Before the
Federal Communications Commission
Washington, DC 20554

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

To: The Commission

REPLY COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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I. INTRODUCTION AND SUMMARY

Numerous network operators, equipment vendors, and public interest groups agree with the Telecommunications Industry Association ("TIA") that the existing regulatory framework, founded on the classification of broadband Internet access as an integrated information service, has been the principal force behind massive private-sector investment and deployment over the past decade. As these parties note, the Commission's own data, as well as the data presented in the National Broadband Plan, reveal that the vast majority of Americans enjoy competition among multiple wired broadband providers, as well as numerous wireless providers offing third- and fourth-generation mobile broadband. These commenters also agree that private capital will continue to play a crucial role in building out service to the small but significant number of unserved and underserved Americans, and that the imposition of Title II regulation would substantially reduce the investment of such capital.

Numerous commenters also agree with TIA that even the most modest conception of the so-called "Third Way" would generate tremendous uncertainty regarding the extent of current and future regulatory burdens, and that such uncertainty would itself be inimical to investment and deployment. Significantly, the validity of investors' concerns has been demonstrated most

strongly not by network operators themselves, but rather by groups seeking even *more* regulation than the Notice contemplates. These parties urge the Commission to treat broadband Internet service providers as if they were the state-sanctioned telephone monopolies of a century ago, under a regime that would surely divert risk capital to other industries. In so arguing, the proponents of regulation make clear that any forbearance decisions issued here will be hotly contested, at the Commission and in the courts, for many years to come.

The record's strong support for TIA's positions is not, however, limited to issues of investment and deployment. Rather, the comments also provide forceful confirmation of TIA's legal points. As commenter after commenter explains, there is no technical or other basis for a determination that broadband Internet access includes a severable telecommunications component. Indeed, if anything, the transmission and processing that comprise Internet access have become even *more* integrated in recent years. As such, any effort to revise the Commission's current interpretation would be unreasonable and unlawful. Moreover, such a decision would be subject to heightened scrutiny – scrutiny it could not survive – given that it would involve reversal of a previous factual determination and would upset substantial reliance interests. Commenters also agree that the Commission's key broadband policy goals can be achieved, by the Commission and other governmental actors, without resort to a transparently contrived reclassification.

In short, the existing regulatory framework has driven billions of dollars of private capital into next-generation broadband networks, and can continue to do so without risk to the Commission's most critical objectives. In contrast, an untested "Third Way," however constituted, would bring risk and uncertainty, deterring investment and undermining national broadband policy, while ensuring years of litigation. The Commission should eschew the

reclassification proposals set out in the Notice, and work within the existing framework to ensure that all Americans share in the bright broadband future.

II. THE COMMISSION'S LONGSTANDING TITLE I APPROACH SHOULD NOT BE SUPPLANTED BY INTRUSIVE REGULATION

The Commission's light-handed oversight of broadband Internet service under its Title I ancillary jurisdiction has been key to the explosive growth of the broadband market in the United States. As the Commission focuses on closing the broadband gap for the diminishing number of Americans without broadband access in the home, now is decidedly not the time for it to turn its back on this successful approach. Rather, as the record makes clear, the current "information service" classification provides the appropriate regulatory foundation to spur private investment in broadband deployment and to protect consumers. Nevertheless, to the extent that any concerns remain, the current framework ensures that the Commission and other stakeholders can act to pursue critical policy goals.

A. Private Investment is the Key to Broadband Deployment in the U.S.

At the outset, the record is unequivocal on one important point: private investment is a primary factor driving broadband deployment. As Cisco aptly observed, "private investment has been, and will continue to be, the key to broadband deployment in the United States."[1] Indeed, TIA has noted that, between 2000 and 2009, the number of Americans with broadband at home went from 8 million to nearly 200 million.[2] In that same time-span, broadband has redefined

[1] Comments of Cisco Systems, Inc. at 2 (filed July 15, 2010) ("Cisco Comments") (citing FCC, Connecting America: The National Broadband Plan, at xi (Mar. 16, 2010) ("National Broadband Plan")); *see also* Comments of Alcatel-Lucent at 7 (filed July 15, 2010) ("Alcatel-Lucent Comments") (noting that "Commission and industry data show that broadband investment, deployment and adoption have increased significantly since the classification decisions establishing broadband Internet service as a Title I offering.").

[2] Comments of the Telecommunications Industry Association at 4 (filed July 15, 2010) ("TIA Comments").

how Americans communicate, access the Internet and do business. This growth has corresponded with massive capital expenditures by those in the broadband ecosystem.[3] As the National Broadband Plan recognized, private investment remains critical to future deployment.[4]

Commenters agree that replacing the Commission's current approach to broadband with aggressive and intrusive regulation will threaten this private investment, which is essential to broadband deployment.[5] The Alliance for Digital Equality, a non-profit consumer advocacy organization that serves to facilitate and ensure equal access to technology in underserved communities,[6] warns that "increased regulation will bring with it negative consequences such as reduced investment, a damaging impact on job creation and reduced opportunities for Internet access in disadvantaged communities."[7] Similarly, Alcatel-Lucent cautions the Commission to

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[3] *See id*. at 6 (describing tens of billions of dollars of annual capital expenditures for broadband).

