

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

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

**COMMENTS OF CENTER FOR MEDIA JUSTICE, CONSUMERS UNION,
MEDIA ACCESS PROJECT, AND NEW AMERICA FOUNDATION**

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	2
DISCUSSION	5
I. The Commission Must Classify Broadband Internet Connectivity Service as a Telecommunications Service in Order to Implement the National Broadband Plan and Protect Internet Users.	5
II. Broadband Internet Connectivity Service Clearly Constitutes a Telecommunications Service Within the Plain Meaning of the Act.	14
III. The Commission Should Classify All Broadband Internet Connectivity Services as Telecommunications Services, Regardless of the Platform or Technology that the Provider Uses.....	20
IV. The “Third Way” Approach Could Strike the Right Balance for Regulatory Treatment of Broadband Internet Connectivity Services, but Only so Long as the Commission Does Not Forbear Too Broadly.....	26
CONCLUSION	31

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Media Access Project, on behalf of the Center for Media Justice, Consumers Union, and New America Foundation (collectively, “Public Interest Commenters”), respectfully submits these comments in response to the Commission’s *Notice of Inquiry* (the “*Notice*”)¹ in the above-captioned docket. As they have in prior proceedings, the Public Interest Commenters strongly support the Commission’s classification as a telecommunications service of what the *Notice* refers to as “broadband Internet connectivity service.”² The Supreme Court has affirmed that making such a classification determination is well within the Commission’s discretion and present authority under the Communications Act. Moreover, as careful analysis of the statute and past Commission decisions makes clear, this classification accords the proper regulatory treatment to the transmission service that providers of broadband Internet connectivity service offer to end-users. In addition to comporting with the statute, classifying wired and wireless broadband Internet connectivity services as telecommunications services – while potentially forbearing from application of certain provisions in Title II of the Act – would provide the most sure and sound legal basis for efficiently achieving the nation’s vital broadband policy goals.

¹ In the Matter of Framework for Broadband Internet Service, GN Docket No. 10-127, *Notice of Inquiry*, FCC 10-114 (rel. June 17, 2010) (“*Notice*”).

² See, e.g., *id.* ¶ 1 n.1.

INTRODUCTION AND SUMMARY

The Commission can and should classify broadband Internet connectivity services as telecommunications services, as proposed in the *Notice*³ and in other informal Commission presentations regarding the “third way” approach.⁴ Applying such a “light touch” regulatory framework to wired and wireless broadband transmission services, modeled in many respects on the Commission’s highly regarded framework for commercial mobile services, will promote competition, provide opportunities for economic growth and free expression, and protect consumers online.

Clarifying and re-establishing the Commission’s authority over the transmission and access components of broadband Internet service offerings also will provide the surest route to implementation of Congress’s and the Commission’s advanced telecommunications and broadband goals. These include such diverse priorities as universal broadband access and adoption, online privacy protection, broadband-based public safety initiatives and enhancements, methods for ensuring non-discriminatory access for the disabled, transparent disclosures and truth-in-billing for broadband service plans, and other common sense protections.

Notwithstanding the flurry of congressional letters, opinion pieces, and scholarly analyses pro and con on this topic, the law is clear, and the technical considerations are easily within the Commission’s expertise. The determination to classify broadband Internet connectivity services as telecommunications services is the appropriate one in light of the legal framework set forth in

³ See generally *id.* ¶¶ 67-99.

⁴ See Statement of Chairman Julius Genachowski, Federal Communications Commission, “The Third Way: A Narrowly Tailored Broadband Framework” (May 6, 2010) (“Genachowski Statement”), available at <http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html> (proposing to “[r]ecognize the transmission component of broadband access service – and only this component – as a telecommunications service”).

the Communications Act. It would recognize Congress's intent that the Commission should retain authority to oversee telecommunications services as such offerings evolve technologically, with basic communications services provided more frequently (and even exclusively in some instances) over wired and mobile broadband facilities rather than legacy systems. Recognizing that broadband Internet connectivity services primarily are transmission services would rectify the improper judgments of the past, which the Public Interest Commenters opposed at the time they were made, that broadband Internet connectivity services are somehow inextricably intertwined with the actual information services they can deliver.

A majority of the Supreme Court affirmed in the *Brand X* decision⁵ not the Commission's prior decision on the merits of this issue, but rather the Commission's authority to interpret the statute and make such determinations. The dissenting opinion in that case recognized more clearly the fundamental nature of the transmission service underlying any offer of broadband Internet connectivity. The decision the Commission makes in this new proceeding undoubtedly will be subjected again to judicial review. Finding that all broadband Internet connectivity services are telecommunications services, and answering these classification questions here and now in a single proceeding, is by far the best approach. The only alternative would be to ground the Commission's work to promote and advance broadband access and adoption on less certain – and, in some cases, discredited – legal grounds. Such an approach would subject implementation of crucial components of the Commission's National Broadband Plan and other vital national broadband and telecommunications policy goals to a series of never-ending lawsuits and years of uncertainty.

⁵ National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005) (“*Brand X*”).

The Commission should instead proceed to issue a decision in this proceeding with all due speed. While Congress eventually will act to update the Communications Act, the Commission need not wait for new legislation to exercise its clear authority here. New legislation could take years to pass, and the Commission need not sit idly by in the interim, leaving broadband policy goals in doubt and consumers unprotected. Applying this classification determination to all broadband Internet connectivity services, regardless of the technological platform used to deliver such services, will increase certainty for network operators and other regulated entities without stifling innovation in networks or unduly burdening network operators with regulation.

Increased certainty and soundness in the Commission's broadband classification framework also will benefit "edge" companies, innovators, and providers of content, applications, and information services. The determination supported by the Public Interest Commenters would draw clear lines to separate transmission services – which always have been within the Commission's purview, regardless of the technologies or capabilities used to manage or operate such telecommunications services – from information services that the Commission historically has not overseen and should not regulate now on such terms. Most importantly, classifying broadband Internet connectivity services as telecommunications services will provide greater certainty and necessary protections for all broadband Internet users. Such certainty benefits not only innovators and edge companies large and small, but also other businesses that rely on broadband Internet connectivity. It also benefits the whole host of educational entities, government and public safety service providers, and individual end-users and consumers for whom fair and open access to broadband is increasingly a necessity for engagement in all manner of economic, educational, civic, and social endeavors.

