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Washington, DC 20554

In the Matter of
Framework for Broadband Internet Service

GN Docket No. 10-127

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I. INTRODUCTION AND SUMMARY

The Commission’s proposed “third way” is in reality a return to the old way of antiquated common carriage regulation that was developed in the 1800s for monopoly transportation and utility services. This approach would see the Commission abandon a regime that has led to the rapid growth of the Internet as an economic engine for our nation in favor of one in which pervasive regulation would become the inevitable norm and regulatory uncertainty would be an unavoidable outcome. As numerous independent financial analysts have observed, the result would be a profoundly negative effect on investment and innovation, jobs, and the broader economy.

The negative fallout would be even more deeply destructive if the Commission were to extend its proposal to the hypercompetitive and rapidly evolving wireless broadband Internet marketplace. Wireless carriers are just now embarking on the massive additional investments needed to upgrade their networks to fourth-generation technologies that will bring greater speeds and capabilities to consumers and further intensify competition for broadband Internet access. As the President recently stated in a memorandum to the Executive Branch, “[f]ew technological developments hold as much potential to enhance America’s economic competitiveness, create jobs, and improve the quality of our lives as wireless high-speed access to the Internet.” Yet extending the Commission’s proposal to wireless broadband Internet service would staunch investment and undercut those benefits.

Indeed, the Commission’s repeated mantra that it is merely proposing to apply to the Internet the same framework that applies to wireless and under which wireless has thrived is more than a little ironic. Wireless broadband services, as Commissioner Baker recently observed, have thrived under a Title I framework. And as to wireless telecommunications service, Congress moved the service largely out of Title II in order to deregulate it. Here, by
contrast, the Commission is proposing to do the exact opposite – to take a previously deregulated
service and apply to it intrusive Title II common carriage regulation. Moreover, the very fact
that the Commission is proposing to reverse its long-established regulatory approach with respect
to broadband Internet access wholly undercuts its assertion that consumers, industry, and
investors should take comfort from the historical deregulatory treatment of wireless service.
Indeed, given that the current Commission is proposing on any number of fronts to abandon the
hands-off approach of prior commissions with respect to wireless service itself, the assertion is
even less persuasive. As a result, the Commission’s own actions only underscore the regulatory
uncertainty inherent in moving broadband Internet access services under the rubric of Title II.

Instead of its unjustifiable proposal to return to the outdated common carriage model, the
Commission should implement a true “third way” – one that is built on the Internet’s successful
history of self-governance based on the decisions of technical standards bodies and industry best
practices, with government playing a backstop role on a case-by-case basis in the event that
industry mechanisms prove inadequate to address any issue that emerges. The Commission,
however, appears intent on maximizing its own authority in the wake of the D.C. Circuit’s
decision in Comcast, without regard to the terms of its organic statute. Its Notice of Inquiry
starts with the assumption that the Commission should have wide authority to carry out its
regulatory agenda and so sets itself the task of determining how best to manufacture the broadest
possible authority. But that has matters precisely backwards. The scope of the Commission’s
authority is properly set by Congress in the Communications Act, not by the Commission’s own
decisions as to what it wants to regulate.

In any event, the argument for the need to reclassify – or more accurately stated, to
misclassify – broadband Internet access is based on a mischaracterization of the scope of the
Comcast decision. That case merely found, based on decades of consistent Supreme Court and lower court precedent, that the Commission had failed to tie the exercise of ancillary authority in that case to any provision of the Communications Act that assigns the agency substantive responsibility. Comcast does not say, as some suggest, that the Commission lacks authority to implement its National Broadband Plan. On the contrary, unlike the situation in Comcast, the Commission has direct authority to implement both of the central pillars of its National Broadband Plan. It has direct authority to allocate commercial spectrum for licensing to provide wireless broadband services, something that the President has emphasized is critical to the future of the nation’s economy and will deliver enormous benefits to consumers. And the Commission has direct authority to address universal service for broadband, including authority to support broadband deployment in any limited areas where it has not already been deployed and would be uneconomical otherwise. The Commission likewise has specific authority under provisions of the Communications Act assigning it responsibilities for matters such as protecting consumer information, disability access, and public safety, and it has previously exercised ancillary authority to extend those protections to Internet-based services without challenge.

As a result, the Commission’s proposal to impose old-world Title II common carrier regulation on broadband Internet services can only be reasonably understood as an effort to create authority for the sweeping so-called “net neutrality” rules that it has proposed. And even as to that end, the proposed Title II classification is off target. The Commission’s proposal, as detailed by the Chairman and the General Counsel, would purport to classify the “transmission component” of broadband Internet access service as a Title II service subject to common carrier regulation. But much of the blocking or other conduct that supposedly is of concern to the Commission typically would occur – to the extent it ever took place – above the transmission
level and thus would be unaffected by the proposed Title II reclassification. For that reason, the General Counsel has explained that the Commission also would assert Title I ancillary authority to directly regulate the information service aspects of broadband Internet access service as a basis for its so-called net neutrality rules. Thus, the Commission is effectively proposing to substitute one Title I theory for another, and the intervening step of subjecting some aspects of broadband Internet access service to archaic common carrier regulations is gratuitous (and costly) regulation for regulation’s sake.

The potential ramifications of the Commission’s two-step theory are breathtaking. Its theory for applying Title II common carriage regulation to the “transmission component” of broadband Internet access would inevitably sweep under Title II a whole range of other Internet-based offerings that incorporate transmission into the service offered to customers – offerings that range from e-readers such as the Amazon’s Kindle that incorporate connectivity, to interconnected Voice over IP services such as Vonage and Skype, to content delivery network providers such as Akamai, to content and application providers such as Google and NetFlix that incorporate their own or third-party facilities to transmit content. Indeed, the Supreme Court emphasized that very fact when it rejected arguments that cable modem service should be classified as a common carrier service. And the Commission’s plan to then assert Title I ancillary authority over the information service components of broadband Internet access would sweep even more broadly and allow the Commission to regulate other content, applications, and information services delivered over the Internet. Although the Commission claims that at least some of these services lie “outside the scope of this proceeding,” that is at best a matter of regulatory grace, and the Commission itself raises the specter of broader application by asking what the rules should be for “non-facilities-based Internet service providers.” Indeed, failure to
address the logical implications of its theory and whether similarly situated providers should be subject to Title II regulation would be arbitrary and capricious.

In addition to all of these reasons why the Commission’s proposal makes no sense and would be affirmatively harmful, the Commission also has no lawful basis for imposing outdated Title II common carrier regulation on broadband Internet services. As the Commission itself has repeatedly determined, and the Supreme Court has affirmed, retail broadband Internet access offered to consumers is an integrated “information service,” not a “telecommunications service” subject to common carriage regulation under Title II. The terms “information service” and “telecommunications service” are, in the words of the Commission, “mutually exclusive,” and, consistent with the statutory definition of information services, an offering that incorporates telecommunications and information service capabilities must be treated as an “information service.” The Supreme Court in Brand X affirmed this determination. In doing so, it expressed deep skepticism about arguments that broadband Internet access could instead be said to include the offering of a telecommunications service, any more than a car dealership could be said to be offering customers engines and other car parts; this skepticism was based in part, as noted above, on the Court’s express recognition that the same arguments would sweep in other services throughout the Internet ecosystem.

Any attempt by the Commission to now reverse its prior determinations would be subject to exacting scrutiny on judicial review. Contrary to the claims of regulatory proponents, the Supreme Court’s decision in Fox does not give an agency carte blanche to change its mind. Rather, the majority and dissent alike emphasized that, when an agency’s new policy rests on factual findings that contradict its prior ones or its prior policy engendered serious reliance interests, the agency’s action is necessarily subject to searching review. Both of those factors
apply here. The Commission’s prior determinations regarding the classification of broadband Internet access were based squarely on its factual findings as to the manner in which that service is offered, and the industry has invested hundreds of billions of dollars of private capital in reliance on those determinations in not just one but four separate and consistent orders. By pulling the rug out from under broadband Internet providers now in an admitted effort solely to expand the scope of the Commission’s bureaucratic control, any order adopting the proposed reclassification at a minimum would be subject to searching judicial review. To the extent such an order sought to reinterpret the statute, the Commission also would not receive *Chevron* deference. The NOI itself admits that reclassification would be for the purpose of creating authority to carry out the Commission’s regulatory agenda, and questions of an agency’s statutory authority are reviewed de novo. And, with respect to the factual determinations that underlay its prior decisions, the Commission made a number of representations to the Supreme Court concerning the manner in which broadband Internet access is offered to consumers. The Commission is now bound by those representations, and the doctrine of judicial estoppel bars it from manufacturing new facts in its effort to create additional authority for itself.

Nothing about the facts has changed in a way that could satisfy such review and justify a such a radical reversal in course. A consumer who purchases broadband Internet access is not buying a pure transmission service but rather the ability to use the Internet. That, in turn, requires providing consumers with the capabilities to retrieve, store, utilize, process, acquire, generate, make available, and transform information. Thus, for example, consumers use their Internet access service on a near constant basis to retrieve and acquire information ranging from e-mails to stored Web content and information. Consumers also obtain the capability to make information available to others through their broadband services, such as through new cloud-
based offerings. Other examples abound. At bottom, broadband Internet access is inherently an offering designed to provide the capability to store, retrieve, and process information in various ways – without those capabilities, a consumer would be getting something unrecognizable.

Moreover, from a technical standpoint, these capabilities are seamlessly integrated into broadband networks. There is no separable “last mile” pure transmission component in today’s broadband networks.

Broadband Internet access services offered to consumers today also include even more information service capabilities as part and parcel of the offerings than they did at the time of the Commission’s initial classification decisions, ranging from DNS to e-mail to parental controls to security to various others. Each of these provides the capability to store, retrieve, and process information and thus falls within the ambit of an information service. The fact that some or all of these capabilities might also be available from third parties does not change the reality that they are integrated parts of the offering that broadband providers make to consumers, as evident from advertisements and other materials that routinely tout and explain these capabilities.

In light of these facts, the Commission cannot meet its heightened burden under Fox to justify a reversal of its prior factual findings or to thwart the reliance interest of companies that have invested billions in broadband infrastructure. Nor is there any basis to conjure a separate so-called Internet connectivity or transmission service that broadband Internet providers have not chosen to offer. Because broadband Internet access providers generally have not and would not choose to offer a transmission service on a common carrier basis, the Commission could implement its proposal only if it compelled providers to offer service on a common carriage basis. The Commission has no authority to do so. As an initial matter, nothing in the statute allows the Commission to require a service to be provided on a common carrier basis where a
provider has not chosen to offer that service to the public indiscriminately. Moreover, even in
the different context where a provider offers a separate transmission service under private
contract, the case law makes clear that, absent a voluntary undertaking, at an absolute minimum,
the Commission cannot impose a common carriage obligation absent a demonstration of market
power. No such market power exists in the broadband Internet marketplace, which is already
highly competitive and becoming more so every day.

While that is true of broadband generally, it is all the more true in the hypercompetitive
and dynamic wireless sector. As the Commission has repeatedly found, wireless services are
highly competitive, with ongoing investment and innovation that have brought tremendous
consumer benefits, from enabling the development of smart phones such as the Motorola Droid
X and the Apple iPhone to innovations such as AppStores that have exploded in popularity. In
such a competitive environment, market forces are far more effective than regulation ever could
be in ensuring that wireless broadband providers do not act in ways harmful to consumers. Thus,
regulation is unnecessary and, by increasing costs and uncertainty and decreasing flexibility to
respond to consumer demands, would be affirmatively harmful. That would be particularly true
now, just as wireless carriers are making the massive investments needed to deploy 4G
technologies that will provide far greater speeds and produce the long sought after third (fourth,
fifth, and sixth) broadband pipe into the home. It would make no sense to impose burdensome
regulations that would discourage such investment at this critical juncture in the industry’s
development. Moreover, the Commission lacks any authority to do so. That is true not only for
all the reasons set out above, but also because section 332(c)(2) of the Act affirmatively bars the
Commission from imposing common carrier regulation on wireless broadband Internet service.
In addition to the infirmities described above, the Commission’s proposal would face significant constitutional problems. By restricting providers’ own speech (or that of its partners), the proposal would impermissibly burden speech in violation of the First Amendment. Today’s broadband networks are the medium through which Internet access providers deliver speech to their customers, whether in the form of the provider’s own content and applications or that of commercial partners that they select, organize, or otherwise package for delivery. And the government can no more impose common carriage obligations on those services than it can throw open the printing presses or the pages of a newspaper to carry the content of others on a common carrier basis. Further, by requiring the compulsory dedication of private property to the use of others with no express statutory authorization and without compensation, the proposal also would run afoul of the Takings Clause in the Fifth Amendment. And, because the Commission’s theory would give it unfettered discretion to regulate broadband Internet access services – as well as numerous other parts of the Internet ecosystem – the proposal also would be contrary to the constitutional non-delegation doctrine.

Ultimately, even the Commission appears to recognize that untrammeled application of Title II regulation to broadband Internet access services would be harmful and unjustified. But its proposal to forbear from some such regulations would not alter the lack of lawful authority to apply common carrier regulation in the first place. Nor would it eliminate the uncertainty created by reclassification give that this or a subsequent Commission could reverse a choice to forbear in response to personnel changes or shifting political tides, much as it is proposing to here with reclassification. Moreover, the limited forbearance proposed by the Commission would not do what it suggests. For example, the Commission says that it will not engage in rate regulation, but that would require it to forbear from sections 201, 202, and 208, which the NOI
would exempt from forbearance. Otherwise, broadband Internet providers would be subject to complaints over the rates and other terms of their service, and therefore subject to price regulation by complaint. In fact, the Commission itself has already proposed to engage in an extreme form of rate regulation in the ongoing net neutrality proceeding, proposing to prohibit broadband Internet access providers from charging any fee for various services they might offer to content or application providers. And this is true despite pointed warnings from the Department of Justice and others that price regulation can stifle the infrastructure investment needed to expand broadband access. Further, the Commission does not propose here to make the factual findings that would ensure forbearance is upheld. For example, it should make explicit findings, which are amply supported by the facts, that the substantive requirements of Title II are not necessary because the intense and growing competition for broadband Internet access services already works to protect consumers. In addition, the Commission should take certain procedural steps, as set forth below, to give teeth to its commitment not to unforsbear and to ensure that the forbearance rug is not pulled out from under providers as the Commission is now proposing to do with respect to classification.

In any event, forbearance, no matter how structured, cannot undo the damage that reclassification would inflict, and the Commission should stop well before it has to grapple with the scope of forbearance. By the Commission’s own admission, this proceeding is at bottom an attempt to manufacture additional authority in the wake of the Comcast decision. That is apparent from the convoluted nature of its proposal – which would require the Commission to reverse a considered conclusion it has reached in at least four separate orders and affirmed by the Supreme Court in the absence of any relevant change in circumstance, to make factual determinations that contradict market realities, to raise significant constitutional problems, and
then to turn around and use its forbearance authority to undo some (but not all) of the worst consequences of what it has just done, while continuing ultimately to rely on Title I to implement its real agenda.

The Commission should not erect a baroque regulatory regime on such a quicksand foundation. Doing so would be legally untenable and cause substantial harms to the thriving Internet ecosystem that has grown so vibrantly over the past fifteen years and that the Commission rightly recognizes is so critical to the nation’s economic future. And while that is true of broadband Internet services generally, it is all the more true in the wireless context. Instead, the Commission should use this opportunity to follow a genuine “third way” built on the Internet’s successful history of self-governance, with the government playing a backstop role in the event industry mechanisms prove inadequate.

II. THE COMMISSION’S PROPOSAL WOULD CAUSE SIGNIFICANT HARM TO THE INTERNET ECOSYSTEM, IS BASED ON AN INCORRECT READING OF THE COMCAST DECISION, AND SHOULD BE REJECTED IN FAVOR OF A GENUINE “THIRD WAY” THAT RELIES ON TECHNICAL STANDARDS BODIES AND INDUSTRY BEST PRACTICES.

The Commission’s proposal is not a “third way” at all, but, in reality, a retreat to antiquated common carrier regulation that the Commission has already rejected as inappropriate for twenty-first century broadband Internet access service. Imposing that outdated regulatory structure on broadband Internet services would have disastrous consequences for investment and innovation throughout the Internet ecosystem, and that would be all the more true if the Commission were to extend its proposal to the hypercompetitive wireless sector. Nor is the Commission’s proposal needed to preserve its authority to implement the key elements of the National Broadband Plan, and arguments to the contrary by the proponents of intrusive regulation are based on a distortion of the D.C. Circuit’s Comcast decision. Rather than
attempting reclassification, the Commission should pursue a true “third way” built on industry technical advisory and standard-setting groups that can address emerging problems, develop industry best practices, and provide a forum to help resolve disputes, with the government serving only as a backstop on a case-by-case basis in the event industry mechanisms prove unable to resolve an actual issue.

A. The Proposed “Third Way” Is Really a Return to the Old Way and Would Result In Reduced Investment and Innovation, Lost Jobs, and Harm to the Economy.

Whatever it may be called, the proposed “third way” is at bottom an attempt to apply old-style common carriage regulation – designed more than a century ago for monopoly-era railroad services – to modern-day broadband Internet access services. This retreat to the past would make heavy-handed regulation the default, subject only to limited forbearance at the changeable grace of regulators based on shifting political tides. The Commission’s proposed approach would thus open the door to intrusive regulation and litigation and leave extraordinary uncertainty in its wake. The result would be reduced investment and innovation, lost jobs, and harm to the economy.

That is the considered assessment of independent analysts who have examined the likely consequences of the Commission’s reclassification proposal from the perspective of the financial markets. Their conclusions are stark. Craig Moffett at Bernstein Research describes reclassification as creating “uncertainty in spades,” with a “profoundly negative impact on capital investment.”

Bank of America/Merrill Lynch likewise observes that reclassification

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1 Craig Moffett, et al., Bernstein Research, The FCC Goes Nuclear, at 1, 2 (May 5, 2010); see also Craig Moffett, et al., Bernstein Research, Weekend Media Blast: Internet En-title-ment . . . the Nuclear Option, at 1, 3 (Apr. 16, 2010) (noting the “enormous uncertainty that would follow re-titling” and the “risk to jobs and capital investment”).
would “threaten” both “jobs and investment” across the broadband ecosystem.\(^2\) Numerous others predict that going down this path would result in a prolonged period of uncertainty and lead to less investment and fewer jobs.\(^3\) Moreover, these analysts note, the uncertainty and risks would be long term: even once any litigation concerning the Commission’s initial decision was resolved, “[r]eclassification could act as a Trojan horse for greater regulation” down the road if, for example, this or a subsequent Commission changes its mind about forbearance.\(^4\) As the Managing Director of Citigroup put it in discussing the possibility of reclassification, “[w]hen investors are looking at policy decisions they’re not just looking at what the FCC wants to accomplish today but what those policies can do over time.”\(^5\)

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\(^3\) See, e.g., Amy Schatz, *New U.S. Push to Regulate Internet*, Wall St. J., May 6, 2010 (FCC plan could lead to “wind down [of] investment in . . . broadband networks”) (citing John Hodulik, UBS); Anna-Maria Kovacs, Regulatory Sources Associates, *FCC Update: Title II Reclassification and Net Neutrality*, (May 6, 2010) (“What is inevitable is a lengthy period of uncertainty, first about the precise shape of the order, then about its fate in court, and then about the ways it will be implemented, and then about the fate of the implementation orders in court.”); Jeffrey Silva, Medley Global Advisors LLC, *FCC Poised to Reset Broadband Regulation*, (May 5, 2010) (“We believe the FCC's attempt to reclassify broadband will create a prolonged period of regulatory uncertainty . . . .”).

\(^4\) Collins Stewart, *FCC Moving Closer to Some Title II Regulations?*, at 1 (May 7, 2010); Cecilia Kang, Post Tech, *A Look at How the FCC’s Move Can Affect Stocks*, Wash. Post, May 7, 2010 (“But the risk, [Barclays Capital analyst James] Ratcliffe said, is longer term. The FCC could change its mind down the road.”), available at http://voices.washingtonpost.com/posttech/2010/05/a_look_at_how_the_fccs_move_ca.html; Schatz, *supra* n. 3 (“You could have regulators involved in every facet of providing Internet over time. How wholesale and prices are set, how networks are interconnected and requirements that they lease out portions of their network.” (quoting UBS analyst Hodulik)); Rebecca Arbogast, et al., Stifel Nicolaus, *FCC Moves Forward on Reclassification; Further Assessment of Likelihood, Impact*, at 1 (May 28, 2010) (“Key investment concerns are that reclassification opens the door to price regulation and unbundling.”).

