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

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

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

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Media Access Project, on behalf of the Center for Media Justice, Consumers Union, and New America Foundation (collectively, "Public Interest Commenters"), respectfully submits this reply to initial comments on the Commission's *Notice of Inquiry* (the "*Notice*")[1] in the above-captioned docket. In their own initial comments,[2] Public Interest Commenters demonstrated that the best reading of the Communications Act (the "Act") would classify broadband Internet connectivity service as a telecommunications service, and that the Commission has the authority and discretion to make this statutory interpretation. Such a decision would provide the surest and soundest legal footing for the Commission to implement the National Broadband Plan[3] and preserve the open Internet. Furthermore, Public Interest Commenters explained the need for a consistent regulatory framework for both wireline and wireless broadband Internet connectivity services, even if the Commission were to find ultimately that some substantive rules should apply differently on the basis of legitimate technological distinctions between such platforms.

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

2 *See* Comments of Center for Media Justice, Consumers Union, Media Access Project, and New America Foundation, GN Docket No. 10-127 (filed July 15, 2010) ("Public Interest Comments").

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

As shown in these reply comments, the record compiled in response to the *Notice* strongly supports the Public Interest Commenters' positions on these points. The following reply cites to and elaborates on the comments filed by other parties in support of these propositions. These reply comments also refute some of the more popular yet persistently flawed arguments that opponents of Title II classification raised in the initial round. Some of these arguments, while still incorrect or incomplete, were at least related directly to the broadband framework issues presented in the *Notice*. Nearly as often, those opposing Commission action in this proceeding merely repeated the same erroneous charges and incorrect legal theories they previously put forward in the Commission's Open Internet proceeding and other fora. Public Interest Commenters submit that the objections these parties raise in any case are no bar to Commission action here, and suggest that the Commission proceed expeditiously to classify broadband Internet connectivity services as telecommunications services.

INTRODUCTION AND SUMMARY

The Commission's function is to interpret the Act, and then to regulate entities that provide services under its jurisdiction as properly interpreted. The *Notice* asks the right questions about the Commission's oversight authority for broadband Internet transmission services, and commenters in this proceeding set about answering those questions in the robust record compiled in response to the *Notice*'s release. The Commission has spent considerable time and resources since the release of the *Notice* on negotiations and discussions[4] related – but only tangentially related, in some instances – to the crucial questions that this proceeding raises about the Commission's ongoing oversight role over interstate communication by wire and radio.

[4] *See, e.g.*, Chloe Albanesius, "FCC's Closed-Door Net Neutrality Meetings Break Down," PCMag.com (Aug. 5, 2010), *available at* http://www.pcmag.com/print_article2/0,1217,a=253422,00.asp?hidPrint=true.

No matter the outcome of such negotiations on open Internet principles, those discussions could not lessen the need for clarification of the Commission's basic authority to oversee broadband communications platforms more generally. Public Interest Commenters demonstrated in their initial comments that the Commission can and should answer questions about the appropriate regulation of broadband Internet connectivity services by classifying such offerings as "telecommunications services" under the Act,[5] subject to at least some of the provisions in Title II of the Act. The full range of such statutory provisions that should apply to wired and wireless broadband services remains an open question, and one on which Public Interest Commenters offered their views initially. Yet, the fundamental issue in this proceeding is the Commission's clear and continuing authority to interpret the Act, revise its prior classification decisions in reasoned fashion, and continue fulfilling its duties as the expert agency charged with protecting consumers, creators, and competition in the provision of communications services.

Thus, the recent announcement[6] by Google and Verizon purporting to craft a legislative framework for open Internet principles must be viewed as little more than a distraction, albeit one that highlights the need for the Commission to complete this proceeding by clarifying its authority over broadband communications transmission. The Public Interest Commenters demonstrated in their initial comments that the Commission can and should classify broadband Internet connectivity services as telecommunications services, applying a "light touch" regulatory framework to wired and wireless broadband transmission services, but one that is grounded on sound legal footing, strong Commission authority, and Supreme Court precedent.

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[5] *See* 47 U.S.C. § 153(43), (46).

[6] *See* Alan Davidson and Tom Tauke, "A joint policy proposal for an open Internet" (Aug. 9, 2010), *available at* http://googlepublicpolicy.blogspot.com/2010/08/joint-policy-proposal-for-open-internet.html.

No proposals for legislation or putative compromises on open Internet principles can answer questions about the proper interpretation of the statute, the correct classification of broadband Internet connectivity, or the Commission's ultimate authority to enforce any rules related to broadband communications. Clarifying and re-establishing Commission authority over the transmission and access components of broadband Internet connectivity offerings is necessary for more than preserving the open Internet. Classifying broadband Internet connectivity service as a telecommunications service also is the best way for the Commission to achieve other National Broadband Plan goals, implement universal service fund ("USF") reform, protect online privacy, enhance broadband-based public safety initiatives, promote broadband access for disabled users, and develop rules for transparency and truth-in-billing measures that protect broadband users.

The reply comments that follow cite abundant support in the record for the proposition that the Commission should classify wired and wireless broadband Internet connectivity as a telecommunications service. This is the best reading of the statute and the best way to achieve these vital national broadband goals efficiently and effectively. Congress may choose to act in this field, but there is no assurance of when it will or what it may do so. The Commission need not sit by in the meantime, but instead should interpret the statute faithfully, revisit classification decisions made under a prior administration, and use the authority it possesses already to regulate telecommunications services "regardless of the facilities used"[7] to offer such services.

As Public Interest Commenters stated in their initial comments, the Act is at present clear regarding the Commission's authority in this area. Likewise clear are court precedents regarding the Commission's discretion to interpret the law and revise its determinations over time. Any

[7] 47 U.S.C. § 153(46).

technical considerations presented by the *Notice* are within the Commission's expertise. The record developed in the initial round of this proceeding supports Public Interest Commenters conclusions in all of these regards.

This is abundantly clear from a review of the comments, regardless of the assortment of unsupported complaints and attacks on Title II chiefly offered up by broadband providers who seek to evade even light-touch regulation. Some opponents of Title II classification seek nothing less than to dismantle the Commission in key respects. They would diminish or eliminate the Commission's traditional oversight role on the basis of nothing more than technological evolutions in basic communications services, which are provided more and more often today over wired and wireless broadband facilities rather than legacy facilities.

Therefore, in addition to citing the well-reasoned views of commenters that support treating broadband Internet connectivity service as a telecommunications service, Public Interest Commenters herein refute opposing arguments that generally fall into three categories: (1) incorrect assertions that the Commission could better implement the National Broadband Plan on the basis of Title I authority, or else based on some combination of new legislation and largely unenforceable commitments from regulated entities; (2) implausible arguments that classification of broadband Internet connectivity under Title II is impermissible under the statute, prior Commission orders, or the Constitution; and (3) inconsistent appeals for a different regulatory classification of wireless broadband Internet connectivity, based at times on misreading of statutory provisions or mischaracterization of mobile wireless broadband market dynamics.

DISCUSSION

I. The Record Demonstrates that the Commission Should Classify Broadband Internet Connectivity as a Telecommunications Service to Best Implement the National Broadband Plan, Protect Internet Users, and Adopt Meaningful Open Internet Rules.

A. The Broadband Framework decision is about more than the Open Internet Proceeding.

The Public Interest Commenters explained in their initial comments that the Commission must assert "Title II" authority over broadband Internet connectivity service in order to realize most promptly Congress's and the Commission's goals set forth in the National Broadband Plan.[8] The need for such a clarification is clear, the current focus of public discourse on substantive net neutrality provisions notwithstanding. Despite the occasional conflation of these vitally important (but ultimately subsidiary) issues in the Open Internet proceeding with the more basic broadband framework and authority questions raised by the *Notice*, Public Interest Commenters logically suggested in their initial comments that the Commission cannot rely on "any voluntary agreements on net neutrality among industry players[ ] to resolve the broader questions set forth in this *Notice*."[9]

Other parties agreed that the Commission's mandate in this proceeding is about more than establishing a solid framework for sensible open Internet rules, as important as that may be. These commenters agreed that the classification decision issued in this docket will dictate the Commission's ability to implement the National Broadband Plan as well as to engage in all manner of important broadband deployment promotion and oversight.[10] As the Open Internet

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[8] *See* Public Interest Comments at 6.

[9] Public Interest Comments at 12.

[10] *See, e.g.*, Comments of Google Inc., GN Docket No. 10-127, at 2 (filed July 15, 2010) (describing the "overwhelming consensus that the goals of the FCC's *National Broadband Plan*…will provide a solid foundation to meet a broad range of challenges" and that there is a

Coalition ("OIC") made clear, the D.C. Circuit's decision in the *Comcast* case[11] this April "questions the overall regulatory framework the Commission has used to promote broadband deployment and protect broadband users," as that decision "makes uncertain the Commission's ability to implement several important parts of the National Broadband Plan, and threatens the ability of the Commission to adopt rules to protect an open and neutral Internet."[12] Free Press similarly concluded at the outset of its submission that "[b]ecause *Comcast* questions the overall regulatory framework the FCC has used to adopt broadband policy, its holding implicates not only the narrow question of whether broadband providers may block content on the Internet but also the FCC's ability to adopt key proposals in its National Broadband Plan."[13] As Public Knowledge succinctly explained it, "[t]he legal framework for the Commission's authority over broadband will provide the foundation for every single Commission decision and policy on broadband, from affordable access to public safety."[14]

Parties other than media and Internet advocacy groups and Internet "edge" companies echoed this same refrain. Commenters as diverse as broadband providers XO[15] and EarthLink[16];

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need for "some limited oversight role for government") (citations omitted); *see also id.* at 2-3 ("The NOI asks whether the Commission's 'ancillary authority continues to provide an adequate legal foundation'…. In light of the *Comcast* decision, Google believes the Third Way framework …presents the most predictable, effective, and tailored approach of those under consideration.").

