment-chilling, job reducing effects of reclassification. And finally, the Commission should pair such forbearance with broad preemption of state and local regulation of broadband Internet access service, in order to avoid a patchwork quilt of inconsistent, investment-detering rules at the state and local levels as well.<sup>218</sup>

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<sup>217</sup> See *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006). AT&T incorporates by reference the arguments it has made in that proceeding (WC Docket No. 04-29).

<sup>218</sup> See NOI ¶ 110. The NOI suggests that the Commission would preempt state “requirements on broadband Internet connectivity service or broadband Internet service that are contrary to a Commission decision not to apply *similar requirements*.” *Id.* (emphasis added). This vision of preemption is far too limited, as it would appear to permit states and localities to impose their own price regulations and other requirements related to the rates, terms, and conditions of broadband Internet connectivity service, provided that such regulations parallel the language found in sections 201 and 202 of the Act. See NOI ¶ 75. While such preemption should be applied broadly to state and local regulations directed at broadband Internet connectivity service or broadband Internet service, it need not apply to state and local laws of general applicability.

**CONCLUSION**

For the foregoing reasons, the Commission should maintain the current regulatory classification for broadband Internet access services.

Respectfully submitted,

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## INTRODUCTION AND SUMMARY

When announcing the “third way” proposal, Chairman Genachowski asserted that Title II reclassification would “restore the status quo light-touch framework” that existed before the *Comcast* decision;<sup>1</sup> would “give providers and their investors [the] confidence” necessary to “unleash investment and innovation” and promote “job creation”; and would rest on the “soundest legal foundation, thereby eliminating as much of the current uncertainty as possible.”<sup>2</sup> The Chairman represented, however, that he would “remain open” and “ready to explore all constructive ideas” as the Commission launched its Notice of Inquiry.<sup>3</sup> The comments have now been filed and the record provides incontrovertible evidence that the “third way” would be a road to ruin. It would deliver none of the benefits the Chairman described, it would not survive judicial scrutiny, it would thwart the Administration’s ambitious broadband agenda, and it would suppress investment, innovation, and job growth just when they are needed most.

*First*, as many commenters explain, the “third way” would not “restore” the pre-*Comcast* “status quo”; instead, it would abandon decades of bipartisan support for the light-touch regulatory framework that has been indispensable to the Internet’s explosive growth. Whether or not accompanied by partial regulatory forbearance, reclassification would, for the first time ever, saddle the broadband industry with regulation originally developed for telephone monopolists seventy-five years ago. Countless financial analysts—and more than three hundred Democratic

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<sup>1</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>2</sup> See Notice of Inquiry, *Framework for Broadband Internet Service*, GN Docket No. 10-127, FCC 10-114, Statement of Chairman Julius Genachowski, at 2 (2010) (“*Genachowski NOI Statement*”); Julius Genachowski, Chairman, Federal Communications Commission, *The Third Way: A Narrowly Tailored Broadband Framework*, May 6, 2010, <http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html> (“*Genachowski ‘Third Way’ Statement*”).

<sup>3</sup> *Genachowski NOI Statement* at 3; Genachowski *‘Third Way’ Statement*.

and Republican members of Congress—thus warn that this regulatory overhang would chill investment incentives and imperil the *National Broadband Plan*'s \$350 billion vision of ubiquitous next-generation broadband for all Americans.<sup>4</sup> **Second**, as leading technical experts have explained, the reclassification proposal rests on fundamental technological and commercial misconceptions about how users connect to the Internet and how Internet access services are offered. **Third**, as many commenters further explain, any reclassification decision would very likely end in judicial reversal after prolonged, industry-destabilizing litigation. **Finally**, and for all that, reclassification would be both (1) *unnecessary*, because the government can achieve all the main goals of the *Broadband Plan* under existing authority without reclassification, and (2) *pointless*, because Title II would not even authorize the Commission to adopt the extreme net neutrality rules favored by the pro-regulation interest groups.

***1. The opening comments confirm widespread concern that the proposed “third way” would hobble economic growth and widen the digital divide.***

As discussed in our opening comments, a wide range of analysts and stakeholders have expressed deep concern about the investment-depressing consequences of any reclassification decision. For example, Craig Moffett of Bernstein Research explains that reclassification “would have sweeping implications, far, far beyond net neutrality”; would generate “a raft of regulatory obligations from the days of monopoly telecommunications regulation, potentially including price regulation”; “would broadly throw into question capital investment plans for all broadband carriers, potentially for years”; and would trigger a “radical downsizing of . . .

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<sup>4</sup> See Staff Presentation, *September 2009 Commission Meeting*, at 45 (Sept. 29, 2009), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-293742A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf); Federal Communications Commission, *Connecting America: The National Broadband Plan* (2010), <http://download.broadband.gov/plan/national-broadband-plan.pdf> (“*Broadband Plan*”).

broadband investment plans.”<sup>5</sup> Congress is similarly concerned. For example, after his recent exchange of letters with Chairman Genachowski, Congressman John Dingell concluded that the “third way” proposal “is based on unsound reasoning,” is “fraught with legal risk,” and would “confound Congress’s and the Commission’s efforts to encourage further investment in broadband infrastructure, create new jobs, and stimulate broadband adoption[.]”<sup>6</sup> Indeed, more than half of the combined members of the House and Senate urge the Commission to reject any Title II reclassification, and House Majority Leader Steny Hoyer admonishes that “authority on this critical matter” properly belongs to “lawmakers” in Congress. AT&T Comments at 4-5.<sup>7</sup>

The overwhelming majority of industry stakeholders have likewise responded to the reclassification proposal with reactions ranging from anxiety to incredulous dismay:

- Equipment makers such as Alcatel-Lucent and Cisco—like the hundreds of members of the Fiber to the Home Council and the Telecommunications Industry Association—fear that the “renewed expenditure” in broadband infrastructure “risks being reversed by the Commission’s Third Way proposal, should it be pursued” (Alcatel-Lucent Comments at 8). The views of these companies are particularly probative on the investment-suppressing risks posed by any reclassification proposal, because “[f]irms that sell goods and services that are inputs to the production and use of information services stand to gain an expanding market . . . and have the incentive to make a completely unbiased judgment on the matter.”<sup>8</sup>

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<sup>5</sup> Paul McNamara, *Comcast Net Neutrality Win Draws Mixed Reaction*, PCWorld, Apr. 7, 2010, [http://www.pcworld.com/article/193759/comcast\\_net\\_neutrality\\_win\\_draws\\_mixed\\_reaction.html](http://www.pcworld.com/article/193759/comcast_net_neutrality_win_draws_mixed_reaction.html) (“*PCWorld Comcast Article*”) (quoting Craig Moffett, Bernstein Research) (emphasis omitted).

<sup>6</sup> Letter from Rep. Dingell to Chairman Genachowski at 1 (July 28, 2010), [http://www.house.gov/dingell/pdf/20100728\\_Dingell\\_Letter\\_to\\_Genachowski\\_on\\_FCC\\_Response.pdf](http://www.house.gov/dingell/pdf/20100728_Dingell_Letter_to_Genachowski_on_FCC_Response.pdf) (“*Dingell Letter*”).

<sup>7</sup> The governors of eighteen states have similarly expressed serious concern about any reclassification, *see* AT&T Comments at 4 n.15, and the Texas Public Utility Commission likewise warns that it would be “extremely problematic for the Commission to now reverse course and potentially harm a sector of the economy that has been an important engine driving job growth and economic activity.” Texas PUC Comments at 4.

<sup>8</sup> *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993) (emphasis omitted).

- The tens of thousands of workers represented by the Communications Workers of America express similar concern that “the Title II route” would “chill[] job-creating investment and innovation” (CWA Comments at 4). And along with the AFL-CIO, civil rights groups, and others, CWA has thus declined to endorse reclassification and instead urges Congress “to move forward quickly on narrowly targeted legislation” in the wake of the *Comcast* decision, lest congressional inaction end up “discouraging deployment to low income and other disadvantaged Americans” (Letter to Chairmen Rockefeller and Waxman at 1-2, attached to CWA Comments as Exh. 1).
- Content creators—represented by the American Federation of Television and Radio Artists, the Directors Guild of America, the International Alliance of Theatrical and Stage Employees, and the Screen Actors Guild—warn that reclassification “could dramatically inhibit” efforts to protect the intellectual property rights on which their livelihoods depend (AFTRA Comments at 6).
- The more than 1000 community leaders represented by the Alliance for Digital Equality warn that the “Third Way” would “restrict deployment of broadband infrastructure by inhibiting investment,” “damag[e] . . . job creation,” and “exacerbate the too-wide digital divide” (Alliance for Digital Equality Comments at 1-2).
- The nearly 900 cable companies of the American Cable Association warn that reclassification would present “significant economic regulatory burdens and regulatory uncertainty” and “may prove to be a deterrent to market entry” for “ACA members who are not already providing broadband Internet service” (ACA Comments at 6, 13).
- Wireless providers such as Sprint, T-Mobile, MetroPCS, Leap, and Clearwire express concern about the impact of reclassification on the nascent wireless broadband industry.
- VoIP provider Vonage encourages “the Commission to develop a more robust and legally sustainable explanation for the exercise of ancillary authority” because that approach is “more straightforward, less intrusive, and less controversial” than “the thornier question of classification” (Vonage Comments at 2, 8).
- The Alliance for Telecommunications Industry Solutions (“ATIS”)—a global standards-development organization whose hundreds of members include Intel, NeuStar, Juniper Networks, Oracle, Sun Microsystems, and Verisign—explains that reclassification would involve regulation of “the Internet” under any definition of that term, and warns that the NOI’s pervasive technological misconceptions “risk . . . creating confusion about the manner in which users connect to the Internet” (ATIS Comments at 4).
- The National Exchange Carrier Association confirms that the NECA DSL tariff does not connect anyone to the Internet and, contrary to the NOI’s mistaken assumption, cannot be characterized as an “Internet connectivity service” (NECA Comments at 5-6).

In contrast to this diverse cross-section of stakeholders concerned about any reclassification proposal, the primary advocates for regulatory heavy-handedness are inside-the-

beltway interest groups such as Free Press and Public Knowledge. Because these groups have never run any large-scale business, they remain oblivious to the costs and uncertainties of “reclassifying” broadband Internet access providers as though they were 20th-century telephone companies. And they cynically insist that reclassification would merely return the industry to the pre-*Comcast* regime. For example, Free Press opines that “[t]he Third Way proposal laid out in the Notice of Inquiry” could not “alter market fundamentals” because, Free Press submits, it “proposes to do no more than restore the pre-*Comcast* status quo.” Free Press Comments at 96.

That is nonsense, as Free Press is well aware.<sup>9</sup> The “pre-*Comcast* status quo” consisted of narrowly tailored “openness” principles without legacy Title II baggage, and it thus omitted the key investment-chilling features of the proposed “third way.” It involved no retail or wholesale regulation under sections 201 and 202 and thus no self-executing prohibitions on any retail or wholesale rate, classification, or practice that some later Commission might find “unjust,” “unreasonable,” or “unreasonabl[y] discriminat[ory].” 47 U.S.C. §§ 201, 202. And it left wireless broadband services regulated by little more than vigorous competition. Against that backdrop, reclassification would obviously upset investor expectations about the regulatory environment for this marketplace. As Jonathan Chaplin of Credit Suisse explains, in views

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<sup>9</sup> On the day of the *Comcast* decision, Free Press’s Ben Scott told the press “that he believes the FCC will reclassify broadband as a telecommunications service, *thus opening it up to tighter regulation*: ‘Comcast swung an ax at the FCC to protest the BitTorrent order. And they sliced right through the FCC’s arm and *plunged the ax into their own back*.’” *PCWorld Comcast Article* (some emphasis omitted); see Joelle Tessler, *FCC loses key ruling on Internet ‘neutrality*,’ Associated Press, Apr. 6, 2010, <http://finance.yahoo.com/news/FCC-loses-key-ruling-on-apf-78990100.html?x=0> (“Scott believes that the likeliest step by the FCC is that it will simply reclassify broadband as a more heavily regulated telecommunications service. That, ironically, could be the worst-case outcome from the perspective of the phone and cable companies.”). Less publicly, Scott told a key White House ally that he viewed the *Comcast* case as a “crisis-tunity” for heavier regulation. See Sara Jerome, *Conservative ethics group claims new evidence against White House for ties to Google*, The Hill (July 27, 2010).

shared by the overwhelming majority of industry analysts,<sup>10</sup> “[t]he biggest disconnect between Washington and Wall Street is on how the competitiveness of the industry is viewed . . . . Competition is doing its job and regulations would make it very difficult for companies to get reasonable return on investment . . . . The threat of regulation could discourage investment and cost jobs[.]”<sup>11</sup>

## **2. *Reclassification would rest on a technologically incoherent foundation.***

The reclassification proposal not only underestimates the threat to investment incentives, but reflects an incoherent understanding of how users gain access to the Internet. Tellingly, the NOI fails even to identify what the Commission proposes to reclassify as a “telecommunications service.” Instead, it asks (at ¶¶ 2, 53-65) how the Commission could define a Title II-regulated “Internet connectivity service” that (1) could be reasonably portrayed as a standalone retail service that connects consumers to “the Internet” but that (2) contains no integrated information-service functionalities and is not itself part of “the Internet.” The short answer is that there is no such service, and any attempt to “identify” one would rest on sheer pretense.

Although the NOI suggests that the service described in the NECA DSL tariff is such a service,<sup>12</sup> it is not. As NECA itself confirms, that service—which is primarily sold to ISPs as a wholesale input—does not itself even allow end users to connect to the Internet. NECA Comments at 5-6. More generally, as ATIS explains, (1) a mere “physical connection” like the NECA DSL service “cannot provide a communications path to other Internet users”; (2) an “Internet connectivity” service is thus “logically synonymous” with the retail “Internet access”

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<sup>10</sup> See AT&T Comments at 2-4; USTA Comments at 1-26 & Appx. 3; CTIA Comments at 7-30; NCTA Comments at 23-27.

<sup>11</sup> Yu-Ting Wang et al., *Reclassification Said to Pose Broad Risk to U.S. Economy*, *Commc’ns Daily*, at 1 (June 14, 2010) (quoting Chaplin) (some emphasis added; some omitted).

<sup>12</sup> See NOI ¶¶ 21 & n.53, 54, 65 & n.179.

service that consumers actually buy; (3) *that* service inherently requires higher-layer information processing; and (4) it “is an inherent and integral part of ‘the Internet.’” ATIS Comments at 5-7.

Simply put, consumers do not purchase any retail service that could be characterized as a mere “on-ramp” to the Internet; they purchase broadband Internet access, which offers them IP-based communications through the Internet backbone to all points on the Internet. As even some reclassification proponents appear to recognize, therefore, the Commission could not try to regulate broadband Internet access without simultaneously regulating “the Internet” under any informed definition of that term. For example, Free Press—unafraid to advocate full-blown regulation of the Internet itself—would define the regulable Title II service as “transmi[ssion of] data from *end to end over the Internet*, the international computer network of both federal and non-federal interoperable packet-switched networks.” Free Press Comments at 49 (emphasis added). Public Knowledge is vaguer in its definition of the proposed Title II service but makes clear that it, too, seeks regulation of “the Internet” under anyone’s definition of that term, urging the Commission to arbitrate Internet backbone “peering dispute[s]” and oversee “the migration to IPv6.” Public Knowledge Comments at v, 27.

In contrast, the Center for Democracy and Technology, which is more sensitive to the optics (if not the consequences) of Internet regulation, would define and regulate a “retail service that enables a customer to send and receive Internet Protocol communications to and from Internet endpoints of the customer’s choosing” by “assigning an Internet Protocol address” to the customer’s devices and “providing the customer with the means for Internet Protocol communications . . . between the customer’s device and one or more interconnection or peering points that enable further routing, directly or indirectly, to the Internet.” CDT Comments at 13. As discussed in Section II.B below, however, there is no “retail service” that provides IP-based

communications to intermediate points (let alone “peering points”) short of “the Internet.” There are, in this context, only broadband Internet access services, which offer consumers seamless communications to all points on the global Internet. And the Commission cannot try to regulate those services without regulating the Internet.

Some proponents of reclassification throw up their hands and confess that they have no idea how the Commission should define the ostensibly regulable “service”; they are certain only that *something* should be reclassified and regulated. According to DISH, the Commission should not even “seek to describe the precise parameters of the Internet connectivity service” and should instead “simply rely upon the definitions of the Communications Act.” DISH Comments at 14. DISH reasons that “broadband providers well understand these [statutory] definitions,” *id.*, and can figure out for themselves what supposed Title II “services” they are “offering,” even if DISH and the Commission itself cannot identify them. *See also* XO Comments at 8 (making a similar argument). To put it mildly, that would not be the type of reasoned decisionmaking that could survive judicial review.

As shown by this crazy-quilt of mutually inconsistent approaches to the “definition” of a non-existent “on-ramp” service, reclassification would be a messy, industry-destabilizing, and dubious affair. Moreover, precisely because (as ATIS and others explain) reclassification would entail regulation of “the Internet” under any accepted definition of that term, it would cross a line the Commission has respected since the earliest broadband Internet access services in the 1990s. The Commission has *never* treated such services as Title II common carrier services, despite the contrary and highly confused arguments on this point by the pro-regulation interest groups. Instead, through Democratic and Republican administrations alike, the Commission has always understood the acute dangers of extending legacy common carrier regulation to any aspect of the

Internet ecosystem, and it has therefore held fast against Title II regulation of any retail Internet access service. *See* AT&T Comments at 67-70.