The Public Interest Commenters would support the “third way” approach outlined in the *Notice*, but only if the Commission carefully considers both the forbearance procedures it intends to follow and the statutory provisions from which it ultimately may forbear. The basic framework proposed in the “third way” portion of the *Notice* could suffice, so long as the Commission does not forbear too broadly and preserves application of all of the necessary statutory provisions, to promote broadband access on just and reasonable terms. As explained herein, the Commission’s adoption of this classification framework also would establish a firm legal basis to provide support for universal broadband access and adoption, protect consumer privacy and the rights of disabled users, and preserve the open Internet.

Nevertheless, the Public Interest Commenters respectfully submit that, in addition to the statutory provisions enumerated in the *Notice*, there are additional provisions from which the Commission cannot and should not forbear. Application of the sections enumerated in the *Notice* and of these additional provisions suggested below by the Public Interest Commenters would promote more efficient service, provide for enforcement of the Act and the Commission’s rules, and fulfill the Commission’s own reporting requirements and other duties.

DISCUSSION

I. The Commission Must Classify Broadband Internet Connectivity Service as a Telecommunications Service in Order to Implement the National Broadband Plan and Protect Internet Users.

As the *Notice* suggests, the *Comcast* case⁶ “appears to undermine prior understandings about the Commission’s ability under the current framework [meaning pursuant to Title I] to provide consumers basic protections when they use today’s broadband Internet services.”⁷ Because the Commission’s prior framework for applying minimal regulations to broadband

⁶ Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010) (“*Comcast*”).

⁷ *Notice* ¶ 1.

Internet connectivity service have been called into question by the D.C. Circuit, the Commission appropriately has proposed to use Title II to assert its jurisdiction over broadband Internet connectivity service. As discussed below in Part II of these comments, the Commission has firm legal standing to classify Internet connectivity service as a Title II telecommunications service.⁸ Moreover, as discussed immediately below, it is essential that the Commission promptly assert its authority over Internet connectivity service. The Commission's authority to oversee broadband Internet connectivity service is essential to the realization of Congress's and the Commission's goals set forth in the National Broadband Plan, and it is essential to the continued vitality of our Twenty-First Century communications infrastructure.

A. Challenges to Commission authority over broadband Internet connectivity service affect all of the Commission's broadband initiatives and objectives in the National Broadband Plan.

In the National Broadband Plan, the Commission has laid out the role that it, and other policymakers, have in facilitating the delivery of affordable broadband Internet connectivity service. Specifically, the Commission has found that policymakers can, *inter alia*: (1) pursue policies to facilitate competition; (2) reform universal service so that broadband is available and affordable to all residents; and (3) take necessary actions to maximize the benefits of broadband across all sectors.⁹ Additionally, the Commission has identified a number of benchmarks for the next decade, which will be used to judge the progress of delivering affordable broadband Internet connectivity service. These benchmarks include delivering affordable broadband service with 100 Mbps download speeds and 50 Mbps upload speeds to 100 million U.S. households, and ensuring that all residents have the means and skills to subscribe to Internet connectivity

⁸ See *infra* Part II.

⁹ FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN xi (rel. Mar. 16, 2010) ("National Broadband Plan" or "Plan").

service.¹⁰ However, many of the measures that the Commission must take to effectuate these goals and meet these benchmarks in the next ten years require swift and certain action, which should not be delayed by regulatory uncertainty and litigation limbo.

For example, to assess “the current and expected nature of competition in broadband network services,” the National Broadband Plan recommends that the Commission “collect data that enable more detailed analysis of the market and competition and make that data more publicly available to ensure visibility into competitive behavior of firms.”¹¹ To that end, the Commission determined that disclosure requirements for broadband Internet connectivity service providers are necessary, so that Internet users will be aware of and informed about the services they are purchasing.¹² The Commission previously has required providers to disclose or report such information pursuant to Section 201(b) of the Communications Act – which applies to telecommunications services. However, since the *Comcast* decision called into question the Commission’s authority to oversee information services, it is uncertain whether the Commission can justify requiring such disclosures from broadband providers if they are not classified as providers of telecommunications services.

The *Comcast* case also casts into doubt the Commission’s ability to facilitate the deployment of affordable broadband Internet connectivity service by reforming the Federal Universal Service Fund (“USF”). The Commission has recommended in the Plan that USF funds be used for deploying broadband Internet connectivity service more widely and making it more affordable.¹³ Key recommendations include expanding the Lifeline and Link-Up programs to make broadband more affordable for low-income households, and expanding federal support

¹⁰ *Id.* at 9-10.

¹¹ *Id.* at 42-43.

¹² *Id.* at xi-xii.

¹³ *See, e.g., id.* at 144-45.

for regional broadband capacity-building aimed at improving broadband deployment and adoption.¹⁴ In recognizing the urgency and need for USF reform, the Commission stated “the federal USF must be modernized to support the advanced broadband networks and services of the future – and must be modernized quickly, in a way that will accelerate the availability of broadband to all Americans.”¹⁵

Although it is evident that swift reform is needed, the *Comcast* decision appears to preclude swift action by the Commission. The plain language of Section 254 directs universal service support towards “telecommunications services,” not information services, and only “telecommunications carrier[s]” are eligible for support.¹⁶ The inability to reform USF so that funds may be used for providing affordable Internet connectivity services will greatly limit the Commission’s ability to ensure that all residents have access to and will adopt broadband.

Finally, the Commission has recognized that it must be mindful of the impact its policies relating to broadband Internet connectivity service will have on other sectors, including education, health care, public safety, job training, and general government uses.¹⁷ As the Commission stated:

It is critical that the country move now to enact the recommendations in this part of the plan in order to accelerate the transformation that broadband can bring in areas so vital to the nation’s prosperity. Diffusion of new technologies can take time, but the country does not have time to spare. There are students to inspire, lives to save, resources to conserve and people to put back to work. Integrating broadband into national priorities will not only change the way things are done, but also the results that can be achieved for Americans.¹⁸

¹⁴ *Id.* at 168.

¹⁵ *Id.* at 143.

¹⁶ 47 U.S.C. § 254(c)(1), (e).

