

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

In the Matter of)
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Protecting and Promoting the Open Internet) GN Docket No. 14-28
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REPLY COMMENTS OF HANCE HANEY
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As the Commission has observed, USTelecom reports that broadband capital expenditures have risen steadily, from \$64 billion in 2009 to \$68 billion in 2012.¹ And in fact, USTelecom subsequently reported that broadband investment was \$75 billion in 2013.² No one in this proceeding demonstrates that facilitating this level of investment is not critical to the Commission’s goal of preserving the “virtuous circle of innovation in which new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses.”³ Additionally, no one has demonstrated investment and innovation in the network would not be placed in jeopardy if the Commission were to rely on its authority under Title II of the Communications Act and revisit its classification of some or all broadband Internet

¹ Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Notice of Proposed Rulemaking* (rel. May 15, 2014) (*NPRM*), at para. 30.

² See USTelecom, *Historical Broadband Provider Capex* <http://www.ustelecom.org/broadband-industrystats/investment/historical-broadband-provider-capex> (last visited Sept. 13, 2014).

³ *NPRM*, at para. 26.

access services as an “information service” for the purpose of subjecting them to more regulation.⁴

Nor has anyone provided a compelling justification for why it would be consistent with the Telecommunications Act of 1996 for the Commission to completely reverse course—upending years of precedent—and classify broadband as an information service. Such a move would likely trigger heightened scrutiny and could plunge industry into years of uncertainty.

I. INVESTMENT AND INNOVATION WITHIN THE NETWORK

No one in this proceeding has demonstrated that Title II classification would not have a negative impact on innovation and investment within the network. Free Press attempts to prove that applying Title II to broadband Internet access service (or components thereof) would “promote, not harm investment” in the network,⁵ but its argument is based on a number of unsupported and unsupportable assumptions.

First, Free Press claims that applying Title II to broadband “does not mean unbundling requirements or rate regulation,” since aside from a couple core provisions the Commission could forbear from applying all of the onerous regulation that governs telecommunications services.⁶ Apparently (although it does not address his concern), Free Press feels confident that expansive forbearance would be straightforward, and not become the focus of highly-contentious battles between various stakeholders—like the spectacle we saw when the Commission implemented the 1996 Telecommunications Act. As the Commission is well-aware, the reality is that interested stakeholders appear at every turn with their own agendas. If, for any reason, forbearance did not proceed

⁴ *NPRM*, Sec. III. F. 2.

⁵ Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Comments of Free Press* (Jul. 17, 2014) (*Free Press*), at 5, 90.

⁶ *Free Press*, at 6.

smoothly, broadband providers would be trapped in the “morass of regulation” that former Chairman William E. Kennard, among others, fought hard to contain within the “telephone world.”⁷ Unnecessary and inappropriate regulation could stifle private investment and innovation within the network and disrupt the “virtuous circle of innovation”⁸ that the Commission seeks to preserve.

Free Press further claims that, in any event, the greatest level of investment in the telecom industry occurred following the enactment of the 1996 Telecommunications Act,⁹ when the Commission was aggressively employing its Title II powers for “promoting competition” and telecom broadband providers were subject to unbundling requirements and rate regulation. Although the pro-competition policies did not burden the cable industry, Free Press claims that the greatest period of cable broadband investment occurred “when the industry fully expected its two-way telecom offerings to be covered under Title II.”¹⁰ Both of these claims are highly misleading.

Even Free Press concedes that the bulk of the investment on the telecom side was not in the residential last-mile connections that are the focus of this proceeding.

Much of this investment was not in the last mile: it was in the guts of the communications system (e.g., intercity fiber; hybrid fiber-coax), and it was a bubble fueled by the rapid adoption of home computers and dial-up Internet services.¹¹

⁷ “CONSUMER CHOICE THROUGH COMPETITION,” remarks by William E. Kennard National Association of Telecommunications Officers and Advisors’ 19th Annual Conference (Sept. 17, 1999).