11 Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010) ("*Comcast*").

12 Comments of the Open Internet Coalition, GN Docket No. 10-127, at 3 (filed July 15, 2010) ("OIC Comments").

13 Comments of Free Press, GN Docket No. 10-127, at 3 (filed July 15, 2010) ("Free Press Comments").

14 Comments of Public Knowledge, GN Docket No. 10-127, at 1 (filed July 15, 2010) ("Public Knowledge Comments").

15 Comments of XO Communications, LLC, GN Docket No. 10-127, at 4 (filed July 15, 2010) ("XO Comments") ("[T]he Commission should not continue to rely primarily on ancillary authority to oversee broadband provider practices…. The *Comcast* decision makes clear that

telecom and Internet company trade association CCIA[17]; educational associations American Library Association, Association of Research Libraries, and EDUCAUSE[18]; various state public utilities commissions[19]; civil rights groups including member organizations of the Media Action Grassroots Network[20]; and civil liberties advocacy organizations such as the ACLU,[21] all agreed on the desirability of at least the light-touch, Title II approach outlined in the *Notice*.[22] They did so for various reasons, including not only the need to establish a sound foundation for

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Title I is an inadequate instrument for exercising oversight…and throws into question the agency's ability to implement particular aspects of the *National Broadband Plan*.").

[16] Comments of EarthLink, Inc., GN Docket No. 10-127, at 13-14 (filed July 15, 2010) ("EarthLink Comments") ("[T]he Commission's efforts to implement its *National Broadband Plan* goals and other broadband-related actions, [and] the FCC's legal and jurisdictional foundation must be grounded clearly and fully in the Communications Act. The [ ] Plan requires clear and rigorous FCC oversight…. [and] the FCC should proceed under the certainty of Title II.").

[17] *See, e.g.*, Comments of the Computer & Communications Industry, GN Docket No. 10-127, at 1 (filed July 15, 2010) ("CCIA Comments") ("These comments explain why the Chairman's proposed Third Way approach to establishing a legal framework for imposing a measure of procompetitive, pro-consumer protections on retail end user broadband Internet access services is both legally sound and appropriately tailored to achieving the nation's goals for ubiquitous, robust broadband service."); *see also id.* at 20 ("Section 254 is the crucible for implementing the National Broadband Plan. Reforming the contribution and eligibility requirements of the Universal Service Fund [ ] is absolutely necessary to fostering the deployment of an interoperable, high-speed broadband network.").

[18] Comments of the American Library Association, the Association of Research Libraries, and EDUCAUSE, GN Docket No. 10-127, at 3 (filed July 15, 2010).

[19] *See, e.g.*, Comments of the California Public Utilities Commission and the People of the State of California, GN Docket No. 10-127, at 6-7 (filed July 15, 2010); Comments of the Public Utilities Commission of Ohio, GN Docket No. 10-127, at 7-10 (filed July 14, 2010); Comments of the Pennsylvania Public Utility Commission, GN Docket No. 10-127, at 3-4 (filed July 15, 2010).

[20] *See* Comments of Esperanza Peace and Justice Center, Main Street Project, Media Alliance, Media Justice League, Media Literacy Project, Media Mobilizing Project, Peoples Production House, Reclaim the Media, Thousand Kites, and Center for Rural Strategies, GN Docket No. 10-127, at 4 (filed July 15, 2010) ("MAG-Net Comments").

[21] *See* Comments of the American Civil Liberties Union, GN Docket No. 10-127, at 1 (filed July 15, 2010).

[22] *See generally Notice* ¶¶ 67-99.

meaningful and enforceable open Internet rules, but also to resolve the more basic need for clarifying Commission authority to promote broadband deployment and protect users of this vital infrastructure.

B. Classification of broadband Internet connectivity as a telecommunications service would provide more certainty and less risk than other approaches.

Some parties opposed to classification of broadband Internet connectivity service as a telecommunications service cited in their initial comments the risk of litigation the Commission may engender by correcting its classification decisions from the last decade, and they suggested as a result that the Commission should embrace Title I and ancillary jurisdiction anew.[23] As the Public Interest Commenters noted in their initial comments, however, the risk of litigation exists no matter what route the Commission takes to resolve questions of its authority over broadband communications facilities, and the benefit of settling such authority questions in this proceeding is the avoidance of multiple lawsuits over jurisdiction.[24] By continuing along the Title I path in the wake of the *Comcast* case and that decision's pronouncements on ancillary authority, the Commission would all but guarantee challenges to its authority each and every time it attempted to implement a portion of the National Broadband Plan[25] – at least whenever such Commission

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[23] *See, e.g.*, Comments of AT&T Inc., GN Docket No. 10-127, at 14 (filed July 15, 2010) ("AT&T Comments"); Comments of the National Cable & Telecommunications Association, GN Docket No. 10-127, at 71 (filed July 15, 2010) ("NCTA Comments"); Comments of Verizon and Verizon Wireless, GN Docket No. 10-127, at 12 (filed July 15, 2010) ("Verizon Comments").

[24] *See* Public Interest Comments at 9-11; *id.* at 11 ("This sort of piecemeal view of the Commission's jurisdiction leaves the Commission constantly vulnerable to legal challenges resulting in years of delay."); *see also* Comments of DISH Network, L.L.C., GN Docket No. 10-127, at 15 (filed July 15, 2010) ("DISH Comments") (concurring with the suggestion that "any endeavor by the FCC to use Title I or Title II as the source of its broadband oversight authority will immediately be challenged").

[25] *See* DISH Comments at 2 ("The *Comcast* decision now requires the FCC to address how it can ensure there is continuing broadband oversight – broadband 'rules of the road' – to meet

action might not be firmly rooted in the Commission's spectrum allocation authority or other such duties.

The Center for Democracy & Technology ("CDT") arrived at the same conclusion as did Public Interest Commenters regarding the relative litigation risks and burdens associated with the Title I and Title II approaches. As CDT noted in its comments, "[i]t would take many individual court cases to get a clearer picture of the scope of the Commission's ancillary jurisdiction, and….[o]nly one thing is certain: Virtually any assertion of ancillary jurisdiction is likely to face challenge in court, and it would be the courts that would (gradually) make the decisions."[26] As OIC articulated essentially the same point, "*Comcast* invites unwanted litigation because it requires the Commission to justify separately every proposed regulation of a broadband service"[27] Thus, the Commission would need "to develop an independent basis of authority every time it sought to regulate in this space. Each action undoubtedly would be challenged in courts around the country, leading to years of uncertainty and delay. Such an approach is far from conducive to a holistic approach toward broadband policy."[28] Assessing the likely outcome of such appellate review, DISH concurred with Public Interest Commenters' belief that Title II offers a better route, and indicated that "[a] reviewing court is much more likely to apply *Chevron* deference to a narrow exercise of Title II jurisdiction over broadband Internet

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its goals and fulfill the enormous promise of the FCC's *National Broadband Plan* to create economic, educational and social opportunity and empower consumer choice.").

[26] Comments of the Center for Democracy & Technology, Public Knowledge, GN Docket No. 10-127, at 5 (filed July 15, 2010) ("CDT Comments").

[27] OIC Comments at 12-13.

[28] *Id.* at 13.

connectivity, consistent with the FCC's historical role and expertise, than to the untested (and still unclear) Title I theories the FCC may devise."[29]

Moreover, the promise of a legislative solution to questions about authority for open Internet rules – no matter how likely or unlikely such compromise legislation may be to pass in both chambers of Congress – cannot be perceived as a bar to Commission action now. As the Public Interest Commenters have noted often, the Commission can and should act in tandem with congressional deliberations that may take months or years to come to fruition. In the meantime, the Commission must "exercise its existing authority to take measured steps ensuring that important broadband policy goals are met and that Internet users are protected from harmful practices."[30] CDT and the Public Interest Commenters again concurred on the basic premise that "Congressional interest in a legislative approach [ ] should not be allowed to derail the Commission's effort to ensure a sensible framework for implementing the Act as currently written."[31] As CDT went on to note, the Commission "remains charged with implementing the existing Act for however long it remains on the books."[32]

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[29] DISH Comments at 15-16. DISH cited and quoted at length from the *Brand X* majority opinion, 545 U.S. at 1002-1003, which concluded that "[t]he questions the Commission resolved in the order under review involve a subject matter [that] is technical, complex, and dynamic" (internal quotation marks omitted). As *Brand X* held, "[t]he Commission is in a far better position to address these questions than we are. ***Nothing in the Communications Act or the Administrative Procedure Act makes unlawful the Commission's use of its expert policy judgment to resolve these difficult questions.***" *Id.* at 1003 (emphasis added).

[30] Public Interest Comments at 13.

[31] CDT Comments at 6.