¹⁷ National Broadband Plan at 194

¹⁸ *Id.*

However, without the legal certainty needed to adopt policies that will encourage the deployment of affordable broadband Internet connectivity service over the next decade, it will be impossible for the Commission to play a role in ensuring that these various sectors realize the benefits of broadband. By turning to Title II, and grounding there the Commission's authority to protect consumers and promote vital broadband programs and policies, the Commission would foster regulatory certainty regarding the basis for regulating the facilities used to offer broadband Internet connectivity service.

B. Reliance on Title I will lead to years of uncertainty regarding the Commission's authority over broadband access and years of delay in implementing the National Broadband Plan.

The *Comcast* decision typifies the road ahead for the Commission if it should decide, as some parties suggest,¹⁹ to go back to the drawing board and rely on Title I to carry out its goals for delivering affordable broadband across the country and protecting consumers online. Prior to the *Comcast* decision, the Commission, various courts, and regulated entities believed the Commission could pursue its statutory goals related to broadband pursuant to Title I and ancillary jurisdiction.²⁰ However, once the Commission attempted to assert its ancillary authority, it was immediately challenged for doing so. This sort of gamesmanship – which may or may not ultimately conclude in the Commission's favor – should be expected if the Commission attempts to pursue its broadband policies and statutory responsibilities pursuant to Title I ancillary jurisdiction.

¹⁹ See, e.g., Letter from Kyle E. McSarrow, National Cable & Telecommunications Association, *et al.* to Julius Genachowski, Chairman, Federal Communications Commission, GN Docket Nos. 09-51, 09-191, WC Docket No. 07-52, at 1-2 (filed April 29, 2010).

²⁰ See *Brand X*, 545 U.S. at 976; Appropriate Framework for Broadband Access Over Wireline Facilities, *Policy Statement*, 20 FCC Rcd 14986, ¶ 4 (2005); Comments of Verizon and Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52, at 92 (Jan. 14, 2010); see also *Notice* ¶ 8 n.14 (describing filings that concurred with this view).

There is little merit to suggestions by some that the Commission could simply use Title I to accomplish critical policy goals set by Congress, or by the National Broadband Plan, or to protect purchasers of broadband Internet connectivity service. Under a Title I regime, the Commission would have to justify its legal authority separately each time it takes any action to implement the National Broadband Plan or protect users who purchase broadband Internet connectivity services. As in the *Comcast* case, parties inevitably will challenge such Commission action in court, leading to years of delay and uncertainty regarding the Commission's ability to implement the National Broadband Plan and protect Internet users.

The reality is that, when it suits them, providers have inconsistently embraced and then attacked Title I as a ground for the Commission's exercise of authority over certain broadband Internet connectivity services and related programs.²¹ For instance, incumbents that argue against Commission authority to adopt open Internet rules have in the past endorsed the Commission's ability to craft rules, based on ancillary authority over all broadband providers that could be used to protect consumers and promote the public interest in the delivery of broadband Internet services.²² While some incumbents and trade associations generally

²¹ See Letter from Ben Scott, Policy Director, Free Press, to Julius Genachowski, Chairman, Federal Communications Commission, GN Docket Nos. 09-191, 09-51, WC Docket No. 07-52, at 6 & n.20 (filed Feb. 24, 2010).

²² See, e.g., Comments of Verizon, CS Docket No. 02-52, at 29 (filed June 17, 2002) ("Nor should classification of broadband under Title I lead to any erosion of the consumer protection provisions of the Communications Act. First, broadband providers will almost always be providers of telecommunications services too and will provide them to the same customers to whom they provide broadband."); see also *id.* ("[T]o the extent that the Commission finds that consumer protection provisions are needed in the public interest, it can and should impose them equally on all broadband providers under Title I. Regulating broadband under Title I does not necessarily equate to total deregulation."); *Petition of SBC Communications for a Declaratory Ruling*, WC Docket No. 04-29, at 41 (filed Feb. 5, 2004) (quoting *United States v. Southwestern Cable Co.*, 392 US. 157, 173 (1968), for the propositions that "Title I affords the Commission ample authority to address these concerns [regarding IP services]" and that "Title I embodies the

acknowledged that open Internet principles make for good policy, they later argued that the Commission can craft such principles for industry guidance but not enforce them, even upon detection of egregious violations of the very same principles.²³

In other instances, when it benefits them, providers will claim the Commission does in fact have ancillary authority over broadband Internet connectivity service. For example, some have argued²⁴ – in their commercial self-interest – that the Commission could use ancillary jurisdiction to redirect universal service funds from traditional phone services to broadband Internet connectivity service. Whether the Commission could or could not do this is a matter of statutory interpretation, which would be a difficult component of a thorough (and long) rulemaking process and ultimately would have to be resolved by the courts.

This sort of piecemeal view of the Commission’s jurisdiction leaves the Commission constantly vulnerable to legal challenges resulting in years of delay. As a result, the Commission would be left with its hands tied in facilitating the deployment of affordable Internet connectivity service, and would have great difficulty accomplishing its goal of meeting specific benchmarks in the next decade. While uncertainty and delay may benefit incumbents, broadband users who are the ultimate beneficiaries of the National Broadband Plan will continue to be penalized as they wait in vain for affordable Internet connectivity service. Thus, the Commission should clarify its authority over broadband Internet connectivity service in this proceeding rather than subjecting each and every broadband deployment, adoption, promotion, and consumer protection

“‘comprehensive mandate’” that Congress gave the Commission to enable it to manage developments in “a field that was demonstrably ‘both new and dynamic.’”).

²³ See, e.g., Comments of AT&T, Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 1-2 (filed Jan. 14, 2010); Comments of the National Cable & Telecommunications Association, GN Docket No. 09-191, WC Docket No. 07-52, at 3 (filed Jan. 14, 2010).

²⁴ See, e.g., Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 09-51, 09-47, 09-137, WC Docket Nos. 05-337, 03-109 (filed Jan. 29, 2010).

initiative to the threat of separate lawsuits and litigation over authority premised on less certain grounds.

