



Office of Commissioner Robert M. McDowell  
Federal Communications Commission  
Washington, D.C. 20554

May 5, 2010

The Honorable Henry A. Waxman  
Chairman  
Committee on Energy and Commerce  
United States House of Representatives  
Washington, DC 20515

Dear Chairman Waxman:

Thank you for the opportunity to testify before you and your colleagues on the Subcommittee on Communications, Technology and the Internet on March 25 regarding the National Broadband Plan.<sup>1</sup> As I testified at the hearing, the Commission has never classified broadband Internet access services as “telecommunications services” under Title II of the Communications Act. In support of that assertion, I respectfully submit to you the instant summary of the history of the regulatory classification of broadband Internet access services.

In the wake of the privatization of the Internet in 1994, Congress overwhelmingly passed the landmark Telecommunications Act of 1996 (1996 Act) and President Clinton signed it into law. Prior to this time, the Commission had never regulated “information services” or “Internet access services” as common carriage under Title II. Instead, such services were classified as “enhanced services” under Title I. To the extent that regulated common carriers offered their own enhanced services, using their own transmission facilities, the FCC required the underlying, local transmission component to be offered on a common carrier basis.<sup>2</sup> No provider of retail information services was ever required to tariff such service. With the 1996 Act, Congress had the opportunity to reverse the Commission and regulate information services, including Internet access services, as traditional common carriers, but chose not to do so. Instead, Congress codified the Commission’s existing classification of “enhanced services” as “information services” under Title I.

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<sup>1</sup> *Oversight of the Federal Communications Commission: The National Broadband Plan: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the House Comm. on Energy and Commerce*, 111<sup>th</sup> Cong., 2d Sess. (March 25, 2010).

<sup>2</sup> Some who are advocating that broadband Internet access service should be regulated under Title II cite to the Commission’s 1998 *GTE ADSL Order* to support their assertion. See *GTE Telephone Operating Cos.*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd. 22,466 (1998) (*GTE ADSL Order*). The *GTE ADSL Order*, however, is not on point, because in that order the Commission determined that GTE-ADSL service was an interstate service for the purpose of resolving a tariff question.

Two years after the 1996 Act was signed into law, Congress directed the Commission to report on its interpretation of various parts of the statute, including the definition of “information service.”<sup>3</sup> In response, on April 10, 1998, under the Clinton-era leadership of Chairman William Kennard, the Commission issued a *Report to Congress* finding that “Internet access services are appropriately classed as information, rather than telecommunications, services.”<sup>4</sup> The Commission reasoned as follows:

The provision of Internet access service . . . offers end users *information-service capabilities inextricably intertwined with data transport*. As such, we conclude that it is appropriately classed as an “information service.”<sup>5</sup>

In reaching this conclusion, the Commission reasoned that treating Internet access services as telecommunications services would lead to “negative policy consequences.”<sup>6</sup>

To be clear, the FCC consistently held that any provider of information services could do so pursuant to Title I.<sup>7</sup> No distinction was made in the way that retail providers of Internet access service offered that information service to the public. The only distinction of note was under the Commission’s *Computer Inquiry* rules, which required common carriers that were also providing information services to offer the transmission component of the information service as a separate, tariffed telecommunications service. But again, this requirement had no effect on the classification of retail Internet access service as an information service.

In the meantime, during the waning days of the Clinton Administration in 2000, the Commission initiated a Notice of Inquiry (NOI) to examine formalizing the regulatory classification of cable modem services as information services.<sup>8</sup> As a result of the *Cable Modem NOI*, on March 14, 2002, the Commission issued a declaratory ruling

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<sup>3</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2521-2522, § 623.

<sup>4</sup> *Federal-State Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11501, ¶ 73 (1998) (*Report to Congress*).

<sup>5</sup> *Id.* at ¶ 80 (emphasis added).

<sup>6</sup> *Id.* at ¶ 82 (“Our findings in this regard are reinforced by the negative policy consequences of a conclusion that Internet access services should be classed as ‘telecommunications.’”).

<sup>7</sup> As Seth P. Waxman, former Solicitor General under President Clinton, wrote in an April 28, 2010 letter to the Commission, “[t]he Commission has *never* classified any form of broadband Internet access as a Title II ‘telecommunications service’ in whole or in part, and it has classified all forms of that retail service as integrated ‘information services’ subject only to a light-touch regulatory approach under Title I. These statutory determinations are one reason why the Clinton Administration rejected proposals to impose ‘open access’ obligations on cable companies when they began providing broadband Internet access in the late 1990s, even though they then held a commanding share of the market. The Internet has thrived under this approach.” (Emphasis in the original.)

<sup>8</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry, 15 FCC Rcd 19287 (2000) (*Cable Modem NOI*).

classifying cable modem service as an information service.<sup>9</sup> In the Commission's *Cable Modem Declaratory Ruling*, it pointed out that "[t]o date . . . the Commission has declined to determine a regulatory classification for, or to regulate, cable modem service on an industry-wide basis."<sup>10</sup> Only one month earlier, on February 14, 2002, in its Notice of Proposed Rulemaking<sup>11</sup> regarding the classification of broadband Internet access services provided over wireline facilities, the Commission underscored its view that information services integrated with telecommunications services cannot simultaneously be deemed to contain a telecommunications service, even though the combined offering has telecommunications components.

On June 27, 2005, the Supreme Court upheld the Commission's determination that cable modem services should be classified as information services.<sup>12</sup> The Court, in upholding the Commission's *Cable Modem Order*, explained the Commission's historical regulatory treatment of "enhanced" or "information" services:

By contrast to basic service, the Commission decided not to subject providers of enhanced service, *even enhanced service offered via transmission wires*, to Title II common-carrier regulation. The Commission explained that it was unwise to subject enhanced service to common-carrier regulation given the "fast-moving, competitive market" in which they were offered.<sup>13</sup>

Subsequent to the Supreme Court upholding the Commission's classification of cable modem service as an information service in its *Brand X* decision, the Commission *without dissent* issued a series of orders classifying all broadband services as information services: wireline (2005)<sup>14</sup>, powerline (2006)<sup>15</sup> and wireless (2007).<sup>16</sup> Consistent with

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<sup>9</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling*), *aff'd*, *Nat'l. Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*).

<sup>10</sup> *Id.* at ¶ 2.

<sup>11</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (*Wireline Broadband NPRM*).

<sup>12</sup> *Brand X*, 545 U.S. 967.

<sup>13</sup> *Id.* at 977 (emphasis added, internal citations to the Commission's *Computer Inquiry II* decision omitted).

<sup>14</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era*, CC Docket Nos. 02-33, 95-20, 98-10, 01-337, WC Docket Nos. 04-242,

the Court's characterization, the Commission made these classifications to catch up to market developments, to treat similar services alike and to provide certainty to those entities provisioning broadband services, or contemplating doing so. Prior to these rulings, however, such services were never classified as telecommunications services under Title II.

Again, I thank you for providing the opportunity to testify before your Committee and to provide this analysis regarding the regulatory classification of broadband Internet access services. I look forward to working with you and your colleagues as we continue to find ways to encourage broadband deployment and adoption throughout our nation.

Sincerely,



Robert M. McDowell

cc: The Honorable Joe Barton  
The Honorable Rick Boucher  
The Honorable Cliff Stearns

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05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*), *aff'd*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

<sup>15</sup> *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006).

<sup>16</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007).