[32] *Id.* ("The agency cannot simply go dormant and abdicate its role for what could be multiple years in anticipation of a legislative update…currently little more than a glint in a committee chairman's eye.").

C. There are too many stumbling blocks and impediments for the Commission to rely on Title I theories at present for its broadband initiatives.

Public Interest Commenters also offer brief comment here on the merits of various Title I rationales offered for broadband-related tasks the Commission might undertake, such as transitioning USF to provide explicit support for broadband deployment as proposed in the Plan. Parties that previously proposed USF reform based on Title I in other proceedings raised those ideas again here,[33] arguing unpersuasively that the Commission can rely on Title I authority to reform USF without resort to direct Title II authority over broadband services. These arguments suggest that the Commission might rely on some combination of ancillary authority derived from Section 254 of the Act,[34] or on a combination of direct and ancillary authority stemming from Section 254 and from Section 706 of the Telecommunications Act of 1996,[35] to support broadband communications services not classified as "telecommunications services" and not provided by "telecommunications carriers" under the Act.[36] As Public Interest Commenters explained in their initial comments, these theories have, at best, a minimal chance of success. The plain language of Section 254 limits the Commission to providing universal service support for telecommunications services rather than information services, and makes only "telecommunications carrier[s]" eligible for support.[37]

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33 *See, e.g.*, Comments of Comcast Corporation, GN Docket No. 10-127, at 10 (filed July 15, 2010) ("Comcast Comments"); AT&T Comments at 22-27; Verizon Comments at 21.

34 47 U.S.C. § 254.

35 *See* 47 U.S.C. § 1302; *see also Notice* ¶¶ 36-37.

36 AT&T and Comcast spell out this Section 706-plus-Section 254 theory in detail. *See, e.g.*, Comcast Comments at 10; AT&T Comments at 22-27.

37 47 U.S.C. § 254(c)(1), (e); *see* Public Interest Comments at 8; *see also* Comments of Data Foundry, Inc., GN Docket No. 10-127, at 3 (filed July 15, 2010) ("Data Foundry Comments") ("[I]t is clear post-*Comcast* that the Commission will be unable to meet at least one of its key goals – the reform of the universal service program to support broadband Internet service – using ancillary authority."). Data Foundry cites to a 1997 letter from Senators Stevens

Others agreed with Public Interests Commenters assessment of the dim prospects for the broad reading that some Title I proponents would suggest, as those proponents focused on Section 254, Section 706, and other provisions that arguably might serve as bases for ancillary authority. Public Knowledge, for example, began its initial comments in this proceeding with an explanation of the obstacles to the viability of Section 706. Public Knowledge also cited a host of other comments filed in the Commission's Open Internet docket that likewise questioned the adequacy of Title I as a potential legal framework for the Commission's broadband oversight role after the *Comcast* decision.[38] Free Press detailed at length the problems inherent in stretching Section 254 to cover broadband, either on the basis of assertions that Section 254 could provide direct authority or ancillary authority for the Commission to require the use of funds for broadband deployment.[39] Other parties' initial comments similarly highlighted the weakness of the Title I approach, and the limited number of statutory provisions that the Commission might use to reinvigorate any ancillary authority approach in the aftermath of the *Comcast* case.[40]

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and Burns to Federal Communications Commission Kennard, which said that "[t]he Commission must live within the limits Congress set. We debated and decided in section 254 whether or not information services would be directly supported by universal service, and the answer was clearly not. The Commission cannot use its generic authority to trump the unambiguously expressed intent of Congress." *Id.* at 3 n.3 (citing Letter from Senator Stevens and Senator Burns to Chairman Kennard, CC Docket No. 96-45, at 13 (Jan. 27, 1997)).

[38] *See* Public Knowledge Comments at 1 (citing comments filed in Commission GN Docket No. 09-191 on the topic of Title I authority by NASUCA, EarthLink, DISH, Google, CDT, and the Public Interest Commenters); *see also id.* at 3-4 (offering further analysis of the problems associated with attempted reliance on Section 706); *see also* Free Press Comments at 131-135 (same).

[39] *See* Free Press Comments at 25-31.

[40] *See, e.g.*, OIC Comments at 9 (noting that "*Comcast* Significantly Circumscribed the Commission's Ancillary Authority"); *id.* at 12 ("The D.C. Circuit's guidance in *Comcast* highlights such a narrow use of ancillary authority that it begs the question of exactly how useful and practical Title I ancillary authority will be going forward.").

All of these problems with Title I suggest that the Commission should opt for classification of broadband Internet connectivity as a telecommunications service. Title I does not offer a sufficiently robust, stable, or comprehensive legal rationale at this time. The prospect of legislation to clarify Commission authority is far from certain. Compromise solutions on open Internet principles would not address the need for more comprehensive oversight of broadband deployment initiatives, nor would such deals resolve questions of Commission authority to mandate consumer protections, protect privacy, promote access for the disabled, or enhance public safety initiatives in the broadband sphere. This explains why so many commenters agreed that a Title II classification decision would best enable the Commission to implement the National Broadband Plan rapidly and to preserve the open Internet, acting on a solid legal foundation for substantive rulemakings and actions affecting the broadband Internet space.

II. The Record Illustrates That Classification of Broadband Internet Connectivity as a Telecommunications Service Would Comport with the Act, Account for Marketplace and Technological Realities, and in No Way Violate the Constitution.

A. As the record in this proceeding shows, Supreme Court precedent confirms the Commission's authority to make the classification decision set forth in the *Notice*.

Public Interest commenters explained in detail in their initial comments[41] that the Supreme Court's decision in the *Brand X* case[42] affirmed ***not*** the Commission's prior decisions on the merits of the broadband classification issue, but rather the Commission's authority to interpret the statute and make such determinations. As a result, the Commission can and should review the bases for its prior determinations to treat broadband Internet connectivity services as

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[41] *See* Public Interest Comments at 3, 18-19.

[42] National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005) ("*Brand X*").

information services, and should at the conclusion of this proceeding – and in the near term – reclassify broadband Internet connectivity as a telecommunications service.

Other commenters agreed with Public Interest Commenters' reading of *Brand X* and other Supreme Court decisions relevant to the inquiry set forth in the *Notice*, ultimately agreeing that the Commission has the discretion to revise its prior classification decisions and good reason to do so here. To list but a few examples, DISH Network cited *Brand X* and earlier decisions firmly supporting the proposition that "[c]ommunications law is premised on the FCC's expertise and authority to alter its regulatory framework as changing circumstances warrant." [43] As DISH subsequently explained, the Commission can properly reconsider in this proceeding its broadband classification decisions of the last decade because "it is now clear that [ ] market predictions and factual assumptions" undergirding those decisions "have proven inaccurate."[44]

XO briefly but strongly concurred with this sentiment, citing *Brand X* as well for the proposition that "the Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change."[45] As the DISH comments illustrated, and as other commenters confirmed, developments in the broadband marketplace over the last decade justify such a change here. These developments illustrated the incorrect nature of the Commission's classification decisions beginning with the 2002 *Cable Modem Order*[46] – the case that *Brand X* ultimately affirmed based on deference to the Commission's authority in this area, not on the merits of the *Cable Modem Order*'s miscategorization of broadband as an information service.

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43 DISH Comments at 4.

44 *Id.* at 4-5.

45 XO Comments at 20 (quoting *Brand X*, 545 U.S. at 1001).

46 *See* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Order*").

Thus, as EarthLink "knows firsthand from today's marketplace" and its role as a competitor in that marketplace, "the legal, factual and policy predicates of the Commission's broadband deregulation in 2002 and 2005 have proven to be seriously flawed and have led to an enormous decline in the number of ISPs offering competitive services" and in such competitive providers' investment in networks that could offer choice to customers served too often by broadband duopolists.[47] OIC likewise looked to the same collection of Supreme Court decisions to support the well-established propositions that the Commission can revisit such classification decisions and other rulings,[48] that courts will defer to the Commission's judgment and statutory interpretation decisions in this area,[49] and that the premises of the *Cable Modem Order* and its progeny at the Commission are in need of such reconsideration.[50]

Because of the circumstances today illustrating the shortcomings of the Commission's prior statutory classification decisions, the fact that regulatory agencies can and indeed should revisit their determinations over time, and the deference that courts accord the Commission in making such determinations, "the agency's change in policy will be upheld" here because "there can be no doubt that it is reasonable to classify broadband Internet connectivity as a distinct telecommunications service."[51] The Commission only needs to interpret the statute properly,

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[47] EarthLink Comments at 3.

[48] *See* OIC Comments at 17.

[49] *See id.* at 16.

[50] *See id.* at 21-27; *id.* at 21 ("The Commission's 2002 order and its progeny rested on two premises: (a) offerings of broadband Internet access providers are functionally integrated…with information services; and (b) there would be robust…competition among broadband Internet access providers over numerous platforms. Neither of these premises applies in today's broadband marketplace.").

[51] Free Press Comments at 4. Verizon implausibly contends that the Commission would not be entitled to *Chevron* deference in any reclassification order because its statutory authority over broadband is directly at issue in the instant proceeding. *See* Verizon Comments at 34. Verizon then claims that the circumstances here are different than they were in *Brand X*, because "this

based on a functional understanding of the transmission service that broadband Internet connectivity providers offer, understanding that such broadband service is separable from the information services that network owners may market and bundle together with their transmission offering.