C. The Commission cannot rely on promises and voluntary guidelines.

Having begun this inquiry, the Commission must see it through completely by promptly classifying broadband Internet connectivity service as a Title II Service. This is especially true in light of recent meetings held by senior Commission officials, with representatives of broadband Internet connectivity service providers and some few edge companies in attendance, to consider a possible compromise on network neutrality. While the Public Interest Commenters understand that the meetings have discussed the Open Internet proceeding, it appears the Commission might use those discussions to forgo final resolution of this proceeding. While the Commission should be open to hearing from various stakeholders on various issues, it cannot use such meetings (nor any voluntary agreements on net neutrality among industry players) to resolve the broader questions set forth in this *Notice*.

As the *Comcast* decision has demonstrated, principles or voluntary guidelines are not as effective as enforceable Commission rules. In the absence of restated Commission authority to adopt actual rules when necessary to facilitate deployment of affordable broadband Internet connectivity service and to protect Internet users, broadband service providers would be able to choose whether to abide by voluntary guidelines, as there would be no meaningful repercussions for failing to do so. By clarifying its authority as Public Interest Commenters suggest here, it is less likely that the Commission will have to deal with contentious, uncertain, and informal complaint processes such as those used in the Comcast/BitTorrent situation.

Thus, the Commission must move ahead on classification to ensure that it has the ability to promote broadband deployment and protect Internet users. Voluntary industry commitments

or negotiated consensus on net neutrality legislation, even if any meaningful consensus could be obtained, would not be a substitute for classification of broadband Internet connectivity service as a telecommunications service. No understanding regarding open Internet principles could purport to address broader jurisdictional questions regarding Commission authority over broadband transmission services.

D. The Commission must act even if Congress is acting on a parallel track.

Not surprisingly, the same parties that make inconsistent and unsupported arguments regarding the ability of the Commission to assert its authority suggest that Congress should or must act to clarify the Commission's jurisdiction.²⁵ Legislation properly restating the Commission's jurisdiction over broadband Internet connectivity service certainly would be welcomed. However, in the months or years that may pass before such a bill could be enacted by Congress and signed into law, the Commission must exercise its existing authority to take measured steps ensuring that important broadband policy goals are met and that Internet users are protected from harmful practices. Thus, while Congress can and should update the law in this area in due time, the Commission need not sit idly by during the intervening years and leave broadband policy goals unaccomplished, nor broadband users unprotected.

²⁵ See, e.g., Prepared remarks of Verizon Executive Vice President Tom Tauke, New Democrat Network Keynote Speech, Mar. 24, 2010 ("Tauke Keynote"), *available at* <http://policyblog.verizon.com/BlogPost/714/RemarksVerizonEVPTomTaukeatNewDemocratNetwork.aspx> (suggesting that proposed new legislation regulate all providers in the broader Internet ecosystem because "it matters not whether competition is constrained by a network company or an applications providers or anyone else in the system of linkages that add up to the Internet"); Jim Cicconi, "Boxes Tumbling Down," AT&T Public Policy Blog (Mar. 25, 2010), <http://attpublicpolicy.com/broadband-policy/boxes-tumbling-down/>.

II. Broadband Internet Connectivity Service Clearly Constitutes a Telecommunications Service Within the Plain Meaning of the Act.

In the Open Internet proceeding, the Public Interest Commenters and others grounded their understanding of broadband Internet connectivity service oversight in the Commission's longstanding, undisputed authority over the transmission component of wire and radio communications facilities.²⁶ The Public Interest Commenters suggested, therefore, that the Commission should consider classification of broadband Internet connectivity services as telecommunications services, or so-called Title II services.²⁷ As illustrated in the previous section, the Commission's determination of the proper framework and classification for broadband Internet connectivity service affects not just the important Open Internet proceeding, but the whole range of Commission responsibilities and initiatives that touch upon broadband Internet connectivity. Thus, in light of the issues raised by the *Comcast* decision,²⁸ the Commission should reconsider decisions about broadband classification rendered under prior administrations and determine in this proceeding that broadband Internet connectivity services are telecommunications services.

²⁶ See Reply Comments of Center for Media Justice, Consumers Union, Media Access Project, and New America Foundation, GN Docket No. 09-191, WC Docket No. 07-52, at 27 (filed April 26, 2010) ("PIC Open Internet Reply Comments"); see also Comments of Free Press, GN Docket No. 09-191, WC Docket No. 07-52, at 31 (filed Jan. 14, 2010) ("Free Press Open Internet Comments"); Comments of the Open Internet Coalition, GN Docket No. 09-191, WC Docket No. 07-52, at 82 (filed Jan. 14, 2010); Comments of the Center for Democracy & Technology, GN Docket No. 09-191, WC Docket No. 07-52, at 20-21 (filed Jan. 14, 2010) ("CDT Open Internet Comments"); Comments of Google Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 43-49 (filed Jan. 14, 2010).

²⁷ See PIC Open Internet Reply Comments at 27; Free Press Open Internet Comments at 32; CDT Open Internet Comments at 22.

²⁸ See, e.g., Genachowski Statement (explaining that "*Comcast v. FCC* does not challenge the longstanding consensus about the FCC's important but restrained role in protecting consumers, promoting competition, and ensuring that all Americans can benefit from broadband communications" but conceding that "the opinion does cast serious doubt on the particular legal theory the Commission used for the past few years to justify its backstop role with respect to broadband Internet communications").

Public Interest Commenters opposed those earlier classification determinations at the time they were made,²⁹ and maintain that classifying broadband Internet connectivity service as a telecommunications service has been and remains the best interpretation of the relevant statutory provisions. Moreover, it is evident from controlling Supreme Court precedent that the Commission has the authority to make this statutory interpretation and classification decision. Finally, whatever the wisdom of past Commission's decisions, those decisions were made on the basis of different sets of facts and heretofore unfulfilled expectations about the results of such deregulation. In any event, the law is clear and so should be the outcome of this proceeding: regardless of the merits of the prior classification decisions, it is entirely proper for the Commission to re-visit this determination, and this proceeding should conclude unambiguously that broadband Internet connectivity services are telecommunications services.