Free Press persists in its claim that “the Clinton FCC” pursued policies matching Free Press’s current agenda. Free Press Comments at 81-82. That is flatly wrong. In 1999, Chairman William Kennard rejected proposals to impose common carrier regulation on then-dominant cable broadband providers precisely because, “[i]f we’ve learned anything about the Internet in government over the last 15 years, it’s that it thrived quite nicely without the intervention of government.”<sup>13</sup> And Chairman Kennard repeatedly made good on that vow. Under his leadership, the Commission twice rejected proposals in 1999 and 2000 to impose “open access” requirements on cable operators in connection with its merger-review authority, in part because the Commission found that “the potential for competition from alternative broadband providers” would suffice to protect consumer interests.<sup>14</sup> In attributing a contrary policy to “the Clinton FCC,” Free Press repeats its habitual mistake: confusing (1) the regulation of specific *facilities* under section 251(c)(3) (line-sharing and other UNE rules) or the *compelled provision of wholesale* transmission services (the *Computer Inquiry* rules) with (2) the classification of the *retail Internet access service* that consumers buy.<sup>15</sup> Only that latter issue is presented here. The

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<sup>13</sup> Remarks of Chairman Kennard, “The Road Not Taken: Building a Broadband Future for America” (June 15, 1999), <http://www.fcc.gov/Speeches/Kennard/spwek921.html>; *see also* AT&T Comments at 101, 115 (discussing Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998) (“*Stevens Report*”).

<sup>14</sup> Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group to AT&T Corp.*, 15 FCC Rcd 9816, 9872-73 ¶ 127 (2000); *see also* Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, 14 FCC Rcd 3160, 3197-98 ¶¶ 74-75 (1999).

<sup>15</sup> *See* Free Press Comments at 81-82. Although the Commission eliminated the line-sharing rules in 2003 (with the concurrence of two Democratic Commissioners and over the dissent of two Republicans), ILECs remain obligated under section 251 to lease copper loops to CLECs that, in turn, support the provision of broadband Internet access over those loops by ISPs.

Commission has *never* subjected *any* retail Internet access service to Title II regulation, and the decisions of the “Clinton FCC” exemplify that policy choice.

**3. Title II reclassification would be unlawful.**

Even if the Commission abandoned its attempt to regulate a nonexistent “connectivity” service and conceded that reclassification involves regulating the Internet itself, such regulation would still be unlawful for the reasons discussed in our opening comments and in Sections II and IV below. Reclassification would run headlong into, among other things, the statutory definitions of “information service” and “telecommunications service,” 47 U.S.C. § 153(20), (43), (46); the prohibition on treating any information service provider “as a common carrier,” *id.* § 153(44); and guarantees of provider autonomy in the provision of Internet service or any other “interactive computer service,” *e.g., id.* § 230. Title II regulation of *wireless* broadband Internet access in particular would also violate the further prohibition on treating any non-CMRS wireless provider “as a common carrier for any purpose under this [Act].” *Id.* § 332(c)(2). The proposed reclassification would be independently invalid because it would pose serious and avoidable constitutional concerns, as discussed in Section III. And those constitutional concerns would be particularly acute in the wireless context, where the Commission induced providers to pay billions of dollars for spectrum rights on the understanding that the Commission would impose common-carrier-type obligations only on licensees of upper 700 MHz C-Block spectrum for the duration of a regulatory “experiment” that has not yet even begun.

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*See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003). That section 251 obligation is independent of the retail classification of Internet access services. The same is true of the *Computer Inquiry* rules, which top Commission officials have vowed not to revive, and which the Commission could not lawfully revive in any event. *See* AT&T Comments at 102-06.

Although we discuss these legal issues in detail below, one point warrants emphasis at the outset. As both the Commission and the Supreme Court have found, Domain Name System (“DNS”) functionalities are inextricably integrated within any broadband Internet access service, and their role constitutes a sufficient (though far from necessary) basis for deeming any such service an “information service.” The pro-regulation interest groups urge the Commission to reverse that finding and to conclude instead that DNS falls within the “telecommunications management” exception to the definition of “information service.” That theory of reclassification is technologically confused and legally foreclosed. For example, DNS look-up functions used with Internet access services exist for the primary benefit of end users, not network operators. They therefore fall outside the “telecommunications management” exception and, *a fortiori*, the pre-1996, nonstatutory “adjunct-to-basic” doctrine, which can be at most coextensive with that statutory exception. Indeed, in its *Brand X* reply brief, the Commission confirmed this very point, representing to the Supreme Court that DNS “does not fall within the statutory exclusion” for telecommunications management,<sup>16</sup> and the Supreme Court thereafter ruled for the Commission.<sup>17</sup> A reviewing court would react with enormous skepticism, if not outright hostility, to any effort by the Commission to retract that material (and objectively correct) representation.

**4. Title II reclassification would be both needless and pointless.**

As we discussed in our opening comments and reiterate in Section I below, reclassification would be as needless as it would be harmful and unlawful. The Commission

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<sup>16</sup> Reply Brief for the Federal Petitioners, *National Cable & Telecommc’ns Ass’n v. Brand X Internet Servs.*, Nos. 04-277 & 04-281, at 5-6 n.2 (U.S. Sup. Ct. filed Mar. 18, 2005) (“*FCC Brand X Reply Brief*”) (attached as Exh. 1 to these reply comments).

<sup>17</sup> *National Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (“*Brand X*”).

retains full authority to accomplish the two core objectives of the *Broadband Plan*—spectrum allocation and universal service reform—and it also has authority to ensure transparency in the provision of broadband Internet access, as the *Comcast* decision itself confirms. And industry self-governance initiatives, together with the prospect of FTC or DoJ intervention if the need ever arises, are more than sufficient to safeguard “net neutrality” in the months leading up to likely congressional action. Title II reclassification would thus serve no purpose beyond (1) divesting the FTC of potential jurisdiction by placing broadband practices squarely within the FTC Act’s “common carrier exemption,”<sup>18</sup> (2) stalling the momentum for legislation, (3) triggering years of legal and regulatory uncertainty, and (4) distracting the Commission from the most important component of its broadband initiative: freeing up new spectrum for broadband Internet access. *See* AT&T Comments at 10-14, 19-27. No reclassification advocate offers any persuasive response to these concerns.

Finally, the proposed reclassification would not even support a core net neutrality rule that its supporters advocate: a ban on “paid prioritization” for performance-sensitive Internet traffic. Common carriers have long offered customers the option of paying extra for higher priority to shared transmission capacity. Decades of judicial and administrative precedent confirm that it is *not even “discriminat[ory],”* let alone “unreasonabl[y]” so,<sup>19</sup> for common carriers to offer such “priority tiering” services to customers who voluntarily agree to pay for them. For that and other reasons, the Commission should not “reclassify” broadband Internet access for the purpose of adopting a no-prioritization rule, because any such rule is as foreclosed under Title II as under Title I.

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<sup>18</sup> *See* 15 U.S.C. § 45(a)(2).

<sup>19</sup> 47 U.S.C. § 202.

## DISCUSSION

### I. THE COMMISSION SHOULD DEFER TO CONGRESS FOR A COMPREHENSIVE SOLUTION WHILE RELYING ON EXISTING AUTHORITY AND INDUSTRY SELF-REGULATION IN THE INTERIM.

#### A. Reclassification Is Unnecessary to Meet the Commission’s Broadband Goals.

As stressed in our opening comments, the Commission can meet its ambitious broadband objectives only by reassuring investors that, despite the nation’s economic turmoil, it makes economic sense to sink hundreds of billions of dollars in private risk capital into the deployment of broadband networks across the country. The Commission would thwart those objectives if it precipitously “reclassified” the industry under Title II.<sup>20</sup> Rather than trying to cram the broadband Internet into an ill-fitting service definition designed for 20th-century telephone networks, the Commission should work with Congress, the industry, and other stakeholders to tailor a rational policy framework for the new challenges of the 21st century. A broad cross-section of the industry—along with a majority of the combined membership of the House and Senate—agrees with that assessment.<sup>21</sup> And as the Commission is aware, Congress is actively considering legislation to bring the Communications Act up to date and fill any perceived regulatory gaps left by the *Comcast* decision.<sup>22</sup>

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<sup>20</sup> See AT&T Comments at 39-44 (discussing the investment community’s reaction to the multiple levels of regulatory uncertainty posed by the “third way” proposal).

<sup>21</sup> See pp. 3-4, *supra*; Cisco Comments at 9; see also, e.g., Information Technology and Innovation Foundation Comments at 3; CTIA Comments at 34-35; TIA Comments at 31; Alcatel-Lucent Comments at 10; Verizon Comments at 26.

<sup>22</sup> Rahul Gaitonde, *Congress to Hold Closed Door Meetings on Communications Policy Issues*, June 22, 2010, <http://broadbandbreakfast.com/2010/06/congress-to-hold-closed-door-meetings-on-communications-policy-issues/> (“In order to gain more information on the communications policy issues which have come up as a result of recent FCC action regarding spectrum policy, broadband deployment and the authority of the FCC; the House and Senate will hold a set of staff led stakeholder sessions.”); see Cisco Comments at 9 & nn.31-34 (listing bills).

No commenter has identified any exigency that could plausibly justify industry-destabilizing regulatory action by this Commission in the months leading up to legislation. In particular, no commenter has identified any “problem” that reclassification would be needed to address in the near term. To the contrary, the broadband Internet access marketplace is healthier, more competitive, and more innovative than ever.<sup>23</sup> And despite irresponsible fear-mongering by pro-regulation interest groups,<sup>24</sup> the *Comcast* decision did not trigger any rash of bad behavior. Instead, as illustrated by the development of the BITAG process,<sup>25</sup> the industry is more committed than ever to responsible self-governance. And the FTC has shown that it is ready and willing to oversee core net neutrality controversies.<sup>26</sup> This, together with the BITAG’s own oversight, is more than sufficient to allay net neutrality concerns pending new legislation.

The Commission also need not “reclassify” broadband Internet access services in order to achieve its main broadband objectives—spectrum allocation and broadband universal service support. *See* AT&T Comments at 21-27. First, no commenter even questions the Commission’s authority to reallocate more spectrum for broadband uses. To the contrary, many suggest that the

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<sup>23</sup> *See, e.g.*, CTIA Comments at 7-30; NCTA Comments at 25-27; USTA Comments at 1-26.

<sup>24</sup> *See, e.g.*, Free Press, Press Release, *FCC Leaves the Internet Unprotected: 21 Days and Counting*, Apr. 27, 2010, <http://www.freepress.net/press-release/2010/4/27/fcc-leaves-internet-unprotected-21-days-and-counting> (insisting that “the clock is ticking at the FCC” and that “Internet users [are] in jeopardy”).

<sup>25</sup> *Initial Plans for Broadband Internet Technical Advisory Group Announced* (June 9, 2010), <http://www.prnewswire.com/news-releases/initial-plans-for-broadband-internet-technical-advisory-group-announced-95950709.html>.

<sup>26</sup> *See, e.g.*, Comments of the Federal Trade Commission, *A National Broadband Plan for Our Future*, GN Docket 09-51, at 9 n.25 (filed Sept. 4, 2009) (“[T]he FTC and FCC have concurrent jurisdiction over the provision of broadband service. So that consumers can benefit from the FTC’s competition and consumer protection expertise, national broadband policies should preserve the FTC’s jurisdiction over broadband Internet access.”); FTC, *Staff Report: Broadband Connectivity Competition Policy*, at 38 (June 2007), <http://www.ftc.gov/reports/broadband/v070000report.pdf> (“[B]roadband Internet access services . . . are part of the larger economy subject to the FTC’s general competition and consumer protection authority[.]”).

Commission should be focusing its energy and political capital on spectrum-reallocation initiatives rather than this reclassification controversy.<sup>27</sup>

As to universal service, a wide cross-section of the industry—including wired and wireless ISPs, state commissions, over-the-top VoIP providers, equipment providers, and the CWA—agrees that the Commission can extend USF funding to broadband services without reclassifying those services under Title II.<sup>28</sup> As we have explained, that authority independently rests on two alternative grounds, *see* AT&T Comments at 22-27, and no commenter persuasively challenges either one.

First, the Commission’s authority to fund broadband rests on section 254 of the Communications Act itself, especially when read in connection with section 1 of the

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<sup>27</sup> *See* Consumer Electronics Association Comments at 1 (“CEA believes that while the robust and thorough discussion regarding the need or desire for broadband reclassification takes place, we must remember that spectrum is a key driver of broadband services and applications.”); Verizon Comments at 21 (“Title III of the Act gives the agency statutory authority over commercial spectrum, including the authority to allocate available spectrum for licensing to promote wireless broadband Internet service . . . [which is of] critical importance . . . moving forward[.]”); Cisco Comments at 8 (citing the fact that “[t]he Commission also retains authority to effectuate a great majority of the NBP’s spectrum-related recommendations” as a reason why the agency should not pursue reclassification); CTIA Comments at 89 (arguing that the Commission should focus its resources on stimulating investment in broadband deployment, and pointing to efforts to bring 500 MHz of broadband spectrum to market).

<sup>28</sup> *See, e.g.,* Public Utilities Commission of Ohio Comments at 5; Vonage Comments at ii, 6-7; Cablevision Comments at 35-36; Comcast Comments at 6-11; CTIA Comments at 49-53; Independent Telephone and Telecommunications Alliance Comments at 2-3, 13-16; NCTA Comments at 6, 38-42; Qwest Comments at 38-41; USTA Comments at 69-73; Cisco Comments at 8; CWA Comments, Exh. 2 at 1; Time Warner Cable Comments at 80; TIA Comments at 27-28; Verizon Comments at 21-23. Universal service reform legislation is also proceeding apace before Congress, which can eliminate any question about the Commission’s authority in this area. *See* John Eggerton, *Boucher/Terry Bill Would Clarify FCC Authority to Migrate USF to Broadband*, *Broadcasting & Cable*, July 22, 2010, [http://www.broadcastingcable.com/article/455107-Boucher\\_Terry\\_Bill\\_Would\\_Clarify\\_FCC\\_Authority\\_to\\_Migrate\\_USF\\_to\\_Broadband.php](http://www.broadcastingcable.com/article/455107-Boucher_Terry_Bill_Would_Clarify_FCC_Authority_to_Migrate_USF_to_Broadband.php).

Communications Act and section 706(b) of the Telecommunications Act of 1996.<sup>29</sup> Among all the commenters, only Free Press develops any sustained argument against this use of section 254. It argues that section 254(c)(1), which refers to universal service as “an evolving level of *telecommunications services*,” makes the Commission “vulnerable to the argument that Congress specifically described universal service as a ‘telecommunications service.’”<sup>30</sup> This narrow interpretation is not the best reading of section 254, let alone the only permissible reading.

To begin with, Free Press’s reading contradicts section 254(c)(1), which defines universal service as “evolving” and compels the FCC to “tak[e] into account advances in telecommunications *and information technologies and services*.” 47 U.S.C. § 254(c)(1) (emphasis added). *See* Cisco Comments at 8; NCTA Comments at 38. Free Press’s construction further contradicts section 254(b)(3), which provides that “[c]onsumers in all regions of the Nation, . . . should have access to telecommunications *and information services*, including interexchange services and *advanced telecommunications and information services*, that are reasonably comparable to those services provided in urban areas[.]” 47 U.S.C. § 254(b)(3) (emphasis added). It also conflicts with section 254(b)(2), which mandates that “[a]ccess to *advanced telecommunications and information services* should be provided in all regions of the

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<sup>29</sup> *See* NOI ¶ 37; Letter from Gary Phillips, AT&T, to Marlene H. Dortch, FCC, GN Docket Nos. 09-51, 09-47, & 09-137, WC Docket Nos. 05-337 & 03-109, Attach. (filed Jan. 29, 2010).

<sup>30</sup> Free Press Comments at 25 (quoting 47 U.S.C. § 254(c)(1)) (some emphasis omitted); *see also* Center for Media Justice, Consumers Union, Media Access Project, and New America Foundation Comments at 8 (“Public Interest Commenters Comments”). The Public Interest Commenters (at 8) also point to section 254(e), which states that “only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support.” 47 U.S.C. § 254(e). But this section is in tension with the other provisions of the statute as much as section 254(c), and the same arguments support a reading that harmonizes the different provisions.

Nation.” *Id.* § 254(b)(2) (emphasis added).<sup>31</sup> As we have explained, the Commission has broad discretion to reconcile the competing terms of section 254, and reading section 254 in conjunction with the universal service principles of section 1 and section 706 should remove any doubt about the scope of its authority.<sup>32</sup>

In any event, the Commission does not even need to rely on section 254 to extend USF funding to broadband, because section 706(b) plainly authorizes such funding on its own. Even Free Press concedes (at 133-34) that “section 706(b) likely does provide direct authority for the Commission” because it “commands the Commission directly to ‘take immediate action’ if it finds that advanced telecommunications capability is not being deployed in a reasonable and timely fashion.” Free Press’s main concern is that, “[b]y statute, the FCC must revisit that determination annually,” *id.*, and the Commission could therefore “only be assured that the policy would remain in effect for a year” at a time. *Id.* at 134.<sup>33</sup> While Free Press may find such

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<sup>31</sup> See AT&T Comments at 22-23; see also Cisco Comments at 8; NCTA Comments at 38. Although (as Free Press notes at 26-27) the Fifth Circuit found that the section 254(b) principles are not binding “statutory commands,” *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 421 (5th Cir. 1999), the Tenth Circuit disagreed, finding that the principles impose “mandatory dut[ies] on the FCC.” *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199-1200 (10th Cir. 2001). In the end, it does not matter whether these section 254(b) principles are mandatory or hortatory; either way, they reveal Congress’s support for an appropriately inclusive reading of section 254.

<sup>32</sup> See AT&T Comments at 24-25; see also Verizon Comments at 21-22; Comcast Comments at 10 (“The policies articulated in Section 1 of the Act and Section 706(a) of the 1996 Act properly guide the Commission’s exercise of authority under Section 254.”); TIA Comments at 28-29 (“[P]roviding universal service funding for broadband services would be consistent with the statutory directives expressly set forth in Section 254, as informed by Sections 1 and 706 of the Communications Act.”); see also *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1101-02 (D.C. Cir. 2009) (“Since the principles outlined [in § 254(b)] use vague, general language, courts have analyzed language in § 254(b) under *Chevron* step two. . . . We will uphold the agency’s interpretation as long as it is reasonable, . . . even if there may be other reasonable, or even more reasonable, views.”) (internal citations and quotation marks omitted).