B. The record evidences that providers do indeed offer a broadband Internet connectivity service, and that this offer of transmission is not inextricably intertwined with information services that broadband providers also may offer.

Cox was one of the network operators in the initial round of comments continuing to press the idea that broadband Internet connectivity is somehow inseparable or inextricably intertwined with operator-provided information services delivered over this broadband transmission platform.[52] The cable operator indicated that it does not sell its broadband Internet connectivity service to customers separately, and that it instead bundles this capacity together with information services that it requires its customers to buy as a package.[53] However, as the Public Interest Commenters explained in their initial comments, the transmission service that

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proceeding concerns the extent of the Commission's statutory authority over broadband Internet access service." *Id.* at 36-37. So, as Verizon would have it, the Commission was entitled to deference when it first decided in the *Cable Modem Order* that broadband was ***not*** a telecommunications service, but it has no authority to reverse that determination because the Commission does not have authority over broadband. *Brand X* plainly precludes the sleight-of-hand that Verizon attempts here. *See Brand X*, 545 U.S. at 980 ("We first consider whether we should apply *Chevron*'s framework to the Commission's ***interpretation*** of the term 'telecommunications service.' We conclude that we should.") (emphasis added). The Commission must reject Verizon's circular reasoning, which, as other commenters noted, afflicted Verizon's initial comments in more than one instance. *See* Reply Comments of the Center for Democracy & Technology, GN Docket No. 10-127, at 3 (filed Aug. 11, 2010) ("CDT Reply Comments").

[52] *See* Comments of Cox Communications, Inc., GN Docket No. 10-127, at 12-21 (filed July 15, 2010) ("Cox Comments"); *see also* AT&T Comments at 67-90; NCTA Comments at 6-21; Verizon Comments at 31-34 (discussing legal standard for reversing prior decisions regarding integration); *id.* at 47-55.

[53] *See* Cox Comments at 4.

broadband Internet connectivity represents is not inextricably intertwined with the information services that such network operators also may make available to customers.[54] Therefore, "the information services that broadband Internet connectivity service providers may bundle together with their transmission service are not legally, technically, commercially, or practicably inseparable from the underlying telecommunications service."[55] In fact, as Public Interest Commenters also explained, the regulatory classification and statutory framework for services that providers offer to customers cannot be dependent on the manner in which those services are bundled together for marketing purposes.[56] Just as the Commission is not required to define an entire "triple-play" bundle (combining voice, video, and data offerings) as one type of service within the regulatory frameworks of the Act, it does not need to define broadband Internet connectivity as an "information service" simply because providers may choose also to offer e-mail and news gathering services. That is true even if a provider, such as Cox or another broadband network operator, purports to require that its customers purchase the whole bundle of services.

Several other commenters filing in the initial round of this proceeding agreed with Public Interest Commenters' analysis. Data Foundry, for one, thoroughly discredited the claim that the transmission capacity of a broadband Internet connectivity service is now or ever was

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54 *See* Public Interest Comments at 16 (citing Reply Comments of Public Knowledge, National Broadband Plan Public Notice #30, GN Docket Nos. 09-137, 09-51, 09-47, at 8-10 (filed Jan. 26, 2010) ("Public Knowledge NBP Reply Comments")).

55 *See* Public Interest Comments at 16 (citing Public Knowledge NBP Reply Comments at 8-10).

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

functionally inseparable from information service that the network operator also may provide.[57] Data Foundry cited to testimony offered in the *Cable Modem Order* proceeding itself that contradicted this inseparability theory, noting that "all of the information processing components cited by the Commission in the [*Cable Modem Order*] were then, and are today, completely severable from the transmission functions provided by the physical facility operator."[58] Thus, "[t]he only thing that was ever inseparable about the transmission and information processing components of broadband Internet access service was the cable and incumbent telephone companies' joint desire to avoid having to comply with…common carrier obligations"[59] for this broadband transmission offering.

Data Foundry proposes elsewhere in its comments that the Commission utilize a "wholesale" rather than a "retail" approach to delineate the broadband Internet connectivity service that would be classified as a telecommunications service under the Act.[60] As indicated in their initial comments, Public Interest Commenters certainly do not oppose Commission consideration for broadband Internet connectivity services of such wholesaling requirements and of additional Title II provisions applicable to other telecommunications services.[61] Nevertheless, as explained immediately below in Part II.C of these reply comments, Public Interest Commenters believe that the Commission can use a functional definition of broadband Internet

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[57] *See* Data Foundry Comments at 11 (asserting that the *Cable Modem Order* and the Commission's broadband classification decisions that followed it were premised on the mistaken conclusion that cable modem service was best viewed as a single, integrated information service, and the misimpression that the telecommunications component of that bundle was not separable from the data processing capabilities included in the bundle).

[58] *Id.* at 12.

[59] *Id.* at 13.

[60] *See, e.g.*, *id.* at 15-16.

[61] *See, e.g.*, Public Interest Comments at 28-29.

connectivity service to draw clear and meaningful distinctions between such broadband Internet connectivity offerings and Internet-based information services.

In either case, Public Interest commenters submit once more that there is no merit to arguments postulating an inseverable link between broadband telecommunications transmission offerings and the actual information services that network operators (and third parties) may of course provide. The robust record in this proceeding demonstrates that such services may indeed be bundled together by network operators, but that the two types of functions are not inextricably intertwined. As a result, the Commission should revisit its prior decisions and classify broadband Internet connectivity as a telecommunications service.[62]

C. The Commission can define broadband Internet connectivity service functionally, and classify it as a telecommunications service without making rigid or improper distinctions between different network layers.

AT&T is one leading proponent of a theory that the Commission cannot readily separate broadband transmission functions from the operation of "the Internet" itself, meaning chiefly information services and functions occurring at higher layers in the network according to the typical OSI stack model.[63] AT&T's argument depends in part on the notion that the Commission cannot regulate just the "on-ramps" to the Internet, but must instead consider the entire path and functionality that users purchase to access the Internet.[64] Starting from this assumption, AT&T then contends that classification of broadband Internet connectivity as a telecommunications

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62 *See* OIC Comments at 21-27; Free Press Comments at 53, 107-120 (providing empirical evidence of non-integration); Public Knowledge Comments at 7, 13, 23 & App. A.

63 *See, e.g.*, AT&T Comments at 58-62. For instance, AT&T proclaims that adopting a proposal to regulate only broadband Internet connectivity would in fact require regulating "for the first time, the guts of the Internet: communications across the Internet backbone by means of the Layer 3 Internet Protocol." *See id.* at 60 (emphasis deleted).

64 *See id.*

service would sweep in too much of "the Internet ecosystem" in terms of information services[65] – or perhaps include too little of the broadband transmission service network operators provide, by excluding network management functions that might occur at a higher layer in the network.[66]

Although AT&T's assertions raise a number of issues for the Commission to resolve, none of them are insurmountable or so complex as to avoid resolution. Public Interest Commenters suggested in their initial comments that the Commission could adopt a functional definition of broadband Internet connectivity without drawing rigid distinctions or definitions pegged to specific layers in the OSI model.[67] Other commenters in this proceeding agreed,[68] providing along the way answers to the complaints that AT&T lodges.

The argument that classification of broadband Internet connectivity as a telecommunications service might be under-inclusive, insofar as the "transmission component" of broadband service purportedly could be defined to include ***only*** functions occurring at the lowest layers, is one that Public Interest Commenters and others addressed in their initial comments. As those earlier submissions in this docket noted, the Act does not dictate such a cramped reading of the term "telecommunications services." To the extent that an information processing operation occurring at a higher layer in the network is used to manage, control, or operate a telecommunications system or telecommunications service, such functions are ***not***

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65 *See id.* at 107.

66 *See id.* at 66 ("To provide 'Internet connectivity,' a communications service must encompass not only DNS look-up and other Layer 3 (and higher-layer) information-service functionalities, but also Internet backbone transmissions as well as peering and transit arrangements.").

67 *See* Public Interest Comments at 19.

68 *See, e.g.*, Free Press Comments at 3, 48-55; Public Knowledge Comments at 19-20, n.75 ("[T]he Communications Act does not enact the Open Systems Interconnection model. From a telecommunications law perspective, what matters is the service being offered to the customer,… The offered 'service' may be cross-cutting and involve components from any layer….")

information services under the statute but are instead considered to be part of the telecommunications service or adjunct to the basic service.[69]

Thus, as CDT made clear in its comments, the Commission is not prohibited from regulating under Title II any such functions that may be used to manage the telecommunications service or system. "These functions do not change the nature of the connectivity service, and are thus comparable to 'adjunct-to-basic' services, first identified and treated as telecommunications services by the Commission in 1985."[70] Moreover, as CDT later identified, there is little weight to AT&T's claims that the Commission would regulate the Internet backbone itself by adopting a Title II classification for broadband Internet connectivity. Even AT&T must concede that "the Act requires the Commission to classify ***services***, not ***facilities***."[71] Thus, the service of providing broadband Internet connectivity to customers "is quite distinguishable from the various other services that AT&T attempts to lump together as being all interconnected parts of the Internet."[72]

In the same vein, the contention that defining broadband Internet connectivity as a telecommunications service would sweep in large parts of the Internet ecosystem – including a range of information services, application providers, and content delivery networks ("CDNs") – likewise does not withstand scrutiny, nor bar the Commission from the proposed Title II classification decision that Public Interest Commenters support. AT&T asserts that "if a

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69 *See* Public Interest Comments at 19 (citing 47 U.S.C. § 153(20) ("The term 'information service'…does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."); *see also* Free Press Comments at 117-118; Public Knowledge Comments at 21-22.