The present Commission can undertake its analysis in this proceeding in light of changed circumstances, evolutions in broadband Internet connectivity service offerings, and historical perspective on the outcome of predictions and promises made in the 2002 *Cable Modem Order* and the 2005 *Wireline Framework Order*.³⁰ As the Supreme Court has made clear recently, the Commission need not meet any higher burden of proof to reverse prior decisions in response to

²⁹ See, e.g., Comments of Center for Digital Democracy, Consumer Federation of America, Media Access Project, Association of Independent Video and Filmmakers, National Association of Media Arts and Culture, and the United Church of Christ, Office of Communications, Inc., CS Docket No. 02-52, at 2 (filed June 17, 2002) (“[T] the Commission has erred as a matter of law in declaring Internet access provided over cable systems to be an ‘information service’ rather than a ‘telecommunications service,’ ...”).

³⁰ See Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) (“*Cable Modem Order*”); Appropriate Framework for Broadband Access Over Wireline Facilities, *Report & Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005) (“*Wireline Framework Order*”).

new facts and new analysis.³¹ For these reasons, the Commission can and should proceed to classify broadband Internet connectivity services as telecommunications services. This framework best comports with the plain language of the Communications Act and prior decisions, and the Commission need not be bound by its classification orders for the reasons set forth below.

Developments in the market, and maturation in broadband Internet connectivity service offerings since the Commission first began considering this specific issue a decade ago, demonstrate conclusively that providers offer a transmission service to their broadband Internet connectivity customers. Contrary to suggestions in the *Cable Modem Order* and *Wireline Framework Order*,³² this transmission component underlies but is not inextricably intertwined with the information services that the network operators also may make available to customers.³³ Therefore, as the Public Interest Commenters and others have demonstrated in the Open Internet and National Broadband Plan proceedings, the information services that broadband Internet connectivity service providers may bundle together with their transmission service are not legally, technically, commercially, or practicably inseparable from the underlying telecommunications service.³⁴

³¹ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). The Court held that there is “no basis in the Administrative Procedure Act or in [its] opinions for a requirement that all agency change be subjected to more searching review,” and that while “the agency must show that there are good reasons for the new policy[.] it need not demonstrate to a court’s satisfaction that the reasons for the new policy are **better** than the reasons for the old one.” *Id.* at 1810-1811 (emphasis in original).

³² See, e.g., *Cable Modem Order* ¶¶ 33, 40; *Wireline Framework Order* ¶ 9.

³³ See, e.g., Reply Comments of Public Knowledge, National Broadband Plan Public Notice #30, GN Docket Nos. 09-137, 09-51, 09-47, at 8-10 (filed Jan. 26, 2010) (“Public Knowledge NBP Reply Comments”).

³⁴ See *id.*

For example, although the *Cable Modem Order* reported that one of the information services cable companies provide is access to DNS,³⁵ this service is not solely provided by broadband network operators. Third-parties are just as capable of providing DNS services, which simply read common, fully qualified domain names (such as “Google.com,” whose domain is used to access information services and content offerings such as e-mail and web content) and match these domain names to a unique Internet Protocol (“IP”) number that computers use to communicate with one another.³⁶ DNS can be seen as analogous to “411” services, which can be offered by both telecommunications service providers and by other non-affiliated entities, each of which can match telephone numbers to a person or business name. Although DNS is an extremely useful service for Internet users, it does not affect the underlying routing of data between end-points that also can be achieved by an end-user or an application simply inputting a known IP address rather than the more convenient domain name. For these reasons, DNS is not inextricably intertwined with the transmission function that broadband Internet connectivity service offers, and neither are other information services or features that the *Cable Modem Order* posits as necessarily “combined” with the broadband offering.³⁷

In sum, the information services that various providers may or may not bundle together with broadband Internet connectivity service are not inextricably intertwined with that transmission or transport component. The regulatory classification and statutory framework for services that providers offer to customers cannot be dependent on the manner in which those

³⁵ See *Cable Modem Order* ¶¶ 17, 37-38.

³⁶ See Public Knowledge NBP Reply Comments at 2 & n.7 (comparing the *Cable Modem Order* with blog posts by Google and OpenDNS explaining those entities’ own DNS offerings).

³⁷ See *Cable Modem Order* ¶ 38.

services are bundled together for marketing purposes.³⁸ Just as the Commission is not required to define an entire “triple-play” bundle (combining voice, video, and data offerings) as one type of service within the regulatory frameworks of the Act, it does not need to define broadband Internet connectivity as an “information service” simply because providers may choose also to offer e-mail and news gathering services. That is true even if a provider purports to require that its customers purchase the whole bundle of services.

The larger context for any reevaluation of the Commission’s prior classification decisions remains clear: to the extent there is any ambiguity in the definitions in the statute, the majority opinion in the Supreme Court’s *Brand X* decision affirmed the Commission’s authority to make the classification determination set out in the instant proceeding.³⁹ Yet there can be little doubt upon a reading of the definitions for “telecommunications service” and “information service” that broadband Internet connectivity service is a telecommunications service under the Act, no matter what technology or transmission protocols any network operator may use to provide that connectivity service. The clear role and function of last-mile broadband Internet access transmission facilities in all instances is to provide transport for the enhanced “information services” and other advanced services that flow over such facilities.

Thus, if the statute were indeed ambiguous, it would be up to the Commission to interpret it reasonably. The most reasonable course in this proceeding then would be to decide that broadband Internet connectivity service is a telecommunications service. If in fact the statute is

³⁸ See, e.g., *Brand X*, 545 U.S. at 1009 n.4 (Scalia, J., dissenting) (“The merger of the physical connection and Internet functions in cable’s offerings has nothing to do with the ‘inextricably intertwined’...nature of the two...but is an artificial product of the cable company’s marketing decision not to offer the two separately,...”).

³⁹ See *id.* at 980.

not ambiguous, as certain of the Public Interest Commenters asserted even in 2002 and earlier, then the Commission can and should arrive at the same determination.

Where to draw the line between this telecommunications service and various information services presents some questions that the Commission must answer, but answering them is not difficult after a careful review of the relevant statutory provisions. The *Notice* asks whether the Commission should draw lines between different network “layers” or network functions “that compose the Internet” when making the classification determination at hand.⁴⁰ The Public Interest Commenters urge the Commission to adopt a functional analysis, mindful of the fact that Section 153(20) of the Act exempts from the “information services” category any information processing capability used “for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”⁴¹ Whether or not providers of broadband Internet connectivity service utilize IP or other processing capabilities to manage, control or operate the telecommunications service they offer to subscribers, the underlying transmission component remains a telecommunications service – regardless of the fact that IP also is used in the provision of various information services delivered over that broadband Internet connectivity platform. In the final analysis, the Commission has all the necessary authority and discretion to make the determination that broadband Internet connectivity service is a telecommunications service, and that is the classification decision that most faithfully interprets the Act.