The effects would severely harm the economy and undercut the key goals laid out in the *National Broadband Plan*. As the Commission recognized there, the growth of broadband depends on encouraging “more private innovation and investment.”⁶ Since the time the Commission confirmed that broadband services were not subject to common carriage regulation, broadband investment and deployment – and the associated economic growth and creation of jobs – has skyrocketed. In recent years, the private sector has invested more in broadband infrastructure – nearly $60 billion annually and hundreds of billions over the last ten years – than the federal government has invested in all forms of transportation.⁷ Verizon itself has invested more in capital expenditures in recent years – more than $80 billion from 2004 through 2008 – than any other company in the United States in any industry. While private investment throughout the economy dropped by 6 percent between mid-2006 and mid-2008, investment in communications equipment grew by nearly 10 percent over that same time period.⁸ The Chair of the President’s Council of Economic Advisers, Christina D. Romer, has noted the centrality of private “[n]onhousing business investment,” both to help pull the economy out of recession in the short term and to provide a stable basis for economic growth going forward.⁹

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⁸ Id.
Investment in broadband creates and preserves jobs, both directly and through the ripple effect it has on the local communities where it is offered.\textsuperscript{10} For example, one study found that “employment in both manufacturing and service industries (especially finance, education and health care) is positively related to broadband penetration.”\textsuperscript{11} It indicates that each $10 billion increase in broadband infrastructure investment produces nearly 500,000 new jobs (including over 260,000 jobs in small businesses), and that, for every one-percentage point increase in broadband penetration in a state, employment increases by 0.2 to 0.3 of a percentage point per year (or about 293,000 jobs nationally).\textsuperscript{12} A more recent study concluded that an average of 434,000 jobs were created each year from 2003 to 2009 due to broadband investment, and that expected investments in broadband deployment “will result in an average of more than a half-million U.S. jobs sustained from 2010 to 2015 relative to a world without such investments.”\textsuperscript{13} Moreover, according to another recent study, companies deploying broadband networks are


\textsuperscript{11} Crandall, \textit{et al.}, supra n. 10, at 2.

\textsuperscript{12} \textit{Id.}

likely to create almost twice as many jobs as non-network Internet companies for every incremental $1 billion in revenue.\(^\text{14}\)

The increased regulation and uncertainty resulting from reclassification would reduce the ability and incentives for network providers to take risks and make the investments leading to such economic growth and job creation. As the Department of Justice noted, regulation – and in particular price regulation – can “stifl[e] the infrastructure investments needed to expand broadband access.”\(^\text{15}\) Economic literature is replete with findings that inappropriate regulation can adversely affect consumer welfare by harming innovation and delaying the expansion of output. For example, one study concluded that delays in the introduction of voice messaging services due to line-of-business restrictions and delays in the introduction of cellular telephone service each imposed multi-billion dollar losses in consumer welfare.\(^\text{16}\) Applying Title II regulation to broadband Internet access would likewise inflict large welfare losses on consumers.


\(^{15}\) Ex Parte Submission of the United States Department of Justice, *Economic Issues in Broadband Competition; A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 28 (filed Jan. 4, 2010) (“DOJ Broadband Comments”); see also Robert J. Shapiro, “Broadband and American Jobs” (Mar. 4, 2010), available at http://ndn.org/blog/2010/03/broadband-and-american-jobs (“[T]he central element for job creation here are the investments required to ensure universal access — not only now, but also as broadband technologies continue to advance. The FCC should promote these investments in every way it can. At a minimum, the Commission should be extremely cautious about policy changes which could weaken the incentives for those investments — *i.e.*, reduce their returns — or raise the price for people to access broadband.”).

In fact, economic studies have shown that imposing so-called net neutrality rules – the apparent impetus for the Commission’s reclassification proposal – “would cost the U.S. economy at least 100,000 to 200,000 jobs per year over the next five years”\textsuperscript{17} or as many as 1.45 million jobs by 2020.\textsuperscript{18} Likewise, studies have demonstrated that the unbundling mandates of Title II alone would significantly reduce investment.\textsuperscript{19}

The negative effects on jobs and investment would be substantially greater if the Commission’s proposal were extended to wireless broadband Internet services. As the President recently stated, “[f]ew technological developments hold as much potential to enhance America’s economic competitiveness, create jobs, and improve the quality of our lives as wireless high-speed access to the Internet.”\textsuperscript{20} As Larry Summers, head of the National Economic Council, noted in a recent speech, the wireless industry directly employs 268,000 people today and another 2.4 million American jobs are directly or indirectly dependent on the U.S. wireless

\begin{itemize}
\item \textsuperscript{17} Charles M. Davidson & Bret T. Swanson, \textit{Net Neutrality, Investment \& Jobs: Assessing the Potential Impacts of the FCC’s Proposed Net Neutrality Rules on the Broadband Ecosystem} at 51 (June 2010).
\item \textsuperscript{18} Coleman Bazelon, \textit{The Employment and Economic Impacts of Network Neutrality Regulation: An Empirical Analysis}, at ii (April 23, 2010); see also Frost & Sullivan, \textit{Net Neutrality: Impact on the Consumer and Economic Growth}, at 4 (May 2010) (even under a “best case scenario in terms of the amount of GDP impact and job growth, the Stratecast model still predicts that in 2011 alone, net neutrality could impose a seven billion dollar a year overhead on the economy with a commensurate job impact of up to 70,000 jobs”).
\item \textsuperscript{19} See, e.g., Thomas W. Hazlett \& Anil Caliskan, \textit{Natural Experiments in U.S. Broadband Regulation}, 7 Review of Network Economics 460, 477 (Dec. 2008) (finding that investment incentives were highly sensitive to changes in unbundling policy, even in the short run, and that the rapid growth of DSL service following the repeal of an unbundling mandate “presents a strong case for protecting such growth dynamics in public policy”).
\item \textsuperscript{20} The White House, Memorandum for the Heads of Executive Departments and Agencies, \textit{Presidential Memorandum: Unleashing the Wireless Broadband Revolution}, at 1 (June 28, 2010).
\end{itemize}
industry.\textsuperscript{21} Since 2001, wireless carriers have made an average combined investment of more than $22.8 billion per year to upgrade their networks to facilitate advanced voice and data offerings. (Topper Decl. ¶ 64.) Carriers are making billions of dollars of additional investments today to roll out fourth generation technologies. Mr. Summers observed that as “[e]ach dollar invested in wireless deployment is estimated to result in as much as $7 to $10 higher GDP. . . . the benefits for job creation and job improvement are likely to be substantial.”\textsuperscript{22} Extending archaic common carrier regulations to wireless broadband services at this crucial time would severely undermine these benefits and strike a significant blow to the national economy.

Although the Commission has suggested that criticisms of its proposal are overblown because it is merely proposing to apply to the Internet the same framework under which wireless voice services have thrived, that comparison is misleading. As Commissioner Baker recently noted, with respect to wireless broadband the comparison is simply wrong: “mobile broadband’s great consumer success has been under a Title I framework . . . . Ironically, those that argue that the wireless framework is working so well are really supporting maintaining the current Title I approach for broadband services.”\textsuperscript{23} In the case of wireless telecommunications service, Congress made the policy decision to move the service largely \textit{out of} Title II in order to \textit{deregulate} it. In 1994, the Commission declared that the “overarching congressional goal” was “promoting opportunities for economic forces – not regulation – to shape the development of the


\textsuperscript{22} \textit{Id.}

CMRS market.”\textsuperscript{24} The Commission explained that Congress amended section 332 of the Act to implement this deregulatory goal and its “general preference in favor of reliance on market forces rather than regulation.”\textsuperscript{25} Here, by contrast, the Commission is proposing to take a deregulated service and move it under the Title II common carriage umbrella. The very fact that the Commission is proposing to reverse its long-established regulatory approach with respect to broadband Internet access eliminates the ability of any stakeholder to take comfort from the historical deregulatory treatment of wireless service. That is even more true given that the Commission is proposing on any number of fronts to abandon the hands-off approach of prior commissions with respect to wireless service itself. As Commissioner Baker noted, “We hear calls for limiting auction eligibility, spectrum caps, arbitrary spectrum leasing limitations like those adopted in the Harbinger/Sky Terra deal, exclusive handset limitations, bill shock mandates, free wireless broadband conditions, data roaming mandates, or regulation of early termination fees. These proposals do not seem light touch to me.”\textsuperscript{26}

Nor can the Commission avoid the manifest harms of its proposal by manipulating the application of Title II. As discussed below (infra Section VI), forbearance from some provisions of Title II will not remedy the harmful effects of reclassification. Moreover, in order to achieve its net neutrality goals – one of the core rationales to which the Commission itself points for its proposed approach – the Commission’s General Counsel has admitted that the Commission’s proposal “would rest on both the Commission’s direct authority under Title II and its ancillary

\textsuperscript{24} Third Report and Order, \textit{Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services}, 9 FCC Rcd 7988, 8004 ¶ 29 (1994).


\textsuperscript{26} \textit{Commissioner Baker Blog}. 

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authority arising from the newly recognized direct authority.” In other words, because much of the blocking or other conduct about which the Commission has professed concern likely would occur (if at all) above the transmission level and would be unaffected by the proposed Title II regulations, the Commission still would have to invoke Title I ancillary authority over the information service components of Internet access service in order for its proposed rules to have the intended effects. As a result, the Commission would merely have substituted one Title I theory for another, and imposing Title II common carriage regulations would amount to gratuitous regulation for regulation’s sake.

Moreover, the Commission’s proposal is sweeping in scope. As discussed in more detail below, the logical implication of its Title II theory would require that numerous other Internet-based offerings that include a transmission component, such as the Kindle, content delivery networks, and interconnected VoIP services, also be subject to common carrier regulation. The Supreme Court made this very point in rejecting arguments that cable modem services should be classified as Title II common carrier services. And any assertion of Title I ancillary authority over the information service capabilities of broadband Internet access would extend to other content, applications, and services over the Internet. Although the Commission claims these effects are “outside the scope of this proceeding,” they are well within the scope of its regulatory theory, and thus the adoption of its theory would itself create uncertainty and harm investment and innovation throughout the Internet ecosystem, even if for now the Commission chose as a matter of regulatory grace not to act on those implications in this proceeding.

B. Regulatory Proponents Misstate the Effect of the D.C. Circuit’s Comcast Decision.

Some parties have suggested that, in the wake of the Comcast decision, the Commission lacks authority to implement key elements of its broadband agenda and that it therefore must reclassify broadband Internet access as a Title II telecommunications service. But the premise of that argument is wrong.

As an initial matter, the Commission has direct statutory authority to address each of the two central pillars of its National Broadband Plan, and nothing in Comcast changed that. First, Title III of the Act gives the agency statutory authority over commercial spectrum, including the authority to allocate available spectrum for licensing to promote wireless broadband Internet service. See, e.g., 47 U.S.C. § 309. As noted above, the Administration has emphasized the critical importance of moving forward on this front, and the Commission can and should do so. Second, the Commission has direct statutory authority over universal service. It has already exercised that authority to assess taxes on Internet-based services. The only issue that the NOI identifies is the ability to subsidize broadband deployment in areas where it is otherwise not economically feasible to do so. But as to that, the Commission has the necessary authority.

Specifically, the ambiguous terms of section 254, read in combination with the express terms of section 706(b), can fairly be interpreted to give the Commission authority to provide universal service support for broadband deployment.28 Section 254(b) provides that the Commission’s universal service programs “shall” be based on certain enumerated principles, which include that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation.” 47 U.S.C. § 254(b)(2); see also id. § 254(b)(3)

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Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services . . . ”). Although other provisions of section 254 may focus on providing universal service support for telecommunications services, the Commission generally has discretion to interpret an ambiguous statute, and the D.C. Circuit itself made clear that Congress’s statutorily stated purpose in enacting an express delegation of authority in a substantive provision of the Act such as section 254 is relevant to determining the intended scope of that authority. See Comcast Corp. v. FCC, 600 F.3d 642, 654 (D.C. Cir. 2010).

The Commission’s section 254 authority to provide universal service support to broadband is reinforced by section 706(b).29 That section requires the Commission to “initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans” and, to the extent it finds such capabilities are not being deployed in a reasonable and timely fashion, directs the Commission to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment . . . .” 47 U.S.C. § 1302(b). As the National Broadband Plan concluded, while broadband has been deployed to most geographic areas of the nation and is in fact available to approximately 95% of Americans, there remain some limited areas where broadband is not yet available. Accordingly, while the Commission would be unable to support a generalized finding that broadband is not being deployed nationally, it could conclude that economic barriers are preventing deployment in certain limited areas where it is not economical. Under those circumstances, section 706(b) itself directs the Commission to take action to remove barriers to infrastructure investment. Such

29 Although, as the Comcast court noted, the Commission has previously concluded that section 706(a) does not provide it with substantive regulatory authority, it has reached no such conclusion with respect to section 706(b).
actions could include targeted universal service support for such investment, as well as Lifeline and Link Up programs if an evidentiary record demonstrated that such programs stimulate demand for supported services and thereby help promote infrastructure investment.

In addition to the fact that the Comcast decision did not speak to, much less limit, the Commission’s direct authority, it did not – as some have suggested – hold that the Commission is wholly without Title I ancillary authority in the context of broadband. In fact, the court reaffirmed that the Commission does have “ancillary authority” to take certain actions that are not expressly delegated to it in appropriate circumstances. The court simply made clear that the Commission may do so only where it satisfies the requirements established in a decades-long string of Supreme Court and D.C. Circuit precedent. First, the proposed regulation must fall within the Commission’s subject matter jurisdiction. Second, the regulation must be “ancillary” to some “statutorily mandated responsibilit[y]” expressly delegated to the Commission under a substantive provision of the Act. And, third, the Commission must compile a concrete evidentiary record demonstrating that its proposed action is necessary for the effective performance of that statutorily mandated responsibility.30

Although the court in Comcast concluded that the Commission did not comply with the governing legal standards in that case and thus vacated the particular order at issue, it did not purport to address more generally whether and how much authority the Commission has to act

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30 See Comcast, 600 F.3d at 646; see also United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968); FCC v. Midwest Video Corp., 440 U.S. 689 (1979); American Library Ass’n v. FCC, 406 F.3d 689, 700 (D.C. Cir. 2005).
on matters relating to broadband Internet access or other Internet-based services.\textsuperscript{31} In any event, the other issues relating to its Broadband Plan that the Commission identifies in its NOI are different from the issue in \textit{Comcast}. In that case, the Commission did not tie its actions to any grant of substantive authority in the Act but instead relied on general statements of purpose. By contrast, the Commission generally does have an explicit grant of substantive authority with respect to the specific issues it identifies relating to its Broadband Plan and has previously and successfully invoked its ancillary authority based on that explicit grant.

For example, the Commission has explicit statutorily mandated responsibilities to protect the privacy of customer information (sections 222 and 631) and to address disabilities access (section 255). Moreover, the Commission has previously exercised ancillary authority tied to these provisions without challenge, specifically finding that it had “authority under Title I of the Act to impose CPNI requirements on providers of interconnected VoIP service,” as well as disabilities access obligations.\textsuperscript{32} Although such ancillary authority would not give the Commission generalized authority to address privacy and disabilities issues, the same would be true of Title II classification. For example, nothing in Title II addresses closed captioning on online video content such as YouTube videos and the absence of certain capabilities embedded

\textsuperscript{31} In fact, the panel in \textit{Comcast} clarified that this was not at issue in the case. \textit{See} Oral Argument Transcript at 79 (“Your point then is not that the Commission has no authority . . . over the Internet, it’s your point . . . that any exercise of authority has to be linked to an exercise of statutory authority under the Act . . . .”) (Tatel, J.); \textit{see also id.} at 31 (“I don’t understand that to be [petitioner’s] argument that the Commission cannot regulate in this area . . . .”) (Sentelle, C.J.).

by computer and other equipment manufacturers. Likewise, Title II classification would do nothing to protect the privacy of consumer information obtained by innumerable websites and other content and application providers. Indeed, the Commission would accomplish little but to substitute itself for the FTC as the agency with authority over the privacy practices of broadband Internet access providers and result in a patchwork approach to privacy that would increase customer confusion.

While the NOI also mentions public safety and homeland security, it is not entirely clear what issues the Commission seeks to address in this area. In certain cases, the Commission again has specific statutory authority and thus the situation is different than in Comcast. For example, the Commission has specific authority to address 911 and has exercised ancillary authority (again without challenge) to extend its reach to Internet-based interconnected VoIP services. The Commission also has direct authority in other specific contexts, such as CALEA, 47 U.S.C. § 1001 et al., and allocation of spectrum for public safety use, id. § 337(b)(1). But no provision in Title II addresses cybersecurity, so classifying broadband Internet access as a Title II service would do nothing to enhance any authority the Commission may have in this area.

Given all this, the Commission’s proposal to impose Title II common carrier regulation on broadband Internet services can only be reasonably understood to be an effort to expand its authority to promulgate “net neutrality” rules and other regulations on broadband Internet access and other Internet-based services. But even here, Comcast did not hold the Commission was wholly without authority, but rather that the Commission in the order on review had not tied its action to any substantive statutory grant of authority or properly preserved such a theory on

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appeal. In any event, as noted above, Title II classification would not provide a basis for the Commission’s sweeping proposed net neutrality rules and, as the Commission has acknowledged, it would still need to invoke Title I ancillary authority to address its professed concerns in this area. As set forth in detail in Verizon’s comments in the net neutrality proceeding, however, whatever more targeted ancillary authority the Commission may have, it does not have ancillary authority to impose sweeping net neutrality rules of the sort proposed in that proceeding.34

In any case, whether as to net neutrality or any other goal articulated in the Broadband Plan, to the extent the Commission lacks authority it thinks it needs, the proper avenue is to seek additional authority from Congress, which is already actively considering these very issues. Indeed, a broad bipartisan cross-section of Congress – including a majority of the House of Representatives – has expressed opposition to the Commission’s reclassification proposal and urged it to wait for Congress to act. Any attempt by the Commission to instead reverse-engineer the facts underlying the proper statutory classification of broadband in order to create statutory authority for itself would be unlawful and unsupportable for numerous reasons described below.

C. The Commission Should Instead Rely on a True “Third Way” Built on the Successful Model of Self-Governance by the Internet Community and Minimal Governmental Involvement.

The Internet has historically been governed largely through the efforts of the Internet community in the form of technical standards bodies (e.g., the Internet Engineering Task Force) and other self-regulatory measures such as the development of industry best practices. As

Verizon and Google jointly explained in the net neutrality proceeding, “[t]he success of the public Internet has been the direct result of the existing system of self-governance, with collaboration and engagement by parties throughout all parts of the Internet ecosystem and minimal governmental involvement.”35

That should continue to be the predominant model going forward. Indeed, just last month, a broad cross-section of the industry (on all sides of broadband policy debates), including Verizon, Google, Cisco, Microsoft, Level 3, Intel, AT&T, and Comcast, announced the formation of the Broadband Internet Technical Advisory Group “to bring together engineers and other similar technical experts to develop consensus on broadband network management practices or other related technical issues that can affect users’ Internet experience, including the impact to and from applications, content and devices that utilize the Internet.”36 Such technical and industry groups can address problems that do arise, develop industry best practices, and provide a forum to help resolve disputes, much as the Better Business Bureau oversees an alternative dispute resolution mechanism for resolving disputes among competitors concerning their advertising.

By relying on such groups, governmental involvement can and should be kept to a minimum, limited to addressing demonstrated harm to competition or to consumers based on the specific facts involved in a particular incident where industry mechanisms are unable to resolve the conduct at issue. Existing laws already provide much of that backstop. Federal and state consumer protection, advertising, tort, and contract laws, including those administered by the

Federal Trade Commission, already guard against fraud, deception, and similar practices. Thus, for example, reclassification is not needed to prohibit a broadband access provider from affirmatively misleading consumers through a false statement about a material term related to its service. Ironically, reclassifying broadband Internet access services as Title II common carriage services would undercut this existing backstop by effectively eliminating the FTC’s authority to act in this arena due to the common carrier exemption in its organic statute.

Likewise, antitrust laws are available to deal with anticompetitive practices in which a broadband Internet access provider might engage. For example, antitrust laws are expressly designed to deal with concerns about a vertically integrated firm leveraging market power over one service (e.g., broadband Internet access) to harm a competitor in a second (e.g., content). These laws have well-established means for undertaking the rigorous economic analysis needed to assess whether allegations of such behavior in a particular instance amount to anticompetitive behavior that should be restricted or are simply manifestations of efficient competition. Similarly, the impact of discrimination on competition is a common focus of antitrust analysis by economists and courts, and antitrust enforcement thus provides a mechanism for addressing potential competitive concerns.

III. THE RECLASSIFICATION OF BROADBAND INTERNET ACCESS SERVICES AS “TELECOMMUNICATIONS SERVICES” FACES INSURMOUNTABLE LEGAL AND FACTUAL OBSTACLES.

The Commission’s proposed reclassification of broadband Internet access services would not survive judicial review. As an initial matter, contrary to the claims of regulatory proponents that the Commission has generally free reign to change course, its proposal would face exacting scrutiny. Indeed, because the ultimate issue in this proceeding is the extent of the Commission’s statutory authority over the Internet, any order adopting its proposal would not receive Chevron deference. The resulting scrutiny would demonstrate both that the Commission has no basis to
change its interpretation of the Act, as affirmed by the Supreme Court, and that the factual predicates for the Commission’s repeated determinations that broadband Internet access does not involve the provision of a separate pure transmission service are even stronger today. Nor does the Commission have the authority to compel providers to offer such a separate service on a common carrier basis.