<sup>33</sup> See also Public Knowledge Comments at 4 (the Commission would find its regulations “subject to new challenges once the Commission determined deployment of advanced telecommunications capability was again ‘timely’”).

congressionally mandated annual reviews inconvenient, that is hardly a basis for *the Commission* not to rely on section 706. The Commission already makes similar section 706 determinations on a yearly basis, and no one could plausibly object to a requirement that the Commission annually reexamine whether it is indeed necessary to continue spending the public’s money on particular programs.<sup>34</sup>

As we have discussed (AT&T Comments at 30-31), the Commission also has existing authority under section 257 to ensure *transparency* in the provision of broadband Internet access services, to the extent such intervention is needed to supplement market forces and FTC oversight. The D.C. Circuit all but confirmed that section 257 authority in its *Comcast* decision (*see* 600 F.3d at 659), and no commenter appears to contest it. Reclassification is thus no more necessary to pursue this objective than any other.

Nor do any of the other policy concerns expressed in the NOI—disabilities access, privacy, and cybersecurity—present any basis for reclassification. All three of these concerns implicate the practices of application and content providers as much as (if not more than) those of broadband providers, and they are thus generally best addressed by other federal agencies with broader jurisdiction over the full range of Internet-related industries. For example, the FTC is the primary government agency engaged today in overseeing Internet privacy. As Free Press concedes (at 86 n.253), Title II reclassification would presumably divest the FTC of any jurisdiction over broadband Internet access services by placing them clearly within the scope of the FTC’s “common carrier exemption.” 15 U.S.C. § 45(a)(2). And it would thereby splinter

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<sup>34</sup> Without elaboration, Free Press and Public Knowledge warn that the Commission’s authority to impose substantive rules under section 706 is “untested and risky” and that the Commission would need “to pursue this uncertain strategy for several years before getting any conclusive guidance from the courts as to whether that strategy is sustainable.” Free Press Comments at 131, 14; *see also* Public Knowledge Comments at 1. But that objection applies with much greater force to proposals for Title II reclassification.

privacy regulation into two artificially separate spheres: one governed by the FCC, and the other by the FTC.<sup>35</sup> That artificial dichotomy would leave consumers facing inconsistent and unpredictable requirements that turn on obscure regulatory classifications—hardly the pro-consumer solution one might expect from “consumer advocacy” groups.<sup>36</sup> In all events, the FTC’s *current* oversight initiatives, together with Congress’s efforts to further solidify and unify that oversight within the FTC,<sup>37</sup> undermine any argument that privacy interests could somehow justify Title II reclassification.

Cybersecurity concerns similarly fall within the jurisdiction of other agencies—in this case, various intelligence and national security agencies. Thus, any new involvement by the Commission would be neither necessary nor particularly useful; indeed, as we have explained, it could be affirmatively counterproductive.<sup>38</sup> And as recognized in pending legislation, a solution

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<sup>35</sup> See Free Press Comments at 86 n.253 (“[T]he privacy obligations for broadband service providers would be set by rule at the FCC, whereas the FTC would oversee protecting consumers in their use of websites and e-mail.”).

<sup>36</sup> See AT&T Comments at 34-37; see Verizon Comments at 25 (“Title II classification would do nothing to protect the privacy of consumer information obtained by innumerable websites and other content and application providers. Indeed, the Commission would accomplish little but to substitute itself for the FTC . . . and result in a patchwork approach to privacy that would increase customer confusion.”). See also Julia Angwin, *The Web’s New Gold Mine: Your Secrets*, Wall St. J., July 30, 2010, [http://online.wsj.com/article/NA\\_WSJ\\_PUB:SB10001424052748703940904575395073512989404.html](http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748703940904575395073512989404.html) (“[T]he nation’s 50 top websites on average installed 64 pieces of tracking technology onto the computers of visitors, usually with no warning. A dozen sites each installed more than a hundred.”).

<sup>37</sup> See Boucher/Stearns Privacy Bill, Staff Draft (rel. May 3, 2010), [http://www.boucher.house.gov/images/stories/Privacy\\_Draft\\_5-10.pdf](http://www.boucher.house.gov/images/stories/Privacy_Draft_5-10.pdf); Rush BEST PRACTICES Act of 2010, H.R. 5777, <http://thomas.loc.gov/cgi-bin/bdquery/z?c111:h.r.05777>.

<sup>38</sup> AT&T Comments at 37-39. For example, the latest malicious cybersecurity event, announced just two weeks ago, involved the theft of data from millions of users through an application that Android customers downloaded onto their phones from the Internet, which then sent their subscriber and phone identification information, text messages, and browsing history to a server whose domain is registered in China. Jared Newman, *Android App Data Theft: Advantage Apple?*, PCWorld, July 29, 2010, [http://www.pcworld.com/article/202165/android\\_app\\_data\\_theft\\_advantage\\_apple.html?tk=hp\\_new](http://www.pcworld.com/article/202165/android_app_data_theft_advantage_apple.html?tk=hp_new). The Commission would have no

to disabilities-access concerns must extend far beyond any Commission-regulated activity (no matter how broadly defined) to include the many diverse equipment manufacturers, software developers, and application and content providers whose cooperation is needed to keep the Internet ecosystem disabilities-friendly.<sup>39</sup>

In sum, while all of these policy concerns are important, none could plausibly justify the proposed Title II reclassification, and no commenter makes any plausible case to the contrary.

**B. Reclassification Would Not Support Any Ban on Paid Prioritization.**

The pro-regulation interest groups support reclassification mainly because they assume that it would support an extreme form of “net neutrality” regulation: a ban on paid prioritization for performance-sensitive applications and content. That assumption is false, and the Commission should not likewise proceed on the mistaken premise that Title II would authorize such a ban, because it would not.<sup>40</sup>

Section 202(a) prohibits “unjust or unreasonable discrimination” in the provision of Title II telecommunications services. 47 U.S.C. § 202(a). Under decades of common carrier precedent, it is not even “discriminatory,” much less “unreasonably” so, for the owner of a transmission resource to sell different tiers of service to different purchasers, even though buyers

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apparent authority to address such malicious applications under any interpretation of the Communications Act.

<sup>39</sup> See Equal Access to 21st Century Communications Act, S. 3304 (introduced May 4, 2010), <http://thomas.loc.gov/cgi-bin/query/z?c111:S.3304;>; see also Brian Hurh, *Congress Takes Action on Broadband Accessibility for the Disabled*, Broadband Law Advisor, May 25, 2010, <http://www.broadbandlawadvisor.com/2010/05/articles/accessibility-persons-with-dis/congress-takes-action-on-broadband-accessibility-for-the-disabled/>.

<sup>40</sup> We refer the Commission to our more detailed discussion of this issue in the net neutrality proceeding. See, e.g., Reply Comments of AT&T Inc., *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191 & WC Docket No. 07-52, at 29-34, 164-66 (filed Apr. 26, 2010) (“*AT&T Net Neutrality Reply Comments*”). To ensure a complete record, AT&T is contemporaneously filing in this docket its comments and reply comments in the net neutrality proceeding.

of the higher-tiered services receive greater priority than other users to the same shared resource.<sup>41</sup> Such arrangements are not “discriminatory” because, even though the purchasers of different service tiers are treated differently, they are by definition not buying “like” services and are by choice not similarly situated.<sup>42</sup> Thus, if Title II applied here, it would not prohibit Internet content providers from purchasing packet-prioritization or other QoS-enhancement services from broadband providers in order to ensure the proper performance of real-time high-definition video and other performance-sensitive content. Instead, Title II would entitle a content provider that has purchased such a service to complain, at most, that the seller (a broadband provider) has “unreasonabl[y] discriminat[ed]” against it under section 202(a) if the seller has sold the *same* service to another, similarly situated provider at a lower price.<sup>43</sup>

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<sup>41</sup> See *AT&T Net Neutrality Reply Comments* at 30-32 (discussing (1) the legacy special-priority services that telcos offer enterprise customers today as tariffed or otherwise commercially available Title II services, and the lack of any “discrimination” objection to them; and (2) judicial and administrative precedent concerning similar practices); see also *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1309 n.5 (D.C. Cir. 1991) (“‘Firm’ sales service is provided under rate schedules or contracts that expressly obligate the gas company to deliver specific volumes of gas within a given time period. . . . Firm service differs from ‘interruptible’ service which provides gas on a ‘when available’ basis and may be interrupted after notice to the subscriber.”) (citations omitted); *Fort Pierce Util. Auth. v. FERC*, 730 F.2d 778, 785-86 (D.C. Cir. 1984) (“Electric utilities often distinguish between ‘firm’ service, under which customers can demand power or transmission at any time, and ‘interruptible’ service, which the utility is entitled to shut off at any point when there is not enough excess capacity beyond that required to guarantee the needs of the utility’s firm customers.”).

<sup>42</sup> See, e.g., *Competitive Telecommc’ns Ass’n v. FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993) (“An inquiry into whether a carrier is discriminating in violation of § 202(a) involves a three-step inquiry: (1) whether the services are ‘like’; (2) if they are, whether there is a price difference between them; and (3) if there is, whether that difference is reasonable.”).

<sup>43</sup> Even Google’s Vint Cerf agrees as a policy matter that regulators should not prohibit such priority tiering under the guise of “net neutrality.” He recently remarked: “With regard to net neutrality, *the term has been vastly distorted*. Our concern has been with *anti-competitive behavior*. Our biggest concern[] is *not* that all packets be treated identically, and it’s *not* that you have to pay more for certain packets. It’s to ensure that there is a level playing field.” Jason Kincaid, *Google’s Top Innovators on the Cloud, Net Neutrality, and More*, TechCrunch, Apr. 12, 2010, <http://techcrunch.com/2010/04/12/googles-top-innovators-on-the-cloud-net-neutrality-and-more/> (emphasis added); see also Stacey Higginbotham, *Google on Net Neutrality, Its Fiber*

Quite apart from that point, if the Commission isolated and “reclassified” the last-mile transmission component of broadband Internet access services, as it has implausibly proposed to do (*see* Section II.B, *infra*), it would leave the remaining Title I ISP service outside the scope of any Title II authority. Yet that is where any breach of “net neutrality” principles would presumably occur. The Commission could not plug that hole by invoking its “ancillary” authority to impose Title II-type regulation on that Title I ISP service. The final sentence of 47 U.S.C. § 153(44) provides that a “telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services.” And that provision would preclude the Commission from trying to impose any broad “nondiscrimination” or other common-carrier-type rules on that non-Title II service. Although we have made this observation before, *see AT&T Net Neutrality Reply Comments* at 165-66, no advocate of reclassification offers any response.

In short, the Commission should not try to reclassify broadband Internet access service under Title II—and thereby throw the entire industry into turmoil—on the flawed assumption that reclassification would support a ban on paid prioritization, because any such ban would in fact be as inconsistent with Title II as it is with Title I.

## **II. TITLE II RECLASSIFICATION WOULD VIOLATE THE ACT BECAUSE BROADBAND INTERNET ACCESS SERVICE REMAINS AN INTEGRATED “INFORMATION SERVICE.”**

Reclassification would also be unlawful. Since the beginning of the *Computer II* regime, the Commission has always classified services into “basic” and “enhanced” categories on the

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*Buildout and Cloud*, GigaOm, Apr. 12, 2010, <http://gigaom.com/2010/04/12/google-on-net-neutrality-its-fiber-buildout-and-cloud/> (“Cerf reiterat[ed] that *Google isn’t calling for every packet to be treated the same*, but rather making sure the owners of the pipe don’t behave anticompetitively toward content flowing over their pipes. *Prioritizing the flow of information for legitimate network management means is fine, but blocking them to stifle competition isn’t.*”) (emphasis added).

basis of consumer perception, and in 1996, Congress ratified that consumer-oriented analysis in its definitions of “telecommunications service” and “information service.” *See* Section II.A, *infra*. Several key conclusions follow from that analysis, and each illustrates why reclassification would be unwise, unlawful, or both.

*First*, as discussed in Section II.B below, the relevant service in this proceeding—*i.e.*, what consumers understand they are being “offered” when they order broadband Internet access service—includes *end-to-end connectivity with the global Internet*, not a truncated last-mile transmission service that stops at a local switching facility or cable headend. *Second*, as discussed in Sections II.C and II.D below, that relevant service encompasses not only transmission, but a variety of enhanced functionalities that operate in tandem with transmission to form an integrated “offering.” Broadband Internet access is therefore every bit as much an integrated “information service” today as it was in 2002, 2005, or 2007, when the Commission made its Title I determinations for cable, wireline, and wireless broadband Internet access services, respectively.

*Third*, as discussed in Section II.E below, it makes no difference to a service’s classification how a provider obtains transmission inputs behind the scenes (*e.g.*, through ownership in fee simple, leasehold interests, or other wholesale arrangements). What matters is the retail service that the provider offers consumers by means of those inputs. The statutory classification analysis is therefore indifferent to whether (or to what extent) a given provider can be characterized as “facilities-based.” Thus, contrary to the erroneous claims of some commenters, “facilities ownership” would be unavailable as a limiting principle for containing the consequences of a reclassification decision for the broader Internet.

Before we address these issues, however, it is first necessary to rebut one particularly confused argument raised by several of the pro-regulation interest groups. As discussed in our opening comments, the Commission’s longstanding commitment to Internet unregulation has coincided with the proliferation of more and faster broadband offerings, plummeting consumer prices per unit of capacity, and the unparalleled success of the modern Internet. *See* AT&T Comments at 17, 52-55. Nonetheless, the advocates of greater regulation argue that, despite the Commission’s predictive judgments, “[f]acilities based competition has not developed,” and they cite that as a basis for reclassification. *E.g.*, Public Knowledge Comments at 26.

As we have previously explained, these assertions of competitive failure are both legally irrelevant and empirically false. *See, e.g.*, AT&T Comments at 69. They are irrelevant both because the statutory analysis does not turn on the level of competition in a market and because, in any event, the Commission could not sensibly encourage providers to invest more by promising to *increase* their regulatory burdens when they do. And they are false because, as the Commission’s own *Broadband Plan* confirms, facilities-based competition is strong and increasing. In particular, intermodal “competition appears to have induced broadband providers to invest in network upgrades”; “typical advertised download speeds to which consumers subscribe have grown at approximately 20% annually for the past 10 years”; and “[c]onsumers are benefiting from these investments” in particular and “from the presence of multiple providers” in general. *Broadband Plan* at 37-38; *see* AT&T Comments at 17, 52-55.<sup>44</sup>

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<sup>44</sup> According to the Commission’s own findings, roughly 92 percent of U.S. census tracts have *at least* two fixed terrestrial broadband services (*i.e.*, not including satellite and wireless broadband) and 89.5 percent of the population is served by at least two *mobile* broadband providers, and 76.1 percent is served by at least three. *See* AT&T Comments at 53-54 (citing Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2008*, at Tbl. 13 (Feb. 2010) (confirming that 91.9 percent of U.S. census tracts have at least two fixed broadband providers—specifically, aDSL, cable

As the *Broadband Plan* adds, moreover, “[n]ew choices—at new, higher speeds—are becoming available, as well,” as exemplified by Clearwire and other wireless broadband providers.<sup>45</sup> That fact creates a dilemma for the pro-regulation interest groups. On the one hand, they wish they could plausibly argue that, in Public Knowledge’s words, “consumers generally have the same choice between cable modem service and telco-provided access that they had in 2005.” Public Knowledge Comments at 26. On the other hand, they simultaneously wish to argue, as Public Knowledge does just a few pages later, that the Commission should inflict new regulations on wireless broadband Internet access services precisely because they are “designed to replace traditional wired offerings in the home” and “25 million people” use them already “for high-speed ‘full Internet access.’” *Id.* at 30 n.116, 32. But these pro-regulation interest groups cannot have it both ways. In fact, wireless broadband Internet access *is* the “third pipe” into the home (and the fourth, fifth, and sixth in many areas), and the resulting competition precludes any need for new regulation for *any* broadband Internet access platform.<sup>46</sup>

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modem, or FTTP services—and 57.2 percent have at least three), *and* Fourteenth Report, *Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, at 7 (rel. May 20, 2010)).

<sup>45</sup> E.g., News Release, *Clearwire Reports Strong Second Quarter 2010 Results* (Aug. 4, 2010), <http://investors.clearwire.com/phoenix.zhtml?c=198722&p=irol-newsArticle&id=1456458> (“As of today, Clearwire has more than one million wholesale subscribers and just under one million retail subscribers on the country’s first 4G network. By the end of 2010 we now expect to have approximately 3 million total subscribers, a significant increase from our previous guidance of just over 2 million subscribers . . . . The Company’s domestic 4G coverage reached approximately 56 million people as of June 30.”).

<sup>46</sup> Free Press claims that, no matter what the level of competition, regulation of the last mile would still be necessary because “a consumer will have at most one Internet service provider in his home at any given time, and switching costs are significant.” Free Press Comments at 82-83. Both halves of that sentence are empirically false. Any consumer with an Internet-enabled mobile device (such as a 3G-enabled iPad, an Android phone, or a laptop with a wireless card) in addition to a wired Internet connection has multiple “Internet service provider[s] in his home.” Just as important, switching costs turn out to be so low in practice that the annual churn rate for *fixed broadband Internet access alone* is approximately 30-35 percent. See AT&T Comments at 53.

Of course, there will never be an unlimited number of competing broadband Internet access networks for the simple reason that the investment required to build such networks is so risky and substantial. But that is precisely why it would be counterproductive, and inimical to the goals of the *National Broadband Plan*, to subject those who would make such high-risk investments to the further uncertainties and costs of legacy Title II regulation.