[4] *See, e.g.*, National Broadband Plan at XV, 9, 143.

[5] *See e.g*., Comments of Bright House Networks, LLC at 4 (filed July 15, 2010) ("We are particularly concerned with the negative effects on innovation and investment that would be the inevitable result of declaring any part of the broadband Internet industry to be subject to Title II regulation."); Comments of AT&T Inc. at 40 (filed July 15, 2010) ("AT&T Comments ") ("Title II reclassification would create multiple new dimensions of investment uncertainty by radically expanding the universe of potential regulation."); Comments of the National Cable and Telecommunications Association at 22-23 (filed July 15, 2010) ("NCTA Comments") ("Replacing the current framework with a policy that presumes regulation and puts the burden on providers to show why regulation should be removed would thwart investment and innovation by imposing financial, technological, and market uncertainty and risks – fundamentally conflicting with the national goals of promoting broadband growth and competition."); Comments of the Public Utility Commission of Texas at 3-4 (filed July 9, 2010) ("A stable and unregulated environment for internet and broadband information service has fostered massive investment and rapid innovation, and a reversal of course to impose common carrier regulation is likely to result in years of uncertainty as these issues are litigated through the federal appeals courts and may very well have the effect of suppressing investment and impeding innovation."); Comments of Qualcomm Incorporated at 9 (filed July 15, 2010) ("Qualcomm Comments") ("New regulation of mobile broadband would deter the investment that is essential to universal broadband connectivity – in direct contravention of the main goals of the National Broadband Plan."); Comments of Time Warner Cable Inc. at 58 (filed July 15, 2010) ("Time Warner Cable Comments) ("[I]mposing public-utility regulation designed for historical monopolies on the entities primarily responsible for building out the nation's broadband networks would put the br[akes] on broadband deployment.").

[6] *See* Alliance for Digital Equality, About ADE, http://www.alliancefordigitalequality.org/about.php (last visited August 11, 2010).

[7] Comments of the Alliance for Digital Equality at 1 (filed July 15, 2010).

understand that service providers may find it their fiduciary duty to *curtail* capital investments if reclassification decisions are unduly burdensome or limit marketplace flexibility.[8] And numerous state governors agree with the conclusion drawn by Governor Mike Beebe (D-AR) that, notwithstanding the valid goals of extending broadband service to rural America and protecting the open Internet, "efforts … to regulate broadband under the common carrier provisions of the 1934 Act will stifle investment in broadband capacity" at a time when that investment is most needed.[9]

As the Commission works to narrow the broadband availability gap, it should be mindful that discrete problem areas (if any exist) do not necessarily warrant a wholesale departure from the current framework in favor of intrusive Title II regulation. As described herein, the record and the Commission's own data demonstrate that there has been extensive broadband buildout over the last decade. The vast majority of Americans enjoy substantial competition for the provision of broadband Internet access, with 82 percent of American housing units served by two or more fixed broadband providers and 89 percent of the American population served by two or more 3G wireless broadband providers.[10] While more deployment is of course needed in some areas for broadband service to become available for the first time and service to be upgraded where presently available, resort to far-reaching and overly blunt regulation is unwarranted,

[8] *See* Alcatel-Lucent Comments at 9.

[9] Letter from Mike Beebe, Governor, State of Arkansas, to Julius Genachowski, Chairman, FCC (filed May 17, 2010); *see also* Letter from Janice K. Brewer, Governor, State of Arizona, to Julius Genachowski, Chairman, FCC (filed June 15, 2010); Letter from Bob Riley, Governor, State of Alabama, to Julius Genachowski, Chairman, FCC (filed June 11, 2010); Letter from Robert F. McDonnell, Governor, Commonwealth of Virginia, to Julius Genachowski, Chairman, FCC (filed June 15, 2010); Letter from Tim Pawlenty, Governor, State of Minnesota, to Julius Genachowski, Chairman, FCC (filed June 9, 2010).

[10] *See* Cisco Comments at 2 (citing National Broadband Plan at 37, 40).

unwise, and ultimately ill-suited to the accomplishment of this objective. If anything, such an approach could have the opposite and unintended effect of inhibiting investment and buildout.[11]

B. The Current "Information Service" Classification Provides the Best Framework for Achievement of the Commission's Objectives

Numerous parties reflecting diverse interests are in agreement that reliance on Title I, in conjunction with specific provisions of Title II that are relevant to information services, remains the best means by which the Commission can exert authority over broadband in order to accomplish its objectives. Notwithstanding the *Comcast* decision,[12] under its current framework, the Commission can assert authority to address the most pressing public policy issues in the broadband space.[13] As TIA has explained, the *Comcast* decision did not reject the Commission's

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[11] *See* Comments of MetroPCS Communications, Inc. at 29 (filed July 15, 2010) ("MetroPCS Comments") (Reclassification "will also breed uncertainty in the market for broadband Internet services at the precise time that the Commission requires market stability for the capital-raising required to implement the *National Broadband Plan*'s goals."); AT&T Comments at 39 ("the Commission can meet its ambitious broadband agenda for America by maintaining the predictable deregulatory environment needed to encourage roughly $350 billion in new private investment. Alternatively, it can take a different path by accommodating the Washington-based interest groups—which invest no capital, deploy no networks, and serve no customers . . . .").