⁸ See, e.g., *NPRM*, at para. 26.

⁹ *Free Press*, at 6 (“The historical data shows that the period of time following the implementation of the 1996 Act produced the greatest level of investment in the telecom industry that this country has ever seen. And most of that investment came from the companies subjected to the full force of the law.”)

¹⁰ *Id.*, at 103.

¹¹ *Free Press*, at 111.

New entrants were “mainly interested in exploiting the arbitrage opportunities between regulated wholesale rates and retail rates.”¹² In the local service market, the new entrants targeted businesses located in major metropolitan areas—not ordinary consumers—because Title II regulation at the state level kept residential rates at or below cost and business rates substantially above cost. While new entrants invested in marketing campaigns, among other things, incumbents diverted billions of investment dollars from network improvements to regulatory compliance (*e.g.*, they were upgrading back office billing and provisioning systems for the benefit of Competitive Local Exchange Carriers and their customers, not to mention participating in hundreds of regulatory proceedings at the FCC and 50 state public utility commissions before litigating the results in court) in anticipation of gaining speedy entry into the long distance business that was very lucrative at the time. George Gilder remarked in 2002 that

Seeking a regulator's nirvana of perfect competition, the feds enmeshed the local loop in a serpentine maze in which no one except lawyers and lobbyists could make any money.¹³

It was in large part for this reason, according to Gilder, that “the number and speed of last-mile broadband connections has been far below the expectations on which the Internet expansion was based.”¹⁴ Robert W. Crandall of the Brookings Institute also observed in 2005 that the FCC’s Title II pro-competition initiatives had diminished investment in broadband.

In the case of broadband in the United States, the existence or threat of regulation has reduced the incentive to develop the necessary infrastructure

¹² Robert W. Crandall, Competition and Chaos: U.S. Telecommunications Policy Since the 1996 Telecom Act (Brookings Inst. Press, 2005), at 157.

¹³ “Unleash Broadband,” by George Gilder, *Wall Street Journal* (Jul. 8, 2002).

¹⁴ *Id.*

to deliver broadband. The response of the Bell companies has been to slash capital spending, which had been rising steadily in 1998-2000. Capital spending per line in 2002 and the next few years had been projected to be far below even its pre-1996 level despite the considerable capital requirements to complete the rollout of DSL, which had been stalled at about two-thirds of U.S. residential and small business locations. However, estimates published after the FCC's February 2003 decision to end line-sharing regulation suggest a rebound in the incumbent's capital spending plans. The downturn in incumbent capital outlays may have been arrested by the FCC's apparent move toward modest deregulation." (citations omitted).¹⁵

Crandall is referring to the *Line Sharing Order* that was adopted by the Commission in September, 1999 (allowing new entrants to provide DSL over the high-frequency portion of the local loop at low cost) and then overturned by the U.S. Court of Appeals in May, 2002.¹⁶ In August, 2003 the Commission issued an order on remand that eliminated line sharing and removed the obligation for incumbent local telecom providers to wholesale last mile "Fiber to the Home" deployments subject to price controls.¹⁷ It was on the basis of this regulatory freedom that Verizon proceeded with its \$23 billion FiOS deployment. On the telecom side, we can see that Title II has inhibited investment in the network.

Free Press' second argument, *i.e.*, that deregulation is not responsible for sustained, robust investment in cable broadband—because cable operators "fully expected" those services to be covered under Title II—is also misleading. At the time, the Commission was resisting calls to regulate cable broadband. In his June, 1998 "Broad(band) Vision for America" remarks, Chairman William E. Kennard said

Three simple conditions: identify the essential facilities; give competitors access to them; and make sure competing networks can interconnect with one another.

¹⁵ See, e.g., *Competition and Chaos*, *supra* note 12, at 127.

¹⁶ *United States Telephone Association, et al. v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

¹⁷ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Order on Remand* (rel. Aug. 21, 2003).