**A. The Statutory Classification Question Turns on the Consumer-Perspective Analysis Adopted in *Computer II*.**

At the highest level of generality, there are two relevant issues in determining whether any provider offers a “telecommunications service” subject to common carrier regulation under Title II. Several commenters, such as Public Knowledge and Data Foundry, put misplaced emphasis on the first of these (often referred to as the “*NARUC* analysis”): whether, with respect to a given service, a provider holds itself out as serving anyone in the eligible public (residential or commercial) that might be interested in purchasing its services on generally standardized terms.<sup>47</sup> Most mass market providers of retail broadband Internet access meet this criterion. But that does not make them Title II “telecommunications carriers” unless the service they offer, by its nature, falls within the category of a “telecommunications service” rather than an “information service.” *That* is the question the Commission answered in all of its classification orders over the past twelve years and the Supreme Court addressed in *Brand X*.

As to that question, the *Brand X* Court found that, since the origin of the *Computer II* rules in the late 1970s, the Commission has always “defined both basic and enhanced services by reference to *how the consumer perceives the service being offered.*” *Brand X*, 545 U.S. at 976

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<sup>47</sup> See, e.g., *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (“*NARUC I*”) (holding that, to be characterized as a common carrier, “one must hold oneself out indiscriminately to the clientele one is suited to serve”). A provider can be a common carrier even if it offers special customer-specific terms to win or retain business. See *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

(emphasis added). Congress reaffirmed that approach when it adopted the closely corresponding definitions of “telecommunications service” and “information service” in 1996, *see id.* at 977, and the Commission may not now abandon thirty-plus years of Commission precedent by rejecting this “consumer perception” analysis. Congress conformed the statutory definitions for “telecommunications service” and “information service” to that pre-1996 analysis by making them both turn on what a provider “offer[s]” consumers. 47 U.S.C. § 153(20), (46). As the Supreme Court has explained, “[i]t is common usage to describe what a company ‘offers’ to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product,” and “[i]t would, in fact, be odd” to construe that term any other way. *Brand X*, 545 U.S. at 990.

Contrary to what some commenters suggest, the Supreme Court did *not* hold that the statutory language was ambiguous *on this point*. Instead, the Court held that the Commission’s longstanding “consumer-perception” analysis so obviously comported with the statutory language that it was unnecessary to determine whether that language would support a contrary (“odd”) approach that departs from the “common usage” of that language.<sup>48</sup> The Court removed any doubt on that issue when it concluded: “*The entire question* is whether the products [contained in broadband Internet access service] are functionally integrated (like the components of a car) or functionally separate (like pets and leashes). That question turns *not on the language of the Act*, but on the *factual particulars* of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance.” *Id.* at 991 (emphasis added).

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<sup>48</sup> *See Brand X*, 545 U.S. at 990 (“*Even if* it is linguistically permissible to say that the car dealership ‘offers’ engines when it offers cars, that shows, *at most*, that the term ‘offer,’ when applied to a commercial transaction, is ambiguous about whether it describes only the offered finished product, or the product’s discrete components as well.”) (emphasis added).

To our knowledge, no commenter in this proceeding seriously argues that the Commission should reject the consumer-oriented definitional analysis in place since the inception of *Computer II*. But that does not stop a number of commenters from all but ignoring that standard when trying to explain how broadband Internet access could be or contain a Title II “telecommunications service.” For example, Free Press implies that a service’s classification somehow depends on whether its enhanced functionalities are *technologically indispensable* to the underlying transmissions. See Free Press Comments at 52-55. And on that basis, Free Press suggests that the various features consumers obtain when they purchase broadband Internet access—such as “e-mail, data storage, caching and DNS”—are irrelevant to the classification analysis because “successful data transmission does not depend on the network operator providing any of these services.” *Id.* at 53.<sup>49</sup>

Again, however, the question is not whether the enhanced features of a service are indispensable to transmission, but “what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product.” *Brand X*, 545 U.S. at 990. By analogy, mufflers and windows are integral parts of a car, and are not separately “offered” to consumers in the sale of a car, even though the car could be operated without them. Moreover, any shift to Free Press’s “technological indispensability” standard would not only

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<sup>49</sup> Public Knowledge similarly asserts that “[o]nly when a service is so linked to Internet access that it is *impossible to use the Internet without it* does it become part of the same ‘offer’ as Internet access.” Public Knowledge Comments at 17 (emphasis added). That formulation is incorrect for the same reasons as Free Press’s formulation. In any event, Public Knowledge concedes that “DNS is an essential component of Internet connectivity.” *Id.* at 19 (emphasis added and capitalization altered). And the Supreme Court and the Commission have both found that DNS is a sufficient basis for deeming broadband Internet access an integrated “information service.” See, e.g., *Brand X*, 545 U.S. at 999. Public Knowledge nonetheless claims (at 18) that those findings were “incorrect” and that “DNS is not an information service,” reasoning that DNS falls within the “telecommunications management” exception of 47 U.S.C. § 153(20). That is wrong for the reasons discussed in Section II.D below.

contradict the statutory language, but also trigger enormous unintended consequences, because the enhanced features of a great many integrated information services are technologically severable from their underlying transmissions.<sup>50</sup> In sum, there is no sensible or legally permissible alternative to the consumer-perception analysis embraced by the Commission in *Computer II* and reaffirmed by the Supreme Court in *Brand X*.

**B. There Is No “Internet Connectivity Service” Apart from Broadband Internet Access.**

For two reasons, the Commission cannot sensibly pursue its apparent proposal (NOI ¶ 65) to define a “broadband Internet connectivity service” on the basis of last-mile transmission services such as the one described in the NECA DSL tariff. First, as USTelecom explains, few if any retail consumers purchase that service, which is designed instead as a wholesale service sold to ISPs. USTA Comments at 60. Second, the service described in the NECA tariff does not itself connect anyone to the Internet. *See* AT&T Comments at 64-66; ATIS Comments at 10-12; NECA Comments at 6.<sup>51</sup>

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<sup>50</sup> *See, e.g.*, AT&T Comments at 96-101, 107-09; *see also Stevens Report*, 13 FCC Rcd at 11529 ¶ 57 (finding that if the Commission “interpreted the statute as breaking down the distinction between information services and telecommunications services, so that some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category”).

<sup>51</sup> For present purposes, that service is indistinguishable from the service addressed in Memorandum Opinion and Order, *GTE Telephone Operating Cos.*, 13 FCC Rcd 22466, 22466 ¶ 1 (1998), which “permit[ted] Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet.” In 1998, the Commission deemed that service jurisdictionally interstate because, like almost any other special access service, it was an input for retail interstate communications services. *See id.* at 22479-80 ¶¶ 23, 25 (describing and adopting GTE’s argument that “its ADSL service is properly tariffed at the federal level on the ground that it [is] similar to existing special access services that are subject to federal regulation under the mixed-use facilities rule because more than ten percent of the traffic is interstate”). That *jurisdictional* analysis, which focuses on the behind-the-scenes uses of wholesale transmission inputs, has no bearing on the *statutory classification* analysis at issue here, which focuses instead on the consumer’s perception of the finished service.

The service described in the NECA DSL tariff provides fixed connectivity between an end user's premises and a local point of interconnection with an ISP's network. As ATIS explains, however, "the offering in the NECA tariff does not include routing or transport capabilities that would enable the user's data to be carried past [that interconnection point], out onto the Internet, and to other users' computers." ATIS Comments at 11. It therefore "does not qualify as 'Internet connectivity'" and is "very different from the [service] that the Commission appears to have in mind" when it uses that term in the NOI. *Id.* More generally, no "'Internet connectivity' can occur without 'Internet access,'" in the form of higher-layer data-processing functionality, and the NOI's contrary suggestion serves only to "inject confusion into this discussion." *Id.* at 6.

Just as important, the NECA DSL tariff does not describe what consumers understand they obtain when they order broadband access to the Internet. They do not buy, or perceive that they are offered, a raw transmission functionality that stops at a nearby central office. Instead, they sign up with ISPs to receive, among other features, *end-to-end communications with all points on the Internet.*<sup>52</sup> And consumers expect ISPs to arrange for such end-to-end connectivity even though ISPs typically have to "outsource" many of those transmission functions to other providers—*e.g.*, through facility leases and peering and transit arrangements with Internet backbone providers. *See* AT&T Comments at 58-62. Analogously, someone who purchases long-distance telephone service expects his interexchange carrier to provide end-to-end connectivity with everyone else on the PSTN outside his local calling area, even though that IXC

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<sup>52</sup> *See* AT&T Comments at 58-62; Letter from Jack S. Zinman, AT&T, to Marlene Dortch, FCC, WC Docket No. 07-52, at 1 (filed June 11, 2010) (attached as Exh. 2 to these reply comments) (providing charts addressing "the physical and logical dimensions of the 'Internet connectivity service' that the Commission has reportedly identified in the NOI").

will likely have to purchase exchange access from the called party's local exchange carrier and sometimes from the originating LEC as well.

Even Free Press acknowledges that any meaningful definition of “Internet connectivity service” must include the “transmi[ssion of] data from *end to end over the Internet*, the international computer network of both federal and non-federal interoperable packet-switched networks. At a minimum, that service includes the sending, receiving, addressing, routing, scheduling, or queuing of data packets *from one end point of a user's choosing to another on the Internet.*” Free Press Comments at 49 (emphasis added).<sup>53</sup> This proposal vividly highlights exactly what Title II reclassification would accomplish: *regulation of the Internet itself*. Public Knowledge likewise does not shy away from encouraging outright Internet regulation. In fact, it urges the Commission to undertake Title II reclassification precisely so that it may impose “interconnect[ion]” obligations on Internet backbone providers, arbitrate Internet “peering dispute[s],” and superintend “the migration to IPv6.” Public Knowledge Comments at v, 27; *see also id.* at 43 (calling for FCC supervision of the IPv6 transition); *id.* at 45 (further elaborating on its call for FCC supervision of peering arrangements). Again, all of these approaches would constitute regulation of “the Internet” under any conceivable definition of that term—and would also be unlawful for the reasons discussed below.

CDT tries out yet another definition of an “Internet connectivity service”: a “retail service that enables a customer to send and receive Internet Protocol communications to and

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<sup>53</sup> Cablevision notes that, in important respects, end users do not “choos[e]” which end points they communicate with on the Internet, and that their ISPs and other Internet providers select many different servers (and end points) that those end users ultimately communicate with, even in the transmission of a single web page. Cablevision Comments at 6-11. That process, Cablevision concludes (at 6, 9-10), makes it untenable to characterize any Internet transmission as “telecommunications,” which, by definition, requires “transmission[] between or among points specified *by the user.*” 47 U.S.C. § 153(43) (emphasis added).

from Internet endpoints of the customer's choosing" by "assigning an Internet Protocol address" to the customer's devices and "providing the customer with the means for Internet Protocol communications . . . between the customer's device and one or more interconnection or peering points that enable further routing, directly or indirectly, to the Internet." CDT Comments at 13. This definition is misconceived in several respects. To begin with, CDT disserves its own avowed purpose "to cabin the definition . . . to entities that provide last-mile connections to retail subscribers." In particular, there is no such thing as "peering points that enable further routing . . . to the Internet," *id.* (emphasis added), because "peering points" are, by definition, where backbone and other IP networks interconnect and are thus *already in the middle of the Internet*. Yet that is where CDT would extend Title II regulation. At the same time, however, CDT's proposed definition would exclude any DSL transmission service such as the one described in the NECA tariff, because that service is rarely (if ever) provided on a "retail" basis, and the telco providers of that service do not "assign[] an Internet Protocol address" to any ISP purchaser, let alone any end user; ISPs do that instead. *See* AT&T Comments at 64-66.

More fundamentally, CDT's approach is untenable because the "service" CDT defines does not describe any actual retail service that anyone obtains. Like the other pro-regulation interest-group commenters, CDT illogically conflates retail and wholesale services throughout its discussion of this definitional issue. Behind the scenes, different wholesale providers do supply the various transmission components needed to reach distant Internet sites. Again, however, the question is what a consumer perceives he or she receives when purchasing a retail service. And retail customers expect their ISPs to provide them with seamless connectivity to all sites on the Internet, not to intermediate points that, like CDT's mythical "retail" service, stop short of those

sites. Consumers do not purchase one retail IP-enabled service to get them part of the way to their Internet destinations and another to carry them the rest of the way.

Ultimately, none of these pro-regulation interest groups is clear about how it conceptualizes the mechanics of Title II reclassification, and some commenters—such as DISH and XO—indicate that they simply have no idea how to define the “connectivity” service they wish to see regulated; they just want “it” regulated. *See* p. 8, *supra*. What *is* clear is that the Commission cannot achieve its regulatory objectives by arbitrarily isolating the last-mile transmission component of end-to-end Internet communications, because no one views that even as “Internet connectivity,” let alone as a severable component of any service consumers actually purchase. Finally, for the reasons discussed in our opening comments, the Commission could not lawfully sidestep that impediment to Title II reclassification by trying to revive the *Computer Inquiry* rules or otherwise force broadband Internet access providers to offer a standalone transmission service on a common carrier basis—steps the Commission has assured the industry it has no intention of taking anyway. *See* AT&T Comments at 102-06.

**C. No Less Than in 2002, 2005, or 2007, Providers Offer Integrated Enhanced Features with Broadband Internet Access Service.**

When consumers purchase broadband Internet access service, they expect to receive not only raw transmission to all points on the Internet, but an inextricable combination of enhanced features that include (among other things) DNS look-up, other DNS functionalities, unique programming content (such as ESPN3.com), email, data storage, parental controls, and user-specific security protections. *See* AT&T Comments at 71-78, 84-90. In findings affirmed by the Third Circuit and the Supreme Court, the Commission has so found, and those findings are all the more inescapable now, with the emergence of ISP-provided, customer-specific cybersecurity measures. *See id.* at 67-70, 76-78, 88-90. As we have explained, moreover, the marketing

practices of AT&T and other providers confirm the integration of these and other “smart” features into broadband Internet access service and the importance that consumers attribute to them.<sup>54</sup>

Although Public Knowledge attaches marketing materials to its comments too in the hope of showing that consumers focus exclusively on throughput speeds, even those materials, hand-picked by Public Knowledge, prove *our* point by confirming the importance of enhanced functionality in the marketplace. For example, Public Knowledge’s exhibits<sup>55</sup> reveal that—

- Comcast entices consumers not only with high speeds, but also with the use of “seven e-mail accounts, each with 10GB of storage,” user-specific security features “at no additional charge,” and access to exclusive sports-related content on “ESPN3.com.”<sup>56</sup>
- Charter offers 10 “[e]mail accounts” per account with “1GB” of “storage” apiece, along with “Charter Security Suite” and content on “ESPN3.com.”
- Cavalier offers “3 email addresses” per account, “[o]ver 7000 MB available email storage,” “FREE Net Guardian Security Suite” (including protection “from viruses, spam and pop-ups”), “FREE Net Medic” (“[s]elf-diagnose and repair problems with your internet connection and email”), and “exclusive web content FREE,” including Disney Connections (“videos, games and fun, family-friendly activities”), Soapnetic, ESPN360, and ABC NewsNow.
- AT&T’s “smartphone services” include “Parental Controls” and “Xpress Mail,” which “lets you access wireless email on a number of different devices.”<sup>57</sup>

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<sup>54</sup> See *id.* at 74-75 (citing marketing materials); Verizon Comments, Attach. A (following declaration); Comcast Comments, Appx. A.

<sup>55</sup> Each of the following is contained in Public Knowledge’s comments at Appendices A and B. The screenshots Public Knowledge chose for those appendices, however, are hardly representative. Navigation to other web pages on the relevant providers’ websites will reveal even greater emphasis on enhanced features. See, e.g., AT&T Comments at 74-75 (quoting from AT&T website); Verizon Comments, Attach. A (following declaration); Comcast Comments, Appx. A.

<sup>56</sup> ESPN3.com, formerly known as ESPN360, is a limited-access website containing exclusive content that Disney sells to some ISPs. Only end users who subscribe to an ISP that has entered into such a commercial agreement with Disney can gain access to this exclusive content. See Comments of AT&T Inc., *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191 & WC Docket No. 07-52, at 32-33, 129 (filed Jan. 14, 2010) (“*AT&T Net Neutrality Comments*”); AT&T Comments at 76.

All of these features inarguably meet the definition of “information services,” and as these advertisements confirm, each is included within the integrated service offering that consumers purchase when they order the corresponding broadband Internet access service.

Even Public Knowledge ultimately acknowledges that “email and other services may be part of the same ‘offer’ in the common use of the term.” Public Knowledge Comments at 18 n.72. Public Knowledge nonetheless contends that they are “not part of the *offer of Internet access.*” *Id.* This makes little sense. Consumers receive—and expect to receive—all of these advertised features as part of the same integrated offering, and both they and ISPs refer to that offering as “broadband Internet access service.” That is the only relevant issue in determining what consumers are offered.

**D. By Itself, the Role of DNS Warrants Characterizing Broadband Internet Access As an Integrated Information Service.**

Although Public Knowledge claims (inaccurately) that email and the other enhanced features of broadband Internet access service are somehow severable from the transmission component of that service, even it acknowledges that “DNS is an essential component of Internet connectivity,” *id.* at 19 (capitalization altered), in that consumer navigation of the Internet without DNS would be practically impossible. This poses a conundrum for the pro-regulation interest groups, because the Supreme Court and the Commission have both found that DNS is a sufficient basis for deeming broadband Internet access an integrated “information service.” *See, e.g., Brand X*, 545 U.S. at 999-1000; *see generally* AT&T Comments at 71-73.

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<sup>57</sup> As discussed in Section IV below, the wireless broadband Internet access service offered by AT&T and others offers yet another integrated feature: conversion of HTML content from the general Internet into the format (WAP) necessary for viewing on certain wireless handsets. By itself, this fundamental “change in the form . . . of the information as sent and received” (47 U.S.C. § 153(43)) removes that wireless service from the definition of “telecommunications” and places it squarely within the definition of “information service.”