70 CDT Comments at 11. In its reply comments in this proceeding (filed one day early in the docket), CDT emphasized that the claimed technical complexity of some such services in the Internet connectivity space does not disqualify such functions "from adjunct-to-basic or network management treatment," because the complexity of the service is "irrelevant to how the service is classified." *See* CDT Reply Comments at 3.

71 CDT Reply Comments at 2 (citing AT&T Comments at 98).

72 CDT Reply Comments at 2.

broadband Internet access provider is deemed to be offering a telecommunications service, there is no principled basis on which the Commission could avoid the conclusion that a very substantial portion of providers in the Internet ecosystem are doing the same."[73]

Contrary to AT&T's assertion, however, individuals accessing content or applications that are stored on, processed by, or retrieved from a CDN still must have their own broadband connections to access the websites or other data cached by the CDN – just as individuals using pulver.com's "Free World Dialup" service at issue in the Commission's 2004 decision needed to "bring their own broadband connection" to use the information service described in that proceeding.[74] Such content providers thus do not offer to the public a broadband Internet connectivity service that constitutes a telecommunications service.

D. Classification of broadband Internet connectivity as a telecommunications service would not violate the First or Fifth Amendment to the Constitution.

Commenters in this proceeding such as NCTA[75] and Verizon[76] repeat, and even expand upon, the meritless constitutional arguments they raised in the Commission's Open Internet proceeding. In response to the *Notice*, they now claim that classification of broadband Internet connectivity as a telecommunications service would violate providers' First Amendment rights to freedom of speech, or that such a classification decision would constitute a taking under the Fifth Amendment. Public Interest Commenters and others debunked such complaints in their

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73 AT&T Comments at 109.

74 Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, *Memorandum Opinion and Order*, 19 FCC Rcd 3307, ¶¶ 5, 9 (2004); *see, e.g.*, Free Press Comments at 88 (asserting that "it is simply preposterous to contend that classifying our two-way IP-based communications infrastructure as a telecommunications service would mandate the same regulatory treatment of" information services).

75 *See* NCTA Comments at 31-35.

76 *See* Verizon Comments at 78-93.

Open Internet proceeding comments, and briefly repeat the refutation of these arguments here. In the main, broadband providers do not engage in speech themselves merely by serving as a conduit that transmits the speech of others, with no editorial control over that third-party content. Nor do they suffer any physical or regulatory taking of their property on the basis of Commission regulation that might eventually allow for rules establishing nondiscrimination principles.

Moreover, as dubious as any claimed constitutional infirmities were in the Open Internet proceeding, they are even more doubtful here. The Commission's classification decision in and of itself would merely determine the framework for regulation of broadband Internet connectivity services, not decide what substantive regulations to apply to them. Even if certain Open Internet rules might plausibly implicate certain constitutional rights – and Public Interest Commenters have shown that they do not – there is no credible argument that the mere act of deciding the proper regulatory framework for broadband would implicate those rights.

First, despite NCTA's and Verizon's arguments to the contrary,[77] broadband Internet connectivity service providers do not act as speakers for purposes of First Amendment analysis when such entities merely transmit information of a customer's or another user's choosing. Established provisions in both the Communications Act and the Copyright Act reinforce this understanding that the network operator is ***not*** acting as a speaker in such instances, but as a conduit.[78] Statutory provisions in both acts provide safe harbors from potential liability for network operators when these entities serve as a conduit for the speech of others, but are not

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[77] *See* NCTA Comments at 31-33; Verizon Comments at 79-81.

[78] *See* Comments of the Center for Democracy & Technology, GN Docket No 09-191, WC Docket No. 07-52, at 31 (Jan. 14, 2010) ("[B]roadband providers are not engaging in their own speech through the provision of Internet access – they are simply communications conduits, and as such they do not have First Amendment objections to a requirement that they carry all communications.").

themselves speakers. Section 230(c)(1) of the Communications Act[79] makes clear that no network operator "shall be treated as the publisher or speaker of any information provided by another information content provider." Similarly, Section 512(a) of the Copyright Act[80] stipulates under Digital Millennium Copyright Act ("DMCA") safe harbors that a "service provider shall not be liable…for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for" material distributed by others on its network.

It is true that broadband Internet connectivity providers, like other communications facilities operators, have some First Amendment rights.[81] As Public Interest Commenters explained in their Open Internet proceeding comments, such rights are dependent on the activity in which the provider is engaged.[82] Any First Amendment protections that such providers may claim only apply when such entities act as speakers – as would be the case for any other individual or entity that alleges a First Amendment violation. The Supreme Court's most recent cable "must-carry" decisions, beginning with the *Turner I* decision handed down in 1994,[83] stated conclusively that "Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[84] Nevertheless, this is the case ***only*** when such providers produce or distribute original programming, or when they "exercise[ ] editorial discretion over which stations or

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79 47 U.S.C. § 230(c)(1).

80 17 U.S.C. § 512(a).

81 *See, e.g.*, Comments of Bright House Networks, GN Docket No. 09-191, WC Docket No. 07-52, at 15-16 (filed Jan. 14, 2010).

82 *See* Comments of Center for Media Justice, Consumers Union, Media Access Project, and New America Foundation, GN Docket No. 09-191, WC Docket No. 07-52, at 34-44 (filed Apr. 26, 2010) ("Public Interest Open Internet Reply Comments").

83 Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) ("*Turner I*").

84 *Id.* at 636.

programs to include" in their space-delimited linear video programming channel lineup.[85] Further, these rights must be viewed in light of the public's right to receive information, which is "paramount."[86]

Cable operators and other broadband Internet connectivity providers exercise discretion over their own speech on the Internet, but they do so only on their own websites and in their other communications. However, as Section 230 and the DMCA provisions cited above illustrate, broadband Internet connectivity service providers neither speak nor exercise editorial control when serving as a conduit for the speech of their customers, or for the speech of non-customers who communicate with the providers' customers over each such provider's access facilities. The *Turner I* Court noted that cable must-carry rules may be understood to regulate speech by reducing the number of channels over which cable operators exercise unfettered control and over which they may transmit their own messages.[87] Conversely, network operators in the broadband Internet context cannot plausibly be characterized as compelled to speak when they carry the data of others in nondiscriminatory fashion and in compliance with the safe harbor provisions described above, nor do they suffer any loss in the number of "channels" over which they may themselves speak. Broadband Internet connectivity service providers have no claim to speak for, control, or edit all sources of information available to their customers who access the Internet, and thus cannot be permitted to conflate network owners' occasional role as speakers

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[85] *See id.* at 637.

[86] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). *Red Lion* itself relied on *Associated Press v. United States*, 326 U.S. 1 (1945), a case regarding newspapers, which the Court has historically treated quite differently from broadcasters. Thus, this governmental authority and ability to protect free expression is not limited to the broadcast industry at issue in *Red Lion*, or even to instances of anticompetitive behavior at issue in *Associated Press*, but to any use of private marketplaces or private property that is made available to the public for use as a conduit and forum for speech. *See, e.g.* Marsh v. Alabama, 326 U.S. 506 (1946).

[87] *See Turner I* at 637.

for purposes of their own content with their role as conduits for the speech of others. Indeed, broadband providers cannot have it both ways. They do not materially contribute to the content they retransmit for others, and they receive important protections based on the presumption that they do not function as speakers. To the extent that they claim to be speakers, they would have to forfeit those protections.[88]

The Commission likewise should dismiss any claim that common carrier regulations are unnecessary or unconstitutional in a competitive setting. Broadband Internet connectivity service providers act as bottlenecks for information flowing both to their own customers and to other providers' customers as well, and their status as conduits for speech rather than speakers themselves does not depend on the level of competition in the market for communications services. No court has held that common carrier obligations for traditional telephone companies violate the First Amendment, and the constitutionality of such common carrier obligations cannot be dependent on the communications platform or infrastructure in use.[89]

Congress also has not suggested that competition obviates the need for common carrier rules. Quite to the contrary, in authorizing the Commission to forbear from the application of certain Title II obligations to mobile wireless common carriers, Congress expressly forbade the Commission from lifting any provisions in Sections 201, 202, and 208 of the Communications Act – which together prohibit unreasonable discrimination in the provision of services.[90] It is

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[88] *See* Andrew Jay Schwartzman, Speech at Federal Communications Commission Workshop on "Speech Democracy and the Open Internet" (Dec. 15, 2009).

[89] *Turner I*, 512 U.S. at 684 (O'Connor, J., concurring in part and dissenting in part) ("[I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies; such an approach would not suffer from the defect of preferring one speaker to another.").

[90] *See* 47 U.S.C. § 332(c)(1)(A); *see also* Comments of Free Press GN Docket No 09-191, WC Docket No. 07-52, at 46 (Jan. 14, 2010) ("Congress allowed the discontinuance of regulations so long as they were not needed to ensure a specific desired outcome – ***just,***

difficult to conceive of a statute, rule, or reasoned policy that would permit unreasonable and discriminatory network management practices on voice networks merely because multiple wireline and wireless providers offer service in the same geographic market. Likewise, it should be unimaginable to condone such discriminatory practices on broadband Internet access provider networks that will serve as our basic communications infrastructure for the 21st Century.