⁴⁰ *Notice* ¶ 60.

⁴¹ 47 U.S.C. § 153(20).

III. The Commission Should Classify All Broadband Internet Connectivity Services as Telecommunications Services, Regardless of the Platform or Technology that the Provider Uses.

The Commission has asked whether it should address the classification of wireless services at the same time it addresses wired services.⁴² While there may be technological differences between wireless and wired access, classifying both wired and wireless broadband Internet connectivity service as Title II services would not preclude the Commission from taking these different network architectures into account when adopting substantive rules. Indeed, the Canadian Radio-television and Telecommunications Commission recently applied its Internet traffic management practices to mobile wireless data services,⁴³ suggesting that despite the technological differences, it is entirely appropriate for both wireless and wired access to be subject to the same regulatory regime. Similarly, the European Union in 2002 recognized the importance of a unified regulatory framework, finding that “all transmission networks and services should be covered by a single regulatory framework.”⁴⁴

More importantly, the Commission has suggested in the National Broadband Plan that it expects wireless providers to play an important role in delivering first-class, affordable broadband Internet connectivity service.⁴⁵ Indeed, a major recommendation in the National

⁴² Notice ¶ 105.

⁴³ Canadian Radio-television and Telecommunications Commission, Telecom Decision CRTC 2010-445, *Modifications To Forbearance Framework For Mobile Wireless Data Services* (June 30, 2010), available at <http://www.crtc.gc.ca/eng/archive/2010/2010-445.htm>.

⁴⁴ The European Parliament and the Council of the European Union, Framework Directive 2002/21/EC, *On a Common Regulatory Framework for Electronic Communications Networks and Services*, (Mar. 7, 2002) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0033:0033:EN:PDF>.

⁴⁵ National Broadband Plan at 137. (“Fourth generation technology holds great promise and will likely play a large role in closing the broadband availability gap if speed and consumer satisfaction are comparable to traditional wired service, such as that provided over Digital

Broadband Plan for creating competition in the broadband market is for the Commission to “take specific steps to make more spectrum available to ease entry into broadband markets and reduce the costs for current wireless providers to offer higher-speed services that can compete with wired offers for a larger segment of end-users.”⁴⁶ While in many ways wireless access *cannot* currently be considered a substitute for wired access, the Commission nonetheless must classify wireless broadband Internet connectivity as a Title II service if it expects wireless Internet connectivity to be a viable alternative to wired access. In other words, to ensure that users of wireless broadband Internet connectivity service have the same protections, experiences, and functionalities as users of wired services, it is critical that the Commission be consistent regarding its oversight authority for all forms of broadband Internet connectivity service.

A consistent regulatory regime is especially critical in light of the role wireless access has played and can continue to play in bridging the digital divide, and in demonstrating to non-adopters the relevance to their lives of broadband Internet connectivity. More and more often, Internet users are relying on mobile Internet access as a means for communicating and accessing information. According to a recent survey, 60% of American adults are wireless Internet users.⁴⁷ These uses include using a laptop with a WiFi connection, or accessing the Internet, email, or instant messaging on a cell phone.⁴⁸ Even devices traditionally not thought of as being used for a wireless Internet connection are being used to access the Internet, though not yet in numbers as large as those for handheld devices or a laptops. For example, game consoles, e-book readers,

Subscriber Line (DSL) or cable modem.”); *id.* at 173 (“The FCC should consider free or very low-cost wireless broadband as a means to address the affordability barrier to adoption.”).

⁴⁶ *Id.* at 42.

⁴⁷ See Aaron Smith, Pew Internet & American Life Project, *Mobile Access 2010*, at 2 (July 7, 2010) (“Pew 2010 Mobile Access Study”), available at http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Mobile_Access_2010.pdf.

⁴⁸ See *id.*

iPods/mp3 players, and tablet computers are increasingly used to access the Internet through a wireless connection.⁴⁹

Importantly, wireless broadband Internet connectivity is being used by populations that have often been on the wrong side of the digital divide. For instance, 54% of African Americans and 53% of English-speaking Hispanics have accessed the Internet on a handheld device.⁵⁰ This is a marked increase from 2007, when 29% of African Americans and 38% of English-speaking Hispanics accessed the Internet on a handheld device,⁵¹ and even from a 2009 survey, which found that 48% of African Americans and 47% of English-speaking Hispanics have accessed the Internet on a handheld device.⁵² These numbers appear to indicate that people of color are increasingly relying on a mobile device to access the Internet.

Moreover, with the introduction of devices like netbooks and wireless data cards, more and more individuals in these communities will be able to rely on a wireless Internet connection to access the same services, content, and opportunities that would be available to them with wired access. For example, 51% of African Americans own a laptop and 46% use their laptops to go online wirelessly.⁵³ Similarly, 54% of English-speaking Hispanics own a laptop and 48% use their laptops to go online wirelessly.⁵⁴ These numbers are quite comparable to those for

⁴⁹ See *id.* at 22-23 (“[T]hese devices largely play a supporting role for Americans who already access the internet wirelessly using a laptop computer or cell phone.”).

⁵⁰ See *id.* at 10. According to a 2009 survey, 48% of African Americans and 47% of English-speaking Hispanics have accessed the Internet on a handheld device. See John Horrigan, Pew Internet & American Life Project, *Wireless Internet Use*, at 14 (July 2009) (“Pew 2009 Wireless Study”).

⁵¹ See Pew 2009 Wireless Study at 14.

⁵² See *id.*

⁵³ See Pew 2010 Mobile Access Study at 21.