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

[13] See TIA Comments at 7-10; Comments of Sprint Nextel Corporation at 2-3 (filed July 15, 2010) (noting that the Communications Act "provides the Commission with unquestionable primary subject matter jurisdiction to address issues like special access pricing, intercarrier compensation, and IP interconnection that directly impact competition in broadband communications. . . . With the Communications Act's primary subject matter jurisdiction and ancillary jurisdiction in hand, the Commission has broad power to shape the broadband industry even without classifying Internet connectivity service as a telecommunications service."); Comments of Verizon and Verizon Wireless at 3 (filed July 15, 2010) ("Verizon Comments") ("[T]he Commission has direct authority to implement both of the central pillars of its National Broadband Plan. It has direct authority to allocate commercial spectrum for licensing to provide wireless broadband services. . . . And the Commission has direct authority to address universal service for broadband. . . . The Commission likewise has specific authority under provisions of the Communications Act assigning it responsibilities for matters such as protecting consumer information, disability access, and public safety, and it has previously exercised ancillary authority to extend those protections to Internet-based services without challenge."); AT&T Comments at 20-39 ("The Commission itself already as the authority it needs to address its two most pressing broadband concerns: broadband spectrum and universal service . . . . Reclassification is likewise unnecessary to address transparency, disabilities access, privacy and cybersecurity."); Comments of Comcast Corporation at 3-17 (filed July 15, 2010) ("Comcast Comments") ("Proceeding under Title I is the best way for the Commission to accomplish its broadband-related agenda."); Time Warner Cable

ability to assert Title I ancillary jurisdiction, nor did it overturn the *Policy Statement*[14] or undercut the Commission's ability to reform the universal service system under section 254.[15] In fact, nothing in the *Comcast* decision prevents the Commission from articulating a thorough basis under the current framework to legally support policies that further its broadband objectives.[16] Moreover, to the extent that parties are concerned with competitive misconduct or abuse, existing antitrust and tort laws can provide a backstop with appropriate remedies.[17]

The "information service" classification and the associated regulatory framework have been endorsed by policymakers, public interest groups, and the companies directly responsible for investing billions of dollars of risk capital toward broadband deployment and upgrades. The National Organizations (comprised of leading civil rights and minority organizations) agree that the Commission's "existing legal framework [] provides the FCC with ample authority to meet its broadband goals and protect the interests of minority consumers and disadvantaged business[es]."[18] Relatedly, Governor Brad Henry (D-OK) described the "influx of investment by competing companies" in the wake of broadband deregulation in his state, leading to the

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Comments at 77-89 ("The Commission can address relevant policy goals relating to broadband services without classifying broadband transmission under Title II.").

[14] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) ("*Policy Statement*").

[15] TIA Comments at 7-10.

[16] *See, e.g., supra* note 13; Comments of the National Organizations at 1-2, 16-32 (filed July 16, 2010) ("National Organizations Comments"); Comments of Cablevision Systems Corporation at 33-36 (filed July 15, 2010) ("Cablevision Comments"); Comments of Cox Communications, Inc. at 21-22 (filed July 15, 2010) ("Cox Comments").

[17] *See* Qualcomm Comments at 9.

[18] *See* National Organizations Comments at 1-2.

conclusion that "the best and most-proven way to reach all Americans with broadband is to follow a model of light or no regulation."[19] This model has been, and can continue to be, successfully pursued by the Commission under its Title I jurisdiction.

C. Industry Efforts Can Be a Useful Resource to the Commission to Address Broadband Network Issues

Where necessary, the Commission's Title I approach can be supplemented by ongoing efforts involving industry to help ensure that any broadband-related issues are quickly identified and addressed. For example, the recently announced Broadband Industry Technical Advisory Group's ("BITAG") mission is to "bring together engineers and other similar technical experts to develop consensus on broadband network management practices or other related technical issues that can affect users' Internet experience, including the impact to and from applications, content and devices that utilize the Internet."[20] In turn, parties including the Center for Democracy and Technology, AT&T, and the Competitive Enterprise Institute recognize that the BITAG could be an important resource for the Commission.[21] Alternatively, and as at least one party has proposed, to the extent that the current framework is held to provide insufficient authority for the Commission, the BITAG and other industry and government collaborative efforts can maintain a watchful eye while the Commission seeks any additional authority from Congress.[22]

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[19] Letter from Brad Henry, Governor, State of Oklahoma, to Julius Genachowski, Chairman, FCC, at 1 (filed May 20, 2010).

[20] Press Release, Broadband Internet Technical Advisory Group, *Initial Plans for Broadband Internet Technical Advisory Group Announced* (June 9, 2010), http://www.prnewswire.com/news-releases/initial-plans-for-broadband-internet-technical-advisory-group-announced-95950709.html.

[21] Comments of the Center for Democracy and Technology at 21 (filed July 15, 2010) ("CDT Comments"); AT&T Comments at 12-13, 18-19; Comments of the Competitive Enterprise Institute at 6 (filed July 15, 2010).

[22] Comcast Comments at 16.