Public Knowledge and similar groups thus resort to arguing that those findings were “incorrect” and that “DNS is not an information service.” Public Knowledge Comments at 18. This is untenable. DNS combines a “distributed database” with “an application-layer protocol”<sup>58</sup> and therefore exemplifies (for example) the classic “storing,” “transforming,” “processing,” “retrieving,” and “utilizing” of information described in the statutory definition of “information service.” 47 U.S.C. § 153(20). Overseen by the Internet Corporation for Assigned Names and Numbers (“ICANN”), DNS also lies at the very core of anyone’s definition of “the Internet.”<sup>59</sup> Nonetheless, the pro-regulation interest groups contend that DNS merely “facilitates the operation and management of the network” and thus falls within the “telecommunications management” exception of 47 U.S.C. § 153(20). Free Press Comments at 117-18; *see also* Public Knowledge Comments at 19-23. There are three problems with this argument: it is wrong; the Commission has already explicitly said that it is wrong in a formal representation to the Supreme Court; and the Supreme Court thereafter ruled in favor of the Commission.

**1. Even As an Original Matter, DNS Does Not Fall Within the Telecommunications-Management Exception.**

In their efforts to shoehorn DNS functions into the “telecommunications management” exception, the pro-regulation interest groups all misconceive how even the most basic DNS look-up function operates, and further overlook the still more sophisticated DNS functions discussed in our opening comments (at 87-88). As its name implies, the “telecommunications management” exception was enacted to address the SS7 signaling system and similar computerized features internal to traditional telephone networks. For example, the SS7 system is

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<sup>58</sup> James F. Kurose & Keith W. Ross, *Computer Networking: A Top-Down Approach* 133 (5th ed. 2010) (“Kurose & Ross”).

<sup>59</sup> *See, e.g.*, National Academy of Sciences, *Signposts in Cyberspace: The Domain Name System and Internet Navigation* 25 (2005), <http://www.nap.edu/catalog/11258.html> (“Signposts in Cyberspace”); *see also* AT&T Comments at 52.

indeed designed to “facilitate[] the operation and management of the network” in that it enables *the telephone company* to prescribe, for *its own benefit*, a clear dedicated path for any given call through the company’s network, all without user interaction.

The DNS look-up function provided with any broadband Internet access service performs an entirely different, non-“management” role. When an end user types a domain name into her browser and sends a DNS query to an ISP, the ISP does not, in the course of answering that query, set up any type of path for the subsequent data session. Instead, throughout a complex multi-step process, the ISP interacts with other DNS servers and converts the human-language domain name into a numerical IP address, and it then conveys that information back to the end user (more specifically, the end user’s browser, in the case of web applications).<sup>60</sup> Equipped with this new information, the *end user* (via his browser) thereafter sends a follow-up request for the Internet resources located at that numerical IP address.<sup>61</sup>

Little or nothing in this DNS look-up process is designed to help a provider “manage” its network; instead, DNS look-up functionalities provide stored information to *end users* to help *them* navigate the Internet. That fact alone is fatal to the interest groups’ efforts to shove DNS into the “telecommunications management” exception within the definition of “information service.” And for similar reasons discussed in our opening comments (at 86-88), that fact also undermines the interest groups’ related efforts to fit DNS into the “adjunct-to-basic” doctrine,

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<sup>60</sup> *Kurose & Ross* at 133; *Signposts in Cyberspace* at 25, Fig. 1, 81, Fig. 3.1. “Address translation” functions of this type have always been considered “information services.” See *Stevens Report*, 13 FCC Rcd at 11536-37 ¶ 75 & n.147 (“[T]he functions and services associated with Internet access were classed as ‘information services’ under the MFJ. Under that decree, the provision of gateways (involving address translation, protocol conversion, billing management, and the provision of introductory information content) to information services fell squarely within the ‘information services’ definition.”) (citing MFJ orders).

<sup>61</sup> *Kurose & Ross* at 133. The routing decisions for that request are then made for each individual packet by each individual router from source to destination on the basis of constantly updated “routing tables.”

which the Commission has suggested is coterminous with the “telecommunications management” exception.<sup>62</sup> Of course, the *statutory* “telecommunications management” exception is now controlling law, not the *nonstatutory*, pre-1996 Act “adjunct-to-basic” doctrine.

By its terms, the “telecommunications management” exception addresses only functions a telecommunications carrier undertakes to “manage” (or “operate” or “control”) its own network. *See* 47 U.S.C. § 153(20). It would make no sense to speak of an end user “managing” (or “operating” or “controlling”) a commercial IP network; those are terms that describe what the network’s owner does, not its customers. The Commission has thus properly refused to apply the “telecommunications management” (or adjunct-to-basic) exception to the provision of “information that is *useful to end users, rather than carriers.*”<sup>63</sup> DNS look-up thus falls outside that exception (and within the definition of “information service”) because it is designed for the convenience of end users, not ISPs. *See* AT&T Comments at 86 & n.146. Indeed, were it otherwise, there would be no niche third-party providers of DNS services, such as OpenDNS.com, that hold themselves out to end users as alternatives to ISP-provided DNS services. Those third-party providers exist precisely because DNS services associated with Internet access are designed to aid end users, not to “manage” the ISP’s own network.

Similarly, those third-party providers exist precisely because DNS services are multifaceted and complex.<sup>64</sup> As we have explained, DNS services encompass both conventional

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<sup>62</sup> First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, 11 FCC Rcd 21905, 21958 ¶ 107 (1996).

<sup>63</sup> Memorandum Opinion and Order, *Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, Bell Operating Companies*, 13 FCC Rcd 2627, 2639 ¶ 18 (Com. Carr. Bur. 1998) (emphasis added) (“1998 272 Forbearance Order”); *see* AT&T Comments at 86-87 & n.146.

<sup>64</sup> Public Knowledge claims (at 20) that DNS functions are “part of plain vanilla, no-frills ‘Internet connectivity.’” That is both false (for the reasons discussed in the text) and legally

DNS look-up functionality as well as a wide range of other “smart” features. *See* AT&T

Comments at 87. The latter include:

- ***Reverse DNS look-up***, which enables a user to access stored information to convert a numeric IP address into a domain name. “The most common uses of the reverse DNS” include, among several others, an “e-mail anti-spam technique”—“checking the domain names in the rDNS to see if they are likely from dialup users, dynamically assigned addresses, or other inexpensive internet services”—and a “Forward Confirmed reverse DNS (FCrDNS) verification,” which, for authentication purposes, can “show[] a valid relationship between the owner of a domain name and the owner of the server that has been given an IP address.”<sup>65</sup> As discussed in our opening comments, these functionalities are analogous to (though far more sophisticated than) “reverse directory assistance” service in the POTS environment, which the Commission has long held to be an information service. *See* AT&T Comments at 87-88.
- ***DNS “error page assist” and “redirect,”*** which, through various means, help an end user find the Internet resource the ISP concludes she is most likely to want to reach when she types a URL that does not properly identify an accessible web page. *See* AT&T Comments at 87.
- ***“DNS sinkhole,”*** which involves “redirect[ing] specific IP network traffic for different security reasons including analysis, diversion of attacks and detection of anomalous activities,” and “has long been deployed by Tier-1 ISP’s globally usually to protect their downstream customers.”<sup>66</sup>

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irrelevant. The statutory definitions classify services according to whether they contain integrated data-processing or storage-and-retrieval functions, and these do. That is as true of “regular” DNS look-up as of the other DNS functionalities discussed here.

<sup>65</sup> *See* Wikipedia, Reverse DNS lookup, [http://en.wikipedia.org/wiki/Reverse\\_DNS\\_lookup](http://en.wikipedia.org/wiki/Reverse_DNS_lookup) (last visited August 11, 2010); Comcast, Customer Central, <http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=PTR> (discussing how Comcast uses reverse DNS lookup to combat spam). End users can obtain reverse DNS look-ups from their ISPs simply by using the look-up command available from the operating system installed on their computers. *See* Wikipedia, nslookup, <http://en.wikipedia.org/wiki/Nslookup> (last visited August 11, 2010); NSLookup Command, *The Living Internet*, [http://www.livinginternet.com/i/ia\\_tools\\_nslookup.htm](http://www.livinginternet.com/i/ia_tools_nslookup.htm) (“You can use the Name Server Lookup (NSLOOKUP) command to query the Domain Name Service for information about domain names and IP addresses. If you enter a domain name, you get back the IP address to which it corresponds, and if you enter an IP number, then you get back the domain name to which it corresponds.”).

<sup>66</sup> Ajit Gaddam, *Sinkholes in Network security: 5 easy steps to deploy a darknet*, AskStudent, Oct. 24, 2006, <http://www.askstudent.com/security/sinkholes-in-network-security-5-easy-steps-to-deploy-a-darknet/>.

- **DNSSEC**, an emerging security technology that “utiliz[es] the powers of recursion and cryptography” to give Internet users “a much higher degree of trust in the hierarchical Domain Name System” by “foreclos[ing] attacks at the domain name-to-IP address stage of requesting a web page.”<sup>67</sup>
- **DNS IPv6 transition aids**. As conventional IPv4 addresses approach exhaustion, the entire Internet industry is transitioning rapidly to IPv6, the successor addressing scheme. During this transition, many end-user devices (“clients”) will choose an IPv6 path in communicating with web servers even though they are not fully IPv6-enabled and will generate “broken IPv6 links due to problematic default behavior and incompatibilities in operating systems, home gateways and customer premises equipment.”<sup>68</sup> This often results in user frustration. ISPs will help solve this problem—and thereby protect users’ interests—by using IPv6 addresses only for certified (“whitelisted”) IPv6 clients and corresponding IPv4 addresses for all non-certified clients.<sup>69</sup>

All of these DNS functions involve data-processing or data-storage; all are thus classic information-service functionalities; and all fall outside the “telecommunications management” exception because they are designed primarily to aid end users rather than manage any network. Tellingly, no pro-regulation interest group even mentions them.

Some of those groups do still argue that the availability of commercial alternatives to DNS is itself a reason to conclude that consumers view DNS as somehow segregable from “the rest” of broadband Internet access services. *See* Free Press Comments at 118. The relevant question, however, is not whether a handful of unusually tech-savvy subscribers *could* use an alternative DNS service, but whether consumers perceive DNS as a functionally integrated part of the service that ISPs actually offer. They plainly do, no less today than in 2002, 2005, or

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<sup>67</sup> Steve Schultze, *A Major Internet Milestone: DNSSEC and SSL*, Freedom to Tinker, Aug. 2, 2010, <http://freedom-to-tinker.com/blog/sjs/major-internet-milestone-dnssec-and-ssl>. *See generally* RFCs 4033, 4034, 4035 (available at <http://www.rfc-editor.org>).

<sup>68</sup> Carolyn Duffy Marsan, *Google, Microsoft, Netflix in talks to create shared list of IPv6 users*, NetworkWorld, Mar. 26, 2010, <http://www.networkworld.com/news/2010/032610-dns-ipv6-whitelist.html?hpg1=bn>. *See generally* Erik Kline (Google), IPv6 Whitelist Operations, [https://docs.google.com/present/view?id=dg356446\\_14fds9jxd2](https://docs.google.com/present/view?id=dg356446_14fds9jxd2).

<sup>69</sup> *See* Igor Gashinsky, *IPv6 & recursive resolvers: How do we make the transition less painful?*, IETF 77 (Mar. 24, 2010), <http://www.ietf.org/proceedings/10mar/slides/dnsop-7.pdf>.

2007. Virtually all end users make use of their ISP’s DNS services, and virtually all of them would be upset and baffled if their ISPs suddenly stopped providing those services and forced them to find alternative DNS providers elsewhere on the Internet or to rely solely on numeric IP addresses in navigating the Internet.<sup>70</sup>

In any event, the availability of third-party alternatives to an ISP’s enhanced functionalities is irrelevant to the classification question even where (unlike here) many consumers know about them.<sup>71</sup> As Time Warner Cable explains by analogy, “[a]utomakers plainly ‘offer’ customers an integrated vehicle despite the fact that various other companies choose to sell discrete auto parts directly to the public. Ford is not reduced to ‘offering’ something more granular than a car (*e.g.*, a muffler) simply because Midas, too, sells mufflers.” Time Warner Cable Comments at 26.

## **2. The Commission and Supreme Court Have Already Resolved This DNS Issue Against the Pro-Regulation Interest Groups.**

The Commission is hardly writing on a blank slate here. In *Brand X*, the Commission argued that DNS—by itself—would suffice to make broadband Internet access a unified “information service,” and the Supreme Court agreed (*see* 545 U.S. at 999-1000). And in making that point, the Commission explicitly rejected a central argument by MCI and EarthLink

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<sup>70</sup> Depending on the circumstances, such third-party DNS offerings may well be inferior to DNS functionalities integrated in an ISP’s own network. First, end users relying on such offerings likely experience extra latency because their DNS queries must generally traverse more “hops” to reach a DNS resolver outside the ISP’s network. Second, content providers often deliver content to end users from one of many cache servers geographically dispersed across the Internet, which the content provider may select based on its proximity to the DNS resolver used by the end user. If an end user selects a third-party DNS provider with a remote resolver, the content provider may select a suboptimal cache server from which to deliver content to that end user, potentially degrading performance.

<sup>71</sup> Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4828 ¶ 51 (2002), *aff’d Brand X*, 545 U.S. 967 (intermediate history omitted).

that DNS was somehow inconsequential because it fell into the “telecommunications management” exception of 47 U.S.C. § 153(20)—the precise argument that the proponents of Title II regulation offer here as a basis for reclassification.

In particular, the Commission explained in its *Brand X* reply brief:

The Act’s definition of “information service” excludes “any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. 153(20). Respondents are correct that use of what EarthLink terms “incidental information management components” in providing traditional telephone service does not convert ordinary telephone service into an information service. See EarthLink Br. 16 n.4, MCI Br. 22-23. *But information-processing capabilities such as the DNS and caching are not used “for the management, control, or operation” of a telecommunications network, but instead are used to facilitate the information retrieval capabilities that are inherent in Internet access. Their use accordingly does not fall within the statutory exclusion.*

*FCC Brand X Reply Brief* at 5-6 n.2 (emphasis added). Again, the Commission was correct on this point. Although Justice Scalia’s dissent (mistakenly) sided with MCI and EarthLink on the “telecommunications management” issue, *see Brand X*, 545 U.S. at 1013, the majority sided with the Commission, concluding that DNS, like caching, is a sufficient basis for concluding that “the service that Internet access providers offer to members of the public is Internet access, not a transparent ability (from the end user’s perspective) to transmit information.” *Id.* at 999-1000 (internal citation and quotation marks omitted); *see also id.* at 1000 n.3.

In briefing this issue, the Commission’s appellate counsel were not merely reporting on some discretionary policy choice the Commission had made and defending its “reasonableness.” Instead, the Commission’s Acting General Counsel was making an extremely narrow and fact-specific (yet highly consequential) representation to the Supreme Court on whether a particular service falls within the “telecommunications management” exception. Having made that representation and secured victory in the Supreme Court, the Commission may not now simply repudiate its own representation. A reviewing court would view this for what it is: a patently

unreasonable about-face occasioned not by an honest reappraisal of this issue, but by the Commission’s desire to assume regulatory powers that Congress has not given it. Indeed, as Verizon argues, a reviewing court could and should conclude that the doctrine of judicial estoppel precludes such gamesmanship.<sup>72</sup>

To be clear, we have no reason to believe that the Commission has any inclination to adopt this approach, because the Commission apparently believes that it can achieve Title II reclassification through a different path: (1) defining a nonexistent “service” (“broadband Internet connectivity”) that excludes DNS and the other enhanced functionalities that consumers receive when they purchase broadband Internet access service, (2) subjecting *that* contrived “service” to Title II reclassification, and then (3) invoking its Title I “ancillary” authority to impose common-carrier-type rules on DNS and the other enhanced functionalities of broadband Internet access. Again, however, that path is independently foreclosed (1) for the reasons discussed in Section II.B above and in our opening comments (*e.g.*, at 62-66, 102-06), and (2) because the last sentence of 47 U.S.C. § 153(44) independently precludes the Commission from invoking “ancillary” authority to apply common-carrier-type rules to Title I information services. *See* p. 22, *supra*; *AT&T Net Neutrality Comments* at 210-11 (refiled in this docket); *AT&T Net Neutrality Reply Comments* at 165-66 (same).

**E. “Facilities Ownership” Is Not an Available Limiting Principle for Containing the Damage Any Reclassification Decision Would Do to the Broader Internet.**

As we have previously explained, the logic of any reclassification decision would extend Title II regulation to an unpredictably broad variety of other providers in the Internet ecosystem. The most obvious casualties would include “alternative” Internet service providers such as

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<sup>72</sup> Verizon Comments at 39-41 (citing *Comcast*, 600 F.3d at 647; *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953)).

EarthLink, Amazon.com and Barnes & Noble (which bundle a web browser and wireless Internet access into the purchase price of their respective eReaders), and Garmin and TomTom (which bundle web search capabilities into their advanced GPS devices). *See* AT&T Comments at 97-101. The logic of reclassification would likely also extend to any company—such as VoIP providers, content delivery networks, and Internet backbone providers—that broadly offers to arrange for the transport of data through the Internet. *See id.* at 55-58, 107-09. These concerns are hardly new. In *Brand X*, the Supreme Court echoed similar concerns in response to arguments by EarthLink and MCI that any information service offered via telecommunications contains a “telecommunications service,” and cited the logical consequences of that position as a reason for rejecting it. *See* 545 U.S. at 994, 996-97.

Free Press criticizes broadband ISPs for pointing out these logical consequences, but in the process it merely reveals its own confusion on the issue. One key example lies in Free Press’s unavailing efforts to avoid the policy consequences that the Supreme Court pointed out in *Brand X* by invoking “facilities ownership” as a supposed limiting principle. Under Free Press’s view of this statutory scheme, “[a] *facilities-based* provider offering an enhanced service always offers a basic service and an enhanced service,” but a “non-facilities-based” provider presumably does not. Free Press Comments at 80 (emphasis added). For at least two reasons, invocation of this “facilities ownership” qualifier would do nothing to prevent Title II reclassification from infecting broad swaths of the Internet ecosystem: facilities ownership is legally irrelevant to the statutory classification of a service, and many providers that Free Press presumably wishes to exempt from Title II regulation are in fact “facilities based.” We address these two issues in reverse order.