⁵⁴ See *id.*

Whites, 55% of whom own a laptop, and 47% of whom use their laptops to go online wirelessly.⁵⁵

Thus, it appears that wireless broadband Internet connectivity can play a critical role in providing Internet access for marginalized communities. While access to the Internet through a wireless device is not a solution to closing the digital divide completely, access to the wireless ecosystem represents a critical first step in helping to close that divide and providing a means for communication. The numbers indicate that wireless devices are increasingly used for Internet access, especially by people in communities of color. Yet, if these communities are to take full advantage of the opportunities afforded to them on the Internet, the Commission must not eliminate protections nor create different sets of rules for broadband Internet users that connect to the Internet wirelessly. Such a decision would relegate mobile broadband users to second-class Internet citizenship. While it is too soon to know the extent to which young people, lower-income households and people of color will decide to rely exclusively on 4G or other high-speed wireless Internet connectivity services – rather than paying for both wired and wireless connectivity – that choice should not consign them to an entirely different Internet experience under a different and less protective regulatory framework.

The Commission can and should account for differences in network architecture and capabilities by adopting flexible substantive rules in various contexts. However, it should not purport to define or classify functionally equivalent Internet connectivity services differently, based merely on the availability of potential alternative sources of authority over wireless services.⁵⁶ Thus, the Commission should act to ensure that wireless and wired broadband Internet connectivity services are treated alike for basic regulatory purposes. This is the

⁵⁵ See *id.*

⁵⁶ See Notice ¶¶ 103-104.

appropriate result from a legal perspective. This approach also promotes the best outcome for social equality and civil rights, and promotes as well a consistent and beneficial consumer experience for users purchasing and using mobile wireless broadband offerings. It is critical to consumer protection goals and to preserving the social and economic value of the Internet that its functionality and “rules of the road” not change based on the technology used to gain access. Broadband Internet users should be able to expect the same protections whether their devices reach the Internet over a WiFi connection to a wired LAN or, moments later, connect over a wireless carrier’s network. From a consumer perspective, today there is one Internet.⁵⁷ The Commission should not encourage a policy environment in which the substance and utility of “the Internet” to which consumers purchase access may be highly variable and unpredictable, based on differing and inconsistent bases of authority or rationales for regulatory oversight.

As a regulatory matter, this should not be controversial. The Commission has previously determined that establishing a common framework for all broadband Internet access providers serves the public interest.⁵⁸ As explained above, the common framework going forward should acknowledge the core transmission component of broadband Internet connectivity service, not rely on misperceptions and unfulfilled predictions about the nature of the service offered to end-

⁵⁷ See Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, “Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity,” at 6 (Sept. 21, 2009) (“Even though each form of Internet access has unique technical characteristics, they are all are different roads to the same place. It is essential that the Internet itself remain open, however users reach it. The principles I’ve been speaking about apply to the Internet however accessed,...”).

⁵⁸ Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, WT Docket No. 07-53, *Declaratory Ruling*, 22 FCC Rcd 5901, ¶¶ 55, 70 (“*Wireless Framework Order*”); see also *id.*, Concurring Statement of Commissioner Michael J. Copps (“Now that IP-based wireless services are classified as Title I information services, the inescapable logical implication of our 2005 decision is that the right to attach network devices – as well as the other three principles of our policy statement – now applies to wireless broadband services.”).

users. Nevertheless, treating all methods used to access the Internet in consistent fashion for regulatory purposes remains the best approach.

The Commission also should be careful to adopt uniform rules and principles because of the increasing prevalence and potential benefits of hybrid networks and cognitive devices that seamlessly transit both wired and wireless Internet access networks in tandem or in series. For example, industry surveys show that data traffic on carrier-serviced smartphones is increasingly migrating to WiFi where available. According to the latest AdMob Mobile Metrics Report, 36% of iPhone traffic in the U.S. traveled over WiFi in November 2009.⁵⁹ WiFi-enabled smartphones are merely the leading edge of a trend toward more consumer-friendly and spectrum-efficient devices and hybrid networks that integrate available wired and wireless networks into a seamless source of bandwidth.⁶⁰ In light of these developments, Internet users and consumers hardly can be expected to understand or accept any policy approach or framework in which they could be subjected to different rules and protections depending on the platform over which their device most efficiently chooses to operate. The Commission cannot and need not seek alternate bases of authority for its oversight of wireless broadband Internet connectivity services, and should ground its authority over both wired and wired services in Title II.

⁵⁹ AdMob Mobile Metrics Report, November 2009, *available at* <http://metrics.admob.com/wp-content/uploads/2009/12/AdMob-Mobile-Metrics-Nov-09.pdf>.

⁶⁰ For a discussion of hybrid networks and their benefits, see Mark MacCarthy, “Rethinking Spectrum Policy: A Fiber Intensive Wireless Architecture,” Aspen Institute Roundtable on Spectrum Policy (March 2009); *see also* Reply Comments of the Public Interest Spectrum Coalition, GN Docket Nos. 09-157 & 09-51, at 15-17 (filed Nov. 5, 2009) (“PISC Spectrum Reply Comments”).

IV. The “Third Way” Approach Could Strike the Right Balance for Regulatory Treatment of Broadband Internet Connectivity Services, but Only so Long as the Commission Does Not Forbear Too Broadly.

The Commission has suggested classifying wired broadband Internet connectivity service as a telecommunications service, while at the same time forbearing from applying most Title II provisions.⁶¹ In an effort to foster competition, Section 160 allows the Commission to “forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets” if the Commission determines that application of the provision is not necessary to keep carriers from raising prices, discriminating unreasonably, or harming consumers, and if forbearance generally would be consistent with the public interest.⁶² Specifically, the Commission has suggested forbearing from all Title II provisions, except Sections 201, 202, 208, 222, 254 and 255.⁶³ This “Third Way” approach could strike the right balance for regulatory treatment of broadband Internet connectivity services, but to attain that balance the Commission must apply the sections enumerated above and expand the list of applicable sections in Title II.

A. The Commission may not forbear from any provisions that place an obligation on the Commission or that do not impose obligations on a telecommunications service.

The Commission has proposed applying just a handful of Title II provisions to broadband Internet connectivity service, while forbearing from the remaining provisions. However, the Commission may not and need not forbear from any provisions that place an obligation on the Commission itself and do not constitute regulations applicable to a telecommunications carrier or

⁶¹ Notice ¶ 67.

⁶² 47 U.S.C. § 160(a).