III. THE COMMISSION'S PROPOSED APPROACH DOES NOT ALIGN WITH THE TECHNICAL CHARACTERISTICS OF BROADBAND INTERNET SERVICE

A. The *NOI* Wrongly Presumes that Broadband Internet Service is Appropriately Conceived as the Joint Provision of Two Separate Components

The record is clear that the Commission's proposed regulatory approach to broadband reclassification is flawed because it relies fundamentally on an erroneous presumption that broadband Internet service is comprised of two wholly distinct elements. TIA agrees with SureWest Communications that neither "the fact that it is possible for some subscribers to access some Internet access functionality separately, nor the fact that Internet access is offered over broadband networks, transforms Internet access into a telecommunications service."[23] As detailed below, consumers expect that a wide range of information service capabilities will be a part of their broadband Internet service because a number of these capabilities, such as the domain name system and caching, are integral to the basic function of retrieving and accessing content from the Web.[24] That some or all of the capabilities of broadband Internet service might also be available from third parties "is irrelevant to whether they are integrated parts of the offering broadband Internet access providers make to consumers . . . ."[25]

TIA agrees with the many commenters firmly rejecting any suggestion that broadband Internet service is the offering of two distinct components.[26] Indeed, most broadband service

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[23] Comments of SureWest Communications at 15 (filed July 15, 2010) (emphasis omitted); *see also* Alcatel-Lucent Comments at 2; Cisco Comments at 5-7; Time Warner Cable Comments at 34-36; Comcast Comments at 26-30; AT&T Comments at 67-78; Verizon Comments at 46-55.

[24] *See* Verizon Comments at 52 (stating that other capabilities such as "e-mail, security, and parental controls are functions that consumers rightly expect when purchasing broadband Internet access service and [] enable consumers to access, interact with, send, and store information over the Internet").

[25] *Id.*

[26] *See, e.g.*, Comments of Alcatel-Lucent at 6 ("As the *Wireline Broadband Order* recognized, consumers and businesses purchase an integrated Internet service offering . . . ."); Comments of AT&T at 45

providers today offer a service that "combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications," just like cable broadband providers did almost 10 years ago.[27]

Moreover, the Commission's proposed dividing line between broadband Internet connectivity service and broadband Internet service does not comport with existing network architecture and design. For example, the Alliance for Telecommunications Industry Solutions ("ATIS") rightly observes that the terms the Commission proposes to use – "broadband Internet service," "Internet access service," and "Internet connectivity service" – are not industry-standard terms.[28] AT&T agrees that the definition of Internet connectivity service that the Commission has proposed is "not simply contrived, but also patently overbroad."[29]

(reclassification "rest[s] on basic misconceptions about how the Internet functions and, in particular, how the Internet's constituent IP networks interact to enable an end user to communicate with others who have Internet connections, send and receive content, and run applications online") (internal quotations and citation omitted); Comments of Charter Communications at 4-5 (filed July 15, 2010) ("Charter Comments") ("Charter's cable modem service today continues to integrate not only the functionalities recognized in the *Cable Modem Declaratory Order*, but also essential services like security screening, spam protection, anti-virus and anti-bot technologies, pop-up blockers, parental controls, online email, instant messaging, and customizable applications, as well as network security-related features that provide essential functionalities of a customer's broadband Internet access service.") (footnote omitted); Comcast Comments at 21-22 (explaining that there is no factual difference between the Internet service offered today and the Internet service that was offered in the past); NCTA Comments at 6-7 (stating that, for many years, "the Commission has carefully examined cable modem and similar broadband services and determined that they are an integrated offering that 'combines the transmission of data with computer processing, information provision and computer interactivity….'"); Comments of Qwest Communications International Inc. at 21 (filed July 15, 2010) ("Qwest Comments") (stating that consumers perceive Qwest's broadband Internet service offerings and those of other providers "to be an integrated broadband Internet access product and not a separate transmission service.").

[27] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, ¶ 38 (2002).

[28] Comments of Alliance for Telecommunications Industry Solutions at 4 (filed July 15, 2010) ("ATIS Comments").

[29] AT&T Comments at 63. ("[The definition] would encompass many services other than Internet access, including special-purpose IP services and products such as e-readers like the Kindle, remote heart monitors, Internet-connected GPS devices (such as the Garmin and TomTom), and smart-grid meters. All

The Commission's efforts to draw lines between Internet connectivity and Internet access ignore the reality that the Internet is not a monolithic network or identifiable destination/location; the Internet "is in actuality a large-scale interconnection of 60,000 major computer networks" and does not exist apart from connections to it or the networks or users that comprise it.[30] Ultimately, the Commission's attempt to create a distinction between Internet access service and Internet connectivity service actually raises confusion because the Commission is wrongly suggesting that "Internet connectivity" can be used without "Internet access."[31] As ATIS observes, the "two terms are logically synonymous."[32]

Finally, a number of commenters responded to the Commission's suggestion that it could identify some of the network "layers" as elements of a telecommunications service and others as elements of an information service.[33] For example, one commenter suggested that the telecommunications component of broadband Internet service should be defined as those services that reside at or below the network layer (Layer 3 and below) or are required to manage the network and that do not fall under Title VI.[34] But in fact, no line can be so easily identified or drawn.[35] For example, broadband Internet access depends on the Transport Control Protocol ("TCP"), which corresponds to the transport layer (Layer 4), to perform flow and congestion

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of these allow the 'user' to communicate with 'others who have Internet connections, send and receive content, and run applications,' however limited.") (footnote omitted).