A. Any Attempt by the Commission To Reverse Course Would Face Stringent Judicial Review and Substantial Procedural Hurdles.

Although some proponents of reclassification claim that the Commission could easily reverse its prior determinations regarding the proper statutory classification of broadband Internet access services because an agency is always free to change its mind, such a reversal in reality would face exacting scrutiny by a reviewing court and, in any event, is barred by the doctrine of judicial estoppel.


The Supreme Court’s decision in FCC v. Fox Television Stations, Inc. stands as a considerable legal obstacle in the path of the proposed reclassification. In Fox, the Supreme Court recognized that when an agency changes course, it must provide a “more detailed justification [for the change] than what would suffice for a new policy created on a blank slate” if—as would be true in this case—its “new policy rests upon factual findings that contradict those which underlay its prior policy” or its “prior policy has engendered serious reliance interests that must be taken into account.” Indeed, the Commission itself concedes in the NOI, at least as to reversals of course on forbearance, that “a more detailed justification” would be

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38 Id. at 1811 (majority opinion).
required in these circumstances. Surviving the exacting scrutiny required by Fox would prove to be an impossible climb for the Commission.

The Supreme Court in Fox affirmed a change in the Commission’s enforcement policy as to certain indecent speech, based on the Commission’s new view of the harm to the public from “fleeting expletives.” In so holding, the Court explained that when an agency changes its interpretation of governing law or changes an administrative rule grounded exclusively on policy or legal considerations, it must “display awareness that it is changing position” and “show that there are good reasons for the new policy.” The Court identified two circumstances (agreed to by both the majority and the dissent) in which an agency is required to “provide a more detailed justification.” This heightened burden is triggered where an agency’s “new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.” As the Court explained, “[i]t would be arbitrary or capricious to ignore such matters” because “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”

Both the concurrence and dissent agreed that more is required when an agency’s policy change is grounded in changed factual circumstances and reliance interests are at stake. As

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40 Fox, 129 S. Ct. at 1809 (majority opinion)
41 Id. at 1811 (emphasis in original).
42 Id.
43 Id.
44 Id.
45 Id.
Justice Kennedy, who provided the decisive fifth vote for the Court’s majority, explained, “an agency’s decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.”

Moreover, Justice Kennedy explained that an agency reversing course must act based on “neutral and rational principles” that provide an objective basis for a reversal in position, and, where the prior position was based upon the agency’s view of the law, it must act “in accord with the agency’s proper understanding of its authority.”

The four dissenting Justices would have required a greater explanation in all cases of agency reversal. But, regardless, Justice Breyer, writing for the dissent, emphasized that an especially high burden is appropriate where the agency rested its prior position either on “particular factual findings” or “its view of the governing law.” In these circumstances, the dissent also would require “a more complete explanation than would prove satisfactory were change itself not at issue.”

The Commission will undoubtedly trigger the heightened burden of Fox if it proceeds with reclassification. First, the heightened burden will apply because the Commission has suggested that its reclassification decision will be grounded in a revised view of the facts. Indeed, the Supreme Court recognized in Brand X that “whether the products here are functionally integrated (like the components of a car) or functionally separate (like pets and

46 Id. at 1824 (Kennedy, J., concurring); see also id. at 1823-24.

47 Id. at 1823 (“If an agency takes action not based on neutral and rational principles, the APA grants federal courts power to set aside the agency’s action as ‘arbitrary’ or ‘capricious.’” (quoting 5 U.S.C. § 706(2)(A))).

48 Id. at 1831 (Breyer, J., dissenting).
leashes) . . . turns not on the language of the Act, but on the factual particulars of how Internet
technology works and how it is provided.”49 Although the Commission’s successful defense of
its classification of broadband Internet service before the Supreme Court in *Brand X* hinged on
the factual predicate that broadband is a single integrated offering without a separate
transmission component, the Commission appears poised to now claim that precisely the
opposite is true.50 Because the reclassification decision will “rest[] upon factual findings that
contradict those which underlay its prior policy,” the Commission must provide “a more detailed
justification” for its reversal than normally would be required.51 Specifically, the Commission
must provide a “reasoned explanation . . . for disregarding facts and circumstances that underlay
or were engendered by the prior policy.”52 If the Commission concludes that the facts have
indeed changed since the *Cable Modem Order*, *Fox* requires that compelling evidence be offered
to actually prove it by way of “discoveries in science,” “advances in technology,” or “a
substantial body of data and experience.”53 But the only “experience” that the NOI offers up as
relevant to the need to reclassify here is the agency’s loss in *Comcast*, not any technological or
other discoveries that caused it actually to question the factual propriety of the present
classification.

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50 *See infra* Part III.A.3.
51 *Fox*, 129 S. Ct. at 1811 (majority opinion).
52 *Id.*
53 *See id.* at 1822-23 (Kennedy, J., concurring) (requiring “a more-reasoned explanation”
where “the reasons for a longstanding policy have been altered by discoveries in science,
advances in technology, or by any of the other forces at work in a dynamic society” and “the
agency may have a substantial body of data and experience that can shape and inform the new
rule”); *id.* at 1839 (Breyer, J., dissenting) (“But its failure to discuss this or any other such
evidence, while providing no empirical evidence at all that favors its position, must weaken the
logical force of its conclusion.”).
Second, Fox’s heightened burden will apply because the Commission’s prior policy, reflected in the Cable Modem Order, “has engendered serious reliance interests that must be taken into account.”54 Indeed, as explained above, Verizon and other providers have invested hundreds of billions of dollars in infrastructure, including deploying next-generation fiber networks, with the expectation that broadband Internet services would remain free from burdensome Title II regulation. These expectations were based on a series of four separate decisions over the course of several years in which the Commission repeatedly reaffirmed that broadband Internet access service is an information service not subject to Title II common carrier obligations – decisions that were affirmed by the courts where they were challenged. As discussed above, numerous studies demonstrate that removal of intrusive regulatory obligations results in increased infrastructure investment. Fox requires the Commission to take the investment-backed reliance interests of these providers into account before dramatically upsetting the entire industry’s expectations, and will subject any decision that does so to more searching review.

The Commission would not be able to satisfy this heightened burden because its shifting positions will cast a shadow over its explanation for “disregarding facts and circumstances that underlay” the Cable Modem Order.55 It would be particularly challenging for the Commission to meet the standard set by Justice Kennedy’s concurrence as it would be difficult for a reviewing court to conclude that reclassification is either grounded in “neutral principles” or “in accord with the agency’s proper understanding of its authority.”56 As noted above, the Commission’s

54 Id. at 1811 (majority opinion); see also id. at 1823 (Kennedy, J., concurring) (“Reliance interests in the prior policy may also have weight in the analysis.”).
55 Id. at 1811 (majority opinion).
56 Id. at 1823 (Kennedy, J., concurring).
motive for reclassification appears to be a strategic maneuver designed to create regulatory authority over broadband in response to its defeat in Comcast. A reversal of position regarding the integrated nature of broadband service designed to escape the effects of an adverse legal decision can hardly be described as decisionmaking based on “neutral principles.” Nor would such a decision be “in accord with a proper understanding of [the agency’s] authority” because it would constitute an inappropriate attempt to expand that authority.

Accordingly, the historical backdrop against which the Commission proposes to reclassify broadband Internet access service—and indeed the NOI’s express description of its purpose—would create substantial doubt under Fox’s heightened burden about the legitimacy of any explanation for disregarding the facts underlying its several previous orders. It would be remarkably convenient for the Commission to suddenly find, in the wake of Comcast, that the operative factual findings in not just one but four separate prior orders are no longer true. And a reviewing court would rightly be skeptical of the Commission’s explanation as to how the facts of broadband Internet service have changed to such an extent as to justify reclassification.


In promoting its proposal, the Commission has relied heavily on the assumption that the reclassification of broadband Internet access services would be subject to a deferential standard of review under Chevron and thus upheld as a reasonable construction of the definition of

\[\textit{Id.}\]

\[\textit{Id.}\]
“telecommunications service.”

But the Commission is mistaken in reading Brand X to say that Chevron deference would apply to its reclassification of broadband Internet access service because “[t]he agency’s self-serving invocation of Chevron leaves out a crucial threshold consideration, i.e., whether the agency [would be] act[ing] pursuant to delegated authority.”

In Chevron, the Supreme Court held “that ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.” In United States v. Mead Corporation, however, the Supreme Court narrowed the circumstances in which Chevron deference applies, holding that “administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” As the Court later clarified, “Chevron deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.”

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59 See, e.g., NOI ¶ 18; see also Schlick Statement at 6 (describing Brand X as “unequivocally reaffirm[ing] the principle that courts must defer to the implementing agency’s reasonable interpretation of an ambiguous statute”); id. at 7 (characterizing Brand X as “afford[ing] the Commission great flexibility to adjust its approach going forward” because “classification of cable modem service is a call for the FCC to make”).

60 Am. Library Ass’n v. FCC, 406 F.3d 689, 699 (D.C. Cir. 2005).


63 Id. at 226-27.

Following *Mead*, the D.C. Circuit has held that agencies are not entitled to deference when the issue presented is their statutory authority. In *AT&T Corp. v. FCC*, for example, the D.C. Circuit explained that *Chevron* deference is warranted “only when ‘Congress has left a gap for the agency to fill pursuant to an express or implied delegation of authority to the agency.’”65 Thus, “a crucial threshold consideration” in determining the applicability of *Chevron* deference is “whether the agency acted pursuant to delegated authority.”66

Under the *Mead* line of cases, therefore, no *Chevron* deference would be due the Commission with respect to its reclassification decision because, unlike in *Brand X*, this proceeding concerns the extent of the Commission’s statutory authority over broadband Internet

65  323 F.3d 1081, 1086 (D.C. Cir. 2003) (internal quotation marks omitted) (quoting *Railway Labor Executives Ass’n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc)).

66  *Am. Library Ass’n*, 406 F.3d at 699; see also *MPAA v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (“The agency’s interpretation of [a] statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the area at issue. . . . *Mead* reinforces *Chevron*’s command that deference to an agency’s interpretation of a statute is due only when the agency acts pursuant to ‘delegated authority.’” (emphasis in original)); see also *Comcast Corp. v. FCC*, 600 F.3d 642, 645-47, 651-60 (D.C. Cir. 2010) (setting forth legal framework for analyzing statutory authority question without applying any deference to the Commission’s interpretation of its ancillary authority). *Brand X* itself shows that no deference is due where statutory authority is at issue. Although the Court applied the *Chevron* framework in that case, it did so only after finding that the Commission had procedural authority to issue the *Cable Modem Order* and further observing that substantive statutory authority was not contested. The Court expressly observed that “no one questions that the order is within the Commission’s jurisdiction,” *Brand X*, 545 U.S. at 981 (citing *Mead* and related cases). “*Hence,*” the Court concluded, “we apply the *Chevron* framework to the Commission’s interpretation of the Communications Act.” Id. (emphasis added).
access service. Indeed, the admitted purpose of the Commission’s proposed reclassification is to manufacture legal authority in order to pursue its desired regulatory agenda.67

Thus, the Commission would have to show that it possessed delegated authority over the Internet in the first place, not just that its construction of the ambiguous “telecommunications service” definition was reasonable. But it is simply not plausible that Congress delegated to the Commission the authority to regulate something as important to the national economy as the Internet merely through supposed statutory ambiguity in the definition of a “telecommunications service” and in particular the meaning of the term “offer.”68 In deciding whether Congress has granted authority over the Internet to the Commission, courts are “guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”69 Congress “does not alter the

67 See, e.g., NOI at ¶ 1 (stating that purpose of proceeding is “to consider the adequacy of the current legal framework” for FCC regulation of broadband and expressing concern over Comcast’s effect on “the Commission’s ability under the current framework” to regulate such service); id. ¶ 8 (noting questions “about the legal framework that will best enable [the Commission] to carry out, with respect to broadband Internet service, the purposes for which Congress created the agency”); id. ¶ 28 (seeking comment “[i]n light of [these] legislative and judicial developments” on the question “whether our existing legal framework adequately supports the Commission’s . . . stated policy goals for broadband” and, in particular, “whether the current information service classification of broadband Internet service can still support effective performance of the Commission’s core responsibilities”).

68 See ABA v. FTC, 430 F.3d 457, 469 (D.C. Cir. 2005) (“‘Mere ambiguity in a statute is not evidence of congressional delegation of authority.’”) (quoting Michigan v. EPA, 268 F.3d 1075, 1082 (D.C. Cir. 2001)).

69 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000); see also ACLU v. FCC, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (“When an agency’s assertion of power into new arenas is under attack, ... courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue.”).
fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, ‘hide elephants in mouseholes.’”

Once outside the framework of *Chevron*, as here, an agency’s “interpretation is ‘entitled to respect’ only to the extent it has the ‘power to persuade’” under *Skidmore*. And the Commission’s statutory construction arguments would lack any “power to persuade” in light of the procedural history of the Commission’s proposal here and its self-avowed purpose of pursuing reclassification as a means to the end of unilaterally generating statutory authority. Reviewing courts will not defer to an administrative interpretation when, as the NOI proposes, an agency manipulates the statutory text as a self-serving litigation tactic or to advance its own agenda.

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70 *Gonzales*, 546 U.S. at 267 (quoting *Whitman v. American Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001)); *Comcast*, Transcript of Oral Argument at 12 (“In looking this over, I found a good many instances in which Congress has instructed the FCC to study the Internet, and taxation of transit sales transactions on the Internet . . . . But what I don’t find is any Congressional directive to the FCC to regulate the Internet.” (Randolph, J.)); *id.* at 33 (“All questions of government are questions of ends and means, right? The problem that you have is all that Congress has spoken about here is the end. . . . But the real difficulty in legislation . . . deals with the means. . . . None of that has been done here by Congress, right?”) (Randolph, J.); *id.* at 67 (“The Commission seems to be intent upon acting upon implicits . . . . You don’t have very much explicit to go on here.”) (Sentelle, C.J.).

71 *Id.* at 256 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). In fact, it is possible that the Commission’s decision would not even be entitled to the lesser *Skidmore* deference because of its stark inconsistency with the agency’s previous classification decisions affirming that broadband is an “information service” based on factual circumstances that the Commission proposes to repudiate in this proceeding. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987).

72 *See Children’s Habilitation Ctr., Inc. v. NLRB*, 887 F.2d 130, 132 (7th Cir. 1989) (“More important than verbal niceties in the standard of review is judicial impatience with the Board’s well-attested manipulativeness in the interpretation of the statutory test for ‘supervisor.’”).

In any event, the Commission would be estopped from opportunistically changing the facts related to broadband Internet access service simply because its interests have now changed. The Commission’s prior decision classifying broadband Internet service as an “information service” in the \textit{Cable Modem Order} was based on the factual determination that broadband was an integrated offering without a separate transmission component.\footnote{Declaratory Ruling and Notice of Proposed Rulemaking, \textit{Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities}, 17 FCC Rcd 4798, ¶¶ 38-39 (2002) (“\textit{Cable Modem Order}”); see also NOI ¶ 17.} Not only did the Commission reach this factual conclusion in the \textit{Cable Modem Order} and in at least three subsequent orders, but agency counsel also made this same factual representation to the Supreme Court in \textit{Brand X}. The Commission is barred from now disclaiming these representations by the doctrine of judicial estoppel.

“Courts may invoke judicial estoppel ‘[w]here a party assumes a certain position in a legal proceeding, . . . succeeds in maintaining that position, . . . [and then,] simply because his interests have changed, assume[s] a contrary position.’”\footnote{Comcast Corp., 600 F.3d at 647 (quoting \textit{New Hampshire v. Maine}, 532 U.S. 742, 749 (2001)).} In particular, playing “‘fast and loose with the courts’” by “found[ing] successive claims on inconsistent facts” is “an evil the courts should not tolerate” because “self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.”\footnote{Scarano v. Central R. Co., 203 F.2d 510, 513 (3d Cir. 1953).} The Commission is not immune from the doctrine of judicial estoppel. In fact, courts have applied judicial estoppel to bar the
Commission from conveniently disavowing a position it previously asserted in the Supreme Court for the sake of a subsequent litigation advantage.76

The requirements for judicial estoppel likewise would be satisfied here if the Commission found, “because [its] interests have changed,”77 that the facts that it represented to the Supreme Court in Brand X are now otherwise.78 The Commission successfully defended its classification of broadband Internet service as an “information service” before the Supreme Court in Brand X by correctly explaining, as a factual matter, that broadband is a single integrated offering without a separate transmission component. Rebutting the contention that “most of what the end user purchases and values is raw, unadulterated transmission,”79 the Commission expressly represented that “the fact is that the Internet access obtained by end users is integrally tied to information-processing functionality.”80 “Cable modem service subscribers,” the Commission asserted, “do not typically obtain or use pure transmission capacity, divorced from all information-processing features.”81 According to the Commission, “subscribers pay a single price for all the capabilities of the service,” and “the transmission component serves no function other than to enable the subscriber to utilize Internet access.”82

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76 See, e.g., Iowa Utils. Bd. v. FCC, 219 F.3d 744, 756 (8th Cir. 2000) (concluding that the Commission was “estopped from trying to now revive the proxy prices” because it “represented to the Supreme Court that it was not establishing rates and depriving the state commissions of their role in implementing the Act”), aff’d in part, rev’d in part on other grounds sub nom., Verizon Commcn’s, Inc. v. FCC, 535 U.S. 467 (2002).
77 Comcast, 600 F.3d at 647 (quoting New Hampshire, 532 U.S. at 749).
78 Brand X, 545 U.S. at 990-91.
80 Id. at 6.
81 Id. at 5.
82 Id. at 16 (internal quotation marks and alterations omitted).
Now that its interests have changed, the Commission has proposed finding precisely the opposite in order to accomplish its stated desire of generating statutory authority over broadband Internet access service. That is, the Commission’s proposed reassessment of broadband service in this proceeding would result in the identification of “a separate transmission component within broadband Internet access service.” The factual findings necessary to reach this conclusion would be flatly inconsistent with the factual assertions that Commission counsel made to the Supreme Court in Brand X.

Given the reliance of providers in investing billions of dollars in their broadband networks, the equities counsel in favor of precluding the Commission from disavowing its prior factual representations to the Supreme Court in order to pursue its present quest for statutory authority. In sum, the Commission is estopped from playing “fast and loose” with the facts it asserted in Brand X regarding the existence of a separate telecommunications service component “simply because its interests have changed.”

B. Reclassification Would Be Contrary To the Act and Repeated Commission Precedents As Affirmed by the Supreme Court.

As we have explained, the Commission has previously concluded multiple times as a matter of statutory interpretation that retail broadband Internet access service offered to consumers is a unitary information service under the terms of the statute." The Commission’s construction of the statute, affirmed by the Supreme Court in Brand X, was correct, and it would

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83 Schlick Statement at 7.

have no basis to re-interpret the statute and conclude that broadband Internet access service is (or contains) a Title II telecommunications service.

The Act defines a “telecommunications service” as “the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used,” and “telecommunications” in turn is defined as “the transmission . . . of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. §§ 153(43), (46) (emphasis added). In contrast, an “information service” is the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” Id. § 153(20) (emphasis added).

The Commission has consistently treated these definitions as creating two “mutually exclusive” categories of services.85 As it explained in the Cable Modem Order, “the Act’s ‘information service’ and ‘telecommunications service’ definitions establish mutually exclusive categories of service: ‘when an entity offers transmission incorporating the ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,’ . . . it offers an ‘information service’ even though it uses telecommunications to do so.’”86 Indeed, that conclusion is compelled by the language of the statute – by definition, a telecommunications service involves “transmission . . . without change in the form or content of the information as sent and received,” and thus a service that provides the capability to transform, process, or otherwise manipulate information cannot be a telecommunications service.

85 See, e.g. Report to Congress, Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501, 11508 ¶ 13 (1998) (“Universal Service Report”) (“Congress intended the categories of ‘telecommunications service’ and ‘information service’ to be mutually exclusive.”); id. at 11520, 11522-23 ¶¶ 39, 43 (“The language and legislative history of both the House and Senate bills indicate that the drafters of each bill regarded telecommunications services and information services as mutually exclusive categories.”).

86 Cable Modem Order, 17 FCC Rcd at 4823-24 ¶ 41.
As the Commission has also explained, including in its briefs to the Supreme Court in *Brand X*, the language of the statute and the mutual exclusivity of telecommunications service and information services also means that a “hybrid” or “mixed” service that integrates both transmission and the capability to change the form or content of information must be an information service, while a telecommunications service is “better characterized as ‘pure transmission.’” 87 Indeed, as the Commission elaborated, because the definition of information services “expressly contemplates a ‘telecommunications component,’ whereas the definition of ‘telecommunications service’ does not similarly contemplate an information service component,” classifying a hybrid or mixed service as an information service is a “regulatory necessity.” 88 Such an interpretation is also necessary to ensure that “information service providers are not subject to regulation as common carriers merely because they provide their services ‘via telecommunications.’” 89 Indeed, any other result would run headlong into the Act’s admonition that the Commission can impose common carriage regulation on a provider “only to the extent that it is engaged in providing telecommunications services.” 47 U.S.C. § 153(44) (emphasis added). By its plain language, this provision bars the Commission from imposing common

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87 Opening Brief for the Federal Petitioners at 29-30, *NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (No. 04-277) (“FCC *Brand X* Opening Br.”); FCC *Brand X* Reply Br. at 7 (“because ‘telecommunications’ is exclusively defined as “transmission *** without change in the form or content of the information,” it “is limited to a ‘pure transmission path’”); see also Final Decision, *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 419-420 ¶¶ 93, 95, 96 (1980) (*Computer II*) (“basic” service is “pure transmission capability”).