⁶³ Notice ¶ 68.

telecommunications service. Since Title II places certain requirements on the Commission, including remedial and reporting measures as well as other mandates that do not apply to a telecommunications carrier or telecommunications service, the Commission may not be able to forebear from these provisions.

For example, Section 257 does not directly regulate “a telecommunications carrier or telecommunications service.” Instead, it requires the Commission to periodically review market entry barriers and report its results to Congress. Since this is an obligation on the Commission, it would appear that forbearance from Section 257 would not meet the test laid out in Section 160. Similarly, Section 207 of the Act confers rights on individuals to recover damages for violations of Title II by filing suit in any district court. The premise of Section 160 – to provide regulatory flexibility and foster competition in local markets – and the plain language of the provision, do not support a theory suggesting that the Commission may forbear from allowing individuals to recover damages for violations of provisions that apply to a Title II carrier. Moreover, it would seem inapposite for the Commission to apply certain provisions of Title II to broadband Internet connectivity service, yet take away enforcement mechanisms that apply when a carrier violates those provisions.

B. The Commission should not forbear from provisions that would enable the Commission to promote competition and ensure the availability of affordable Internet connectivity service.

The general principle behind Section 160 is that forbearance should be considered appropriate if the Commission finds that enforcement of a specific provision is not necessary to prevent carriers from raising prices, discriminating unreasonably, or harming consumers, and if forbearance generally would serve the public interest. Forbearance decisions have been made based on an analysis of individual market factors to ensure that competition exists in the defined

market, not only at the national level as suggested in the *Notice*.⁶⁴ Indeed, the Commission recognized this point in its recent Public Notice seeking comment on the proper framework for a forbearance analysis. The Commission “recognize[d] that the state of competition may vary from area to area and from market to market. The conclusions reached by applying the market power framework set forth in the *Qwest Phoenix Forbearance Order* likewise may vary based on differing evidence regarding the state of competition.”⁶⁵

Under this framework, the Commission should not determine at this time to forbear too broadly on a geographic scope. It may be true that some of the Title II provisions may not be currently necessary, applicable, or desirable, in some or all of the thousands of geographic markets in which broadband Internet connectivity service is offered. However, the Commission should not order wholesale forbearance without fully considering the effect such a decision would have on prices, on consumers, and on the public interest generally.

For example, Section 214 requires Commission approval before, *inter alia*, a carrier acquires another carrier. The Commission should not forbear at this point and simply assume it should have no role in such transactions under this framework, especially if such a transaction would eliminate competition and result in a monopoly. Similarly, the Commission has indicated a desire to increase competition in the broadband market.⁶⁶ To do so, the Commission might refrain from forbearing from provisions in Sections 251 and 256 of the Act, so that it can consider whether forbearance from these provisions would satisfy the statutory test. In sum, the

⁶⁴ See *id.* ¶ 73.

⁶⁵ “Wireline Competition Bureau Seeks Comment On Applying The *Qwest Phoenix Forbearance Order* Analytic Framework In Similar Proceedings,” WC Docket Nos. 06-172, 07-97, *Public Notice*, DA-1115 (rel. June 22, 2010).

⁶⁶ See, e.g., National Broadband Plan at 36 (“Competition is crucial for promoting consumer welfare and spurring innovation and investment in broadband access networks. Competition provides consumers the benefits of choice, better service and lower prices.”).

Commission should refrain from forbearance for additional provisions, the application of which would better enable the Commission to promote competition and ensure the provision of service on just and reasonable terms. Whatever the outcome of its forbearance analyses ultimately may be, the Commission should take care in designing its forbearance procedures so as to comport with the principles underlying Section 160 and other provisions of the Act.

C. The Commission should not tie the validity of its classification decision to appellate review of any subsequent forbearance decision.

The Commission has recognized the litigation that may occur in response to its decision in this *Notice*, specifically if it adopts the Third Way approach. The *Notice* states:

If the Commission were to elect the option of classifying Internet connectivity as a telecommunications service but forbearing from most of Title II, then a reviewing court could in theory uphold the classification determination but vacate the accompanying forbearance in whole or in part.... We seek comment on any lawful mechanisms that (assuming adoption of the third classification option) could be utilized to address this theoretical situation, even if that means the Commission would not, in the post-litigation situation just described, ultimately maintain the classification of Internet connectivity as a telecommunications service.⁶⁷

In no event should the Commission attempt to create “mechanisms” that would tie the validity of its classification decision to the ultimate outcome of appellate review for any subsequent forbearance decision.

It would be improper and illogical to bind in some way the classification decision, which is a basic question of statutory interpretation, to the outcome of such judicial review. As these comments explain, initiating this broadband framework proceeding and undertaking clarification of the Commission’s authority over broadband Internet connectivity services is essential to the effective and rapid implementation of the Commission’s broadband policy goals, not to mention to fulfillment its universal service mandate in an evolving technological landscape and any

⁶⁷ *Notice* ¶ 99.

number of other statutory requirements. Nevertheless, while getting the results right is crucial, the decision to classify broadband Internet connectivity as a telecommunications service is not merely a results-driven exercise. The Commission should make that determination on the basis of the record to be developed in this proceeding, and the Public Interest Commenters are confident that the record will demonstrate unmistakably the solid legal foundation for this classification. To put that determination at risk of being undone by a potential, subsequent appellate decision on a different (albeit related) question would not make for sound policy or sound legal reasoning.

CONCLUSION

For the foregoing reasons, the Commission should classify broadband Internet connectivity services as telecommunications services under the Act. Such a regulatory classification best comports with the statute, falls well within the Commission's discretion, and provides a sound legal footing for accomplishment of vital policy goals set out in the Act and in the Commission's National Broadband Plan. The Commission should interpret the statute logically and consistently to reach the conclusion that broadband Internet connectivity is a telecommunications service no matter the technological platform used to offer this service. Whether offered over wired or wireless facilities, broadband Internet connectivity service remains a transmission service that the Commission can and must oversee on the basis of its Title II authority. Nevertheless, the Commission can consider forbearing from application to this service of some provisions in Title II, so long as the Commission's "third way" approach incorporates the statutes set forth in the *Notice* as well as any additional statutory provisions necessary to effectuate Commission oversight and protect broadband Internet users.

Respectfully submitted,

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