In addition, Verizon's reliance on the Supreme Court's *Citizens United* decision[91] is misplaced. Verizon argues that common carriage would result in requiring broadband 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," and claims this would be a violation of the First Amendment because it interferes with a provider's ability to exercise editorial discretion to decide which speech is carried.[92] Verizon also argues that classification of its broadband services under Title II would "subject Verizon to regulation of its prices …under Sections 201 and 202" and violate the First Amendment under *Citizens United* because such "price regulations" would "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."[93] These claims centered on *Citizens United* must fail for the same reasons as other spurious First Amendment claims discussed above: a broadband Internet connectivity provider is ***not*** serving as an editor or speaker when transmitting the speech of others, and indeed expressly disclaims any liability for such third-party websites and traffic.

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reasonable and non-discriminatory treatment…. Section 332(c)(1)(A) of the Act… specifically forbids the FCC from removing CMRS providers from an obligation to adhere to Sections 201, 202 and 208 of the Act.").

[91] Citizen's United v. FEC, 130 S. Ct. 876 (2010).

[92] *See* Verizon Comments at 81-82.

[93] *Id.* at 83-84.

Neither does classification of broadband Internet connectivity service as a telecommunications service constitute an uncompensated taking in violation of the Fifth Amendment. Despite certain broadband providers' repetition of these arguments here,[94] Public Interest Commenters and others debunked the same takings claims in the Open Internet docket as well. The classification determinations proposed in the *Notice* could constitute neither a physical taking of property nor a regulatory taking of the variety recognized by the Supreme Court. To prove a physical taking without compensation in violation of the Fifth Amendment, complainants must demonstrate at minimum that a "permanent physical occupation" has occurred.[95] The path that the Commission proposed in the *Notice* quite obviously neither intends nor effects any such physical occupation. The fact that electronic data may flow over the facilities of wireline and wireless broadband Internet access service providers does not mean that such traffic effects a permanent physical occupation of those facilities.[96]

The proposed rules also do not constitute a regulatory taking, as the classification proposal in the *Notice* could not be said to deprive broadband Internet access providers of all economically beneficial uses of their broadband facilities.[97] Furthermore, the classification proposal cannot be said to interfere with any reasonable investment-backed expectations.[98] Broadband network operators have been on notice for at least the last decade and a half that the

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94 *See, e.g.*, AT&T Comments at 109-111; Verizon Comments at 90-94.

95 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-27 (1982). The *Loretto* decision found that even a minimal physical occupation could constitute a taking, but it preserved government's ability to adopt laws and regulations that may require some expenditure or the purchase of additional property by regulated parties.

96 *See* Cablevision Systems Corp. v. FCC, 570 F.3d 83, 98 (2009) (holding that alleged "electronic" occupation of communications facilities did not amount to a physical taking in the cable must-carry context).

97 *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1018 (1992).

98 *See id.* at 1034.

Commission would conduct a series of proceedings in order to determine the proper regulatory classification and treatment for broadband facilities. The Commission therefore should reject opponents' takings claims along with such opponents' invalid First Amendment claims.

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

A. The case for a consistent framework is clear, and an array of commenters from different industry sectors agree on the need for consistency.

Public Interest Commenters detailed in their initial comments the rationale for adopting a consistent regulatory framework applicable both to wired and wireless broadband Internet connectivity, including mobile wireless broadband Internet services. In short, the Commission should classify both wired and wireless broadband Internet connectivity as telecommunications services because they provide functionally the same service. In their initial comments, the Public Interest Commenters acknowledged that there may be some legitimate technological differences between wireless and wired networks, which could justify taking these different network architectures into account when adopting substantive rules, but which should ***not*** preclude the Commission from classifying wired and wireless broadband Internet connectivity services as Title II services and adopting the same regulatory principles for both.[99]

The reasons for adopting such a consistent framework and classification scheme are many, and need no more than brief recounting here. The National Broadband Plan looks to wireless broadband options as a source of competition to wired broadband offerings in some markets, as a more affordable service for new adopters and people of limited means, and as a potential first broadband service in more rural and remote markets.[100] Unless the Commission

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99 *See* Public Interest Comments at 20.

100 *See, e.g.*, MAG-Net Comments at 7-8.

proposes to engineer in this proceeding a ***worsening*** of the digital divide and an increase in service disparity for low-income communities, people of color, and rural populations, it must ensure that the same types of openness rules and consumer protections can be applied to both wired and wireless broadband Internet offerings.[101] Adopting a different framework for mobile broadband could lead to different rules for users that connect to the Internet wirelessly, and thus could relegate mobile broadband users to a second-class Internet experience.[102] This result also would make no sense in light of the increasing convergence of wireline and wireless networks, which is based on the growth in popularity and availability of hybrid devices that can access the Internet one moment through carrier-licensed spectrum and the next over a wired connection plugged into WiFi router.[103]

The Commission can account for differences in network architecture and capabilities by adopting flexible substantive rules in various contexts. However, it should not purport to define or classify functionally equivalent Internet connectivity services differently. As Public Interest Commenters explained, this result should not be controversial, as the Commission has previously determined that establishing a common framework for all broadband Internet access providers

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101 *See, e.g.*, National Broadband Plan at 137. ("Fourth generation technology holds great promise and will likely play a large role in closing the broadband availability gap if speed and consumer satisfaction are comparable to traditional wired service, such as that provided over Digital Subscriber Line (DSL) or cable modem."); *id.* at 173 ("The FCC should consider free or very low-cost wireless broadband as a means to address the affordability barrier to adoption.").

102 *See* Public Interest Comments at 21-23; MAG-Net Comments at 8 ("Imposing different classifications for wireless and wireline connectivity services risks creating different sets of rules for communities that connect to the Internet through a wireless connection, relegating mobile broadband users to second-class Internet citizenship.").

103 *See* Public Interest Comments at 25.

serves the public interest.[104] Indeed, as the record in this proceeding shows, consistency is not particularly controversial. Many parties, other than the largest mobile wireless broadband incumbents and their trade association representatives, embraced the principle of a consistent framework for wired and wireless alike. This was true no matter how such commenters came out on the classification question more generally. Strong Title II classification proponents such as Free Press,[105] Public Knowledge,[106] and CDT[107] all favored application of the same classification framework to wired and wireless broadband Internet connectivity services, as did Title II classification supporters such as the civil rights organizations comprising the Media Action Grassroots Network,[108] along with media reform and consumers' organizations such as New Media Rights and Utility Consumers' Action Network.[109]

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[104] Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, WT Docket No. 07-53, *Declaratory Ruling*, 22 FCC Rcd 5901, ¶¶ 55, 70 ("*Wireless Framework Order*").

[105] *See, e.g.*, Free Press Comments at 3 ("The Commission should adopt a broad, functional definition for broadband Internet connectivity that…must include…wireless networks. No functional distinction justifies the disparate treatment of wired and wireless networks, and the Commission must have a secure foundation for making broadband policy in the wireless space if we are to achieve the nation's broadband goals.").

[106] *See* Public Knowledge Comments at 28-35; *id.* at 28-29 ("In light of the plain statutory language and judicial precedent establishing platform agnosticism, the Commission should not try to create a distinct regulatory structure for 'wireless broadband' simply because it uses wireless technology.").

[107] *See* CDT Comments at 18 ("In a converging world where wireless connectivity is expected to make broadband Internet access increasingly ubiquitous, failing to address wireless would leave a gaping hole in any jurisdictional framework meant to facilitate the country's critical broadband policy goals.").

[108] *See* MAG-Net Comments at 8 ("[I]t is critical that the Commission classifies both wireless and wireline broadband Internet connectivity services as a Title II service.").

[109] *See* Comments of New Media Rights and Utility Consumers' Action Network, GN Docket No. 10-127, at 10 (filed July 15, 2010) ("The perception of mobile wireless broadband service is one reason why mobile wireless broadband services should be classified as a commercial mobile service and subject to the same regulatory requirements as current commercial mobile services such as wireless phone service.").

Yet, some wireless broadband providers themselves also favor a consistent framework for wireless and wired broadband Internet services, even if they disagree with Public Interest Commenters in some respects about the scope of Title II classification. Clearwire, for one, explicitly called for the application of the same principles to all providers, explaining that differences in network technology "are not relevant to the ***statutory*** approach, although they certainly may be relevant to some of the specific ***rules*** that are eventually adopted under" the Commission's new broadband framework.[110] As Clearwire indicated, and as Public Interest Commenters certainly agree, "the Commission should have the same ability to take action in the public interest to promote competition and protect consumers for all Internet service platforms, regardless of technology."[111]

Clearwire's support is noteworthy, and its business model highlights the need for consistent application of Title II by demonstrating the difficulty that the Commission would have drawing lines between wired and wireless broadband Internet services. Clearwire is marketed in direct competition to DSL and other lower-bandwidth wireline ISP offerings. Yet, Clearwire's connectivity also will be increasingly mobile as well as fixed and nomadic. There would be no principled basis derived from the statute for the Commission to include such hybrid fixed/mobile wireless platforms in the regulatory framework but exclude other mobile platforms – especially if it expects all such wireless broadband platforms to compete with each other and with wired broadband offerings on more or less level terms.