88 FCC *Brand X* Opening Br. at 45-46.

carriage regulation with respect to any information service, even if that service has a telecommunications component.90

Thus, the Commission has consistently and rightly determined that, as a matter of statutory interpretation, only an offering limited to pure transmission can be considered a telecommunications service and that a “mixed service” must be classified solely as an information service. The Commission further concluded in the Cable Modem Order that, because the definitions of “telecommunications service” and “information service” focus on the “offering” being made to users, the classification of broadband Internet access “turn[s] on the nature of the functions that the end user is offered” from the user’s point of view.91 In other words, if all that a user is getting is pure transmission, the service is properly characterized as a telecommunications service. If, on the other hand, the offering includes more than transmission and incorporates some integrated capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information, it is an information service.

The Supreme Court affirmed the Commission’s statutory interpretation in Brand X. See 545 U.S. at 986-1003. The Court concluded that the Commission’s interpretation was consistent with both the Act and longstanding Commission precedent. See, e.g., id. at 989 (FCC interpretation “follows not only from the ordinary meaning of the word ‘offering,’ but also from the regulatory history of the Communications Act”). Conversely, the Court expressed deep skepticism about arguments akin to what the Commission proposes in the NOI that cable modem service could be deemed to include a common carrier telecommunications service. As the

90 As Verizon previously explained, this provision also would prohibit the Commission from using its ancillary authority to impose common carriage obligations on information services. See Verizon Net Neutrality Comments at 93-95; FCC v. Midwest Video Corp., 440 U.S. 689 (1979).

91 17 FCC Rcd at 4822-23 ¶ 38.
Supreme Court explained, “[i]t would, in fact, be odd to describe a car dealership as ‘offering’ consumers the car’s components in addition to the car itself,” and the same would be true of a reading of the Act under which cable modem providers “offer” the discrete transmission components of the “integrated finished” broadband Internet access service offered to consumers Brand X, 545 U.S. at 990; see also id. at 989, 990 (Commission’s interpretation of “offer” best reflected “common” and “ordinary” usage).

The Court further expressed doubt that the 1996 Act “worked th[e] abrupt shift in Commission policy” that would result from an interpretation under which every entity that uses telecommunications inputs to provide an information service would be deemed to offer a separate telecommunications service and which would “entail[] mandatory common-carrier regulation of entities that the Commission never classified as ‘offerors’ of basic transmission services.” Id. at 994-95. As the Court recognized, the ramifications of such an “abrupt shift” would be breathtakingly broad, as it “would subject to mandatory common-carrier regulation all information-service providers that use telecommunications as an input to provide information service to the public.”92 Id. at 994 (emphasis added). Indeed, the majority pointedly noted that the dissent did not “deny that its position logically would require applying presumptively mandatory Title II regulation to all [information service providers].” Id. at 995 n.2. As explained below, the Commission’s theory would do just that, bringing within Title II entities ranging from Internet backbone providers, to VoIP services such as Vonage and Skype, to content delivery networks such as Akamai, to application providers such as Google that integrate

92 See also Universal Service Report, 13 FCC Rcd at 11529 ¶ 57 (explaining that if the Commission “interpreted the statute as breaking down the distinction between information services and telecommunications services, so that some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category.”).
their own transmission into their services, and even device providers, such as the Kindle or other
book readers that integrate transmission into the service sold to consumers.

Following the Court’s ruling in *Brand X*, the Commission issued three other orders
reaching the same conclusions about the proper interpretation of the Act as applied to broadband
Internet access services. In each case, the Commission determined that the key question under
the statute was whether the service at issue provided pure transmission or “inextricably combines
the transmission of data with computer processing, information provision, and computer
interactivity.” And in each case the Commission concluded that the transmission and
information service capabilities were integral parts of a single offering.

The Commission has no basis to reverse its interpretation of the Act. And under that
interpretation, broadband Internet access can be a telecommunications service only if it is offered
as a stand-alone, pure transmission service. The Commission has repeatedly found to the
contrary – that instead, broadband Internet access service offerings inherently incorporate
functionally integrated information service capabilities. As discussed below, that remains true
today and accordingly, under the Act, broadband Internet access services must be classified as
information services.

**C. The Commission Lacks Any Factual Basis To Reverse Its Repeated Determinations That Broadband Internet Access Is an Integrated Information Service.**

The Commission’s prior decisions concluding that broadband Internet access service is
an information service rested on certain specific factual findings about the offering made to

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consumers. Not only do the Commission’s prior factual findings remain valid, but today’s broadband Internet access offerings in even more respects incorporate integrated capabilities to retrieve, store, utilize, process, acquire, generate, make available, and transform information. Thus, the Commission could not provide the detailed evidentiary basis required by Fox to contradict its prior factual findings.

1. As a Factual Matter, Broadband Internet Access Offerings Are Integrated Information Services.

In classifying cable modem service as an information service, the Commission found as a factual matter that broadband Internet access service inherently involves capabilities such as information processing, interaction with stored data, and other functions that are the hallmarks of information services. As the Commission concluded, “cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications.” As noted above, the Commission reiterated and explained its conclusion in its briefs to the Supreme Court, where it noted “the fact is that the Internet access obtained by end users is integrally tied to information-processing functionality,” and “the transmission component serves no function other than to enable the subscriber to utilize Internet access.”

In its Brand X decision affirming the Commission, the Supreme Court likewise explained that cable modem service is an information service because it provides consumers with a comprehensive capability for manipulating information using the Internet via high-speed telecommunications. That service enables users, for example, to browse the World Wide Web, to transfer files from file archives available on the Internet via the ‘File Transfer Protocol,’ and to access e-mail and Usenet newsgroups.

95 Cable Modem Order, 17 FCC Rcd. at 4822 ¶ 38.
96 FCC Brand X Reply Br. at 6, 16 (internal quotation marks and alterations omitted).
In other words, subscribers can reach third-party Web sites via “the World Wide Web, and browse their contents, only because their service provider offers the ‘capability for … acquiring, [storing] … retrieving [and] utilizing … information.’” “The service that Internet access providers offer to members of the public is Internet access,” not a transparent ability (from the end user’s perspective) to transmit information.”

This fundamental conclusion remains true today: wireline and wireless broadband Internet access offerings do not include only pure transport services, but rather the entire purpose for the offering is to provide consumers with the capability (to use the statutory term) to access, interact with, store, and send information over the Internet. That in turn involves providing capabilities to retrieve, store, utilize, process, acquire, generate, make available, and transform information. Thus, broadband Internet access at its core is inherently an information service.

For example, the fundamental function of broadband Internet access service is to provide consumers with the capability to store, retrieve, acquire, and utilize information. In a number of cases, such information may be stored by the broadband Internet access provider itself – such as e-mails, information the user has saved in his/her personal web storage, content provided by the broadband provider or its partners (e.g., portal pages), and cached Web content and information. Consumers also use their broadband Internet access service to store information of their own creation, including emails, documents, photos, and other information and materials that they maintain in personal

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98 As the Commission described in its brief to the Supreme Court, “by ‘clicking through’ to another ISP’s website, a subscriber is necessarily utilizing the cable provider’s services to ‘interact[] with stored data *** maintained on the facilities of’ the other ISP (namely, the contents of the requested web pages, e-mail boxes, etc.) and is thereby utilizing the cable operator’s ‘capability for *** acquiring, *** retrieving [and] utilizing *** information.’” FCC Brand X Reply Br. at 5 (quoting Universal Service Report, 13 F.C.C.R. at 11830 ¶ 76).
web storage space that Verizon and other providers offer to customers. (Id.) Broadband Internet access service also offers consumers the capability to make information available to others. For example, new cloud-based offerings such as collaboration software enable consumers to make information available to other users through their broadband service, as well as to retrieve and acquire information from other users. (Id. ¶ 7.) In addition, consumers are provided the capability to generate and transform information using their broadband Internet access service, by, for example, personalizing the content that will appear on their home portal pages when they first log on, which in turn requires the provider to store the consumer’s preferences and process information to generate the personalized homepage. (Id. ¶ 8.) In these and numerous other ways, broadband Internet access service as a whole is inherently an offering designed to provide consumers with the capabilities to retrieve, store, utilize, process, acquire, generate, make available, and transform information – not simply to transport it. A service without these capabilities would be a fundamentally different offering.

In addition to concluding that broadband Internet access as a whole is an information service, the Commission found further support for its classification in the fact that broadband Internet access services included as part and parcel of the offerings various applications and functions that themselves provided information service capabilities. That is even more true today then at the time of the Commission’s decision in the *Cable Modem Order*. The Commission pointed in particular to the Domain Name System (“DNS”), which it noted “constitutes a general purpose information processing and retrieval capability that facilitates the use of the Internet in many ways.”99 Likewise, the Supreme Court called out DNS as a significant information service capability integrated in broadband Internet offerings:

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99 *Cable Modem Order*, 17 FCC Rcd at 4822 ¶ 37.
A user cannot reach a third-party’s Web site without DNS, which (among other things) matches the Web site address the end user types into his browser . . . with the IP address of the Web page’s host server. See P. Albitz & C. Liu, DNS and BIND 10 (4th ed. 2001) (For an Internet user, “DNS is a must. . . . [N]early all of the Internet’s network services use DNS. That includes the World Wide Web, electronic mail, remote terminal access, and file transfer”).

Brand X, 545 U.S. at 999.

The DNS processes and transforms the plain-language web address entered by a consumer using a geographically distributed, hierarchical system of servers. (Technical Decl. ¶ 13.) In many cases, web addresses can be resolved to a number of different IP addresses (e.g., if the content is cached in many locations); the DNS intelligently determines based on a variety of criteria such as geographic distance which of these possible IP addresses should be the destination IP address for a particular user request. (Id.) In some cases, the DNS may determine that a user-entered address cannot be resolved to any IP address. In such cases, DNS systems can process the address and, for example, “redirect” the user to a page different than the one requested (such as, for example, a search results page that displays listings containing words similar to those in the user-entered address) or try to “correct” the address (by, for example, fixing a typo or misspelling). (Id.) The DNS thus stores and retrieves IP address information, processes the user-entered address, and generates and transforms information when necessary. DNS performs these processes expressly to provide the consumer the ability to access, interact with, send, and share stored information.

The Commission also pointed to other portions of broadband Internet access offerings as providing information service capabilities. E-mail, for example, provides among other things the capability to store and retrieve e-mails to and from the provider’s servers.100 Broadband Internet

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100 Cable Modem Order, 17 FCC Rcd. at 4821-22 ¶¶ 37-38; Technical Decl. ¶ 12; Service Decl. ¶¶ 11, 23.
access offerings also include the capability to “create a web page that is accessible by other Internet users” and have that stored on the provider’s servers – thus, providing additional capabilities to store, retrieve, transform, and make available information. Likewise, as the Commission and Supreme Court noted, broadband Internet access providers may “facilitate[] access to third-party Web pages by offering consumers the ability to store, or ‘cache,’ popular content on local computer servers” so as to “increase[e] the speed of information retrieval.”

All of this remains true today. Moreover, wireline and wireless broadband Internet access services integrate even more information service capabilities as part and parcel of the offerings than they did at the time of the Commission’s initial classification decisions. For consumers, these range from parental controls to various security functions to access to various storage capabilities to specialized content. (Services Decl. ¶¶ 12-17, 24-25.) Offerings to Verizon small business customers include these capabilities as well as others, such as online file backup and a Small Business Center portal, which includes professional/social networking forums and access to various types of stored content. (Services Decl. ¶¶ 19-21.) As described in the attached declarations, each of these provides capabilities to retrieve, store, utilize, process, acquire, generate, make available, and/or transform information to store, retrieve, and process information. (Services Decl. ¶¶ 12-21; Technical Decl. ¶¶ 7-12, 24-25.) To take one example, parental controls enable parents to block, filter, select, and track children’s online activities. That requires providing the capabilities to, among other things, store the parents’ settings and to process each request by a child for access to a webpage or to send or receive messages to determine if the request is consistent with the parental control setting before it is fulfilled. (Technical Decl. ¶ 24.) Another example is Verizon’s use of a “reputation system” that

\[101\] Cable Modem Order, 17 FCC Rcd. at 4821-22 ¶¶ 37-38; Services Decl. ¶ 11.

\[102\] Brand X, 545 U.S. at 1000; Cable Modem Order, 17 FCC Rcd. at 4809-10 ¶ 17.
processes emails to develop profiles of e-mail senders and create and store a database of suspicious IP addresses from which information is retrieved to block potentially harmful inbound and outbound emails from those addresses. (*Id.* ¶ 8.) Other security functions likewise involve processing packets to check for harmful traffic and retrieving stored information from databases containing information about security threats. (*Id.*) These and other security techniques ensure consumers’ ability to access, interact with, send, and store information over the Internet safely.

From the consumer’s perspective, each of these capabilities is part and parcel of the broadband Internet service offering. Some of them, such as DNS and caching, are integral to the basic function of retrieving and accessing content from the Web that obviously is central to a broadband Internet access service offering. Others such as e-mail, security, and parental controls are functions that consumers rightly expect when purchasing broadband Internet access service and again enable consumers to access, interact with, send, and store information over the Internet. (*Services Decl.* ¶ 27.) The fact that these capabilities and content are an integral part of a broadband Internet access offering and part of what consumers are looking to buy when they purchase that offering is reflected in providers’ advertising campaigns and other communications to their customers, which include promotions of and references to these capabilities. (*Services Decl.* ¶¶ 28-29.) Verizon and other broadband Internet access providers would have no reason to include and tout these and similar functions unless consumers desired and expected them as part of the offering.

The fact that some or all of these capabilities might also be available from third parties is irrelevant to whether they are integrated parts of the offering broadband Internet access providers make to consumers, just as the possibility that a customer could buy from a third party a custom steering wheel does not make the original steering wheel any less an integrated part of the car.
Web-based email services existed at the time of the *Cable Modem Order* and were certainly prevalent in 2007 when the Commission determined that wireless broadband Internet access services are information services, but the Commission attributed no significance to this fact. And rightly so. Under the terms of the statute, the question is what “capability” is offered to consumers; whether every consumer chooses to use each and every function is irrelevant. That is why the Commission concluded that broadband Internet access services are integrated information services “regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service.”\textsuperscript{103} The same is true with respect to DNS – as the Commission found, DNS is an integrated part of broadband Internet access and fits the definition of an information service. The fact that third parties may offer this capability or that consumers may use the third party’s service is legally irrelevant to what the broadband Internet access provider is actually offering and its appropriate classification. As the Commission explained to the Supreme Court, a “cable modem subscriber’s choice not to utilize certain capabilities does not eliminate that capability or change the underlying character of the service offering.”\textsuperscript{104} In any case, virtually all consumers today rely on their broadband Internet access service providers’ DNS and security, and millions similarly rely on e-mail and other capabilities. (Services Decl. ¶ 30.)

The integrated nature of the transmission and information service capabilities of broadband Internet access services is also evident from a technical standpoint. Contrary to the Commission’s apparent assumption, there is not a separate “on-ramp” to the Internet that involves just pure transmission prior to reaching the “real” Internet and its associated

\textsuperscript{103} *Cable Modem Order*, 17 FCC Rcd at 4822-23 ¶ 38.

\textsuperscript{104} FCC *Brand X* Reply Br. at 4.
information service capabilities. Rather, unlike the relatively identifiable separation between last-mile transmission provided by a telephone company and the information service functions provided by an ISP in the old dial-up world, broadband networks seamlessly integrate transmission and information service capabilities starting from the consumer’s computer and all through the network. DNS, for example, begins with the user’s own computer, which may have its own cache of IP addresses for recently visited websites. But DNS frequently requires access to any number of a geographically dispersed set of DNS servers that are connected to the Internet backbone, whether the service provider’s own backbone network or other backbone networks reachable through peering and transit relationships. (Technical Decl. ¶ 28.) Thus, just the mere process of determining the address of the site with which the consumer is trying to connect can require facilities and capabilities located throughout the Internet. Likewise, security functions are integrated throughout the network, again starting with software on the consumer’s computer through the backbone networks and attached servers and databases. (Id.) The ability of a consumer to make available a live video feed through the Internet (e.g., from a home video camera) likewise demonstrates the absence of a separate “on-ramp”: the consumer’s home network is as much part of the Internet as any other content provider’s network facilities. Thus, the terms “last mile” and “on-ramp” are of little relevance in considering the broadband Internet services offered by providers today.

The integration of information service capabilities is even more true in the case of wireless broadband Internet services. Not only do such services incorporate DNS, security, access to stored content, and other features as described above, but wireless devices, which include a wide range of computing capabilities, are an integral part of wireless broadband Internet access service. (Technical Decl. ¶¶ 15-19.) Even with so-called “bring your own
device” services, the wireless broadband Internet access provider sets various technical standards that the device must meet, and the broadband Internet access provider is responsible for ensuring the device complies with various FCC rules for mobile stations and other regulatory obligations. (Id.) Thus, wireless devices are integral to the offering of wireless broadband Internet access service and add yet another dimension of information service capabilities.

2. **Given the Facts, the Commission Would Have No Basis To Reverse Its Repeated Prior Determinations That Broadband Internet Access Is An Integrated Information Service and To Define a New Separate “Internet Connectivity” Service.**

In light of the facts, the Commission cannot meet its heightened burden under *Fox* to provide a detailed justification for a reversal in course. The facts establish that broadband Internet access service continues to be an integrated information service. To the extent the relevant facts have changed since the Commission’s prior decisions, they have made that conclusion even *more* clear.

Nor could the Commission define a new “Internet connectivity” telecommunications service as it proposes to do. NOI ¶¶ 63-65. As set forth above, there is no last-mile transmission component that provides pure connectivity to the Internet. Rather the ability to connect to the Internet (e.g., to reach a website) and to access, interact with, send, and store information over the Internet involves integrated information service capabilities from the customer’s computer (or device) through the entire network. Put another way, the Commission’s proposal to define “Internet connectivity” as the “functions that ‘enable [broadband Internet service subscribers] to transmit data communications to and from the rest of the Internet” (id. ¶ 64) necessarily encompasses numerous information service capabilities, as well as portions of providers’ networks (e.g., Internet backbone facilities) that the Commission claims it does not intend to regulate.
The Commission’s suggestion (id. ¶ 21 n.53, ¶ 65) that the NECA DSL Access Service tariff can provide a basis to define such a service fares no better. As an initial matter, even if some providers were to choose to offer a separate transport service, that would not provide a basis to characterize another provider’s integrated Internet access offering as consisting of two separate services (or compelling other providers to also provide a separate transport service). In any case, the service offered under the NECA tariff is a telecommunications service used “for the purpose of combining these telecommunications services with [the customer’s] own information service(s) to create a new retail service for sale to its end user customer(s).” NECA Tariff §§ 8.4.1, 8.5.1. Thus, whatever service is offered under the NECA tariff, it is not a service offered to consumers that allows them to connect to the Internet, and the tariff itself actually confirms the need to integrate both telecommunications and information service capabilities.

Ultimately, the Commission’s approach to defining an “Internet connectivity” service is logically backward – it cannot first decide that broadband Internet access involves the provision of a telecommunications service and then arbitrarily define what that telecommunications service may be. The threshold question should be whether there is a separate pure transport service offered to consumers, and no such service exists for Verizon and most other broadband Internet providers today.

The Commission cannot escape this problem and attempt to conjure a transport service by recharacterizing information service capabilities such as DNS, caching, and security as “adjunct to basic” services. NOI ¶ 59. As an initial matter, the Commission already has repeatedly concluded that these functions are “information services,” and a court would be highly unlikely to find that suddenly reclassifying them as adjunct to basic – which neither the Commission nor any litigant has previously even raised as a possibility in the four proceedings
and subsequent litigation in which the classification of broadband Internet access has been at issue – met the heightened standard mandated by Fox. Further, as discussed above, broadband Internet access service as a whole is an information service – as a result, there is no “basic” service to which DNS and similar capabilities could be adjunct. The Commission has previously applied this category only in connection with traditional telephone service so that the presence of an information service capability does not convert a transmission service into an “information service” if it merely “facilitate[s] establishment of a basic transmission path over which a telephone call may be completed, without altering the functional character of the telephone service.”

The inapplicability of that description to broadband Internet access – which does not even involve the “establishment of a basic transmission path” – is plain. And it certainly would not apply, for example, to security functions that filter or block potentially harmful traffic and thus could not be said to be facilitating transmission of that traffic.

Finally, the Act, as amended in 1996, does not even recognize an “adjunct to basic” category of service. Although the Commission has suggested such a category may be embodied in the telecommunications network “management exception” to the definition of “information services,” that exception must be read narrowly to refer to internal functions of the network such as signaling that are incidental to the actual transmission involved in providing basic telecommunications services, not capabilities that provide features and benefits that are useful to consumers.