If we do this, there is no need for additional FCC regulation of advanced services, whether offered by the incumbent phone companies or by their competitors. No tariffs to file, no retail price regulation, and no unbundling of the new technologies that must be deployed to make expanded bandwidth to the home a reality. Because that new technology is really a new frontier, one that should not be burdened by regulation.¹⁸

In the speech, Kennard made it clear that the “essential facilities” were “the local loop and the space in the local phone company's central offices where both the phone company and its competitors can install the new technology.” Kennard addressed this subject again the following year in his “Consumer Choice through Competition” remarks.

What I would like to do is take the opportunity here today to talk to you a little bit about why I believe the best way to achieve these values is to resist the urge to regulate right now. One reason is because of my vision that we will have multiple broadband pipes – cable, DSL, broadband wireless, satellite, terrestrial broadcast. *That is why I think the debate that we are having today about unbundling and access to this cable pipe is fundamentally different from the debates that we had about the telephone industry, when everybody knew that we only had one wire for the foreseeable future.*” (emphasis added.)¹⁹

In light of these comments, it's hard to imagine how the cable industry as a whole could have “fully expected” broadband to be covered under Title II. In hindsight, it would have been unreasonable for cable broadband investors to make such an assumption, in light of the fact the Commission subsequently found that broadband is an information service, and the Supreme Court (6-3) affirmed.²⁰ Free Press' argument that the un-regulated status of cable broadband was immaterial to the investment expectations of cable operators strains credulity.

¹⁸ “A BROAD(BAND) VISION FOR AMERICA,” remarks by William E. Kennard to the Federal Communications Bar Association (Jun. 24, 1998).

¹⁹ *CONSUMER CHOICE THROUGH COMPETITION*, *supra* note 7.

²⁰ *National Cable & Telecommunications Association et al. v. Brand X Internet Services et al.*, 545 U.S. 967 (2005) (*Brand X*).

Free Press also overlooks the recent example of Google Fiber. Cities including Kansas City and Portland are promoting investment in broadband by allowing Google and others to cut costs and build according to demand instead of Title II-type universal coverage requirements.

The flexibility to choose where to build, more efficient construction techniques and cheaper components mean it costs Google about 20% less to reach a home compared with Verizon Communications Inc.'s FiOS high-speed service, according to Bernstein estimates.²¹

Following the Google Fiber model (“building to demand and working with local authorities to reduce construction costs”) makes it more economical to serve more consumers, and it enabled AT&T to announced plans to provide up-to-one gigabit speeds in as many as 100 cities.²²

A closer examination of past and present events than the one Free Press offers here reveals that on the telecom side Title II has significantly curtailed investment in the network. It also shows that there is a very limited basis for concluding the un-regulated status of cable broadband had no bearing on the expectations of cable investors. Free Press’ arguments are unpersuasive, and the Commission ought to take heed given that it’s own analysis of the interplay between regulation, investment and innovation (“investment and innovation have flourished while the open Internet rules were in force”)²³ is highly cursory. The open Internet rules that were in place are not the same as Title II.

²¹ “Google Fiber Is Fast, but Is It Fair?” by Alistair Barr, *Wall Street Journal* (Aug. 22, 2014).

²² *Id.*

²³ *NPRM*, at para. 29.

II. BROADBAND RECLASSIFICATION WOULD VIOLATE THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996

No one in this proceeding has demonstrated that broadband is a telecommunications service as a matter of statutory interpretation. Public Knowledge argues: (1) DNS doesn't qualify as an information service, because it is used to "manage" a telecommunications service;²⁴ and (2) according to traditional common carriage analysis—which focuses on how a provider "holds itself out to the public"—broadband is not an integrated service, because "it is clear in a way that it was not in 2002 that the general public primarily uses internet access service as a conduit for third-party content."²⁵ As the Commission is well aware, both of these arguments were presented and disposed of in *Brand X* (2005).²⁶