Sprint likewise favors a consistent regulatory framework for wired and wireless broadband Internet connectivity, calling on the Commission not to exempt wireless from its

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[110] Comments of Clearwire Corporation, GN Docket No. 10-127, at 6 (filed July 15, 2010) ("Clearwire Comments").

[111] *Id.*

classification inquiries but rather "to adopt a narrow definition for Internet connectivity service that includes only those minimum network elements and functions essential to establish a line of transmission between the user and the Internet."[112] Sprint's more balanced approach to the classification decision likely stems from its recognition that the Commission needs more certain authority, which would flow from treating mobile broadband Internet services as telecommunications services, if the Commission is to promote competition through steps such as mandatory data roaming requirements.[113]

Less surprising than wireless carriers themselves acknowledging benefits from consistent classification for wired and wireless broadband is the fact that wired broadband providers, typically opposed to Title II classification, nevertheless would prefer not to see their wireless counterparts exempted from any "third way" classification decision. NCTA, for example, suggests that the Commission "must also take care not to tilt the playing field by applying its classification decision only to cable and wireline broadband Internet platforms. The same fundamental rules must apply to all providers regardless of technology or platform."[114] Thus, as NCTA rightly asserts, "[t]o the extent wireless providers face particular technical limitations in implementing the regulatory requirements that follow from reclassification, those limitations could be reflected in the application of the rules – not through a complete exemption."[115] SureWest also opposes Title II classification generally, but rightly suggests that the

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[112] Comments of Sprint Nextel Corporation, GN Docket No. 10-127, at 13 (filed July 15, 2010).

[113] *See id.* at 14.

[114] NCTA Comments at 84. NCTA also argues persuasively that "[i]t would be arbitrary and capricious, not to mention ineffective, to only apply the legal framework to wireline providers if the goal is to prevent preferences or discrimination by those who provide access or gateways to Internet content" and that "basic principles of regulatory parity dictate that the market not be skewed by artificial regulatory advantages." *Id.*

[115] *Id.*

Commission's proposal to classify wired broadband Internet services alone as telecommunications services would improperly skew investment by bestowing a different status on wireless networks.[116]

Application of a consistent regulatory framework to wired and wireless broadband Internet connectivity services is the right answer on legal and policy terms, and commenters ranging from Internet advocacy groups and civil rights organizations to wired and wireless providers alike support this approach. The Commission should adopt such a consistent framework, and should dismiss the objections discussed below regarding the supposed market-based or statutory rationales for treating wireless broadband differently.

B. The Commission should not heed claims for different regulatory treatment based on the supposed competitive nature of wireless services, or on the nascent and emerging nature of wireless Internet broadband connectivity.

Despite all of these reasons to treat wired and wireless platforms alike for purposes of basic broadband regulatory frameworks, some commenters suggest that the Commission should ignore the functional equivalence of the services, the plain meaning of the statute, and the benefits of regulatory parity for user expectations, consumer experiences, and investment incentives. There are a number of such arguments raised by parties generally opposed to Title II classification, but most of these arguments revolve around the supposed competitive nature of the wireless market on an intramodal basis,[117] or else on the emerging and developing nature of mobile broadband Internet connectivity services.[118]

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116 *See* Comments of SureWest Communications, GN Docket No. 10-127, at 20-21 (filed July 15, 2010).

117 *See, e.g.*, Comments of CTIA – The Wireless Association, GN Docket No. 10-127, at 7 (filed July 15, 2010); Comments of T-Mobile USA, Inc., GN Docket No. 10-127, at 16-18 (filed July 15, 2010) ("T-Mobile Comments"); Verizon Comments at 74-77.

118 *See, e.g.*, T-Mobile Comments at 7-10; Verizon Comments at 77.

At the risk of repeating themselves, Public Interest Commenters reiterate the proposition that the Commission cannot interpret the statute faithfully and yet conclude that functionally equivalent broadband connectivity services, used to reach the same Internet, should be treated differently for regulatory classification purposes. The comments cited and quoted above from entities as diverse as Free Press, Public Knowledge, Sprint, and NCTA all support that same conclusion. The amount of competition amongst providers of a particular type of service simply cannot be reasonably construed as relevant to the statutory approach the Commission should take, although the level of competition ***might*** be relevant to some of the specific rules that the Commission adopts after deciding the framework.[119] Public Interest Commenters submit that the logic of this conclusion is inescapable. Mobile wireless voice service does not cease to be a telecommunications service just because multiple providers may offer such a service in a particular geographic market. This is the reason that Congress granted the Commission some flexibility to dispense by regulation with certain Title II provisions otherwise applicable to wireless voice services, but not with the core common carrier protections in Sections 201, 202, and 208 of the Act.[120] The level of oversight the Commission exercises may change based on the competitiveness of the product market, but the basic nature of the service clearly does not.

Public Interest Commenters also note two additional problems with the competition-based arguments some parties propose as a basis for exempting wireless broadband Internet connectivity from the classification determinations suggested in the *Notice*. First, as illustrated in several proceedings by the Public Interest Commenters, and most recently in comments filed

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[119] *See* Clearwire Comments at 6.

[120] *See* 47 U.S.C. § 332(c)(1)(A); *see also id.* § 160.

by Media Access Project and Free Press[121] in the Commission's current Mobile Wireless Competition annual report docket,[122] there is not effective competition in the mobile wireless space – especially in the mobile wireless broadband data and Internet market so thoroughly dominated at present by the two largest providers: AT&T and Verizon Wireless. The Public Interest Commenters of course do not intend to re-argue the Commission's mobile wireless competition tests and analyses in this docket, but nonetheless do caution the Commission against accepting in this broadband framework proceeding any untested or discredited assertions about the amount of effective competition among wireless broadband Internet connectivity providers.

Second, as illustrated in the Public Interest Commenters reply comments in the Open Internet Proceeding, even the existence of competition among providers of broadband Internet connectivity does not resolve problems arising from the terminating access monopoly that such providers maintain over their customers and from the high switching costs that customers face.[123] Moreover, "competition offers especially poor protection to minority groups and other market participants with reduced leverage and bargaining power vis-à-vis incumbents."[124] The present proceeding does not present the question of the substantive open Internet rules that the Commission might apply to wireless broadband networks. Still, Public Interest Commenters

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121 Comments of Free Press and Media Access Project, WT Docket No. 10-133, at 3 (filed July 30, 2010).

122 Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, including Commercial Mobile Services, WT Docket No. 10-133, *Public Notice*, DA 10-1234 (rel. June 30, 2010).

123 *See* Public Interest Open Internet Reply Comments at 15 (quoting at length from Comments of the Ad Hoc Telecommunications Users Committee, GN Docket No. 09-191, WC Docket No. 07-52, at 9-10 (filed Jan. 14, 2010) ("[E]ven if broadband Internet access markets were robustly competitive…once a subscriber chooses a wireline or wireless Internet access provider, her content, application, and service providers are captive to that [network] provider regardless of the competitive choices, if any, available to [the subscriber] before subscription.")).

124 Public Interest Open Internet Reply Comments at 15-16.

take the liberty of re-stating their position because so many parties opposing Title II classification have attempted to conflate the broadband framework determination with the Commission's separate net neutrality deliberations, and thus have used the same arguments in both dockets. As explained in that earlier proceeding, neither competition nor the supposed nascent or emerging nature of a service begin to answer the question of the need for nondiscrimination rules. These factors should have even less bearing on questions of statutory interpretation and proper application of the Act's definitions to various broadband Internet connectivity services.

C. Section 332 of the Act does not prohibit the Commission from applying Title II provisions to wireless broadband Internet connectivity providers.

Lastly, AT&T and Verizon claim the Commission does not have the authority to classify wireless broadband Internet connectivity service as a telecommunications service.[125] Relying on the language of Section 332 and the *Wireless Framework Order*,[126] they claim that mobile broadband Internet access is not a commercial mobile service (commonly referred to as "CMRS"), but instead is a private mobile radio service. By identifying themselves as private mobile radio service providers, AT&T and Verizon argue that their mobile broadband services are outside of the reach of Title II because Section 332(c)(2) of the Communications Act prohibits the Commission from treating private mobile service providers as common carriers.

In the *Wireless Framework Order*, the Commission extended to wireless broadband its prior classification decisions regarding cable, wireline, and broadband over powerline (or "BPL") broadband Internet connectivity. In an effort to achieve regulatory parity – albeit based on the wrong initial determinations for these other types of networks – the Commission

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125 *See* Verizon Comments at 72-75; AT&T Comments at 112-114.

126 *See supra* note 104.

determined that mobile wireless broadband Internet connectivity service was an information service and not a telecommunications service. Additionally, in an effort to achieve consistency with the prevailing statute, the *Wireless Framework Order* determined that wireless broadband Internet connectivity service was not a CMRS as defined in Section 332(d) of the Act.[127]

1. *The Commission must reevaluate its decision to classify wireless broadband Internet connectivity as an "information service."*

Section 332(d) defines "commercial mobile service" as a mobile service "that is provided for profit and makes interconnected service available" to the public. The *Wireless Framework Order* concluded that wireless broadband Internet connectivity was not a CMRS based solely on that decision's interpretation of the term "interconnected service." The *Wireless Framework Order* further concluded that even if wireless broadband Internet connectivity was an interconnected service, it would be inconsistent for the Commission to allow an unregulated information service to also be classified as a regulated commercial mobile radio service.[128]

However, as discussed in Public Interest Commenters initial comments, previous Commissions' decisions to classify broadband Internet connectivity as an information service were made on the basis of different sets of facts and unfulfilled expectations about the results of deregulation.[129] Relying only on this flawed interpretation of Internet connectivity service, along with an incomplete analysis of Section 332 and Part 20 of the Commission's regulations, the Commission found in the *Wireless Framework Order* that mobile Internet connectivity was not a CMRS. As a result, the Commission should reevaluate its CMRS determination in the *Wireless*

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[127] *Wireless Framework Order* ¶ 37.