The Commission rightly noted to the Supreme Court that “information-processing

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106 The narrowness of this exception is evident from its origins. As the Commission has explained,
capabilities such as the DNS and caching are not used ‘for the management, control, or operation’ of a telecommunications network, but instead are used to facilitate the information retrieval capabilities that are inherent in Internet access. Their use accordingly does not fall within the statutory exclusion.”

Otherwise, the exception would swallow the rule and undermine the “telecommunications service” and “information service” dichotomy that Congress established.

3. If the Commission Were To Find that Broadband Internet Access Involves the Offering of a Separate Telecommunications Service on These Facts, Then Numerous Other Internet-Based Offerings Also Would Be Subject to Title II Regulation.

Although the Commission seeks to sidestep the question what its legal theory would mean for the rest of the Internet ecosystem by asserting that it is “outside the scope of this proceeding” (NOI ¶ 107), it cannot avoid confronting that issue. The Commission itself opens the door to this inquiry by seeking comment on how its theory might apply to non-facilities-based Internet service providers. Indeed, failure to consider this issue would be arbitrary and

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[t]he telecommunications management exception was initially included in the definition of ‘information service’ contained in the Modification of Final Judgment. That definition explained what services the BOCs were not permitted to offer while recognizing that certain computer processing capabilities were permitted within the provision of their regulated services. Thus, the telecommunications management exception permitted the BOCs to improve their telecommunications networks without running afoul of the restriction on providing information services. Prior to the MFJ and divestiture, the Commission had permitted certain computing capabilities to be incorporated into AT&T's telecommunications network to facilitate and modernize the provision and use of basic telephone service. This does not mean that when Pulver or another information services provider offers these capabilities on a stand-alone basis that they are transformed into telecommunications services.


107 FCC Brand X Reply Br. at 5 n.2.
capricious. As the D.C. Circuit has explained, an agency may not “appl[y] different standards to similarly situated entities and fail[] to support this disparate treatment with a reasoned explanation and substantial evidence in the record.”\textsuperscript{108}

Here, if the Commission were to conclude that broadband Internet access providers actually offer a separate Title II telecommunications service even with the facts as described above, then it would inevitably follow that numerous other Internet-based offerings also involve the provision of a telecommunications service subject to Title II regulation. That would be even more true if, as it has indicated, the Commission were to also assert Title I ancillary authority to directly regulate the information service aspects of broadband Internet access service. Such a theory would allow the Commission to regulate any content, application, or other service delivered over the Internet.

The Commission recognized more than a decade ago that if it “interpreted the statute as breaking down the distinction between information services and telecommunications services, so that some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category.”\textsuperscript{109} The statutory definition makes clear that every information service is provided “via telecommunications” and therefore has a transport component. As the Supreme Court recognized in \textit{Brand X}, if an information service provider was also offering a telecommunications service anytime the information service “components” could theoretically be separated, then numerous actors in the Internet ecosystem would suddenly find themselves subject to Title II common carriage regulation. Indeed, the Court pointedly

\textsuperscript{108} \textit{Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.}, 403 F.3d 771, 777 (D.C. Cir. 2005); \textit{Airmark Corp. v. FAA}, 758 F.2d 685, 692 (D.C. Cir. 1985) (vacating orders failing to meet this standard as “patently arbitrary”).

\textsuperscript{109} \textit{Universal Service Report}, 13 FCC Rcd at 11529 ¶ 57.
noted that even the dissent did not disagree that would be the case. Moreover, that would be true even if they did not themselves provide the transmission component, since non-facilities based resellers have long been subject to Title II regulation. Indeed, the Commission already has rejected a distinction between facilities-based and non-facilities-based providers: “There is no reason to classify wireline broadband Internet access services differently depending on who owns the transmission facilities. . . . As the Commission indicated in its Report to Congress, what matters is the finished product made available through a service rather than the facilities used to provide it.”110 Further, the fact that these providers may not transport information all the way to the end user does not make a difference – the same is true of traditional long distance carriers, which clearly are providers of telecommunications services.

As a result, there is no limiting principle by which the Commission’s Title II theory would not encompass a wide range of offerings. Take, for example, e-readers such as Kindle and other devices that provide the user with transmission capabilities (e.g., GPS navigation devices and wireless photo frames). A user that buys a device such as a Kindle also obtains the ability to transmit books and other content/information to and from the device. Under the Commission’s theory, this transmission component would be a separable telecommunications service. There can be no question that the transmission is technically separable – indeed, in the case of Amazon, it purchases a separate wireless telecommunications service that it then resells to consumers as part of the purchase price of the Kindle. Further, users understand they are obtaining this transmission service. Amazon prominently explains that purchase of a Kindle includes 3G wireless service that enables users to, among other things, download books and post material to sites such as Twitter and Facebook. Users are also told that they will receive “[n]o

110 Wireline Broadband Order, 20 FCC Rcd at 14865 ¶ 16.
monthly wireless bills or commitments. Amazon pays for Kindle’s wireless connectivity so you won't see a monthly wireless bill.” 111 If broadband Internet access could be said to include the offering of a separate telecommunications service, there would be no reasoned basis to treat Kindle and similar offerings differently.

The Commission’s theory also would sweep in Voice over IP services such as Vonage, Skype, and others. A VoIP customer is purchasing the ability to transmit voice communications. In the case of interconnected VoIP service, the VoIP provider itself is providing the transmission to and from the PSTN, whether over its own or leased facilities. Under the Commission’s mistaken theory here, that transmission would be separable to the same extent that the transmission involved in Internet access is supposedly separable. And the ability to transmit calls to and from the PSTN is central to what consumers are buying. Thus, again under the Commission’s theory, such interconnected VoIP services would involve the provision of a separate telecommunications service.

Similarly, the logical consequence of the Commission’s proposal would be to classify content delivery networks and other Internet transport services such as Akamai as offering a Title II telecommunications service. These entities offer backbone and content-delivery services directly to a range of large and small business customers and also offer the equivalent of wholesale services to content and application providers. 112 These providers use their own or leased facilities to transport customers’ data and information to and from facilities that connect directly to the Internet. Under the Commission’s theory, such “transport” would be the


112 Under the Commission’s theory, offering services to business customers on a standardized basis, as Akamai and others do, could qualify as offering service “to the public” for purposes of common carriage regulation.
equivalent either of what retail broadband Internet access service providers offer to end users or of what wholesale transport providers offer to others. Moreover, if the Commission were to conclude that a capability such as “caching” is “adjunct to basic,” then that would directly implicate content delivery networks.

The havoc that the Commission would wreak would not stop there. It would reach content and application providers such as Google that have their own network and transmission facilities. These providers use their own, often extensive, network facilities to transport content of a user’s choosing to and from that user. As noted, the fact that their facilities may not take the content all the way to the user does not disqualify them from being providers of telecommunications service any more than it does for long distance carriers. Similarly, online video services such as NetFlix, Hulu, and YouTube provide or lease transmission capacity to send video content to and from Internet users.

Any theory under which the Commission concluded that broadband Internet access services included the offering of separate telecommunications service under Title II would implicate all of these players. And the Commission’s plan to then assert Title I ancillary authority over the information service components of broadband Internet access in order to promulgate “net neutrality” rules would allow it to sweep even more broadly and regulate other content, applications, and information services delivered over the Internet. To be clear, Verizon does not believe these services should be deemed to involve the provision of a telecommunications service subject to common carrier regulation any more than should broadband Internet access. However, that would be the logical consequence of the Commission’s proposal. And, even if the present Commission were to decline to regulate these other entities, that would not prevent parties from filing complaints under section 208 and
forcing the Commission to confront these consequences or future Commissions from taking that
step – possibilities that would increase regulatory uncertainty throughout the Internet ecosystem
and provide further reason why the Commission should not adopt its proposal.

D. The Commission Cannot Compel Broadband Internet Access Providers To
Offer a Separate Transport Service on a Common Carriage Basis.

As described above, broadband Internet service providers today do not offer consumers a
separate, pure transmission service at all, much less on a common carriage basis. As a result, the
Commission could implement its proposal only by compelling providers to offer such a service
subject to common carrier regulation. The government’s power to compel an entity to act as a
common carrier where that entity does not voluntarily choose to do so is limited, and those limits
are grounded in fundamental concepts of property rights. Just as the government generally
cannot confiscate private property and hand it over to someone else, it generally cannot compel
the owner of the property to make it available for the use of others. To be sure, private property
owners historically have taken on common carriage obligations in some contexts, typically
situations in which they comply with common carriage requirements in exchange for a
government granted monopoly and the assurance of a guaranteed return. But an agency’s
ability to compel a party to provide service as a common carrier is necessarily limited.

In order to compel a provider to dedicate its property to the use of others, at a minimum,
an agency must have explicit statutory authority to do so. The courts have made clear that the
Commission could not embark on such a course without a “clear warrant” from Congress.

Nothing in the Act provides the “clear warrant” expressly authorizing the Commission to compel

113 See National Ass’n of Regulatory Util. Comm’rs v. FCC, 525 F.2d 630, 642 (D.C. Cir.
1975) (NARUC I) (concept of a common carrier “developed as a sort of quid pro quo whereby a
carrier was made to bear a special burden of care, in exchange for the privilege of soliciting the
public’s business”).

providers to unbundle their information services into their component parts and to offer a separate transmission service as a common carriage telecommunications service under Title II. To the contrary, as noted above, the definition of “information services” in the Act expressly recognizes that those services will be provided “via telecommunications,” and prohibits the Commission from extending Title II regulation to those services. Likewise, the definition of “telecommunications services” subject to Title II’s requirements includes only those services that an entity “offer[s]” to the public generally. The term “offers” indicates a voluntary undertaking, not a grant of authority to compel an entity to provide any service of the Commission’s choosing on common carrier terms.

Longstanding case law confirms that common carrier regulation is proper only for services a carrier has already chosen to offer on a common carriage basis. In other words, a finding that a carrier is “holding [it]self out to serve indiscriminately” is a “prerequisite” to common carrier status.\footnote{NARUC I, 525 F.2d at 642; see also NARUC II, 533 F.2d 601, 608 (D.C. Cir. 1976) (“[T]he primary sine qua non” of the analysis is whether the service in question is already provided indifferently.)} The Commission cannot simply order a provider to act as a common carrier:

Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.\footnote{See NARUC I, 525 F.2d at 644.}
And, “[w]hile the Commission may look to the public interest in fine-tuning its regulatory
approach, it may not impose common carrier status upon any given entity on the basis of the
desired policy goal the Commission seeks to advance.”117

In any event, even if the Commission did have authority to compel common carriage in
the absence of a voluntary undertaking in certain circumstances, it is clear that it could not do so
without, at an absolute minimum, a demonstration that the service provider has substantial
market power.118 Contrary to the Commission’s claim, nothing in Brand X suggests otherwise.
Although the Court there noted that the Commission had previously applied Computer II
unbundling requirements to DSL, it explained that the Commission had done so as a matter of
history without doing an “analysis of contemporaneous market conditions,” based on the fact that
DSL used the same telephone network that the Commission had traditionally treated as a
monopoly subject to common carriage regulation. See Brand X, 545 U.S. at 1000-01. And the
Court recognized that, “[u]nlike at the time of Computer II, substitute forms of Internet
transmission exist today,” and those “changed market conditions warrant different treatment.”
Id. at 1001.

By contrast, as the Commission subsequently confirmed in classifying DSL as an
“information service,” an “analysis of contemporaneous market conditions” demonstrates that no
such market power exists in the broadband marketplace. The Commission has now repeatedly
concluded that broadband Internet access services should be free of common carriage and other

117 Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475, 1481 (D.C. Cir. 1994).
118 See, e.g., Virgin Islands Tel. Corp. v. FCC, 198 F.3d 921, 925-27 (D.C. Cir. 1999); NARUC I, 525 F.2d at 641-42; AT&T Submarine Sys., Inc., 13 F.C.C.R. 21585, 21588-589
(1998) (the decision to impose common carrier treatment depends on whether “the public interest
. . . require[s] the carrier to be legally compelled to serve the public indifferently” because the
carrier “has sufficient market power”); Cable & Wireless, PLC, 12 F.C.C.R. 8516, 8521-22
(1997).
Title II regulation based on findings that these services are developing in a competitive manner, that the broadband marketplace is rapidly evolving, and that there are no signs of so-called “market failure.” The Commission’s expectations in adopting this approach have been more than fulfilled, with broadband competition steadily increasing as traditional telephone companies, cable operators, and wireless companies have continued to make massive investments in new technologies such as fiber-to-the-premises, DOCSIS 3.0, and 4G wireless services, including LTE and WiMax. Wireless 4G services, with higher speeds and expanded capabilities, will provide a true third (and fourth, fifth, and sixth) broadband pipe into the home and result in even greater cross-platform competition. The evidence thus demonstrates that competition is thriving – providers have made massive investments, consumers have benefitted from greater speeds and capabilities, and prices have declined.

1. **Wireline and other fixed broadband providers aggressively compete against one another.**

Since the Commission decided to free telephone company broadband services from legacy regulation, traditional telephone companies and cable providers have engaged in fierce competition to retain existing subscribers and gain new ones. By all indicators, competition between these rivals is strong and growing. First, these companies have made massive investments in their networks, with the result that cable modem services are available to 92 percent of all U.S. households and DSL to 83 percent. (Topper Decl. ¶¶ 9, 11.) The

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Commission’s High-Speed Internet Services Report indicates that, at a minimum, 87.1% of all census tracts have both a cable modem and ADSL provider. (Topper Reply Decl. ¶ 19.) These providers are now pouring investment dollars into upgrading these networks. Verizon is investing more than $23 billion to pass more than 18 million premises with its next-generation, all-fiber FiOS network, and has already passed more than 15.6 million of those premises as of the end of March 2010. Other companies such as AT&T and Qwest also are deploying fiber-based broadband services to millions of households. (See id. ¶¶ 26-27.) Each of the major cable operators is upgrading its network to DOCSIS 3.0 technology, with most already between two-thirds and 100 percent complete, and analysts expecting the technology to be available to approximately 99 percent of U.S. homes passed by cable by 2013. (Id. ¶¶ 30-31.) According to the Commission, wireline broadband providers made about $48 billion in capital expenditures in 2008 and another $40 billion in 2009, with broadband-specific investments of at least $20 billion in 2008 and $18 billion in 2009.

Broadband providers are relying on the Commission’s previous orders as they make these multibillion dollar investments in response to competitive pressures and the real risk that they will lose subscribers to rivals. Investment by one competitor breeds investment by another. Time Warner, for example, has acknowledged that it is upgrading to DOCSIS in a targeted way as a direct response to Verizon’s deployment of FiOS. As the Commission recognizes in its


121 National Broadband Plan at 38.

122 Transcript, TWC - Time Warner Cable, Inc. at Morgan Stanley Technology, Media & Telecom Conference at 11-12 (Mar. 1, 2010); see also id. at 7 (“I would say that there are going to be times where we [Time Warner and Verizon] trade innovative product sets back and forth. Something -- one day I will have something that they don’t have and vice versa.”).
Broadband Plan, “competition appears to have induced broadband providers to invest in network upgrades.”\textsuperscript{123}

Second, even as consumers have benefited from the higher speeds and greater capabilities of these networks, prices (particularly on a per megabit basis) have been \textit{falling} over time – clear indication of a competitive marketplace. (\textit{See} Topper Decl. ¶¶ 35-36.) Third, both telephone and cable companies have been engaged in aggressive marketing campaigns, including discounts and special offers. These advertisements regularly compare the provider’s own service to those of competitors both in terms of capabilities and features and price. (\textit{See id.} ¶¶ 42-43.) Verizon’s FiOS advertisements, for example, criticize cable broadband technology, and cable companies such as Comcast, Cox, and Time Warner have responded by specifically targeting FiOS in their advertisements. (\textit{See id.} ¶¶ 42-43.) Such significant advertising expenditures would make no sense in the absence of a competitive marketplace. Fourth, the vibrant competition is evident from the considerable and rising subscriber churn rates among wireline broadband providers. (\textit{Id.} ¶ 20.) For example, Comcast reports that 65\% of its new subscribers are switching from other Internet service providers. (Comcast Net Neutrality Comments at 20.) According to one prominent analyst, cable broadband providers have experienced monthly churn rates of between 2.4 percent and 3.0 percent, equating to annualized churn rates of between 28.8 percent and 36 percent.\textsuperscript{124}

Finally, in addition to fiber, cable, and DSL, there is additional broadband competition from a variety of sources. The United States is perhaps the only country in the world with at least two satellite broadband services widely available. (\textit{See} Topper Decl. ¶ 109.) Fixed

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\textsuperscript{123} \textit{National Broadband Plan} at 38.
\textsuperscript{124} \textit{See} Craig Moffett et al., Bernstein Research, \textit{Broadband: Are We Reaching Saturation?}, at 4, Ex. 2 (Aug. 14, 2007).
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wireless broadband also is available in many locations, with the potential to reach many more at relatively low cost compared to the deployment of wireline facilities. (See id. ¶ 108.) WISPA, which represents more than 300 wireless ISPs, states that its members provide broadband fixed wireless services to more than 2 million consumers and businesses, concentrated heavily in rural areas. (See id.) There is at least one fixed wireless broadband provider in all but four states (Connecticut, Delaware, Maine, and Rhode Island), and an average of 16 providers in the 38 states for which data are available.125

2. **Wireless companies have expanded into broadband services with the advent of 3G services, and the deployment of 4G services will bring increased cross-platform competition.**

Wireless broadband services, while still at their nascent stage, are the subject of intense competition. That is evident even from just the number of competitors. The marketplace for wireless broadband service includes a wide range of providers, including the four national carriers, other facilities-based providers such as Clearwire, and numerous regional and smaller carriers. (Topper Decl. ¶¶ 51, 69-72.) In its most recent Wireless Competition Report, the Commission found that as of November 2009, 98.1% of the population had access to at least one mobile provider of 3G wireless broadband service, 90% had a choice of 2 or more mobile broadband providers, and 76% had a choice of 3 or more mobile broadband providers.126

Again, competition among wireless broadband services is evident on every dimension. Since 2001, wireless carriers have made an average combined investment of more than $22.8

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billion per year to upgrade their networks to facilitate advanced voice and data offerings. (Topper Decl. ¶ 64.) Even as speeds and capabilities have increased, wireless data plans have fallen in price both on an absolute scale and on a per-megabyte basis, and carriers offer a wide variety of price plans. (Id. ¶¶ 58-59.) For example, in 2004, AT&T offered a data plan of $19.99 for the first 8MB of data, while in 2009, it offered a 200 MB mobile broadband plan for $40, a reduction from $2.50 per MB to $0.20 per MB. (Id. ¶ 58.) Similarly, in 2004, Sprint offered a $40 data plan for 20MB, but its 5GB mobile broadband plan in 2009 was priced at $60, a reduction from $2 per MB to $0.12 per MB. (Id.) Prices have also declined on an absolute basis. In August 2009, for example, Sprint reduced the cost of its 3G/4G plan by $10, from $79.99 per month to $69.99.127 Decreasing prices and increased output belie any claim that providers have market power.

Competition will only be increased by the emergence of 4G services, which, at anticipated typical speeds of 5-12 Mbps and peak download speeds as high as 50-60 Mbps for at least some networks, are comparable to many of the fixed broadband options that consumers use today and sufficient for the average user.128 Wireless providers are investing heavily in 4G services and have begun deploying them. In 2008, Verizon Wireless invested over $9 billion for spectrum in the 700 MHz auction, and it will initiate commercial LTE service with coverage to approximately 100 million people in up to 30 markets during this year, and expects to provide coverage to its entire 3G footprint by the end of 2013. (Topper Decl. ¶ 65.) AT&T will be starting LTE trials this year, with commercial deployment beginning in 2011. (Id. ¶ 66.)

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127 See Kathryn Weldon, Current Analysis, Sprint lowers the Price of Mobile Broadband 3G/4G, Keeping to Its Value and Data Leadership Positioning (Aug. 21, 2009).

128 Topper Decl. ¶¶ 97-98; Topper Reply Decl. ¶ 13; Marguerite Reardon, Verizon Expects 4G Launch Next Year, cnet reviews, Feb. 18, 2009 (“In its initial trials, Verizon says that it has demonstrated peak download speeds of around 50Mbps to 60Mbps.”), available at http://reviews.cnet.com/8301-13970_7-10166622-78.html.
now offers 4G to 43 markets and plans to bring service to multiple additional markets including Los Angeles, New York, and Miami during this year.129 Indeed, Sprint has access to so much spectrum that its CEO has suggested that it could deploy infrastructure to offer 4G services over both WiMAX and LTE.130 Clearwire has launched 4G service in at least 44 markets and plans to cover 120 million people in 80 markets by the end of this year.131 Cable companies such as Comcast and Time Warner have already begun to resell Clearwire’s 4G service in 16 markets. (Topper Decl. ¶¶ 70, 101; Topper Reply Decl. ¶ 6.) Regional providers are also upgrading – MetroPCS, for example, plans to begin deployment of its LTE network in the second half of this year. (Topper Decl. ¶ 71.)