A. DNS Is An Information Service

The Court specifically declined to address the first argument—i.e., that DNS is "scarcely more than routing information"—when it was cited by the dissent.²⁷ Were the court to reconsider this issue today, the facts would differ. Professor Christopher S. Yoo points out that "smart DNS" functions have greatly increased the functionality of broadband services since *Brand X*.²⁸

²⁴ Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Comments of Public Knowledge* (Jul. 15, 2014) (*Public Knowledge*), at 68-69 ("DNS service—the service that the Commission and the Supreme Court both identified as being an inextricable component of internet (sic) access—is not an information service. 47 U.S.C. § 153(20) says this expressly, codifying years of Commission precedent that found that services necessary to route, manage, or otherwise use telecommunications services are themselves regulated as telecommunications services.").

²⁵ *Id.*, at 69.

²⁶ *Brand X*, *supra* note 20.

²⁷ *Id.*, at 994, n. 3.

²⁸ Christopher S. Yoo, "Is There A Role For Common Carriage In An Internet-Based World," (2013). *Houston Law Review*, Vol. 51, p. 545, 2013; U of Penn, Inst for Law & Econ Research Paper No. 13-37, at 566.

Other services include faster name resolution, greater network security, protection against denial of service attacks, botnet detection, web error redirection, parental controls, and a host of other advanced services.²⁹

Yoo notes that when consumers access content stored in multiple locations, DNS choose the closest and least-congested route, making it “hard to characterize Internet communications as being between ‘points specified by the user’ as required by the definition of telecommunications service.”³⁰ Verizon similarly lists several examples showing that broadband has become far more integrated with information services than was the case in 2005.

... broadband Internet access services continue to integrate information services, including data storage or email services that involve storing or utilizing data; parental controls and other security functions that store security preferences, then filter data as it is retrieved or generated by the consumer; and services for personalizing home portal pages through generating or transforming information. In addition, broadband providers such as Verizon now integrate into their broadband offerings ever-more advanced features and capabilities, including cloud-based services for storing information, as well as for retrieving and acquiring information via software services; new spam filters and other reputation systems for processing potentially harmful data; and caching servers and CDNs that store media content to enable consumers to access that content at faster speeds. From the perspective of a consumer, then, information service capabilities and data transmission are more intertwined in broadband Internet access service than ever before (footnotes omitted).³¹

B. Broadband Is Not Pure Transmission When It Is Used To Access Third-Party Content

With respect to the second argument advanced by Public Knowledge—*i.e.*, a consumer uses “pure transmission” when the consumer accesses content provided by parties other than the cable company—the *Brand X* Court specifically agreed with the Commission’s judgment to the contrary.

²⁹ *Id.*

³⁰ *Id.*, at 567.

³¹ Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Comments of Verizon and Verizon Wireless* (Jul. 15, 2014) (*Verizon*), at 59-60.

This argument, we believe, conflicts with the Commission's understanding of the nature of cable modem service, an understanding we find to be reasonable. When an end user accesses a third-party's Web site, the Commission concluded, he is equally using the information service provided by the cable company that offers him Internet access as when he accesses the company's own Web site, its e-mail service, or his personal Web page.³²

In *Brand X*, respondents also argued that the Commission's interpretation would allow any communications provider to "evade" common carrier regulation. In the words of the Court,

Respondents argue that under the Commission's construction a telephone company could, for example, offer an information service like voice mail together with telephone service, thereby avoiding common-carrier regulation of its telephone service.³³

As the court notes, the FCC prevented against this possibility by saying that separable services cannot be combined. Thus, telephone service does not become an information service because a telecom carrier packages it with voice mail.³⁴

There is also no distinction between integrated information services offered directly by broadband providers versus indirectly by third-parties. To create such a distinction would be to go beyond the statute and impose a form of unbundling.