*First*, as a preliminary matter, Free Press’s proposed “facilities ownership” qualifier—even if it could be squared with the statutory definitions—would still impose Title II regulation on an extraordinary array of Internet-based companies. For example, Google (like Yahoo!, Microsoft, and others) owns and operates a multi-billion-dollar global fiber transmission network, which it uses to transmit search results and paid advertising to end users and on behalf of countless thousands of advertisers.<sup>73</sup> It uses those same facilities to provide users with an independent DNS service and cloud computing. In short, Google is plainly a “facilities-based provider offering an enhanced service” in each of these cases. And under Free Press’s position, Google, as a “facilities-based provider offering an enhanced service[,] always offers a basic service and an enhanced service.” Free Press Comments at 80. Of course, whenever pinned down on this point, Free Press disavows the logical consequences of its logic, but never quite explains why they do not follow.

Free Press reveals similar confusion throughout its comments. For example, it claims (at 4) that “[t]he Act embodies the principle that one set of obligations applies to the infrastructure that provides the capacity to transmit and receive information, and that a different set of obligations applies to content providers who use that infrastructure to transmit information.” But the Internet is teeming with providers that defy this contrived dichotomy. For example, supposed “content providers” like Google are not passive repositories of “information” that rely solely on the transmission services of others; instead, they transmit that information over their own sprawling transmission networks.

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<sup>73</sup> See *AT&T Net Neutrality Comments* at 27-32. Google CEO Eric Schmidt explains: “[W]e have not only data centers, but we have fiber that interconnect[s] those data centers, and connect[s] to the ISPs. At Google, speed is critical. And part of the way we get that speed is with that fiber.” Fred Vogelstein, *Text of Wired’s Interview of Google CEO Eric Schmidt*, *Wired*, Apr. 9, 2007, [http://www.wired.com/print/techbiz/people/news/2007/04/mag\\_schmidt\\_trans](http://www.wired.com/print/techbiz/people/news/2007/04/mag_schmidt_trans).

*Second*, Free Press’s proposed “facilities-ownership” qualifier cannot be squared with the statutory definitions or, for that matter, with decades of telecommunications law. As the Supreme Court has explained, the legal classification of a retail service does not depend at all on how the service provider obtains its wholesale transmission inputs—*i.e.*, through buying facilities, leasing them, or reselling wholesale services; what matters is how the consumer perceives the finished retail product. *See Brand X*, 545 U.S. at 990-97; AT&T Comments at 69-78; *see also* 47 U.S.C. § 153(46). And that is why—outside the Internet context—the “telecommunications service” characterization has always encompassed, among others, (1) standalone long-distance carriers (such as AT&T Corp., MCI, and Sprint) and CLECs (such as XO and tw telecom) that rely on local exchange carriers for last-mile connections to individual end users and (2) pure resellers, such as calling card providers, that may own no transmission facilities at all. *See* AT&T Comments at 98-100.

A number of parties continue to overlook this incontrovertible point, and one particularly glaring example is EarthLink. EarthLink belongs to the class of so-called “non-facilities-based” ISPs—*i.e.*, ISPs that, like standalone long-distance companies, may own extensive transmission facilities but that lease rather than own the *last-mile* transmission links connecting those networks to individual end users. Without clearly explaining why, EarthLink appears to believe that leasing rather than owning those last-mile links makes all the difference for purposes of statutory classification. It could not be more wrong.

From a consumer’s perspective, the retail service purchased from an ISP like EarthLink is functionally the same as the corresponding service purchased from an ISP that owns the last-mile transmission inputs. EarthLink’s service thus necessarily falls within the same statutory category as any other broadband Internet access service. *See Brand X*, 545 U.S. at 994, 996-97; AT&T

Comments at 99-100 (explaining why the Commission may not adopt Justice Scalia’s incorrect and repudiated contrary view). As the Supreme Court has held, the statutory analysis, which turns on that consumer perspective, “do[es] not distinguish facilities-based and non-facilities-based carriers,” *Brand X*, 545 U.S. at 997, and thus any regime that applies Title II regulation to “facilities-based” ISPs would necessarily “subject to common-carrier regulation non-facilities-based ISPs that *own no transmission facilities*,” *id.* at 994 (emphasis added).<sup>74</sup>

In asserting otherwise, EarthLink makes a common mistake: it conflates the *Computer II* unbundling rule with the statutory characterization issue presented here. As we have discussed, that now-abolished rule required wireline telephone companies (but not cable, satellite, or wireless providers) to “unbundle” the transmission components of any *information services* they offered and sell those transmission functions on a standalone basis to unaffiliated information service providers. *See* AT&T Comments at 102-06. This rule applied only to facilities-based information service providers—or, more precisely, only to a limited subset of such providers (wireline telcos). But that fact is irrelevant to the antecedent question of whether a service fell within the definition of “information service” and thus triggered this obligation in the first place.

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<sup>74</sup> EarthLink claims (at 17) that, as a policy matter, the Commission should not *want* to classify “non-facilities-based” ISPs as “telecommunications carriers” because they supposedly “do not control Internet connectivity” and “have no ability to degrade or block traffic going throughout the broadband network.” That policy rationale is not only legally irrelevant to the statutory classification question, but factually wrong as well. As EarthLink elsewhere acknowledges, it provides all the same enhanced features as “facilities-based” ISPs, and its customers “typically use [its] domain name service (DNS) to resolve URLs.” EarthLink Comments at 9. EarthLink is therefore just as capable as any “facilities-based” ISP of using these enhanced higher-layer functionalities to “control Internet connectivity” and, where appropriate, “block” traffic.

*See id.* As discussed, *that* question has always been answered in exactly the same way for any given type of retail service whether the provider of that service is “facilities-based” or not.<sup>75</sup>

Free Press similarly confuses wholesale and retail services in asserting that Akamai (which sat out the opening comment round) would fall outside the scope of Title II reclassification. According to Free Press, Akamai does not “offer data transmission itself (a prerequisite for a determination that [its services are] telecommunications service).” Free Press Comments at 88-89. In fact, Akamai *does* offer its thousands of business customers “transmission” of their data to servers throughout the Internet; indeed, it boasts that it “routinely delivers between fifteen and thirty percent of all Web traffic, reaching more than 4 Terabits per second.”<sup>76</sup> And it makes no difference that, as Free Press observes (at 89), Akamai “depend[s] on procuring transmission capacity from third-party telecommunications network providers.” The same is true of *every* telecommunications carrier that does not own every single facility that a particular telephone call may traverse from calling to called party, including every IXC, CLEC, or CMRS purchaser of special access services or UNEs. Again, the characterization of a provider as a “telecommunications carrier” or “information service provider” depends on how its customers perceive the retail services that provider offers, not on how the provider arranges for

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<sup>75</sup> EarthLink cites a 1995 order of the Common Carrier Bureau for the proposition that “‘the contamination doctrine,’ whereby the inclusion of an enhanced (information) service with a basic transmission telecommunications service resulted in the entire bundle being treated as an enhanced service, did not apply to facilities-based carriers[.]” EarthLink Comments at 8-9 & n.26 (citing Memorandum Opinion and Order, *Independent Data Communications Manufacturers’ Ass’n, Inc.*, 10 FCC Rcd 13717 (1995) (“*Frame Relay Order*”). In that order, however, the Bureau found only that, to the extent certain AT&T services were properly classified as “enhanced services,” AT&T could “not avoid its *Computer II* and *Computer III* obligations” merely by invoking the “contamination doctrine” and therefore had to “unbundle the basic frame relay service” underlying those services. *Frame Relay Order*, 10 FCC Rcd at 13722-23 ¶¶ 41-45. Again, the operation of these now-defunct *Computer Inquiry* rules has no bearing on the antecedent issue presented here: classification of the retail service itself. *See also* Free Press Comments at 78-79 (similarly misconstruing the *Frame Relay Order*).

<sup>76</sup> Akamai, Customer Stories, <http://www.akamai.com/html/customers/index.html>.

the inputs for those services behind the scenes—and thus not on the extent to which the provider owns transmission facilities in fee simple, leases them from third parties, or purchases wholesale services from other carriers.

Tellingly, even Public Knowledge repudiates Free Press’s position on these issues. Public Knowledge indicates that “backbone transport” and “content delivery networks (CDNs)” like Akamai would be “subject to the same analysis” as broadband ISPs and that, under the logic of reclassification, they would therefore incur Title II obligations unless they could qualify as “private carri[ers]” by virtue of “particularized decisions with regard to provision of service.” Public Knowledge Comments at 6 n.32.<sup>77</sup> The problem for Akamai and similar providers is that, in fact, they *do* hold themselves out to hundreds of thousands of business customers around the world, offering tiers of service that are often highly standardized. *See* AT&T Comments at 57-58. Traditionally that has not exposed them to common carrier regulation because they have an independent basis for remaining outside of Title II: like broadband ISPs, they integrate enhanced features such as caching together with transmission. But if the Commission were to deem caching insufficient to keep broadband ISPs from Title II regulation, it would logically have to draw the same conclusion for CDNs and other non-ISP Internet providers.

Likewise, even Data Foundry, which supports aggressive regulation of broadband networks, warns the Commission against reclassifying retail broadband Internet access service, and urges it instead to resurrect the old *Computer II* unbundling requirement by compelling the provision of a wholesale transmission service to unaffiliated ISPs. *See* Data Foundry Comments

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<sup>77</sup> Public Knowledge’s Harold Feld has similarly acknowledged that “Akamai is moving information from one place to another. That’s plainly ‘telecommunications.’” AT&T Comments at 107 n.182 (quoting Feld blog post). In his (mistaken) view, however, “Akamai does not offer its service to ‘the general public’ or even a distinct class of the general public” because “[a]ny entity that wants to use Akamai’s CDN negotiates its own special deal with Akamai.” *Id.*

at 13-14. Data Foundry claims that this latter approach “has the advantage of clearly NOT regulating ‘the Internet’ because the Commission could decline to regulate the provision of Internet Protocol (IP) based services,” *id.* at 15, whereas reclassification of the retail service—as proposed in the NOI—could “subject to common [carrier] regulation a far larger class of presently unregulated entities,” *id.* at 18. That concern is accurate and compelling, even though Data Foundry’s proposed “solution”—revival of the *Computer Inquiries* regime—is foreclosed as a matter of both law and policy. *See* AT&T Comments at 102-06.

To be clear: no one is arguing that *each* of the various theories proposed to support reclassification would necessarily lead to Title II regulation of the *entire* Internet. But the Commission would create self-executing regulatory consequences for *much* of the Internet if it tried to effectuate Title II reclassification by narrowing the statutory category of “information service” to exclude integrated functionalities such as DNS and caching. Under that approach, the Commission would necessarily extend Title II regulation to, at a minimum, Internet backbone providers such as Level 3 and Cogent, CDNs such as Akamai and Limelight, and any other company that holds itself out to the commercial public as offering some combination of Internet transport and caching. Finally, *any* basis for reclassifying cable and telco providers of broadband Internet access as Title II carriers—whether it involves reconceptualizing the statutory definitions or not—would necessarily extend to all providers of broadband Internet access service, including providers like EarthLink that lease last-mile facilities rather than own them outright and providers like Amazon.com, Barnes & Noble, and others that, through the Internet-enabled devices and Internet access they offer (*e.g.*, the Kindle and the Nook), resell the transmission services offered by others.

**F. Any Reclassification Decision Would Receive No Judicial Deference.**

As we have discussed, Title II reclassification would upend decades of U.S. Internet policy, all without a hint of congressional approval, based on a results-driven reinterpretation of arcane definitional provisions whose meaning and application the Commission appeared to have settled many years ago over the course of at least four separate orders, an appeal to the Third Circuit, and a separate appeal all the way to the Supreme Court.<sup>78</sup> Particularly because “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or . . . hide elephants in mouseholes,”<sup>79</sup> a reviewing court would subject this industry-transforming regulatory decision to exacting scrutiny, and *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), confirms rather than undermines that conclusion.<sup>80</sup>

First, this is *not* an area—like the allocation of spectrum, the targeting of universal service support, or (as in *Fox*) the regulation of broadcast indecency—where Congress has given the Commission discretion to serve the public interest however it deems appropriate, subject only to broadly written, policy-oriented statutory standards. *See* AT&T Comments at 20-27. Instead, Congress has given the Commission specific factual criteria to apply when determining whether a given service should be subject to common carrier regulation. The Commission must apply

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<sup>78</sup> *See, e.g., Cable Modem Order*, 17 FCC Rcd at 4822-23 ¶¶ 38-40; Report and Order, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14880-81 ¶ 50 (2005), *aff'd Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007); Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901, 5902 ¶ 2 (2007) (“*Wireless Broadband Order*”); Memorandum Opinion and Order, *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281, 13285-90 ¶¶ 7-15 (2006).

<sup>79</sup> *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006).

<sup>80</sup> Letter from Seth P. Waxman, Counsel for United States Telecom Association, to Julius Genachowski, Chairman, Federal Communications Commission, GN Docket No. 09-51 & WC Docket No. 07-52 (filed Apr. 28, 2010) (attached to AT&T Comments as Exh. B).

those factual criteria fairly and dispassionately; it may not reverse-engineer “answers” to factual questions simply to produce desired policy outcomes, let alone to enlarge its own sphere of regulatory authority. In Time Warner Cable’s words, “the Commission cannot manipulate the service classifications[,] . . . toggling back and forth between ‘telecommunications service’ and ‘information service’ labels[,] solely to determine the level of regulation that should apply. . . . [T]he Commission cannot first decide what ultimate power it seeks, and then determine how to conduct a functional analysis in such a manner as to ensure that it obtains its favored consequences.” Time Warner Cable Comments at 17-18.

The Commission has left no room for doubt that it intends to pursue reclassification precisely because, after the *Comcast* decision, it can think of no better way to ensure its own authority to set U.S. Internet policy. *See, e.g.*, Verizon Comments at 37-38 (citing, *e.g.*, NOI ¶¶ 1, 8, 28). Any technical justification the Commission might now devise in an effort to support reclassification would be perceived for what it is: a contrived, ends-driven rationale for assuming regulatory power that Congress has not granted. As Verizon explains, such decisions are entitled to no judicial deference. *See id.* at 34-38.

The Supreme Court’s decision in *Fox* supports that conclusion, despite the contrary suggestions of Free Press and others. As the *Fox* Court held, 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>81</sup> Here, as we have explained, the Commission could not reclassify broadband Internet

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<sup>81</sup> *Fox*, 129 S. Ct. at 1811 (emphasis added); *see also id.* at 1824 (Kennedy, J., concurring in part and concurring in the judgment) (an “agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past”).

access services without both (1) “contradict[ing]” its prior “factual findings” (even though the material facts have not changed) and (2) undermining the “serious reliance interests” of broadband Internet access providers in the maintenance of the existing investment-friendly regime. AT&T Comments at 78-80 (quoting *Fox*, 129 S. Ct. 1800).

Free Press argues that “Title II classification should not implicate the kinds of reliance interests discussed in *Fox*” because, it says, “no one has suggested that the Title II classification will apply retroactively,” and “all actors in the broadband marketplace will have ample warning before the new structure goes into effect.” Free Press Comments at 128-30. This makes no sense. Collectively, broadband providers have invested hundreds of billions of dollars over the past decade to deploy broadband facilities and win broadband spectrum licenses, all in reliance on the Commission’s repeated decisions to keep the broadband ecosystem free of legacy common carrier regulation. Free Press does not seek to apply its proposed Title II regime solely to services offered over *new* facilities and to exempt services offered over existing networks embodying those hundreds of billions of dollars in *sunk* investments. If it were feasible, however, this would be the only solution to the problem of defeated investment-backed expectations. Yet even that solution would undermine the Administration’s goal of encouraging *future* investments totaling yet another \$350 billion in private risk capital.

### **III. TITLE II RECLASSIFICATION OF ANY BROADBAND INTERNET ACCESS SERVICE WOULD BE UNLAWFUL FOR ADDITIONAL REASONS INDEPENDENT OF THE STATUTORY DEFINITIONS.**

#### **A. Title II Reclassification Would Violate Section 230 and the First Amendment.**

The NOI proposes this radical restructuring of American Internet policy largely, and perhaps primarily, because the Commission wishes to impose “net neutrality” requirements constraining the editorial discretion of broadband Internet access providers over the services they

provide their customers. *See, e.g.*, NOI ¶¶ 26, 42-50, 76 n.200. And quite apart from the adoption of specific net neutrality rules, the NOI suggests that, upon reclassification, sections 201 and 202 could be interpreted to impose similar requirements by themselves. *See id.* ¶ 76 n.200; *see also* Qwest Comments at 36. If so, reclassification would violate both section 230 of the Communications Act and the First Amendment—or, at a minimum, raise sufficient First Amendment concerns as to invalidate the proposed reclassification under the doctrine of constitutional avoidance.<sup>82</sup>

As discussed in our opening comments, section 230 authorizes—indeed, encourages—broadband ISPs to block, among other things, “filthy, excessively violent, harassing, or otherwise objectionable” content from their services. 47 U.S.C. § 230(c)(2)(A). As that provision confirms, Congress specifically intended that broadband ISPs would exercise editorial judgment over the content of Internet access services, and *not* simply act as common carriers, transmitting all “information of the user’s choosing.” 47 U.S.C. § 153(44). *See also* AT&T Comments at 90-91. Section 230(c)(2) effectuates a more general congressional policy judgment, expressed in section 230(b)(2), that the Internet should continue developing “unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). Whether articulated as net neutrality rules or extreme “common carrier” obligations, broad prohibitions on blocking by an ISP would violate these congressional directives.

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<sup>82</sup> *See* NCTA Comments at 31-34; Qwest Comments at 34-37; Time Warner Cable Comments at 54-57; Verizon Comments at 79-89; USTA Comments at 48 n.127. *See generally* *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002) (the “constitutional avoidance canon of statutory interpretation trumps *Chevron* deference”).