Wireless providers already are advertising their 4G services as wireline replacements. Clearwire, for example, advertises its 4G WiMAX service as “a wireless alternative to DSL or cable internet service,” and one of its officers recently noted that “roughly half the customers come on and use it [Clearwire’s services] as a – overall as a replacement to whatever it is that they were having before, which is a combination usually of DSL or cable broadband.” (Topper Reply Decl. ¶¶ 14,16.) The Department of Justice has stated that “[e]merging fourth generation (“4G”) services may well provide an alternative sufficient to lead a significant set of customers to elect a wireless rather than wireline broadband service.” DOJ Broadband Comments at 8.

Moreover, a recent survey suggests that “low-income groups are the fastest adopters of the

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130 Andrew Parker & Paul Taylor, Sprint’s 4G Move Opens Way to Merger, Financial Times (July 12, 2010).

mobile Web, showing an opportunity that wireless technology could play in helping to bridge a
digital divide.” As with voice telephony, in which wireless services initially were a
complement to wireline services but have now become a common replacement as increasing
numbers of consumers “cut the cord,” the rollout of 4G will make wireless broadband a clear
competitive alternative to wireline service and force those wireline providers to respond in terms
of price, capabilities, or other attributes to counter the advantage of mobility.

Thus, the facts make clear that the broadband marketplace is not characterized by market
failure or the presence of the kind of market power that might even begin to justify compelling
providers to offer a common carriage transmission service. Indeed, the mere fact that the
Commission would have to compel so many competing telephone company, cable, mobile and
fixed wireless, and satellite providers to each unbundle their services to offer a separate common
carriage transmission service in and of itself demonstrates that there is no bottleneck or market
failure. Thus, the Commission cannot compel broadband Internet access service providers to
offer a separate transmission service on a common carriage basis.

IV. THE COMMISSION’S PROPOSAL WOULD BE PARTICULARLY HARMFUL
AND UNJUSTIFIABLE WITH RESPECT TO WIRELESS BROADBAND
SERVICES.

While the Commission’s proposal would be harmful and unlawful with respect to
broadband Internet services generally, it would be particularly irrational and damaging in the
wireless context. As an initial matter, the Commission lacks any authority to apply Title II to
wireless broadband Internet services. That is true not only for all the reasons described above,
but also because section 332 affirmatively bars the Commission from imposing common carrier

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minorities_low-income_homes_mo.html.
regulation on wireless broadband Internet services. Under section 332(c)(2), “a person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is engaged, be treated as a common carrier for any purpose” under the Act. The Act defines a “private mobile service” as “any mobile service . . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service.” 47 U.S.C. § 332(d)(3). A “commercial mobile service,” in turn, is “any mobile service . . . [that] makes interconnected services available” to the public or a substantial portion of the public. Id. § 332(d)(1). Finally, an “interconnected service” is “service that is interconnected with the public switched network.” Id. § 332(d)(2).

The upshot of these definitions is that the Act expressly prohibits the Commission from imposing common carrier obligations on any mobile service offering that does not include service interconnected with the public switched network. As the Commission has found, mobile broadband Internet access service is just such an offering because it “in and of itself does not provide th[e] capability to communicate with all users of the public switched network.”\textsuperscript{133} The fact that VoIP or other applications riding over mobile broadband Internet service may provide an interconnected service makes no difference because wireless broadband Internet access “itself is not an ‘interconnected service’ as the Commission has defined that term.”\textsuperscript{134} Thus, pursuant to the Act, mobile broadband Internet access service is a private mobile service, and the plain meaning of section 332 bars the Commission from treating it as a common carrier service. That would remain the case even if the Commission were to conclude (contrary to reality) that mobile broadband Internet access includes the offering of a separate transmission service – that transmission service still would not itself provide the capability to communicate with the public.

\textsuperscript{133} \textit{Wireless Broadband Order}, 22 FCC Rcd at 5917 ¶ 45.

\textsuperscript{134} \textit{Id.}
switched network and thus it too could not be treated as a common carrier service given the prohibition in section 332(c)(2). And, as noted above, the Commission could not impose common carrier regulation on the information service aspects of wireless broadband Internet access service because of section 153(44) of the Act, which broadly prohibits non-telecommunications services from being subject to common carriage regulations. 47 U.S.C. § 153(44) (a “telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services”) (emphasis added).

None of the provisions of Title III that the NOI cites (¶ 103) provides any basis to override the express language of section 332(c)(2) or section 153(44). The various sections of Title III that authorize actions in the “public interest” that the Commission cites (sections 301, 303(r), 307(a), and 316) cannot override these more specific provisions of the Act.135 “The FCC must act pursuant to delegated authority before any ‘public interest’ inquiry is made under §303(r).”136 Thus, the Act affirmatively bars the Commission’s proposal to reclassify wireless broadband Internet services under Title II or Title III with respect to wireless.

The Commission’s proposal also makes even less sense as a matter of policy with respect to wireless broadband services. As discussed above, wireless services are subject to particularly intense and continually growing competition, with ongoing investment and innovation that has brought tremendous benefits to consumers. The vast majority of consumers have access to 3G services from multiple providers, including the four nationwide carriers and regional facilities-

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135 Section 301 dictates the need for a license to operate radio transmitters; Section 303 provides general licensing and rulemaking authority for the Commission to issue those licenses. Sections 307 and 316 of Title III are plainly irrelevant; the former deals with the issuance, renewal, and geographic distribution of licenses, the latter with modifications to granted licenses. None of these provisions speaks to the regulatory classification of information or telecommunications services.

136 MPAA, 309 F.3d at 806 (emphasis in original).
based providers. Providers compete along many dimensions such as pricing of service packages and devices, different calling plans, innovative applications and features, and network quality and coverage. The result of this competitive marketplace has been falling prices and increasing capabilities. And that competition will only increase as providers invest in 4G networks, which will bring greater speeds and capabilities.

This competitive market has resulted in extraordinary innovation that has led to a broad array of consumer choices. Smartphones have proliferated, ranging from the Droid to the iPhone to the Palm Pre. As CTIA reports, consumers can choose from among over 630 devices from 33 different manufacturers, including an array of smartphones such as the Droid, iPhone, Palm Pre, and NexusOne. New business models such as application stores have enabled consumers to select from an exploding number of applications that are customized to work with various operating systems and devices. And consumers can choose among a wide range of service models – from open devices, such as the Android-based Nexus One, that provide access to all lawful content and applications in an unmediated marketplace, to more managed options such as the iPhone with Apple-prescreened applications, to more limited devices such as the Amazon Kindle that provide access to particular types of content. Moreover, the wireless broadband marketplace is moving toward greater openness, as exemplified by Verizon’s Open Development program, which allows users to attach any wireless device that meets its published technical standards and to use any application on that device, and the creation of the Verizon Wireless LTE Innovation Center – an “incubator” to assist third-party device and application developers to create innovative new products and services for Verizon’s 4G wireless network.

The result is exactly the type of environment that the Commission should want – a highly competitive and dynamic market characterized by constant innovation and investment that is leading to an ever-expanding array of consumer choices. It surely cannot be the case that consumers would benefit if the market became more homogenized and they had fewer choices. Yet that is what application of Title II to wireless broadband services portends. For example, the specter of rate regulation (either directly or by way of section 208 complaints) will inhibit the development of innovative pricing models that could benefit consumers. The non-discrimination requirements of Title II could call into question cooperative development efforts and deals to feature particular applications on a particular device or service (e.g., the provision of Google maps on the iPhone) – even though they are a manifestation of carriers in competitive markets trying to meet consumer demands.

It defies explanation why the Commission would move to impose Title II regulation in the face of a wireless broadband marketplace that is so wildly successful. That success stems directly from the long-standing federal policies of promoting competition, investment, and innovation in the wireless industry without heavy-handed common carrier regulatory obligations. Market forces today already are ensuring that wireless broadband providers meet consumer expectations – those that do not will quickly lose customers to those who do. That is why the marketplace is characterized by extraordinary levels of investment and innovation. Network providers have invested, and are continuing to invest, billions of dollars in their networks. Earning a reasonable rate of return on those investments requires attracting and retaining as many customers as possible, which in turn means offering attractive options and capabilities designed to best meet consumer demand. These incentives are far more effective than regulation in ensuring that wireless broadband providers do not act in ways harmful to consumers. Thus,
regulation is unnecessary. By increasing costs and uncertainty and decreasing flexibility to respond to consumer demands, Title II regulation would suppress investment and innovation and therefore would be affirmatively harmful.\footnote{See, e.g., Robert W. Hahn, Robert E. Litan, Hal J. Singer, \textit{The Economics of ‘Wireless Net Neutrality,’} at 9 (Apr. 2007) (“The problem for regulators is that dynamic incentives to invest are important to wireless operators. Inefficient regulation threatens to jeopardize the investment needed to upgrade the existing third generation (3G) wireless platform to support broadband services and to launch the fourth generation (4G) network to support real-time applications such as mobile video, remote monitoring, and mobile commerce.”).}

It would be particularly nonsensical to risk the significant harms from Title II regulation at this juncture in the wireless industry’s development. Carriers are just now embarking on the massive investments needed to deploy 4G technologies, which will provide far greater speeds and capabilities and produce the third (fourth, fifth, and sixth) broadband pipes into the home. Common carrier rules would limit new business models and otherwise create regulatory uncertainty. That would call into question whether network providers could earn sufficient returns to justify this investment – a result that would discourage 4G deployment and decrease the “potential to enhance America’s economic competitiveness, create jobs, and improve the quality of our lives” that the President recently recognized wireless high-speed Internet services have today.\footnote{The White House, Memorandum for the Heads of Executive Departments and Agencies, \textit{Presidential Memorandum: Unleashing the Wireless Broadband Revolution,} at 1 (June 28, 2010).}

Subjecting wireless broadband Internet services to common carrier regulation would also be particularly harmful because wireless providers face unique technological and operational constraints. For example, wireless broadband Internet providers face significant challenges in dynamically managing spectrum because capacity demand at any given cell site is much more variable as the number and mix of subscribers constantly change in sometimes highly
unpredictable ways. The complexities are compounded by limited spectrum resources, which means a provider cannot readily increase capacity – a problem that will only be multiplied if the Commission were to adopt proposals to impose spectrum caps that limit new spectrum acquisitions or data roaming requirements that would allow third-party providers’ customers to occupy a wireless broadband provider’s spectrum resources. The strictures of Title II could significantly reduce the flexibility providers have to deal with these constraints (or increase uncertainty about whether certain strategies would be permissible). For example, the possibility of rate regulation could reduce a provider’s ability to experiment with different pricing plans and models in an effort to deal with network congestion. Any nondiscrimination requirement could call into question techniques providers use to operate the network efficiently and optimize data throughput, such as sophisticated queuing and scheduling algorithms that send more packets of data to users during times of good signal-to-noise conditions and less when signal-to-noise conditions are bad. The end result would be increased costs and lower quality service for consumers.

V. IMPOSING TITLE II COMMON CARRIAGE REGULATION ON BROADBAND INTERNET ACCESS SERVICE VIA RECLASSIFICATION WOULD RAISE SIGNIFICANT CONSTITUTIONAL AND OTHER LEGAL PROBLEMS AND WOULD BE UNLAWFUL FOR THESE REASONS AS WELL.

Imposing Title II common carriage regulation on broadband Internet access service via reclassification would raise significant constitutional issues under both the First and Fifth Amendments. Because Verizon and other providers do not actually offer a stand-alone transport service but only a single integrated information service, any effort to bring their broadband Internet access services within the ambit of Title II would necessarily require the Commission to compel a separate transport offering.140 But government-compelled common carrier status

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140 See NOI ¶ 54.
would engender a confrontation with the Constitution that counsels strongly against the existence of statutory authority to take this drastic action, and would render such an action unlawful in any event. 141

A. Title II Common Carriage Regulation of Broadband Internet Access Service Would Create Serious First Amendment Problems.

There can be no question that imposing mandatory Title II common carriage obligations on broadband Internet access service would raise serious First Amendment concerns. Verizon’s broadband platform is a medium through which it offers a form of speech—its own Internet and other content services—to its customers. That platform serves as the microphone through which broadband Internet access providers speak, and governmental restrictions that inhibit the reach or use of that microphone necessarily impinge on First Amendment interests. Like cable programmers and cable operators, broadband Internet access providers “engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.” 142

Indeed, broadband Internet networks are the modern-day equivalent of the printing press. Both are the means by which speech is facilitated and disseminated, and in both contexts the speaker makes numerous choices about the content and format of the speech that will be disseminated by those means. Among other things, broadband providers may decide to block spam or harmful content, or to feature or package their own or partners’ selected content. The

141 As Verizon has previously explained, an agency may not interpret its governing statute in a manner that raises substantial constitutional problems. See Verizon Net Neutrality Comments at 109-11; Verizon Net Neutrality Reply Comments at 108 (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988), and Bell Atl. Tel. Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994)). 142 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 635 (1994); see also id. at 636 (“Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.”).
role of the Internet as a mode of mass communications is no less important today than the role of
privately-owned newspapers in earlier days of our country’s history.\textsuperscript{143} Thus, as a matter of first
principles, Verizon’s position under the First Amendment as a broadband Internet access
provider is no different than a newspaper publisher’s. That the “Framers may have been
unaware of certain types of speakers or forms of communication . . . does not mean that those
speakers and media are entitled to less First Amendment protection than those types of speakers
and media that provided the means of communicating . . . when the Bill of Rights was
adopted.”\textsuperscript{144}

Accordingly, regulation of broadband networks today would present the same speech
conterns that regulation of newspapers has historically created. As the Supreme Court has
explained, forcing a newspaper to afford third-parties indiscriminate access to its printing press
and newspapers clearly violates the First Amendment: “[A] [g]overnment-enforced right of
access inescapably ‘dampens the vigor and limits the variety of public debate.’”\textsuperscript{145} Prohibiting a
newspaper from exercising editorial control over the form and content of its pages likewise
violates the First Amendment: “A newspaper is more than a passive receptacle or conduit for
news, comment, and advertising. The choice of material to go into a newspaper, and the
decisions made as to limitations on the size and content of the paper, . . . constitute the exercise
of editorial control and judgment.”\textsuperscript{146} Just as a government-mandated right of access to a private

\textsuperscript{143} See Citizens United v. FEC, 130 S. Ct. 876, 906 (2010) (“The great debates between the
Federalists and the Anti-Federalists over our founding document were published and expressed
in the most important means of mass communication of that era—newspapers owned by
individuals.”).

\textsuperscript{144} Id.

Times v. Sullivan, 376 U.S. 254, 279 (1964)).

\textsuperscript{146} Id. at 258.
printing press and regulation of the prices and other terms of such access pursuant to a complaint 
process would plainly violate the First Amendment, so too would mandating access to broadband 
networks and applying vague and indeterminate price and access controls to the services 
provided over those networks infringe on free speech rights.

In particular, compelled common carrier status for, and the consequent application of 
Title II common carrier obligations on, broadband Internet service would burden providers’ 
speech and the speech of their partners in the following ways. First, compelled common 
carriage of broadband Internet access service could force Verizon and other Internet access 
providers indiscriminately to allow third parties to gain access to the providers’ means of 
expression on the same terms as they or their partners do and, at the very least, would cause 
significant confusion about the permissible terms and conditions of such access. In this way, 
compelled common carriage could require broadband Internet providers to give every speaker 
the same relative voice on the Internet and to carry the speech of others to the same extent they 
carry their own, as some advocates of broadband regulation have urged. As the Court’s decision 
in *Citizens United* confirms, however, that goal cannot be reconciled with the First Amendment. 
The First Amendment “reject[s] the premise that the Government has an interest ‘in equalizing 
the relative ability of individuals and groups’” to have their voices heard because such action 
ultimately “deprive[s] the public of the right and privilege to determine for itself what speech 
and speakers are worthy of consideration.”\(^\text{147}\) Thus, “media corporations could [not] have their 
voices diminished to put them on par with other media entities.”\(^\text{148}\)

\(^{147}\) *Citizens United*, 130 S. Ct. at 904, 899 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) 
(per curiam)).

\(^{148}\) *Id.* at 905.
Forced access to Verizon’s or another provider’s integrated broadband service also would be incompatible with the First Amendment to the extent it compelled a speaker to carry the speech of others—or to carry such speech on the same terms as its own—when that speaker’s editorial judgment dictated otherwise. Like a newspaper, Verizon’s integrated broadband service “is more than a passive receptacle or conduit for news, comment, and advertising.” It is not and never has been a “dumb pipe,” and Verizon and other Internet access providers make myriad choices about the “material to go into [it]” or “limitations on the size and content” of its offerings149 – ranging from blocking spam or malicious content, to restricting pornography, to packaging and presenting their own or their partners’ content – all of which involve the exercise of editorial control and judgment. Thus, forcing carriage of the speech of others on a broadband network would be no less constitutionally problematic than a government rule requiring the Washington Post to allow other publishers to use its printing presses. “It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”150 Indeed, “[t]he Supreme Court has repeatedly ruled that video programming distributors (such as Comcast, DIRECTV, DISH, Time Warner, Cablevision, Verizon, and AT&T) and video programming networks (TNT, ESPN, Fox News, MSNBC, and several hundred others) are editors and speakers protected by the First Amendment’s guarantees of freedom of speech and of the press.”151

149 Tornillo, 418 U.S. at 258.
150 Id.
Second, compelled common carriage of broadband Internet access service would subject Verizon to regulation of its prices (as well as other terms and conditions) under Sections 201 and 202 either directly or through the complaint procedures of Section 208. The First Amendment forbids laws that “impos[e] a burden [on speech] by impounding proceeds on receipts or royalties” from that speech\textsuperscript{152} or laws that limit the audience that speakers reach.\textsuperscript{153} As a result of reclassification, however, broadband Internet access service providers such as Verizon would be subject to regulation or complaints under Section 208 concerning whether their prices are “just and reasonable” under Sections 201 and 202. Price regulation pursuant to this process would effectively impound the revenues from broadband speech and shrink the pool of Verizon’s listeners by reducing the availability of funds for network deployment and speech over those networks.

The Supreme Court has made clear that this type of regulation under a “reasonableness” standard is problematic where protected speech is at issue. In \textit{Riley v. National Federation of the Blind of North Carolina, Inc.},\textsuperscript{154} for example, the Court invalidated under the First Amendment a state law capping the percentage of donations professional fundraisers could retain as a “reasonable” fee for soliciting contributions. The Court could not “agree to a measure that requires the speaker to prove ‘reasonableness’ case by case based upon what is at best a loose inference that the fee might be too high.”\textsuperscript{155} Allowing the permissible pricing standard to be fleshed out through iterative complaint proceedings could not resolve the First Amendment


\textsuperscript{153} \textit{Id.} at 898 (government rules that “reduce[] the quantity of expression by restricting . . . the size of the audience reached” implicate the First Amendment).

\textsuperscript{154} 487 U.S. 781 (1988).

\textsuperscript{155} \textit{Id.} at 793.
“Speakers . . . cannot be made to wait for ‘years’ before being able to speak with a measure of security . . . . This scheme . . . necessarily chill[s] speech in direct contravention of the First Amendment's dictates.”\textsuperscript{156} The First Amendment problems presented by reclassification are no different.

Indeed, imposing common carrier obligations on broadband Internet access service could more broadly chill lawful speech. As noted above, Section 201, which broadly outlaws, for example, any “unjust or unreasonable practice,”\textsuperscript{157} with no further limiting principle as to either the type of practice or its effect, is so highly generalized as to fail to make clear what sort of conduct would be off limits for covered broadband Internet access providers. In the broadband context, where protected speech is at issue, application of that standard would present serious concerns under the First Amendment. “[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.”\textsuperscript{158} For the same reason, vague standards such as those contained in Section 201 would operate as a prior restraint on speech, effectively

\textsuperscript{156} Id. at 793-94 (citations omitted).

\textsuperscript{157} 47 U.S.C. § 201(b).

\textsuperscript{158} Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (alterations and internal quotation marks omitted); see also Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982) (“[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.”); Fox v. FCC, No. 06-1760, slip op. at 22-29 (2nd Cir. July 13, 2010) (holding that Commission’s indecency policy was impermissibly vague under the First Amendment because it failed to “provide a discernible standard by which broadcasters can accurately predict what speech is prohibited”).
requiring providers to seek Commission approval before making a wide variety of basic
decisions about their broadband offerings.159

Third, the proposed common carrier status would infringe on First Amendment rights by
making speaker-based distinctions.160 The NOI proposes to single out for Title II regulation only
facilities-based broadband Internet access service providers.161 But the ownership structure of a
broadband Internet access provider cannot diminish one class of speaker’s rights, as the Supreme
Court recently made clear.162 Even if the Commission’s proposed reclassification were to cover
all types of Internet service providers, that regulatory regime would still single out broadband
Internet access providers (and their prospective content partners) from among the many other
players in the Internet ecosystem, such as Google, Akamai, and Amazon,163 that have a similar

159 See Citizens United, 130 S. Ct. at 895-96 (holding that where “a speaker who wants to
avoid threats of . . . liability and the heavy costs of defending against [agency] enforcement must
ask a governmental agency for prior permission to speak, such regulations function as “the
equivalent of prior restraint by giving the [Commission] power analogous to licensing laws
implemented in 16th- and 17th-century England, laws and governmental practices of the sort that
the First Amendment was drawn to prohibit”).

designed or intended to suppress or restrict the expression of specific speakers contradict basic
First Amendment principles.”); Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue,
460 U.S. 575, 577, 592-93 (1983) (“A tax that . . . targets individual publications within the
press, places a heavy burden on the State to justify its action.”).