[30] ATIS Comments at 5.

[31] *See id*. at 6.

[32] *Id*.

[33] *See* Framework for Broadband Internet Service, *Notice of Inquiry*, 25 FCC Rcd 7866, ¶ 60 (2010) ("*NOI*") ("Are distinctions between the functional 'layers' that compose the Internet relevant and useful for classifying broadband Internet service?").

[34] *See* Comments of Professor Scott Jordan at 3.

[35] Indeed, even Free Press agrees that the FCC should not rely on a rigid, layers-based approach to defining broadband Internet connectivity, albeit for different reasons as argued by TIA. Comments of Free Press at 50-51 (filed July 15, 2010) ("Free Press Comments").

control on network traffic. As a practical matter, TCP and Internet Protocol ("IP") (used at Layer 3) are closely linked.

Thus, in the context of Internet access, it would make "little sense to offer Level 3 routing services without also offering Level 4 congestion control and transport functions, and few, if any, providers do so."[36] A Commission-mandated technical demarcation, based on "layers" or any other criteria, would "deter investment … by classifying the regulatory treatment of technical architectures in a manner that would quickly become obsolete in the face of rapidly changing technology."[37] As Alcatel-Lucent states, "a regulatory separation" that "rel[ies] on the separate transmission component in the NECA tariff or IETF Layers as proxies[] fails to recognize how the broadband marketplace continues to evolve with transmission and enhanced capabilities even more integrated and intertwined today than they were back in 1998 when the Commission first took up the classification of Internet service as an Information Service."[38]

B. Providers Confirm that Today's Networks are Complicated, Integrated, and not Easily Segregable

Network operators confirm that commenters suggesting that broadband Internet access service is clearly different and separable from broadband Internet connectivity are simply wrong.[39] As Cox succinctly explained: "There is no point in the Cox network, or many other Internet providers' networks, where Internet 'connectivity' ends and the rest of the network

[36] ATIS Comments at 10 ("In sum, communication between and among users of the Internet is not possible without the processing that takes place in Layers 3 and 4 of the OSI model. Without these routing and transport functions, data simply could not be transmitted from one location to another regardless of the number or type of physical links established.").

[37] Comments of Samsung Telecommunications America, LLC at 5-6 (filed July 15, 2010).

[38] *See generally* Alcatel-Lucent Comments at 2-7.

[39] *See, e.g.*, Comments of American Civil Liberties Union at 3 (filed July 15, 2010); CDT Comments at 7.

begins."[40] In fact, the Commission has consistently and correctly found that broadband Internet access contains a range of integrated data-processing functions.[41] Indeed, numerous commenters agree that broadband Internet access includes myriad elements including protocol conversion, IP address number assignment, domain name resolution, caching, network monitoring, capacity engineering and management, fault management, trouble shooting, security screening, spam protection, anti-virus and anti-bot technologies, pop-up blockers, parental controls, online email, instant messaging, and customizable applications, as well as network security-related features that provide essential functionalities of a customer's broadband Internet access service.[42] The Supreme Court in the *Brand X* decision[43] endorsed this analysis.[44]

If anything, evolution in technology has undercut any argument that broadband Internet service involves a distinct telecommunications component. "[W]hen consumers today use their Internet connections to access a web page, it is decreasingly likely, particularly for popular and frequently-requested content, that they are retrieving information from any particular point they may think they have specified (*i.e.*, the content provider)."[45] In actuality, the opposite is more likely – that end users are not retrieving information from the original requested source. When broadband providers retrieve Internet content in this manner (from their own servers or third-party servers), that approach "places their provision of Internet access firmly outside of the statutory definition of a 'telecommunications service.'"[46] In other words, "Internet users can no

[40] Cox Comments at 18-19.

[41] *See* Time Warner Cable Comments at 19.

[42] *See, e.g., id*. at 20-24; Charter Comments at 4-5; Verizon Comments at 48-49, 82; Comcast Comments at 22-24; AT&T Comments at 73-78.

[43] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) ("*Brand X*").

[44] *See* Time Warner Cable Comments at 20-21; Cisco Comments at 5.

[45] Cablevision Comments at 8-9.

[46] *Id.* at 9.

longer meaningfully be said to be choosing the end points of their online communications" – a key component of the Commission's efforts to classify Internet connectivity as telecommunications.[47] Moreover, since 2002, ISPs have continued to "push" intelligence toward the edge of the network to help block spam, arrest the spread of malware and viruses, and improve quality of service.[48]

Ultimately, then, the Commission's rationale for supporting Title I classification is even stronger now than it was in 2002.[49] "Internet access *remains* an integrated offering that intertwines transmission with protocol conversion, storage and retrieval of information, DNS resolution, caching, network security, and other functions to enable access to email, web browsing, file-sharing, and other offerings."[50] Thus, broadband Internet service was and remains an integrated service.