C. The Classification of Broadband As An Information Service Is Consistent With the Underlying Purpose of the Telecommunications Act of 1996

The hypothetical of a telephone company converting regulated telephone service into an un-regulated information service by packaging it with voice mail, in the opinion of this Commenter, captures the true purpose of the exception (*i.e.*, "does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service") in 47

³² *Brand X*, at 995.

³³ *Id.*, at 991.

³⁴ *Id.*

U.S.C. §153(20). A contrary interpretation that treats any network innovation as “telecommunications” whenever it is used by a consumer to access third-party content would conflict with the underlying purpose of the 1996 Telecommunications Act to “promote competition and reduce regulation.”³⁵ Were the Commission adopt this approach, it would effect a mandatory unbundling and preserve regulation in perpetuity.

As someone who witnessed and participated in the deliberations leading to the Telecommunications Act of 1996 (I was the legislative assistant for telecom to the chairman of the Senate Communications Subcommittee, Sen. Bob Packwood of Oregon [a former chairman of the full Commerce Committee and Finance Chairman] at the time), my own personal recollection as to what at least some of the leading framers had in mind is that: (1) legacy Title II regulation should be retained until the telecom industry became competitive, and (2) forbearance by the FCC is in the public interest when there is sufficient competition to protect consumers and forbearance will accelerate competition by giving incumbents more freedom to compete. (I would argue we’ve already reached that point, which would moot this whole discussion.) Meanwhile, I believe they also thought there should be a different set of risks and rewards for advanced services, which they were trying to promote. Like former chairman Kennard has said, I believe they envisioned containing legacy Title II regulation within the “telephone world” (*see p. 2*). They also wanted to ensure that telephone companies couldn’t prematurely escape Title II regulation (before they faced real competition) by providing Plain Old Telephone Service with some clever and pre-existing or anticipated use of computers. Signaling System 7 is one such example of which we were aware at

³⁵ Pub. L. 104-104 (1996).

the time, and which I believe accounts for the qualifier in 47 U.S.C. §153(20). According to WIKIPEDIA, the uses of SS7 included “number translation, local number portability, prepaid billing mechanisms, short message service (SMS), and a variety of other mass market services.”³⁶ There was a fear these services might qualify as information services and undo the transitional regulatory framework Congress sought to establish by allowing incumbent local exchange carriers to “evade” common carrier regulation. No one, so far as I knew, sought to prospectively block the introduction of innovative *new* services, whether by incumbent telecom carriers, cable operators, or anyone else. The idea was to create appropriate incentives for *everyone* to invest and innovate. Although the local competition provisions in the 1996 Act would be needed for a few years to help new entrants get established, there was never any serious consideration given to folding advanced services that combined communications and computing into Title II.

Congress’ point of reference was the 100-year old Public Switched Telephone Network monopoly. Broadband did not exist at the time. Years later (in 1999), in fact, former chairman Kennard would remark,

Indeed, broadband is just a nascent industry. The fact is that we don't have a duopoly in broadband. We don't even have a monopoly in broadband. We have a “no-opoly.” The bottom line is that, most Americans don't even have broadband.³⁷

Broadband is a good example of what Congress and President Clinton hoped to achieve when they enacted the 1996 Telecom Act. Compared to the telephone and CATV, broadband is revolutionary. Competing broadband platforms have solved the critical problem of one wire into the home for voice and another for video that has

³⁶ See WIKIPEDIA, *Signalling System No. 7* http://en.wikipedia.org/wiki/Signalling_System_No._7 (last visited Sept. 13, 2014).

³⁷ Remarks by FCC Chairman William E. Kennard before the Federal Communications Bar, Northern California Chapter, San Francisco, CA (Jul. 20, 1999).

animated communications policy these many years. And there is nothing in the statute or the legislative history to suggest that telephone companies and cable operators couldn't participate in the information revolution, or that the information revolution should be confined to the network's edge. To subject the network now and forever to regulation that was designed for industrial age "natural monopolies" runs the risk of completely suffocating investment and innovation within the network. And no one knows whether the network is fully evolved, or whether other—as-yet-unimagined—ground-breaking innovation may be in store.