161 See NOI ¶ 1 & n. 1 (defining “broadband Internet service” to “refer to the bundle of
services that facilities-based providers sell to end users in the retail markets” (emphasis added));
see also id. ¶ 106 (seeking comment on how to treat non-facilities-based Internet service
providers and suggesting that such providers “stand in a different position in the eyes of the
consumer”).

162 Citizens United, 130 S. Ct. at 906 (rejecting rule that “would allow a conglomerate that
owns both a media business and an unrelated business to influence or control the media in order
to advance its overall business interest” but “[a]t the same time” would forbid “some other
corporation, with an identical business interest but no media outlet in its ownership structure,”
from “speak[ing] or inform[ing] the public about the same issue”).

163 See NOI ¶ 107 (purporting to exempt Internet backbone services, content delivery
networks, and other services from the scope of reclassification).
capacity to impact consumers’ Internet experience. This “differential treatment cannot be squared with the First Amendment.”\textsuperscript{164}

Finally, it bears emphasis that the First Amendment problems created by mandatory Title II common carrier status would extend with equal or greater force to any rules or regulations the Commission might later adopt pursuant to its newly-created authority under Title II.\textsuperscript{165} For example, imposing forced access on “managed,” “specialized” or other differentiated services, such as a provider’s own storefront, App Stores, or other proprietary services (where providers’ editorial control is at its zenith), would be particularly troublesome under the First Amendment. As an initial matter, because providers cannot continually expand network capacity, such an obligation would necessarily limit the capacity available for the offering of providers’ own “managed” or “specialized” services, thus substantially decreasing the amount of that type of speech. Likewise, some proponents of regulation favor rules that would restrict a provider’s ability to determine the level of capacity available for its own speech—such as its video services, storefronts, and the like—as compared to capacity available for traditional Internet access services. Any such restrictions would restrict a provider’s ability to engage in its own protected speech and impermissibly “diminish the free flow of information and ideas.”\textsuperscript{166} In addition, any requirement to provide access to a provider’s own “managed,” “specialized” or other proprietary services would constitute impermissible compelled speech. For example, if Title II were the basis for a legal mandate that all applications be offered in a provider’s App Store or on its

\begin{itemize}
\item[] \textsuperscript{164} \textit{Citizens United}, 130 S. Ct. at 906; see also \textit{Cablevision Sys.}, 597 F.3d at 1326 (Kavanaugh, J., dissenting) (program access rule violated First Amendment in part because it discriminated “among similarly situated video programming distributors and video programming networks”).
\item[] \textsuperscript{165} \textit{See generally} Verizon Net Neutrality Comments at 109-123; Verizon Net Neutrality Reply Comments at 108-118.
\item[] \textsuperscript{166} \textit{Turner I}, 512 U.S. at 656 (describing the law invalidated in \textit{Tornillo}).
\end{itemize}
storefronts, such a mandate would plainly preclude the exercise of providers’ discretion to select for themselves the applications they wish to offer in their stores.\textsuperscript{167} The end result of such a rule would be to deter, rather than facilitate, speech: if a provider were required to allow access to \textit{all} content or applications into the provider’s storefront or application store, there would likely be no offering at all.\textsuperscript{168}

In addition, rules imposing particular forms of rate regulation, such as regulations limiting certain business models or sources of revenue that are necessary for providers to fund broadband networks, would also present serious First Amendment concerns. A rule that, for example, prohibited providers from featuring paid content on their networks, providing managed or specialized services in addition to traditional Internet access, or charging application and content providers for various services they might provide would dramatically limit revenue needed to pay for network investment.\textsuperscript{169} And that type of economic burden could make it uneconomical to expand broadband coverage, thereby limiting, in an even more drastic way than general rate regulation, the ability of network providers to extend the reach and capacity of their “microphones” in order to speak to their chosen audiences.\textsuperscript{170}

\textsuperscript{167} \textit{See Tornillo}, 418 U.S. at 258 (“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment” protected by the First Amendment.).

\textsuperscript{168} \textit{See Arkansas Educ. Television Comm’n v. Forbes}, 523 U.S. 666, 681 (1998) (“Were it faced with the prospect of cacophony, on the one hand, and . . . liability, on the other, a public television broadcaster might choose not to air candidates’ views at all.”).

\textsuperscript{169} \textit{See Grosjean v. American Press Co.}, 297 U.S. 233, 244-50 (1936) (invalidating tax on newspaper advertisements).

\textsuperscript{170} \textit{See Minneapolis Star}, 460 U.S. at 577, 592-93 (invalidating “‘use tax’ on the cost of paper and ink products consumed in the production of a publication”); \textit{Tornillo}, 418 U.S. at 256-57 (invalidating statute imposing additional “cost in printing and composing time and materials”).
For these reasons, reclassification of broadband Internet access service itself, as well as the rules and regulations for which reclassification is apparently intended to create the necessary “legal framework,” would create serious the First Amendment problems and would be subject to heightened scrutiny. When government regulation prohibits or limits protected speech, compels a speaker to facilitate the speech of others in a way that threatens to deter or burden the speaker own speech,\textsuperscript{171} interferes with a speaker’s judgment on what speech to feature or promote,\textsuperscript{172} or imposes costs only on one medium of communication\textsuperscript{173} – all of which the proposed reclassification or the net neutrality proposals that are the impetus for reclassification threaten to do – it is subject to the highest form of First Amendment scrutiny, known as strict scrutiny.\textsuperscript{174}

But even if the intermediate scrutiny test applied – which it would at a minimum, given that there is at least an incidental effect on speech – these restrictions would fail. Under intermediate scrutiny, a regulation cannot be sustained unless “it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free

\textsuperscript{171} See \textit{Tornillo}, 418 U.S. at 256-57 (invalidating state law compelling newspapers to print certain material after recognizing (1) “the penalty resulting from the compelled printing . . . exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print” and (2) the “economic realit[jies]” making it impossible to engage in “infinite expansion” of capacity to carry speech); \textit{see also Turner}, 512 U.S. at 656 (describing law invalidated in \textit{Tornillo}).


\textsuperscript{173} See \textit{Minneapolis Star}, 460 U.S. at 588, 592-93 (“A tax that singles out the press . . . places a heavy burden on the State to justify its action.”); \textit{Ark. Writers’ Project Inc. v. Ragland}, 481 U.S. 221, 228 (1987) (invalidating tax on certain magazines).

\textsuperscript{174} Although there might be an exception to the application of strict scrutiny when a speaker owns a medium of transmission and can create a bottleneck restricting all other speakers, \textit{see Turner I}, 512 U.S. at 657, that narrow exception would be inapplicable to broadband Internet service. As explained above, the courts and this Commission have repeatedly recognized that broadband services are subject to strong and growing competition, and thus there is no bottleneck.
expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."\(^\text{175}\)

In fact, these statutory duties and regulatory obligations would not withstand judicial review under any First Amendment standard because there is no evidence of any legitimate problem with respect to the current classification of broadband Internet access service that could justify the speech burdens. As Verizon demonstrated in the related rulemaking proceeding, and as explained above, proponents of Internet regulation have not identified any problem that sufficiently justifies the proposed regulations and restrictions they would impose on broadband Internet providers’ speech.\(^\text{176}\) That lack of evidence is explained by the highly competitive state of the broadband market, in which providers offer subscribers access to all lawful content and have strong economic incentives to continue to do so.

In the instant proceeding, there has been absolutely \textit{no} demonstration of any bona fide need to compel the offering of a separate common carrier service and thereby imperil the speech rights of broadband Internet access providers and their partners by subjecting them to Title II regulation. Rather, the \textit{admitted} purpose of the Commission’s proposed reclassification is to manufacture legal authority in order pursue its desired regulatory agenda.\(^\text{177}\) This self-serving rationale is insufficient to warrant imposing heavy speech burdens on broadband Internet access providers.

\(^{175}\) \textit{Id.} at 662 (internal quotation marks omitted).

\(^{176}\) \textit{See} Verizon Net Neutrality Comments at 117-118; Verizon Net Neutrality Reply Comments at 115.

\(^{177}\) \textit{See supra} Section III.A.2.
B. Title II Common Carriage Regulation of Broadband Internet Access Service Would Create Serious Takings Problems.

Any government compulsion to offer broadband Internet service as a common carrier “telecommunications service” under Title II also would create serious problems under the Takings Clause. It is well-settled that the Commission lacks authority to impose regulatory obligations that would result in a taking in “an identifiable class of cases.”178 Because compelled common carrier status and the resultant Title II burdens would fall upon existing broadband facilities-based providers, such action would create “an identifiable class of cases in which application of [the] statute [would] necessarily constitute a taking.”179 Network operators have vested property rights in the physical infrastructure of the networks that they own and have spent billions of dollars to build, maintain, and modernize, and in the ability to use those networks in reliance on the Commission’s settled approach to broadband over the last decade. Reclassification of broadband Internet service by compelled common carrier status would violate those rights and investment-backed expectations by forcing network operators to dedicate their network facilities to the use of others on terms to which the operators would not agree.

The Commission’s proposal provides no mechanism for compensating operators for such takings and indeed could not because Congress alone possesses the power to appropriate federal funds.180 Allowing broadband Internet access providers to continue charging retail customers for access would not solve the compensation problem because, in a competitive market such as the

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178 Bell Atl., 24 F.3d at 1445.
179 Id.
180 Id.; see also Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1510 (D.C. Cir. 1984) (en banc) (“When there is no authorization by an act of Congress or the Constitution for the Executive to take private property, an effective taking by the Executive is unlawful because it usurps Congress's constitutionally granted powers of lawmakers and appropriation.”), overturned on other grounds, 471 U.S. 1113 (1985).
broadband marketplace, providers cannot raise retail rates to offset the loss from the taking and, even if they could, those revenues belong to the provider and thus cannot be considered compensation by the government.

As explained above, there is simply no basis—much less any statutory authority in the Commission—for any government requirement that broadband Internet access providers offer the telecommunications component of their integrated broadband product as a separate common carrier offering. The decision to turn private property over to public use generally rests with the property owner, not the government.181 Here, Verizon and other broadband network owners have not voluntarily agreed to take on common carriage obligations. Thus, it would be an extraordinary government action—and by definition a taking—for government to compel a property owner, such as a broadband network owner, to make his facilities available for the use of others on a common carriage basis.

In particular, compelling network providers to grant third parties the right to transmit their information over proprietary networks on regulated terms and conditions would constitute a per se unconstitutional occupation of those networks.182 The transmission of electronic signals over a broadband network is a modern-day physical invasion of private property. As commentators have explained, “One can scarcely imagine a more vivid example of physical invasion than freight trains owned by one railway barreling down another railway’s stretch of


182 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 430(1982) (holding that a per se taking occurs when the government authorizes a “permanent physical occupation” of property even if “only relatively insubstantial amounts of space” are permanently occupied by others in a manner that does “not seriously interfere with the [owner’s] use of the rest of his [property]”); Bell Atl., 24 F.3d at 1445 (finding that the Commission’s physical co-location rules, which granted competitive access providers “the right to exclusive use of a portion of the [local exchange carriers’] offices,” amounted to a per se taking under Loretto).
track. In electrical or telecommunications networks, the electrons or photons are the equivalent of a railway’s locomotives.” A government-created right to make such transmissions is, at the very least, the digital equivalent of an easement over another’s property, which the Supreme Court has made clear is no less a taking simply because it is not continually used. And, to the extent Title II were interpreted to require a broadband Internet access provider to allow the attachment of physical devices directly to its network, as proposed in the network neutrality rulemaking, that too would constitute a per se taking.

Imposing Title II common carrier obligations on broadband Internet access providers also would present substantial regulatory takings issues. The Supreme Court considers three factors in determining whether a regulatory taking has occurred: (1) the character of the government action; (2) the economic impact of the government action; and (3) reasonable investment-backed expectations. The character of the government action here would be suspect because its stated purpose would be to generate the agency’s desired scope of statutory authority over the Internet.

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183 J. Gregory Sidak & Daniel F. Spulber, Deregulatory Takings and Breach of the Regulatory Contract, 71 N.Y.U.L.REV. 851, 951-53 (1996); see also Loretto, 458 U.S. at 450 (Blackmun, J., dissenting) (asserting that a company “continuously pass[ing] its electronic signal through . . . cable” would create the “physical touching” necessary for a per se physical taking); CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1021 (S.D. Ohio 1997) (“Electronic signals generated and sent by computer have been held to be sufficiently physically tangible to support a trespass cause of action.”); Thrifty-Tel, Inc. v. Bezenek, 54 Cal. Rptr. 2d 468, 473 n.6 (Cal. Ct. App. 1996) (“[T]he electronic signals generated by the [defendants’] activities were sufficiently tangible to support a trespass cause of action.”). But see Qwest Corp. v. United States, 48 Fed. Cl. 672, 694 (2001); Cablevision Sys. Corp. v. FCC, 570 F.3d 83 (2d Cir. 2009).

184 Nollan, 483 U.S. at 832 (holding that “a ‘permanent physical occupation’ has occurred [under Loretto] where individuals are given a permanent and continuous right to pass to and fro, so that real property may be continuously traversed, even though no particular individual is permitted to station himself permanently upon the premises”).

185 See Loretto, 458 U.S. at 438 (finding an unconstitutional taking based on the “direct physical attachment of plates, boxes, wires, bolts, and screws” to the owner’s property).

It also would constitute a complete reversal from not just one but four separate previous
Commission orders, in utter disregard of the investment-backed interests of the parties that relied
on those orders. And, as explained above, compelled common carriage constitutes a particularly
intrusive form of regulation that requires providers to turn over their property to the use of
others, and is the modern day form of a physical invasion of broadband Internet access
providers’ networks.\footnote{id} Further, the economic impact of compelled common carriage and the
resultant reclassification would be massive, as the intensely negative market reaction to the
Commission’s proposal has already demonstrated.\footnote{see supra section ii.a.} The applicability of Sections 201, 202, and
208 to broadband Internet access service would impose enforceable legal limitations on rates,
thereby reducing providers’ ability to earn reasonable returns on their infrastructure
investments.\footnote{see district intown properties ltd. ‘p’ship v. district of columbia, 198 f.3d 874, 878
(d.c. cir. 1999) (stating that “[a] regulation’s economic effect upon [a] claimant may be measured in several different ways,” including the ability to earn a reasonable rate of return).} Indeed, the Commission has already proposed an extreme form of rate regulation
in its ongoing net neutrality proceeding where it has proposed prohibiting Internet access
providers from charging content or application providers at all for certain services.\footnote{notice of proposed rulemaking, preserving the open internet; broadband industry
practices, gn docket no. 09-191, wc docket no. 07-52 ¶ 106 (rel. oct. 22, 2009).} Even apart
from direct rate regulation, imposing duties under Title II that limit or preclude certain business
models or revenue sources, or that restrict the provision of managed or specialized services, also
would severely impact the economics of broadband service. That impact would not only
undermine the ability to continue to build out networks based on expected revenues and costs,
but sharply reduce the incentives for future investment. Finally, reclassification would
\footnote{id. (noting that that a “‘taking’ may more readily be found when the interference with
property can be characterized as a physical invasion by government”).}
drastically interfere with broadband Internet access providers’ reasonable investment-backed expectations. Broadband Internet access providers, at government urging and with its full support based on at least four separate FCC decisions, have invested billions of dollars in broadband infrastructure with the expectation that their broadband Internet services would remain free from burdensome Title II regulation.191 Verizon alone is investing more than $23 billion to pass more than 18 million premises with its next-generation, all-fiber FiOS network, and billions more on its 3G and 4G wireless networks, and that investment was premised on the absence of monopoly-style common carriage and rate regulation requirements. Accordingly, the Commission’s proposed reclassification would be unconstitutional under the Takings Clause and therefore unauthorized by law.

C. Title II Common Carriage Regulation of Broadband Internet Access Service Would Create Serious Problems under the Non-Delegation Doctrine.

Under the separation of powers that lies at the heart of our governmental system, Congress may not delegate its lawmaking power over a subject to an agency without providing appropriate standards and principles such that the agency can fairly be said to be executing Congress’s will.192 Under the Commission’s theory, however, it would have unfettered discretion to reclassify not just broadband Internet access service but any service that arguably incorporates a transmission function, as well as unfettered discretion to regulate under Title I any information service delivered over the Internet. As some commentators have observed,

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191 See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (holding that EPA disclosure to competitors of certain proprietary data submitted by a party could constitute a taking where such disclosure interfered with reasonable investment-backed expectations); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (finding a taking when private party relied on ability to control access to marina in making investments, and government thereafter compelled private party to open the marina to the public).

“[a]cceptance of jurisdiction-by-reclassification would mean that the FCC had essentially unfettered discretion to regulate the Internet as it sees fit, free of any Congressional restraints.”

Justice Scalia’s dissent, upon which the proponents of reclassification so heavily rely, foresaw this very problem:

[T]he Commission might conclude that it can order cable companies to “unbundle” the telecommunications component of cable-modem service. And presto, Title II will then apply to them, because they will finally be ‘offering’ telecommunications service! Of course, the Commission will still have the [authority] to forbear from regulating them under § 160. . . . Such Mobius-strip reasoning mocks the principle that the statute constrains the agency in any meaningful way.

The absence of any substantive, legislatively-provided standard in the Commission’s proposal to limit in any way the agency’s decision as to whether to move an important sector of the American economy from a largely deregulated state into a heavily-regulated framework or what parts of broadband Internet service to so regulate is thus highly problematic. Interpreting the Act to grant the Commission such authority would conflict with the basic notions of political accountability inherent in the non-delegation doctrine.

Of course, there has been no clear direction from Congress to regulate the Internet at all. To simply presume that Congress granted the Commission authority to regulate the Internet based on silence in the Act’s definitional provisions would also risk running afoul of the non-delegation doctrine because nothing in those provisions indicates a considered choice by

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194 Brand X, 545 U.S. at 1014 (Scalia, J., dissenting) (emphasis added).

195 Loving v. United States, 517 U.S. 748, 758 (1996) (“[T]he delegation doctrine[ ] has developed to prevent Congress from forsaking its duties.”); see also Oral Argument Transcript at 28-29 (“[T]o allow the FCC to aggregate to itself the power to decide whether the Internet should be regulated and how allows Congress to evade its responsibilities.”) (Randolph, J.).
Congress to grant the Commission authority over the Internet, much less to provide even an
intelligible principle for how to implement such authority. ¹⁹⁶ To the extent the Act reflects any
Congressional choices at all with regard to the Internet, it indicates that Congress intended for a
decidedly deregulatory policy to apply. ¹⁹⁷ And, in any event, the absence of any intelligible
limiting principle to cabin the Commission’s discretion to extend its regulatory reach to all
aspects of the Internet ecosystem dooms its theory under the non-delegation doctrine.

D. In Any Case, the Commission Could Not Reclassify Without Issuing an NPRM
and Engaging in Rulemaking.

The Commission’s approach also suffers from another legal infirmity: it cannot reverse
course and reclassify broadband Internet access service as a telecommunications service without
first engaging in notice and comment rulemaking. Although an NOI followed by a declaratory
ruling may be an appropriate vehicle for “clarification” of existing law, ¹⁹⁸ such as when the
Commission determined the classification of broadband Internet access in the first instance, here
the Commission would be manifestly changing existing law by reversing four prior orders.
Moreover, its change would have both the stated intent and the immediate effect of subjecting
broadband Internet access providers to a multitude of new substantive obligations, including both

en banc) (“Were courts to presume a delegation of power absent an express withholding of such
power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with
Chevron and quite likely with the Constitution as well.”) (emphasis in original).

¹⁹⁷ See, e.g., 47 U.S.C. § 230(b)(2) (stating that market for Internet service should be
“unfettered by Federal or State regulation”); see also Oral Argument Transcript, Comcast Corp.
v. FCC, 600 F.3d 642, 647 (D.C. Cir. 2010) (“In looking this over, I found a good many
instances in which Congress has instructed the FCC to study the Internet, and taxation of transit
sales transactions on the Internet . . . . But what I don’t find is any Congressional directive to the
FCC to regulate the Internet.” (Randolph, J.)).

¹⁹⁸ Sprint Corp. v. FCC, 315 F.3d 369, 374 (D.C. Cir. 2003) (“Underlying these general
principles is a distinction between rulemaking and a clarification of an existing rule.”); 47 C.F.R.
§ 1.2 (declaratory ruling appropriate for “removing uncertainty”).
those set out in the newly applicable statutory provisions and those in the myriad rules and interpretive orders adopted by the Commission under color of those statutory provisions.