C. Broadband Wireless Networks Face Particularly Unique Technical Challenges

If the Commission truly wants to promote investment and innovation in the wireless broadband market,[51] it will be best served by continuing to rely on a measured regulatory approach for *all* broadband services. Like wireline networks, the telecommunications component of wireless broadband Internet access is part of an integrated "comprehensive service offering."[52] The telecommunications component of the wireless service is "entirely inseverable

[47] *Id.*

[48] Cisco Comments at 6.

[49] *See id.*

[50] *Id.*

[51] *See* National Broadband Plan at 76-79.

[52] MetroPCS Comments at 21-23.

from the information service component."[53] In its Reply Comments in the Open Internet proceeding, TIA observed that broadband wireless is a relatively nascent market and that the Commission should take the same hands-off approach as it did with the new wireline Internet marketplace, and allow wireless carriers the flexibility to operate their networks to maximize efficiency.[54]

Moreover, before it considers revisiting wireless broadband classification, the Commission must ensure that it has a complete understanding of the unique characteristics of the wireless network.[55] Specifically, while all broadband providers face bandwidth and management challenges, broadband wireless providers face a particularly unique operating environment because wireless networks are constrained by limited and dynamically changing radio resources.[56] Spectrum constraints, combined with a mobile user base, require wireless providers to manage their networks closely to control latency and jitter, and such management would be threatened by Title II regulation.[57] Thus, the Commission should proceed cautiously in order not

[53] *Id.* at 29-32.

[54] *See* Reply Comments of the Telecommunications Industry Association, GN Docket No. 09-191, WC Docket No. 07-52, at 6-7 (filed Apr. 26, 2010); s*ee also* Comcast Comments at 35-36 ("Although currently not as robust as the most advanced wireline broadband Internet services, wireless broadband technologies also are delivering broadband Internet services to consumers. . . . In such a vibrant and evolving marketplace, regulation is a liability, not an asset."); Qualcomm Comments at 3 (Wireless network operators must retain flexibility to manage access to that resource through an unconstrained array of bandwidth conservation tools.).

[55] ATIS Comments at 13 ("[T]o fully address the question posed by the *NOI* regarding wireless networks, the Commission would need to seek and receive specific comments on the network infrastructure used by the various wireless providers (which varies from provider to provider) and determine how broadband data flows through the network.").

[56] *Id.* at 12 ("ATIS takes no position with respect to any of the Commission's policy goals, but notes that wireless networks face unique technical challenges. For wireless networks to work properly and successfully manage the limited spectrum resources available to them, these networks require a tight coupling of the transport and physical layers.") (footnote omitted).

[57] Comments of CTIA – The Wireless Association® at 55-61 (filed July 15, 2010) ("CTIA Comments").

to stifle the innovation and growth occurring in wireless broadband services.[58] TIA agrees with T-Mobile that the imposition of wireless regulations (and indeed any broadband regulation) at this stage would be premature and would risk stifling the industry's investment and innovation at the same time the Obama Administration has celebrated the job creation and economic growth potential of wireless broadband.[59]

D. The Availability of Broadband Services under the NECA Tariff Does Not Mean that Internet Connectivity Service Can Be Easily Separated

In its Comments, TIA observed that while broadband services offered under the National Exchange Carrier Association, Inc. ("NECA") tariffs are treated as telecommunications services, this does not necessarily mean that all broadband service providers have the ability to accurately separate the costs and functionalities associated with the telecommunications component from those associated with the information service component.[60]

Other parties agreed with TIA's conclusion. USTelecom noted that, contrary to the Commission's claim, the NECA DSL access service tariff does not signify a voluntary offering by rate-of-return local exchange companies of broadband transmission service, and the tariff offers no guidance in defining broadband Internet connectivity.[61] Indeed, USTelecom adds that it is unaware of *any* end user customer having *ever* ordered the DSL access service described in the NECA tariff.[62] Verizon agrees that the NECA-tariffed service is not offered to consumers on its own, and, "even if some providers were to choose to offer a separate transport service, that would not provide a basis to characterize another provider's integrated Internet access offering as

[58] Comments of Leap Wireless International, Inc. at 7-8 (filed July 15, 2010).

[59] Comments of T-Mobile USA, Inc. at 9, 22-23 (filed July 15, 2010).

[60] *See* TIA Comments at 16-17.

[61] Comments of The United States Telecom Association at 59 (filed July 15, 2010) ("USTelecom Comments").

[62] *Id.* at 60.

consisting of two separate services (or compelling other providers to also provide a separate transport service)."[63]

Finally, the Commission can draw very little guidance from the services identified in the NECA tariff as a technical matter because the tariff does not actually define or offer either Internet connectivity or access, and does not provide services beyond Layers 1 and 2.[64] Moreover, even if it had some application to traditional wireline carriers (which it does not), NECA's tariffed DSL offering is not even a valid model for broadband cable providers because these companies do not offer standalone transmission, but rather a single service that connects a subscriber to the Internet and provides all the functionality needed to interact with the Internet.[65] The DSL service tariffed by NECA simply does not provide Internet connectivity. "Unlike cable modem service, which offers the customer a single service that connects a subscriber to the Internet (*i.e.*, to backbones and major Internet exchange points) along with providing all the functionality needed to interact with the Internet, the NECA-tariffed service only offers a connection to the telephone company's wire center serving the end user."[66]

E. Given Reliance Interests, the Commission Will Face High Legal Hurdles in Any Effort to Reverse Its Previous Policy

In last year's *Fox* decision, the Supreme Court stated that an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" – "when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that

[63] Verizon Comments at 56.