These and other “net neutrality” rules<sup>83</sup>—whether imposed through Title II reclassification or otherwise—would likewise violate the First Amendment. Such requirements would compromise the ability of broadband ISPs to offer tailored services featuring specific content, to partner with specific application and content providers as wireless broadband providers already do today, and to select the means of amplifying or enhancing their own or others’ content or applications.<sup>84</sup> All of these are protected forms of expression.<sup>85</sup> The Commission could not justify such speech restrictions even under intermediate scrutiny, let alone the much more demanding strict scrutiny test that would likely apply.<sup>86</sup>

Specifically, such requirements (1) would not “further[] an important or substantial government interest . . . unrelated to the suppression of free expression,” and (2) “the incidental restriction on alleged First Amendment freedoms” would be “greater than is essential to the furtherance of that interest.”<sup>87</sup> First, the Commission could not identify any market *problem* that such requirements are needed to “fix.” See *AT&T Net Neutrality Comments* at 93-96. As the Supreme Court has explained, when the Commission “defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply ‘posit the existence of the disease

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<sup>83</sup> See, e.g., Notice of Proposed Rulemaking, *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93, at ¶¶ 106-07 (rel. Oct. 22, 2009) (“*Open Internet NPRM*”).

<sup>84</sup> *AT&T Net Neutrality Comments* at 235-44; *AT&T Net Neutrality Reply Comments* at 167-73.

<sup>85</sup> See *AT&T Net Neutrality Comments* at 235-37; see generally *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1987) (holding that content-neutral restrictions on the volume of concert loudspeakers implicate the First Amendment). See also *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 790 n.5 (1988) (a “statute regulating *how* a speaker may speak directly affects that speech”) (emphasis added).

<sup>86</sup> *AT&T Net Neutrality Comments* at 235-44; *AT&T Net Neutrality Reply Comments* at 167-73.

<sup>87</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

sought to be cured.’ It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>88</sup> Indeed, Stuart Benjamin, the Commission’s current Scholar in Residence, suggested in 2000 that subjecting then-dominant cable broadband providers to “open access mandates will trigger [a] First Amendment inquiry” requiring explanation of the “fairly specific and fairly serious harm to the public interest that the [government] is trying to avoid or minimize.”<sup>89</sup> Where, as here, “there is no evidence of any urgent need for preventive action,” the agency is not entitled to the “benefit of the doubt.”<sup>90</sup>

Second, even if the Commission could identify some problem requiring interference with the editorial discretion of broadband ISPs, the proposed requirements would still violate the First Amendment because they would “burden substantially more speech than is necessary to further the government’s legitimate interests.”<sup>91</sup> Again, the federal government can achieve its valid policy goals in this area without Title II reclassification. And any net neutrality-like

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<sup>88</sup> *Turner*, 512 U.S. at 664 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)). See also *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (the burden to show that the state interest is advanced by the regulation on speech “is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree”); *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003) (quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 822 (2000)) (“Where first amendment rights are at stake, ‘the Government must present more than anecdote and supposition’” as a justification for burdening speech).

<sup>89</sup> S. M. Benjamin, *Proactive Legislation and the First Amendment*, 99 Mich. L. Rev. 281, 295 n.64, 289 (2000). Professor Benjamin noted that “most commentators . . . have concluded that cable Internet service does not fit into the category of ‘telecommunications service’ and is not, as a statutory matter, subject to common carrier obligations” and added that, in any event, “the First Amendment concerns . . . would seem to apply to cable Internet service no matter how it was statutorily characterized.” *Id.* at 295 n.64.

<sup>90</sup> *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50, 37 n.60 (D.C. Cir. 1977).

<sup>91</sup> *Turner*, 512 U.S. at 662 (citing *Ward*, 491 U.S. at 799). See also *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) (same).

requirements flowing from Title II reclassification would be impermissibly underinclusive, in that they would ignore the far greater threat to Internet “openness” posed by non-ISP gatekeepers like Google, which, through undisclosed algorithms, manipulates the results generated by its long-dominant search engine to pick the Internet’s winners and losers.<sup>92</sup>

**B. Title II Reclassification Would Violate the Takings Clause.**

As we discussed in our opening comments, Title II reclassification would also violate the Fifth Amendment’s Takings Clause. At the very least, it would exceed the Commission’s authority by exposing the public fisc to a substantial risk of just-compensation liability.

A regulatory taking occurs when government action causes significant economic harm that interferes with settled, investment-backed expectations, particularly where the action is extreme and unjustified.<sup>93</sup> All of these factors are met here.<sup>94</sup> As many commenters note, reclassification would thwart substantial investment-backed expectations. *See, e.g.*, CTIA Comments at 30-31; Qwest Comments at 34; Verizon Comments at 90-94. The industry has invested hundreds of billions of dollars in private capital based on the explicit understanding that the Commission meant what it said when it classified broadband Internet access as an integrated

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<sup>92</sup> *See* AT&T Comments at 63-64, 107-09; *AT&T Net Neutrality Comments* at 239-41; *National Fed’n of the Blind v. FTC*, 420 F.3d 331, 345 (4th Cir. 2005) (regulation of speech “can violate the First Amendment by restricting too little speech, as well as too much”); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-19 (1993) (invalidating a city ordinance banning news racks containing only a certain type of publication because there was not a “reasonable fit” between the government’s stated interest and the means chosen by the government to further that interest).

<sup>93</sup> *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984).

<sup>94</sup> Title II regulation would constitute a physical taking, as well, to the extent it required providers to support services they would otherwise have chosen not to provide over their IP platforms. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982); *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

information service. The proposed reversal in course would substantially and impermissibly devalue those investments.

This constitutional concern is particularly acute in the case of wireless broadband services. Wireless providers such as AT&T have bid and invested billions in spectrum auctions based on the Commission's representations that they could use the acquired spectrum to provide mobile broadband Internet access services as unregulated information services, without the "openness" obligations that the Commission explicitly confined to the upper 700 MHz C-Block alone. *See* AT&T Comments at 111. The Commission adopted those "openness" requirements as part of a controlled regulatory experiment to study the effects of such requirements on wireless broadband services, including what "unanticipated drawbacks" such requirements might present.<sup>95</sup> Because providers have not yet provided broadband Internet access services over the C-Block, that controlled experiment has not yet begun, and applying common carrier rules to *non*-C-Block licensees would nip it in the bud. And it would impermissibly undermine the investment-backed expectations that the Commission gave such licensees, who spent billions more than they otherwise would for spectrum that the Commission made clear would be subject only to Title I oversight. *See* AT&T Comments at 111-12 & n.190.

In any event, whether or not a court would ultimately find a "taking" here, a federal agency may not adopt policies that expose the public fisc to the risk of just-compensation liability unless Congress has explicitly authorized it to do so. *See* AT&T Comments at 109-12. And as we have discussed, Congress has not remotely authorized the Commission to adopt the policies at issue here.

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<sup>95</sup> Second Report and Order, *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, 22 FCC Rcd 15289, 15364 ¶ 205 (2007).

**C. Title II Reclassification on the Basis of a Mere Notice of Inquiry Would Violate the APA.**

The reclassification discussed in the NOI would constitute the most dramatic restructuring of U.S. Internet policy in the Commission’s history. Under the Administrative Procedure Act, a radical reversal of that type, with its myriad regulatory implications, requires more than a mere “notice of inquiry”; it requires formal notice and comment.<sup>96</sup> Simply as a procedural matter, therefore, the Commission could not lawfully reclassify broadband Internet access on the basis of this NOI; it would need to issue a separate NPRM first.

As many commenters explain, the Commission cannot avoid the APA’s notice-and-comment requirement, as it proposes to do here, on the ground that reclassification is merely an “interpretation of the Communications Act” (NOI ¶ 29). “[N]ew rules that work substantive changes in prior regulations are subject to the APA’s [notice and comment] procedures.”<sup>97</sup> Likewise, “[w]hen an agency changes the rules of the game” such that new regulatory obligations are created, or when it “has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule,” and “more than a clarification has occurred.”<sup>98</sup> Thus, “[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation

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<sup>96</sup> See also NCTA Comments at 27-30; Time Warner Cable Comments at 28-29; Verizon Comments at 96-99. As explained in our opening comments (at 91-109), reclassification would violate the APA in independent substantive respects, because the costs—to investment and innovation, and to the regulatory stability of the Internet ecosystem as a whole—would far outweigh the putative benefits.

<sup>97</sup> *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003).

<sup>98</sup> *Id.*; *United States Telecom Ass’n and CenturyTel, Inc. v. FCC*, 400 F.3d 29, 35 n.12 (D.C. Cir. 2005) (quoting *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)).

itself: through the process of notice and comment rulemaking.”<sup>99</sup> And, of course, “labeling a major substantive legal addition to a rule a mere interpretation”<sup>100</sup> does not make it so.

Here, Title II reclassification would clearly constitute a “substantive change” under any version of this test. The Commission’s proposed action would reverse at least four orders classifying Internet access service as an information service,<sup>101</sup> decades of deregulatory treatment of information services, and a Supreme Court opinion affirming this longstanding approach. Reclassification would also trigger a host of new regulatory requirements, many of them self-executing under the terms of sections 201 and 202 alone, and would thus impose new obligations on previously unregulated services.<sup>102</sup> It is hard to imagine any neutral forum in which this would pass for mere “clarification” rather than a fundamental change in law. Such procedural gimmickry would further confirm a reviewing court’s sense that the Commission has indiscriminately knocked down all legal barriers in its rush to patch up the D.C. Circuit’s perceived insult to the Commission’s own jurisdiction.

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<sup>99</sup> *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

<sup>100</sup> *United States Telecom Ass’n*, 400 F.3d at 35 (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000)); see *Paralyzed Veterans*, 117 F.3d at 588 (“a stated intent to treat a major substantive legal addition as an ‘interpretative’ rule will not by itself suffice to escape the notice and comment requires of section 553” of the APA, and an “interpretation” will more likely be treated as substantive if it “really provides all the guidance” or is “sufficiently distinct or additive to the regulation”).

<sup>101</sup> Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14862-65 ¶¶ 12-17 (2005); *Cable Modem Order*, 17 FCC Rcd at 4825-26, 4828-31 ¶¶ 44, 52-55; *Wireless Broadband Order*, 22 FCC Rcd at 5916, 5919-20 ¶¶ 40-41, 50-53; Memorandum Opinion and Order, *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service As an Information Service*, 21 FCC Rcd 13281 (2006).

<sup>102</sup> See AT&T Comments at 115-16. The Commission itself recognizes this, noting that “affected providers might need time to adjust to any new requirements.” NOI ¶ 100. And of course, the Commission feels compelled to forbear precisely because it recognizes that reclassification would work a major and immediate change in the substantive status quo, including retail price regulation under sections 201 and 202.

Nor has the Commission somehow fixed the substance of this problem by seeking comment on a diffuse set of competing regulatory proposals. First, the NOI lacks the regulatory flexibility analysis that must accompany any NPRM. That analysis, if conducted, would consider the substantial burdens that any Title II reclassification decision would have on businesses of all sizes, including smaller broadband Internet access providers and their suppliers.<sup>103</sup> Second, the NOI omits the full substantive notice that accompanies genuine notice-and-comment proceedings. The NOI does not set forth any “proposed rules”; instead, it seeks comment, at a very high level of generality, on different types of regulatory regimes. And two of those regimes would massively reshape the entire industry in ways the NOI does not begin to explore; for example, the NOI does not address the potential effects of reclassification on retail rates and other retail terms of service. Third, the NOI does not even establish the full comment period normally associated with an NPRM. In 1993, President Clinton directed federal agencies to generally afford the public a comment period of “*not less than 60 days*” as part of his initiative to “restore the integrity and legitimacy of regulatory review and oversight” and produce “consistent” and “sensible” rules.<sup>104</sup> The Commission’s decision here to give the public *less than 30 days* to comment on this sweeping change in communications policy is indefensible. If the Commission is planning to effect that change on the basis of this NOI, its inattention to these procedural requirements is as inexplicable as it is unlawful.

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<sup>103</sup> See 5 U.S.C. § 601, *et seq.*; *see, e.g.*, ACA Comments at 14-21.

<sup>104</sup> Executive Order 12866 (Sept. 30, 1993), 58 Fed. Reg. 51,738, 51,740 (1993). Section 6(a)(1) of the Executive Order obligates an agency “in most cases . . . [to] include a comment period of not less than 60 days,” and the Commission could not justify affording any less time here. Additionally, the Commission’s proposed reclassification would likely qualify as a “significant regulatory action,” given the billions of investment dollars at stake in the broadband industry, and therefore likely would trigger the OIRA reporting requirement. *Id.* at Section 6(a)(3). The Commission’s end-run around the rulemaking process suggests that it may be trying to skirt this requirement as well.

#### IV. SECTION 332(C) INDEPENDENTLY BARS TITLE II RECLASSIFICATION OF WIRELESS BROADBAND INTERNET ACCESS SERVICES.

Although reclassification advocates insist that the Commission categorize wireless broadband Internet access as a Title II service,<sup>105</sup> not one of them grapples with the fact that Congress has expressly precluded that course of action. As we and others explained (*see, e.g.*, Verizon Comments at 72-74), section 332(c)(2) bars the Commission from treating any wireless provider “as a common carrier for any purpose under this [Act]” except insofar as it is providing a “commercial mobile radio service” (“CMRS”). 47 U.S.C. § 332(c)(2). And under the plain language of the Act and Commission precedent, wireless broadband Internet access service does *not* qualify as “CMRS,” because it does not offer “interconnection with the public switched network.”<sup>106</sup> And that is so whether broadband Internet access service is classified as a “telecommunications service” or an “information service.” *See* AT&T Comments at 112-14. The statutory language is clear on this point, and any attempt by the Commission to evade it (and to reverse yet another precedent) in order to achieve its jurisdiction-enhancing aims would only exacerbate the Commission’s legal risks.

Quite apart from that legal obstacle and the others discussed above, wireless broadband Internet access services fall outside the scope of Title II for an independent reason as well. Many such services routinely alter the basic format of web pages to permit viewing on non-HTML-enabled wireless devices. For example, to support existing wireless devices that use Wireless

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<sup>105</sup> *See, e.g.*, Mobile Internet Content Coalition Comments at 2; Free Press Comments at 55-64; Public Knowledge Comments at 28-35.

<sup>106</sup> *Id.* § 332(c)(1), (d)(1)-(2); *see also* *Wireless Broadband Order*, 22 FCC Rcd at 5917-18 ¶ 45 (notwithstanding its use to support VoIP and other interconnected services, wireless Internet access “*itself* is not an ‘interconnected service[.]’”).

Application Protocol (WAP) 1.0,<sup>107</sup> AT&T employs a WAP 1.0 gateway that converts the content provider's HTML transmission into a format that WAP 1.0 devices can understand and display. This is a critical service for AT&T subscribers that continue to use WAP 1.0 devices; without it, they could not make use of most complex or interactive websites.<sup>108</sup> For WAP 2.0 devices, the use of a WAP 2.0 gateway likewise optimizes content for a better user experience on more sophisticated WAP 2.0 devices and further allows application providers to offer personalized services to a WAP 2.0 device without implicating the user's privacy.<sup>109</sup> As the AT&T Developer Program website explains, the "AT&T WAP gateway provides over-the-air optimization and compatibility assurance for content delivered over the WAP 2.0 protocol. This includes lossless compression of text content (i.e., markup languages), and *translation of content*

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<sup>107</sup> As one industry expert explains: "On your mobile device, WAP replaces a Web browser with a WAP browser, which can . . . request data from a Web site. The major difference between how you access the data via a browser on your PC and a WAP 1.x browser is that the WAP browser requires a WAP gateway. This gateway functions as an intermediary between the mobile and Internet networks. When placed between a WAP browser and a Web server, it takes care of the necessary binary encoding of content and can also translate WML [wireless markup language] to/from HTML." Harshad Oak, *A Primer on Wireless Application Protocol (WAP)*, TechRepublic, July 3, 2002, [http://articles.techrepublic.com.com/5100-10878\\_11-1045252.html](http://articles.techrepublic.com.com/5100-10878_11-1045252.html). As he adds, WAP 2.0 "moved toward adopting widely accepted Internet standards" including "XHTML Basic[,] the mobile version of XHTML 1.0," thereby making the gateway less critical for WAP 2.0 devices. Nonetheless, even in a WAP 2.0 environment, "deploying a WAP proxy can optimize the communications process and may offer mobile service enhancements, such as location, privacy, and presence based services. In addition, a WAP proxy is necessary to offer Push functionality." WAP Forum, *WAP 2.0 Technical White Paper*, at 6-7 (Jan. 2002), [http://www.wapforum.org/what/WAPWhite\\_Paper1.pdf](http://www.wapforum.org/what/WAPWhite_Paper1.pdf).

<sup>108</sup> This illustrates a broader point made by Verizon: in the wireless broadband ecosystem, broadband Internet access service is also tightly integrated with the end-user device, which further illustrates the extent to which the service is not properly described as including a stand-alone transmission service. Verizon Comments at 54-55.

<sup>109</sup> See also Verizon Joint Declaration ¶ 16 (Attach. B). The gateway provides a randomly assigned but unique id number to the device's HTTP transmissions, so that application providers can respond to the user with personalized service without accessing more identifiable user information such as the device's phone number. See AT&T Developer Program, *Wireless Application Protocol (WAP)*, <http://developer.att.com/developer/index.jsp?page=toolsTechDetail&id=800094> ("AT&T Developer Program Website").

into formats compatible with the target device (i.e., WML [Wireless Markup Language] encoding).”<sup>110</sup> In all these contexts, the “change in the form . . . of the information as sent and received” precludes wireless broadband service from being classified as a telecommunications service. *See* 47 U.S.C. § 153(43).