As the D.C. Circuit has explained, notice and comment rulemaking is required when an agency “grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests.”\textsuperscript{199} There can be no question that a decision to reclassify broadband Internet access services as subject to Title II common carriage regulation necessarily would “impose obligations” and have “other significant effects on private interests.” Indeed, that is the stated purpose for the reclassification – to enhance the Commission’s authority to impose obligations that do not currently apply. Although rulemaking may not be required when an “agency is merely explicating Congress’ desires,” it is necessary where an “agency is adding substantive content of its own.”\textsuperscript{200} In addition to the fact that, as explained above, there is no evidence of a Congressional desire for the Commission to regulate the Internet at all, a decision to reclassify broadband Internet access would subject providers to any number of rules or interpretations adopted under color of the newly applicable statutory provisions that would add “substantive content” to the scope of those obligations. Moreover, although reclassification would require the Commission to interpret relevant provisions of the Act, the crux of the issue – as explained by the Supreme Court in \textit{Brand X} – will be the continuing validity of the Commission’s factual determinations concerning the nature of broadband Internet access service offerings. Those determinations go beyond simply “explicating Congress’ desires” and require the Commission to

\textsuperscript{199} \textit{Batterton v. Marshall}, 648 F.2d 694, 701-02 (D.C. Cir. 1980); \textit{American Hosp. Ass’n v. Bowen}, 834 F.2d 1037, 1045 (D.C. Cir. 1987); \textit{see also} 5 U.S.C. § 551(4) (defining a rule as “the whole or part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . .”).

\textsuperscript{200} \textit{American Hosp.}, 834 F.2d at 1045; \textit{see also} \textit{Hemp Indus. Ass’n v. DEA}, 333 F.3d 1082, 1087 (9th Cir. 2003) (rulemaking not required where agency “merely explain[s], but do[es] not add to, the substantive law that already exists in the form of a statute or legislative rule”).
add “substantive content.” As the D.C. Circuit has said, “a refusal to initiate a rulemaking naturally sets off a special alert” when a change in existing law is sought “on the basis of a radical change in its factual premises.” Indeed, the very case on which the Commission relies explained that “changes in fact and circumstance” are “exactly” what “notice and comment rulemaking is meant to inform.”

Finally, the same reasons that would make a declaratory ruling an inappropriate vehicle for any determination to change the regulatory treatment of broadband Internet access services also would require that any order doing so, in whatever form, could have only prospective effect. Although retroactive application may be appropriate in some circumstances for new applications or clarifications of existing law, “[t]he governing principle is that when there is a ‘substitution of new law for old law that was reasonably clear,’ the new rule may justifiably be given prospective-only effect in order to ‘protect the settled expectations of those who had relied on the preexisting rule.’” Here, there can be no question that a decision to treat broadband Internet access service in whole or in part as a Title II telecommunications service – which would require the Commission to reverse four prior orders and the position it advocated before the Supreme Court and other appellate courts – would amount to a “substitution of new law for old law” and upset settled expectations. In such circumstances, the Commission has routinely recognized that

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201 *American Horse Protection Ass’n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987).

202 *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997). Although the Commission cites this case for its dicta noting that an agency may change a prior statutory interpretation without notice and comment rulemaking, NOI ¶ 29 n.81, as noted a decision to reclassify here would require the Commission not only to change its statutory interpretation, but also to make factual determinations diametrically opposed to those it has made before.

fundamental notions of equity and fairness dictate that a change in law have only prospective effect. 204

VI. THE POSSIBILITY OF FORBEARANCE UNDER SECTION 10 OF THE ACT DOES NOT REMEDY THE HARMFUL EFFECTS OR LEGAL FLAWS OF TITLE II RECLASSIFICATION.

As explained above, untrammeled application of Title II to any component of broadband Internet access service would be unlawful and cause immeasurable harm to the Internet ecosystem – as even the Commission appears to recognize. Forbearance, no matter how structured, cannot undo the damage that reclassification would inflict, and the Commission should stop well before it has to grapple with the scope of forbearance. In any event, as explained below, the Commission’s forbearance proposal would not eliminate the uncertainty in the broadband markets created by reclassification, would not remedy the Commission’s lack of authority to impose the Title II framework on broadband Internet services, would not achieve what the Commission promises it would as the proposal inevitably would lead to rate and other regulation, and would not include the factual findings or procedural framework that would ensure that the Commission’s forbearance decision is neither overturned on judicial review nor reversed by this or another Commission in the future.

First, forbearance would not eliminate the uncertainty in broadband markets that reclassification would cause. As the Commission’s experience with forbearance demonstrates, this approach would cause massive uncertainty and litigation, leaving all parts of the Internet

204 See, e.g., Fox, 129 S. Ct. at 1808 (majority opinion) (noting that Commission had refused to apply change in indecency policy retroactively because “existing precedent would have permitted” the broadcast at issue and thus broadcaster “did not have the requisite notice” to justify retroactive application); see generally Landgraf v. USI Film Prods., 511 U.S. 244, 265, 280 (1994) (explaining that “[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly”).
ecosystem unsure about the path that Commission regulators might follow as personnel change, political winds turn, or new calls for regulation (including through the Section 208 complaint process) emerge. Indeed, the Commission’s current efforts to reclassify broadband Internet services as common carriage services notwithstanding repeatedly reaching exactly the opposite conclusion in a series of orders over several years highlights the lack of comfort that any initial decision to forbear will truly stick. This uncertainty is highlighted by the Commission’s own assertion that it could “unforbear” from any forbearance decision made as part of its proposed approach.\textsuperscript{205} That kind of regulatory ambiguity would paralyze innovation and discourage investment, in the same way that reclassification itself would, at precisely the time when economic growth is critical and delivery of broadband to all Americans is a national priority.\textsuperscript{206}

In fact, the Commission under Chairman Kennard already considered and rejected the argument that the availability of forbearance mitigates the harm that would follow from imposing Title II burdens on broadband Internet access providers:

\begin{quote}
Notwithstanding the possibility of forbearance, we are concerned that including information service providers within the ‘telecommunications carrier’ classification would effectively impose a presumption in favor of Title II regulation of such providers. Such a presumption would be inconsistent with the deregulatory and procompetitive goals of the 1996 Act. In addition, uncertainty about whether the Commission would forbear from applying specific provisions could chill innovation.\textsuperscript{207}
\end{quote}

Indeed, even if the Commission forbore from all current statutory and regulatory obligations, it also would need to forbear from all future obligations if there is to be any chance that reclassification will not stifle investment and innovation in the broadband marketplace. Otherwise, each new action taken by the Commission in the Title II arena would lead to a new

\textsuperscript{205} NOI ¶ 98.
\textsuperscript{206} See supra Section II.A.
\textsuperscript{207} Universal Service Report, 13 FCC Rcd at 11524-25 ¶¶ 46-47.
round of forbearance proceedings with no certainty as to the outcome. Thus, to the extent the Commission forbears from particular provisions of Title II, it should also make clear that it is forbearing from all existing and future regulatory obligations that are promulgated pursuant to those provisions.208

Second, Commission action under Section 10 would do nothing to remedy the Commission’s lack of authority to impose the Title II framework on broadband Internet services. Instead the Commission’s proposed use of its forbearance authority exacerbates the problems with its proposal by turning the purpose of Section 10 on its head. Congress enacted Section 10 as part of a legislative overhaul designed to “reduce regulation in order to . . . encourage the rapid deployment of new telecommunications technologies.”209 Yet in this proceeding, the Commission seeks to exercise its forbearance authority not to lift existing regulatory obligations that no longer serve the public interest, as Congress intended, but rather as a mechanism to reverse-engineer a justification for massively increasing the statutory and regulatory burdens of

208 See 47 U.S.C. § 160(a) (authorizing forbearance from “any regulation”).

broadband Internet providers.\textsuperscript{210} The Commission’s results-oriented use of forbearance—driven by its apparent dissatisfaction with the limits on its statutory authority—only adds to the legal defects of the Commission’s proposal.

Third, the limited forbearance proposed by the Commission would not do what it promises. The Commission, for example, has maintained that its proposal would not lead to rate regulation.\textsuperscript{211} However, that would require the Commission to forbear from sections 201, 202, and 208, as it properly should. But the NOI suggests that the Commission will not forbear from Section 201, 202, and 208.\textsuperscript{212} By their plain terms, these provisions plainly could lead to rate and other regulation because they would subject broadband Internet access providers to Section 208 complaints alleging claims regarding their rates and other terms of their service under Sections 201 and 202.\textsuperscript{213} In fact, the Commission itself already has proposed an extreme form of rate regulation in its ongoing net neutrality proceeding in the form of a proposed prohibition on charging content and application providers for various services. To ensure there will actually be no rate regulation, the Commission would have to fully forbear from Sections 201, 202, and 208 (or at a minimum any aspects of those sections related to regulation of rates and other terms and conditions of service), as well as abandon its own prior rate regulation proposal.

\textsuperscript{210} NOI ¶ 70 (proposing to exercise forbearance authority with respect to Title II obligations that are “currently inapplicable” in order to impose new obligations on broadband Internet providers).

\textsuperscript{211} Schlick Statement at 8 (“Nor would identification of a telecommunications service within broadband Internet access be a harbinger of monopoly-era price regulation, as some have suggested.”).

\textsuperscript{212} NOI ¶¶ 74, 76.

The Commission also has not proposed to make the explicit factual findings that would ensure forbearance is upheld on judicial review. In particular, it should make explicit findings, which are amply supported by the facts described above (see supra Section III.C.1), that the substantive requirements of Title II are not necessary because the intense and growing competition for broadband Internet access services already works to protect consumers. As the Commission has repeatedly found in a series of orders declining to regulate broadband Internet access services, “competition among providers of broadband service is vigorous” and “greater competition limits the ability of providers to engage in anticompetitive conduct . . . since subscribers would have the option of switching to alternative providers if their access to content were blocked or degraded.”

Thus, instead of “simply observ[ing] the current marketplace for broadband Internet services,” as the NOI proposes, the Commission should make explicit and detailed factual findings that: competition and innovation are thriving, providers have made massive investments, consumers have benefited from greater speeds and capabilities, prices have declined, and there is no evidence to suggest that broadband Internet access providers have market power. Indeed, in light of these facts, the statute requires the Commission to forbear broadly from all of the provisions of Title II. See 47 U.S.C. § 160(a) (stating that the Commission “shall forbear from applying any regulation or any provision of this Act” where statutory criteria are met).

Fourth, the Commission promises that the forbearance decision will endure. Yet it has not proposed to take steps to give teeth to its commitment not to unforbear and ensure that the

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214 Memorandum Opinion and Order, Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corp. to Time Warner Cable Inc. and Comcast Corp., 21 FCC Rcd 8203, 8296 ¶ 217 (2006); Wireline Broadband Order, 20 FCC Rcd at 14877-78 ¶ 44; Wireless Broadband Order, 22 FCC Rcd 5901; Cable Modem Order, 17 FCC Rcd at 4825, 4828-31 ¶¶ 44, 52-55.

215 NOI ¶ 70.
forbearance rug is not pulled out from under providers as the Commission is now proposing to do with respect to classification. The Commission should expressly provide, for example, that it must overcome a heightened standard to reverse a forbearance decision in this setting. As the Commission has recognized,\textsuperscript{216} and as explained above, the Supreme Court held in Fox that an agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate . . . when . . . its new policy rests upon factual findings that contradict those which underlay its prior policy . . . or when its prior policy has engendered serious reliance interests that must be taken into account.”\textsuperscript{217} The Commission appears to agree that “to overturn a grant of forbearance, the Commission would first have to compile substantial record evidence that the circumstances it previously identified as supporting forbearance have changed.”\textsuperscript{218}

Moreover, the Commission should find and acknowledge that broadband Internet providers will act in significant reliance on the forbearance decision remaining in place absent exceptional and unforeseen changes to the broadband market. A decision to broadly forbear from Title II obligations under these circumstances—especially with future innovation and investment hinging on regulatory stability—will have “engendered serious reliance interests that must be taken into account.” In light of these deep reliance interests, the Commission should make clear that any future decision to unforbear based on changed factual circumstances would have to clear the highest possible hurdle to withstand judicial review.

In addition, clear procedural rules are needed to further limit the possibility of unforbearance and protect the reliance interests generated by forbearance. The unforbearance

\textsuperscript{216} NOI ¶ 98.

\textsuperscript{217} Fox, 129 S. Ct. at 1811 (majority opinion); see also id. at 1823 (Kennedy, J., concurring) (“Reliance interests in the prior policy may also have weight in the analysis.”).

\textsuperscript{218} Schlick Statement at 9.
procedural regime should make clear that the burdens of production and persuasion require more from those seeking unforbearance than from those seeking forbearance in the first instance.\textsuperscript{219} As the Commission has acknowledged, to grant an unforbearance petition, the “Commission would first have to compile substantial record evidence that the circumstances it previously identified as supporting forbearance have changed.”\textsuperscript{220} Accordingly, the Commission should adopt a procedural regulation that makes clear that the burdens of production and persuasion require the party seeking unforbearance not only to establish that forbearance is no longer warranted under the Section 10(a) criteria, but also to bring forth “substantial record evidence” that the underlying facts have changed and that unforbearance would not upset the “serious reliance interests” of broadband Internet providers.

The Commission also should make clear that the one-year statutory clock—and the derivative “deemed granted” provision of Section 10—do not apply in the unforbearance setting. Section 10(c) provides that a petition for forbearance “shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission.”\textsuperscript{221} The text of Section 10(c) gives no indication that the one-year clock should extend to unforbearance petitions, and interpreting it in such a manner runs contrary to the congressional purpose underlying the enactment of this provision. Congress enacted Section 10 because it would “be a useful tool in ending unnecessary

\textsuperscript{220} Schlick Statement at 9.
\textsuperscript{221} 47 U.S.C. § 160(c).
Indeed, the D.C. Circuit has explained that Section 10 was “[c]ritical to Congress’s deregulation strategy[.]” Because unforbearance does not advance this deregulatory mandate, it would be unreasonable to conclude that Congress wanted regulations from which the Commission had forborne to be administratively resurrected based on agency inaction.

Fifth, and last, the Commission should make clear that any reclassification decision is expressly contingent on the concomitant forbearance decision being fully upheld on judicial review. The reclassification of broadband Internet access service without broad forbearance is an even more dangerous scenario as the Commission itself recognizes. Imposing the full panoply of common carriage obligations (including price regulation and tariffing requirements) on broadband Internet access services would be catastrophic because it would result in massive reductions in investment and innovation, lost jobs, harm to the economy, and disruption to consumers’ services. To prevent this scenario from becoming reality, the Commission should include language in the decision expressly stating that the reclassification and forbearance decisions are inseverable. In particular, the Commission should expressly find that it “would

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223 AT&T Inc. v. FCC, 452 F.3d 830, 832 (D.C. Cir. 2006).
224 MD/DC/DE Broadcasters Ass’n v. FCC, 236 F.3d 13, 22 (D.C. Cir. 2001) (“Whether the offending portion of a regulation is severable depends upon the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision.”); see also Arizona Public Serv. Co. v. EPA, 562 F.3d 1116, 1122 (10th Cir. 2009) (“A regulation is severable if the severed parts ‘operate entirely independently of one another,’ and the circumstances indicate the agency would have adopted the regulation even without the faulty provision.”) (quoting Davis County Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1459 (D.C. Cir. 1997))); North Carolina v. EPA, 531 F.3d 896, 929 (D.C. Cir. 2008) (“Severance and affirmance of a portion of an administrative regulation is improper if there is ‘substantial doubt’ that the agency would have adopted the severed portion on its own.”) (quoting Davis County Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1459 (D.C. Cir. 1997))).
not have” proceeded with reclassification “but for” the inclusion of broad forbearance\textsuperscript{225}—that is, that it would indeed prefer “no” reclassification “at all” to reclassification without forbearance.

The Commission also should expressly state that the reclassification and forbearance decisions are so inextricably intertwined that one piece could not “function sensibly” without the other because “[h]eavy-handed regulation prescriptive regulation can chill investment and innovation” and “subject the providers of broadband communications services to extensive regulations ill-suited to broadband”\textsuperscript{226} in “tension with section 706(a) of the 1996 Act.”\textsuperscript{227} By making these clear statements, the Commission can maximize the chances that the reclassification and forbearance decisions stand or fall together in court so “that in the event of an adverse court decision on forbearance the old unitary information service classification would spring back.”\textsuperscript{228}

\textbf{VII. BROADBAND INTERNET ACCESS IS AN INHERENTLY INTERSTATE SERVICE THAT IS NOT SUBJECT TO STATE REGULATION.}

The Commission asks what authority states have to regulate broadband Internet access.\textsuperscript{229} The answer to that is simple. Regardless of the outcome of this or any other pending proceeding, the Commission should confirm that broadband Internet access, VoIP, and other IP-based services are quintessential “interstate” services that are not subject to state regulation. Broadband Internet access (and other IP-enabled) services are multi-faceted, any-distance services that cannot practicably be separated into intrastate and interstate parts. These services

\textsuperscript{225} \textit{K Mart Corp. v. Cartier, Inc.}, 486 U.S. 281, 294 (1988).


\textsuperscript{227} NOI ¶ 98.

\textsuperscript{228} Schlick Statement at 9.

\textsuperscript{229} NOI ¶¶ 109-110.
are deployed nationally, using national systems and platforms. As President Obama noted in announcing new national fuel efficiency standards, multiple sets of overlapping requirements result in “an inefficient and ineffective system of regulations.”230 The same is true in the case of Internet-based services – a single federal regime will produce efficiencies that would be lost if these services were subjected to more than 50 different sets of rules.

Recognizing these facts, the Commission has previously determined that broadband Internet access is an interstate service because “the points among which cable modem service communications travel . . . . are often in different states and countries.”231 As the Commission recently noted, although “broadband Internet access service traffic may include an intrastate component, [the Commission] has concluded that broadband Internet access service is properly considered jurisdictionally interstate for regulatory purposes.”232 Even if certain Internet communications may be intrastate when analyzed on an end-to-end basis, there is no practical way to separate intrastate and interstate components of broadband Internet service: “In a single Internet communication, an Internet user may, for example, access websites that reside on servers in various states or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another


231 Cable Modem Order, 17 FCC Rcd at 4832 ¶ 59.

country, and may do so either sequentially or simultaneously.\textsuperscript{233} Given the way in which caching and content delivery networks work, even if one page of a website is stored in a cache server local to the user, the next page the user seeks from the same website may be in a server across the country. Similarly, even the DNS look-up process, as explained above, is likely to involve interaction and communication with servers around the country or around the world, even if the server hosting a particular web site is located in the same state as the consumer. Where it is impossible or impractical to separate a service into intrastate and interstate components, that service is exclusively interstate for regulatory purposes and state regulations that would interfere with valid federal rules or policies are preempted.\textsuperscript{234}

State regulation of broadband Internet access would result in just that type of interference. As the Commission recognized in its \textit{Vonage Order} preempting state regulation of VoIP services, “multiple disparate attempts to impose economic regulations” on an Internet-based service “thwart its development and potentially result in it exiting the market.”\textsuperscript{235} Congress has clearly articulated its preference for a cohesive national broadband policy, and the Commission has consistently favored such an approach. In Section 230 of the Act, Congress stated that “[i]t is the policy of the United States – … to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by

\textsuperscript{233} \textit{GTE Telephone Operating Cos.}, 13 FCC Rcd at 22479 ¶ 22.


\textsuperscript{235} \textit{Vonage Order}, 19 FCC Rcd. at 22428 ¶ 36.
Federal or State regulation.” The Commission has unequivocally interpreted this provision to demonstrate Congress’ “clear preference for a national policy to accomplish this objective” and to provide “support for preventing state attempts to promulgate regulations” that may hinder achievement of a vibrant and competitive free market. Section 706 of the 1996 Act also directs the Commission to “encourage the deployment … of advanced telecommunications capability to all Americans” by utilizing various “methods that remove barriers to infrastructure investment.” Burdensome and disparate state economic regulations would conflict with all of these goals, as well as the Commission’s professed desire to “promot[e] innovation, investment, and competition in the broadband context.” NOI ¶ 29. That is true regardless of how the Commission classifies broadband Internet access services.

Preemption of state regulation also would be consistent with the Commerce Clause in the Constitution. That provision has long been understood to deny states the power to unjustifiably discriminate against or burden interstate commerce through regulation (the “dormant Commerce Clause”). Numerous courts have struck down state regulations of the Internet or services provided over the Internet on the grounds that such regulations would inevitably have negative effects on interstate commerce that were not outweighed by any putative state benefits.

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237 Vonage Order, 19 FCC Rcd at 22425-26 ¶ 34.


Likewise, as described above, state economic regulation of broadband Internet access service would have an inevitably burdensome effect on interstate commerce.
CONCLUSION

The Commission has no legal or factual basis to reverse course and find that broadband Internet access service is (or contains) a Title II telecommunications service subject to common carriage regulation and thereby expand its statutory authority over the Internet beyond the bounds that Congress has established. Instead, the Commission should pursue a genuine “third way” built on the Internet’s successful model of self-governance based on industry technical standards and best practices, with the government serving as a backstop only on a case-by-case basis in the event industry mechanisms prove unable to resolve an issue.

Respectfully submitted,

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