[64] *See* ATIS Comments at 10-12.

[65] *See* NCTA Comments at 59-60.

[66] *Id.* at 60.

must be taken into account . . . . It would be arbitrary or capricious to ignore such matters."[67] Here, both of the conditions mentioned apply. First, reclassification would upset the settled reliance interests of broadband ISPs, which have made substantial investments in broadband facilities in reliance on that approach. As CTIA points out, this reliance implicates not only prior broadband classification orders but also assurances that auctioned spectrum, other than the Upper C Block, would be free from Title II regulation.[68] Broadband service providers have invested billions of dollars in reliance on the Commission's consistent pledge to fence off broadband Internet access from common carrier regulation.[69] Second, reclassification would necessarily be based on the (questionable) conclusion that the transmission and processing components of broadband Internet access now are separate.[70] The current classification was based upon a "factual determination that the transmission and data processing components of the service are functionally integrated and are not offered separately."[71] These facts, as detailed above, have not changed. "Indeed, if anything, broadband Internet access services are even more functionally

[67] *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) ("*Fox*") (footnote omitted). While *Fox* stands for the general proposition that, in most cases, an agency like the FCC need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one, TIA believes that the Court's guidance on changed policies is particularly relevant in the current circumstances.

[68] *See* CTIA Comments at 71, 75-77.

[69] *Id.* at 31. *See also* Comcast Comments at 2 ("Comcast, for its part, has invested tens of billions of dollars of private risk capital to upgrade its network and develop and deploy new technologies to deliver an array of services, including broadband Internet services, to consumers throughout the United States."); Cox Comments at 3 ("Cox has invested more than $16 billion since 1996 to upgrade its network"); Verizon Comments at 14 ("Verizon itself has invested more in capital expenditures in recent years – more than $80 billion from 2004 through 2008 – than any other company in the United States in any industry.").

[70] *See* TIA Comments at 13-15.

[71] USTelecom Comments at 50.

integrated today than when the Commission first considered the matter more than a decade ago."[72]

IV. THE COMMISSION MUST SUFFICIENTLY LIMIT THE SCOPE OF ANY TITLE II REGULATIONS TO MINIMIZE THE POSSIBILITY OF BACKSLIDING

While much attention has been paid to the direct costs of the regulations that the Commission has proposed to apply to broadband Internet service, the Commission must also bear in mind the problems associated with even more burdensome regulation, and with the concerns raised by the *prospect* of such additional regulation in the future. Such fears are likely to be bolstered by arguments presented in this docket by parties advocating a regime far more expansive than that initially proposed – a framework virtually indistinguishable from that designed to regulate monopoly telegraph and telephone carriers nearly a century ago. However modest and well-intentioned the Commission's plans may be here, supporters of a "full Title II" approach are sure to continue their push to regulate the Internet. Reclassification of broadband Internet service would provide the legal predicate for more aggressive action by *less* modest, *less* well-intentioned decision-makers in the future. This fact alone dramatically increases the risk associated with the "Third Way."

A. Application of Regulation beyond the Small Group of Core Provisions Originally Proposed Would Seriously Undermine Network Investment and Deployment

TIA attached to its opening comments a study conducted by Cambridge Strategic Management Group ("CSMG") regarding the real-world effect that a new regulatory regime would have on providers' investment decisions.[73] CSMG, a strategic consulting group with

[72] *Id.*

[73] *See* CSMG, *FCC Reclassification NOI: Economic Impact Assessment* (July 15, 2010), appended to TIA Comments ("CSMG Study").

expertise in wireless, media, technology and telecommunications, found that increased regulatory burdens under Title II would "impair[] the commercial case for network investment" and raise "the required level of any universal service subsidy that could be awarded" to support broadband deployment.[74] Unsurprisingly, the investment-deterrent effect of regulation increases as more Title II obligations are applied, substantially reducing the "net present value" of a proposed investment. CSMG found, for example, that the application of various obligations that could flow directly from Sections 201 and 202 could reduce the net present value of one new fiber-to-the-home project by nearly *$13 million*, such that a project that would otherwise result in expected gains would instead be expected to *lose* money.[75] The effect on a rural cable provider's decision whether to deploy a hybrid fiber-cable ("HFC") network would be even more dramatic, likewise killing otherwise viable projects.[76]

The CSMG study highlights the substantial dangers posed by the "Third Way." The proposed approach will chill investment even if adopted as first proposed, with only Sections 201, 202, 208, 222, 254 and 255 applying to broadband Internet service. As various parties have explained, application of Sections 201 and 202 of the Act to broadband Internet services would create tremendous uncertainly, subjecting ISPs to post-hoc determinations that their rates or practices were unreasonable and thus unlawful. This uncertainly would seriously undermine investment even if the Third Way were adopted as proposed, particularly given the proposed retention of the Section 208 complaint process (which will allow parties to bring claims on which the Commission will be required to rule).[77] Providers invest when they believe that

[74] *Id.* at 5, 6.