[128] *See id.* ¶ 41.

[129] *See* Public Interest Comments at 15; *see also supra* Part II.A.

Framework Order, classify wireless broadband Internet Connectivity as a telecommunications service, and ignore the statutory arguments made by AT&T and Verizon regarding Section 332.

Following its prior decisions for cable, wireline, and BPL broadband Internet connectivity, the Commission classified wireless broadband Internet connectivity service as an information service.[130] Relying on those decisions for other platforms and on the *Brand X* decision, the Commission determined:

> that wireless broadband Internet access service is similarly an "information service." Like cable modem service, wireline broadband Internet access service, and BPL-enabled Internet access service, wireless broadband Internet access service offers a single, integrated service to end users, Internet access, that inextricably combines the transmission of data with computer processing, information provision, and computer interactivity, for the purpose of enabling end users to run a variety of applications. These applications, identical to those provided by cable modem service, wireline broadband Internet access, or BPL-enabled Internet access, "taken together constitute an information service as defined by the Act." Accordingly, we find that wireless broadband Internet access service meets the statutory definition of an information service under the Act.[131]

Yet, contrary to the conclusion suggested by the passage above, the record in the instant proceeding demonstrates that classifying broadband Internet connectivity service as a telecommunications service is the best interpretation of the relevant statutory provisions – in both wireline and wireless contexts. Based on the law and the current facts, it is entirely proper for the Commission to re-visit its determination in the *Wireless Framework Order*, and at this time to conclude unambiguously that both wireless and wireline broadband Internet connectivity services are telecommunications services.

2. *The Commission should reconsider the definition of what constitutes a CMRS, recognizing once more that Congress intended the statutory terms*

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130 *Wireless Framework Order* ¶ 26.

131 *Id.* (citation omitted).

> *"interconnected service" and "interconnected" to be defined broadly, and intended the phrase "functional equivalent" to broaden the scope of CMRS.*

Revisiting this basic regulatory classification determination would also remove any perceived inconsistency and any reservations the Commission may have had in defining an information service as a commercial mobile service. The *Wireless Framework Order* concluded that wireless broadband Internet connectivity was not a CMRS. Section 20.3 of the Commission's rules defines CMRS as a mobile service that is:

> (a)(1) provided for profit, *i.e.,* with the intent of receiving compensation or monetary gain;
> (2) An interconnected service; and
> (3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or
>
> (b) The functional equivalent of such a mobile service described in paragraph (a) of this section.[132]

The Commission's interpretation of Section 332 and Part 20 in the *Wireless Framework Order* failed, however, to take into account critical aspects of the language of these provisions, as well as the Commission's initial findings with respect to Congress's intent in enacting Section 332.

For instance, when determining in 2007 whether wireless broadband Internet connectivity was a CMRS, the Commission's narrow interpretation of "interconnected service" failed to take into account Congress' intent to limit the types of services that were considered private mobile radio services. Additionally, the *Mobile Broadband Order* failed to explain the relevance of other key statutory and regulatory language and terms (besides "interconnected service"), such as the definition in the rules of the key term "interconnected" as well as the relevance of the definition's reference to a "functional equivalent" of a CMRS.

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[132] 47 C.F.R. 20.3.

The *Wireless Framework Order* narrowly construed the phrase "interconnected service" to imply that a CMRS must have the ability to "communicate to or receive communications from *all* users" on the public switched network (or "PSTN").[133] In other words, the Commission appeared to suggest that any CMRS had to provide a direct connection with to ***all*** subscribers connected to the PSTN. However, when tasked with initially interpreting the language of Section 332 and Congress's intent in enacting that provision, the Commission concluded quite differently.

In particular, the Commission interpreted the phrase "interconnected service" much more broadly. The Commission found:

> that by using the phrase "interconnected service," Congress intended that mobile services should be classified as commercial services if they make interconnected service ***broadly available*** through their use of the public switched network. The purpose underlying the congressional approach…is to ensure that a mobile service that gives its customers the ***capability*** to communicate to or receive communication from other users of the public switched network should be treated as a common carriage offering (if the other elements of the definition of commercial mobile radio service are also present, or if the service can be deemed the ***functional equivalent*** of CMRS).[134]

Thus, in determining initially what could be considered an "interconnected service" the Commission was concerned with the capabilities of the service, and not only whether such services allowed subscribers to communicate directly with all users in the PSTN. This broad reading is supported by the Commission's interpretation of the term "interconnected," which is a key definitional element of "interconnected service" that the *Wireless Framework Order* failed to address or consider.

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[133] *Wireless Framework Order* ¶ 45 (emphasis in original).

[134] *See* Second Report and Order, *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1141, 1434 ¶ 54 (1994) ("*CMRS Order*") (emphases added) (internal citations omitted).

When initially implementing Section 332, the Commission broadly defined the term "interconnected" to mean "direct or *indirect* connection through automatic or manual means (either by wire, microwave, or other technologies) to permit the transmission of messages or signals between points in the public switched network and a commercial mobile radio service provider."[135] Indeed, the Commission stated that it intended to "broadly interpret[ ] the definitional elements of CMRS because Congress intended this definition to ensure that the Commission regulate similar mobile services in a similar manner."[136]

Thus, considering all the relevant terms, the Commission clearly can conclude that mobile broadband Internet connectivity services fall within the definition of CMRS. At minimum, mobile broadband Internet connectivity services indirectly interconnect to the public switched network by providing the subscriber with the ability to indeed reach all telephone numbers, and do so by allowing users to choose from among any number of interconnected VoIP applications or other methods for placing calls through a broadband connection. Such an interpretation would allow for Title II treatment of mobile broadband Internet connectivity

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[135] *CMRS Order* ¶ 56 (emphasis added) (internal citations omitted). The Commission later codified these definitions in 47 C.F.R. 20.3:

> *Interconnection or Interconnected*. Direct or *indirect connection* through automatic or manual means (by wire, microwave, or other technologies such as store and forward) to permit the transmission or reception of messages or signals to or from points in the public switched network.
>
> *Interconnected Service*. A service:
>
> (a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network[.]

[136] *CMRS Order* ¶ 79.

services, and would be consistent with the classification of all Internet connectivity services as telecommunications services.

The *Wireless Framework Order*'s interpretation of what constitutes a CMRS would appear to broaden the scope of those services considered private mobile services simply to include offerings merely because they offer broadband or IP-based services. However, the Commission previously recognized that "Congress intended to narrow the scope of the definition for private mobile radio service" and did so "by adding language stating that a mobile service would be considered to be private if it is ***not*** the ***functional equivalent*** of a commercial mobile radio service."[137] For this reason, the Commission concluded that "even if a mobile service does not fit within the strict definition of a commercial mobile radio service, if the service amounts to the 'functional equivalent' of a service that is classified as CMRS, it should be regulated as a CMRS."[138] Importantly, this broad interpretation of CMRS is consistent with both Congress's and the Commission's recognition of the need to "ensure that similar services are subject to the same regulatory classification and requirements."[139]

The *Wireless Framework Order* (along with AT&T and Verizon in their comments in this proceeding) never acknowledged that a service still can be considered a CMRS if it is the functional equivalent of such an offering, nor that Congress expected that "even if a mobile service does not fit within the strict definition of a commercial mobile radio service, if the service amounts to the 'functional equivalent' of a service that is classified as CMRS, it should be regulated as a CMRS."[140] Congress could not have intended that wireless carriers offering a

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137 *Id.* ¶ 76 (emphases added).

138 *Id.* ¶ 78.

139 *Id.*

140 *Id.*

broadband transmission service to the public for a fee should be completely free from regulatory oversight by simply labeling themselves as a "private" mobile radio service providers, based on nothing more than the technology underlying their broadband or IP-based telecommunications services. Instead, Congress and the Commission recognized that in many cases private carriers had become indistinguishable from common carriers,[141] and chose to expand the types of services that would be considered commercial mobile services.

Thus, based on current facts and the law, and the proper interpretation of relevant statutory and regulatory language, the Commission could find that mobile broadband Internet connectivity services are telecommunications services and commercial mobile services. Pursuant to this appropriate interpretation, the Commission is not prohibited from applying Title II provisions to mobile broadband Internet connectivity services as Verizon and AT&T claim.

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[141] *Id.*

CONCLUSION

For the foregoing reasons, the Commission should move expeditiously to classify both wired and wireless broadband Internet connectivity services as "telecommunications services" under Section 153 of the Act. Such a classification would best comply with the terms of the Act itself, and also would provide the best legal foundation for achievement of national broadband policies and goals. Supreme Court precedent confirms that this statutory interpretation question and related technical considerations are within the expert agency's authority to decide. As a result, and as the record in this proceeding demonstrates, the Commission can discount or dismiss the various technological, economic, statutory, and constitutional barriers posited by opponents of Title II classification.

Respectfully submitted,

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