D. Title II Is Inappropriate For the Broadband Market

Title II could open the door to all manner of regulation—including unbundling and price regulation. Just because substantial numbers of consumers have no need or desire for legacy services—and are voting with their feet—doesn't mean regulatory paradigms designed specifically for legacy services (with their unique economical and technological capabilities and limitations in mind) are necessary or desirable for advanced technologies.

The purpose of unbundling is to mandate retail competition, but the Department of Justice has cautioned the Commission that it "does not expect to see a large number of suppliers" in the broadband market, nor "expect prices to be equated with incremental costs."³⁸ There is no evidence that Congress sought "textbook markets of perfect competition, with many price-taking firms"; and according to the Department of Justice, "[t]hat market structure is unsuitable for the provision of broadband services,

³⁸ In the Matter of Economic Issues in Broadband Competition: A National Broadband Plan for Our Future, FCC GN Docket No. 09-51, *Ex Parte Submission of USDOJ* (Jan. 4, 2010), at 7.

which involve very substantial fixed and sunk costs.”³⁹ According to the late Professor Alfred E. Kahn,

The industry is obviously no longer a natural monopoly and wherever there is effective competition—typically and most powerfully, between competing platforms—land-line telephony, cable and wireless—regulation of the historical variety is both unnecessary and likely to be anticompetitive.⁴⁰

Professor Yoo says that,

Of the four rationales for determining the scope of common carriage—whether industry players (1) hold themselves out as serving all comers, (2) are “affected with a public interest,” (3) are natural monopolies, or (4) offer transparent transmission capability between points of the customers choosing without change—each has been discredited or is inapplicable to Internet-based technologies.⁴¹

He elaborates that, “commentators have criticized holding out as ‘a conspicuously empty’ justification for imposing common carrier obligations.”⁴² And that even “skeptical commentators recognize that [monopoly power] has become the dominant, if not the sole, criterion for determining the scope of common carriage.”⁴³ The bottom line is there is no basis in law or policy to classify broadband as a telecommunications service.

III. TITLE II RECLASSIFICATION WOULD TRIGGER HEIGHTENED SCRUTINY AND LEAD TO MORE UNCERTAINTY

Title II reclassification would amount to a complete policy reversal. Although Public Knowledge doesn’t believe that the FCC “would need to provide a more detailed explanation when it changes course than when it grapples with an issue *de novo*,”⁴⁴ the Supreme Court, as Verizon points out, has said that in fact the FCC *must* “provide a

³⁹ *Id.*, at 29.

⁴⁰ “Network Neutrality,” by Alfred E. Kahn, *AEI-Brookings Joint Center for Regulatory Studies* (Mar. 2007).

⁴¹ *Christopher S. Yoo, supra* note 27, at 545-46.

⁴² *Id.*, at 554.

⁴³ *Id.*, at 560.

⁴⁴ *Public Knowledge*, at 101-102.

more detailed justification than what would suffice for a new policy created on a blank slate” *when* the new policy “rests upon factual findings that contradict those which underlay its prior policy” or has “engendered serious reliance interests that must be taken into account.”⁴⁵ The Court adds,

It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.⁴⁶

Reclassification is not a slam dunk. The Commission risks plunging the industry into years of uncertainty if it classifies some or all broadband Internet access services as an “information service.”

CONCLUSION

For these reasons, the Commission should reject any invitation to rely on its authority under Title II of the Communications Act and revisit its classification of some or all broadband Internet access services as an information service for the purpose of subjecting broadband to more regulation.

Respectfully Submitted,

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The views expressed herein are those of the author and do not necessarily reflect those of the Discovery Institute.

⁴⁵ *FCC v. Fox Television Stations*, 556 U.S. 502 (2009).

⁴⁶ *Id.*