Nor would there be any way to shoehorn this functionality into the “telecommunications management” exception of 47 U.S.C. § 153(20). The conversion, enhancement, and customer-privacy protection AT&T offers over the WAP gateway has nothing to do with managing or ensuring the *network’s* ability to transmit information. Instead, it is provided solely for the benefit of Internet *users*—the consumers who wish to make the greatest use of Internet resources over their mobile devices, and the application and content providers that wish to give those consumers the best experiences possible.<sup>111</sup>

Finally, as many commenters stress,<sup>112</sup> it would also make no *policy* sense for the Commission to inflict legacy common carrier regulation on this nascent and uniquely dynamic portion of the broadband Internet access marketplace. Wireless services like Clearwire’s are emerging as full competitors to wired broadband Internet access services, as Public Knowledge concedes. *See* Public Knowledge Comments at 30 n.116, 32-33. But that is not a reason to saddle them with new regulatory burdens, as Public Knowledge suggests. It is a reason to preserve a deregulatory regime for *all* broadband Internet access services in this increasingly

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<sup>110</sup> *See AT&T Developer Program Website* (emphasis added).

<sup>111</sup> *See, e.g., 1998 272 Forbearance Order*, 13 FCC Rcd at 2639 ¶ 18 (the “telecommunications management exception” does not encompass functions that are “useful to end users, rather than carriers”).

<sup>112</sup> *See, e.g., CTIA Comments* at 1-48; *T-Mobile Comments* at 1-23; *Leap Wireless Comments* at 2, 6-8; *MetroPCS Comments* at 7-17, 20-28, 37-46.

competitive marketplace.<sup>113</sup> There is similarly no merit to Public Knowledge’s claim that “it is a logical impossibility for the Commission to say that wireless providers *are* offering Internet access service while at the same time insisting that those providers *are not* offering a Title II service.” Public Knowledge Comments at 31. There is no inconsistency here because *no* form of broadband Internet access is “a Title II service.” In any event, even if wired broadband Internet access *could* be lawfully classified as a Title II service and wireless could not be (for the reasons discussed above), these services would still all be competitors in the broadband marketplace, despite the asymmetry in legal treatment. It certainly would not follow that “the Commission must exclude wireless service from any analysis of or planning for the broadband Internet access market,” as Public Knowledge suggests. *Id.* at 31-32.

**V. THE NOI’S FORBEARANCE PROPOSALS WOULD BE GROSSLY INADEQUATE TO PRESERVE INDUSTRY STABILITY AND INVESTMENT INCENTIVES.**

The Commission proposes to deal with the highly regulatory, self-effectuating results of reclassification through forbearance from various provisions of Title II. But that approach would do nothing to assuage the industry’s greatest concerns, and it would sow new seeds of uncertainty due to its inherent instability.

First, even if the Commission could deliver the tailored, reliable forbearance it proposes, the provisions from which the Commission proposes *not* to forbear would be severely problematic in their own right. *See* AT&T Comments at 114-16. The Commission has relied on sections 201 and 202, for example, as the basis for a host of retail and wholesale common carrier regulations, including rate regulation, resale, recordkeeping, billing-related, interconnection, and

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<sup>113</sup> *See, e.g., AT&T Net Neutrality Comments* at 140-82; *AT&T Net Neutrality Reply Comments* at 65-102.

related requirements, to mention only a few.<sup>114</sup> Moreover, even apart from the Commission’s own formal regulations, the nebulous prohibitions in sections 201 and 202 on various forms of “unjust,” “unreasonable,” and “unreasonabl[y] discriminat[ory]” conduct are *self-effectuating*, and reclassification would presumably extend them, for the first time, to the retail terms of broadband Internet access as well as to any wholesale terms. Those prohibitions are often interpreted through the adjudicatory process, and penalties are meted out on a case-by-case basis. Providers could thus find themselves penalized after the fact for violating those statutory prohibitions through new services or products that they believed to be entirely legitimate.

That risk would chill innovation and slow providers’ ability to respond to changes in the marketplace. Providers have good reason to fear that every new network management technique, any commercial arrangement, and any anti-piracy measure—all practices that pro-regulation interest groups reflexively condemn—would become the subject of complaints and litigation. To take one example, content creators have rightfully expressed concern that the Commission’s contemplated action in “enforcing Section 202(a) against [broadband Internet service providers]—based on both past interpretations and uncertain future application—could dramatically inhibit the vast majority of efforts to monitor or prevent the illegal online distribution and performance of copyrighted works.” AFTRA Comments at 6.

In any event, there is a substantial risk that the Commission could not deliver the forbearance it promises. The primary supporters of the Commission’s reclassification proposal—the pro-regulation interest groups—squarely oppose forbearance from virtually any significant and potentially applicable provision of Title II. They insist that the Commission must

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<sup>114</sup> See, e.g., Verizon Comments at 102; Memorandum Opinion and Order, *Orloff v. Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless*, 17 FCC Rcd 8987 (2002), *aff’d Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

preserve and enforce a litany of the most heavily regulatory provisions of Title II.<sup>115</sup> Indeed, in addition to the provisions that the NOI proposes to preserve, Public Knowledge lists 23 *additional* Title II provisions that it hopes to inflict on broadband Internet access providers.<sup>116</sup> And of course the Commission is internally divided on these issues, with Commissioner Copps openly supporting full-blown Title II regulation of broadband Internet access services.<sup>117</sup>

Arguments for applying a number of these provisions in the broadband context are simply perplexing. For example, Public Knowledge (at 39) resists forbearance from the anti-slamming prohibition of section 258, but it is unclear how “slamming”—the unrequested replacement of one service provider for another—could even arise in the broadband context as a technical matter. In any event, Public Knowledge identifies no instances where such broadband “slamming” (whatever that might be) has in fact occurred, let alone a market failure warranting regulatory intervention. And although Public Knowledge would reflexively apply section 203 against broadband Internet access providers, even it acknowledges that traditional tariffs—the subject of section 203—probably make no sense in this environment.<sup>118</sup> That is an understatement. Under established Commission precedent, neither the tariffing provisions of

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<sup>115</sup> See Public Knowledge Comments at 38-51; Free Press Comments at 64-75.

<sup>116</sup> See Public Knowledge Comments at 39, 44 (advocating retention of sections 203, 205, 206, 207, 209, 211, 212, 213, 214(c), 214(e), 215, 216, 218, 219, 220, 222, 225, 251(a), 254, 255, 256, 257, and 258). Public Knowledge is willing to excuse a few provisions that relate specifically to Bell Operating Companies or facsimile or payphone services, among others.

<sup>117</sup> Remarks of FCC Commissioner Michael J. Copps, *Openness and Innovation in the Digital World?*, Stanford Law School, at 4 (June 9, 2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-298708A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298708A1.doc).

<sup>118</sup> See Public Knowledge Comments at 50 (advocating for applicability of 47 U.S.C. § 203 but conceding that that provision is probably best satisfied through providers’ *advertisements*).

sections 203-205 nor the highly regulatory exit and entry provisions of section 214 make sense in this or any other competitive marketplace.<sup>119</sup>

For the same reason, there is no merit to Free Press’s suggestion (at 67-68, 72) that the Commission enforce sections 251(a) and 256 to oversee broadband “interconnection” or Public Knowledge’s request (at 27) for Commission intervention in Internet peering disputes. There is no plausible policy justification for regulation of Internet peering and transit arrangements among IP networks (including ISPs), for that is one of the most competitive and well-functioning marketplaces in the Internet ecosystem. Free Press and Public Knowledge offer no evidence to the contrary. They simply cannot bear the thought of letting well-functioning markets continue to serve the needs of broadband providers and consumers alike without regulatory intervention.

These forbearance issues—which could occupy scores of pages in a properly crafted NPRM, but which this NOI glosses over in a few scant pages—underscore just how messy any Title II reclassification would be. No matter how much the Commission might profess otherwise, any reclassification would open a Pandora’s box of complex, burdensome, legacy regulations with deeply uncertain application to the broadband Internet, and the Commission

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<sup>119</sup> See Qwest Comments at 11-12; see also, e.g., Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730, 20752-53 ¶¶ 42-43 (1996) (subsequent history omitted) (concluding that “tariffs . . . are not necessary to protect consumers” since “competition is sufficient to ensure that . . . carriers’ charges . . . [as well as] non-price terms and conditions are [just] and reasonable”); Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1480 ¶ 179 (1994) (subsequent history omitted) (forbearing from “permitting tariffs for interstate service offered directly by CMRS providers” because the “presence of competition in the CMRS market, [makes] access tariffs seem unnecessary”); *id.* at 1481 ¶ 182 (concluding that in the competitive CMRS market, “exercise of . . . Section 214 authority is unnecessary to ensure against unreasonable charges and practices, or to protect consumers”); Report and Order, *Streamlining the International Section 214 Authorization Process and Tariff Requirements*, 11 FCC Rcd 12884, 12905 ¶ 49 (1996) (concluding that the level of competition for international carriers has increased to a level where “impairment of service is unlikely and customers will be able to obtain alternative service within” the [60 day] waiting period).

could not easily close that box up again, or let out just the “right” types of Title II requirements but not the “wrong” ones.

Any forbearance decision could also be vulnerable on appeal, because the arguments in favor of forbearance would inevitably clash with (1) arguments the Commission would presumably make to support reclassification in the first place and (2) arguments the Commission has already made in favor of broadband regulation in its net neutrality proceeding. In both contexts, the Commission has suggested that broadband Internet access competition has not developed as it had predicted in the *Cable Modem Order* and that the Commission needs expanded regulatory authority to achieve its public policy goals.<sup>120</sup> Again, those arguments are empirically untenable, given the healthy state of competition. *See* pp. 24-25, *supra*; AT&T Comments at 52-55. But as NCTA and others note,<sup>121</sup> the Commission has backed itself into an awkward corner by questioning the very competition that would presumably justify forbearance—and thus has raised its risk of reversal for any forbearance decision. And the Commission has further increased the litigation risks for any forbearance decision by adopting ever-more (and excessively) stringent tests for forbearance in other contexts.<sup>122</sup>

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<sup>120</sup> *See* NOI ¶ 61; *Genachowski ‘Third Way’ Statement* (stating that a lack of Commission action can leave “consumers unprotected and competition unpromoted”); *Open Internet NPRM* ¶ 7 (“In many parts of the United States, customers have limited options for high-speed broadband Internet access service.”).

<sup>121</sup> *See* NCTA Comments at 65-67; Time Warner Cable Comments at 61-62 (“[I]f the Commission finds that some kind of market failure compels it to reverse its prior policies and subject broadband Internet access service providers to at least some Title II regulation, the Commission in that case would be hard pressed to show that application of specific requirements is *not* necessary to protect consumers.”).

<sup>122</sup> *See* Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, FCC 10-113, ¶ 41 (rel. June 22, 2010). On the other hand, as Qwest points out, if the Commission *can* make the showing necessary to forbear from *some* provisions of the Act—as indeed a proper empirical analysis would support—the same competition that would protect consumers and the public interest with respect to *those* provisions would also support

If the Commission reclassifies broadband Internet access service but key forbearance determinations are successfully appealed, the Commission and the industry would then face the perfect storm: self-effectuating Title II regulation without necessary forbearance. While that may be what the pro-regulatory advocates want, the Commission professes to understand how catastrophic that outcome would be. Yet the NOI's sole response is to suggest that, to hedge its bets, the Commission might "not . . . ultimately maintain the classification of Internet connectivity as a telecommunications service" if its accompanying forbearance decisions are invalidated. NOI ¶ 99. Even if the Commission could lawfully "toggl[e] back and forth between 'telecommunications service' and 'information service' labels solely to determine the level of regulation that should apply" (Time Warner Cable Comments at 17-18), the weak possibility that the Commission might ultimately follow that route is small comfort to an industry that must, in the words of Citigroup Managing Director Mike Rollins, make investment decisions based "not just" on "what the FCC wants to accomplish today but what those policies can do over time."<sup>123</sup>

Indeed, even if the Commission's forbearance decisions were *upheld*, the industry would have to calculate the risk that later Commissions would seek to reverse those determinations. That concern is exacerbated by the Commission's evident willingness to abandon decades of Title I treatment for broadband Internet access services; its initiatives to consider regulation of

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forbearance from sections 201 and 202 as well. *See* Qwest Comments at 15. For similar reasons, the Commission should grant AT&T's own still-pending petition seeking complete forbearance from all of Title II's common carrier regulations to the extent they may be found to apply to IP-enabled services, including broadband Internet access services. *See* AT&T Comments at 123-24; Public Notice, *Pleading Cycle Established for Comments on Petition of SBC Communications Inc. for Forbearance Under Section 10 of the Communications Act from Application of Title II Common Carrier Regulation to "IP Platform Services,"* 19 FCC Rcd 2640 (2004).

<sup>123</sup> Howard Buskirk, *Regulatory Uncertainty Created by FCC Seen Limiting Network Investment*, Communications Daily, July 15, 2010; *see also* John Curran, *Panelists: Neutrality, Title II Broadband Issues Breeding Investor Uncertainty*, TR Daily, July 14, 2010.

broadly deregulated wireless services;<sup>124</sup> and its willingness to take seriously (and indeed to invite) requests for un-forbearance, even as the Commission insists that its forbearance decisions have an aura of permanence.<sup>125</sup> In short, the so-called “third way” would generate a profoundly unstable regulatory future in which everything is always up for grabs. There could be no regulatory environment more toxic to long-term investment and innovation.

Apart from forbearance, any reclassification decision would also require the Commission to take on the challenge of preempting *state* regulation and enforcement.<sup>126</sup> In part because of jurisdictional criteria under state law, the states have traditionally been much more active in regulating services deemed “telecommunications services” than those deemed “information services.” And they have displayed a strong appetite for regulation of any service whenever the

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<sup>124</sup> See AT&T Comments at 118-21.

<sup>125</sup> See, e.g., AT&T Comments at 116-18. See also NCTA Comments at 48-49; Time Warner Cable Comments at 33; USTA Comments at 41-42; Verizon Comments at 100-01, 106-07. Indeed, Commission forbearance orders issued *even while this proceeding has been pending* have affirmatively invited parties to file “un-forbearance” petitions if, in their view, the Commission’s “predictive judgment proves incorrect.” See Order, *Telecommunications Carriers Eligible for Universal Service Support; Federal-State Joint Board on Universal Service; Head Start Petition for Forbearance; Consumer Cellular Petition for Forbearance; Midwestern Telecommunications Inc. Petition for Forbearance; Line Up, LLC Petition for Forbearance*, WC Docket No. 09-197, CC Docket No. 96-45, FCC 10-134, ¶ 20 (rel. July 30, 2010) (to the extent the Commission’s “predictive judgment proves incorrect . . . parties may file appropriate petitions with the Commission and [the Commission has] the option of reconsidering this forbearance ruling”); Order, *Federal-State Joint Board on Universal Service; Telecommunications Carriers Eligible for Universal Service Support; i-wireless, LLC Petition for Forbearance from 47 U.S.C. § 214(e)(1)(A)*, CC Docket No. 96-45, WC Docket No. 09-197, FCC 10-117, ¶ 20 (rel. June 25, 2010) (same); see also Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, 21508-09 ¶ 26 n.85 (2004); Memorandum Opinion and Order, *Petition of SBC Communications Inc. for Forbearance from Structural Separations Requirements of Section 272 of the Communications Act of 1934, As Amended, and Request for Relief to Provide International Directory Assistance Services*, 19 FCC Rcd 5211, 5223-24 ¶ 19 n.66 (2004).

<sup>126</sup> Section 10 forbearance preempts state enforcement of the preempted *federal* provision, but the Commission must separately preempt *state* laws. 47 U.S.C. § 160(e). See also NCTA Comments at 77-78.

Commission has not explicitly preempted their authority, as in the case of fixed VoIP services.<sup>127</sup> This prospect of state regulation of broadband Internet access services would undermine established federal policy and create a state-by-state hodgepodge of regulation that would undermine anything the Commission hopes to achieve with its forbearance proposal.<sup>128</sup> And as the comments of several state commissions show, the Commission is likely to face serious opposition to any decision to meet that concern through preemption.<sup>129</sup> Each of *those* decisions is likely to be challenged, and broadband Internet access providers will be subjected to additional investment-draining regulatory uncertainty as these issues are litigated for many years into the future. Finally, as several commenters warn, reclassification could expose all broadband ISPs—large and small—to a host of new state and local taxes, which the Commission may lack authority to preempt.<sup>130</sup>

In short, while comprehensive forbearance paired with preemption is clearly preferable to the stricter version of reclassification the Commission has outlined, even the former approach

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<sup>127</sup> See, e.g., Time Warner Comments at 67; Examiner’s Report, Docket No. 2008-421, *In re: Investigation into Whether Providers of Time Warner “Digital Phone” Service and Comcast “Digital Voice” Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service* (Me. Pub. Util. Comm’n May 18, 2010); *Petition for Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Service*, Docket No. DT 09-044, New Hampshire Telephone Association (N.H. Pub. Util. Comm’n Mar. 6, 2009).

<sup>128</sup> See AT&T Comments at 121-22; NCTA Comments at 77-82; Time Warner Cable Comments at 67-69; Verizon Comments at 107-11.

<sup>129</sup> Pennsylvania Public Utilities Commission Comments at 2-3 (supporting the Commission’s approach only to the extent it “does not preempt state law or forbear from state responsibilities”); Public Utilities Commission of Ohio Comments at 9 (“strongly urg[ing] the FCC to avoid forbearing substantive Title II provisions that would result in preemption of State jurisdiction in certain areas”); State of New York Broadband Development and Deployment Council Comments at 3 (noting that it is “important that the Commission not preempt states from addressing issues that arise in their states”); California Public Utilities Commission Comments at 15-19 (advocating that the Commission allow state involvement regarding numbering administration, emergency services, service quality, and small carriers).

<sup>130</sup> See, e.g., Cablevision Comments at 21-25; Charter Comments at 6-10; NCTA Comments at 77-82.

would be, in the words of Congressman Dingell, “fraught with legal risk,” “confound[ing] Congress’s and the Commission’s efforts to encourage further investment in broadband infrastructure, create new jobs, and stimulate broadband adoption[.]”<sup>131</sup> The “third way” is, plainly, very much the “wrong way” for American consumers and the American economy.

## CONCLUSION

The Commission should maintain the current regulatory classification for broadband Internet access services.

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<sup>131</sup> *Dingell Letter at 1.*