[75] *Id.* at 16.

[76] *Id*. at 32.

[77] As Cisco states, "[b]ecause the complaint process opens any practice to challenge at any time, the risks posed will never abate, even years after the regime is set in place." Cisco Comments at 4. *See also*

expected returns will exceed expected costs. A regime in which providers simply do not know what is and is not permissible, and in which the line between the two can shift at any time, would eliminate any prospect of conducting these calculations, pushing capital to other, surer ventures.[78]

Of course, the harms associated with Sections 201 and 202's application would grow far worse if this Commission – or a successor Commission – were actually to interpret these provisions aggressively with respect to broadband Internet service. For example, notwithstanding the Commission's stated intentions, Section 201 could certainly be read to mandate price regulation, wholesale rights, or even network unbundling. Likewise, Sections 201 and 202 could be applied in a manner that simply precludes any disparate treatment of different traffic types, specific end-user service features, or other pro-competitive innovations. CSMG found that application of such requirements would undercut deployment even more than the more basic set of obligations likely to arise from the Third Way. For example, CSMG found that such requirements would reduce the ten-year net present value of an HFC deployment in a rural town by more than $19 million, and would reduce the ten-year net present value of an FTTH deployment in an urban locale by almost $18 million.[79]

Comcast Comments at 38 ("[T]he Third Way's proposal to forbear from the more specific provisions that would impose such obligations would not prevent consumers (or, more likely, competitors whose interests may not coincide with those of consumers) from filing complaints challenging broadband ISPs' pricing and practices."); AT&T Comments at 116 ("Internet service providers would inevitably face numerous complaints brought by retail and wholesale complainants alleging that those providers have engaged in 'unjust,' 'unreasonable,' or 'discriminatory' behavior in violation of sections 201 and 202.").

[78] As Verizon, Qwest, AT&T and others have pointed out, there is evidence that even the Commission's consideration of the Third Way has driven capital away from the communications sector. *See* Verizon Comments at 13 & n.3; Qwest Comments at 9 n.26; AT&T Comments at 2-6. *See also* Verizon Comments at 99-100 (noting that Third Way "would cause massive uncertainty and litigation, leaving all parts of the Internet ecosystem unsure about the path that Commission regulators might follow as personnel change, political winds turn, or new calls for regulation (including through the Section 208 complaint process) emerge.").

[79] *See* CSMG Study at 12, 15.

B. Even if the Third Way Were Adopted in as Modest a Form as Possible, Uncertainty Regarding Future Decisions by the Commission or the Courts Would Chill Investment

In addition to the above, the mere risk that courts or other future Commissions might undercut any forbearance decisions adopted by this Commission will generate still more uncertainty, further undermining investment, even if the "Third Way" proposal is adopted in its most modest form. As Cisco explains, "investors evaluating today's business opportunities must necessarily account for tomorrow's risks."[80] Put differently, "even the risk of additional regulation will depress investment, because providers considering deployment must account for future developments – and discount expected returns accordingly."[81] The Notice's effort to disclaim any intention to "unforbear"[82] will provide little comfort to investors, given that this Commission just weeks ago openly contemplated revoking a prior forbearance grant,[83] not to mention comments expressly asking the Commission to leave the door to "unforbearance" wide open.[84] In short, even if the Commission forbore from all but the six statutory provisions

[80] Cisco Comments at 4 (footnote omitted).

[81] Qwest Comments at 18. *See also* Verizon Comments at 12 ("The Commission's proposed approach would … open the door to intrusive regulation and litigation and leave extraordinary uncertainty in its wake. The result would be reduced investment and innovation, lost jobs, and harm to the economy.").

[82] *See NOI* at ¶ 98.

[83] *See, e.g., Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area,* Memorandum Opinion and Order, WC Docket No. 09-135, FCC 10-113, ¶ 34 & n.112 (rel. June 22, 2010) (declining to "prejudge" pending petition seeking to rescind forbearance granted to Qwest in the Omaha Metropolitan Statistical Area). *See also In the Matter of Telecommunications Carriers Eligible for Universal Service Support Federal-State Joint Board on Universal Service Head Start Petition for Forbearance Consumer Cellular Petition for Forbearance Midwestern Telecommunications Inc. Petition for Forbearance Line Up, LLC Petition for Forbearance,* Order, WC Docket No. 09-197, CC Docket No. 96-45, FCC 10-134, ¶ 20 (rel. July 30, 2010) ("To the extent, however, that our predictive judgment proves incorrect and these conditions prove to be inadequate safeguards, parties may file appropriate petitions with the Commission and we have the option of reconsidering this forbearance ruling.").

[84] *See, e.g.*, Comments of CompTel Comments at 6 (filed July 15, 2010) ("COMPTEL disagrees that reversing a decision to forbear should be any more difficult than reversing any other decision….").

originally identified by the Chairman, reclassification would engender significant concern regarding the future, which would undercut investment.

Such concern would be well founded. As the record makes clear, various parties fervently desire the application of nearly all of Title II's core provisions to broadband. Public Knowledge, for example, inveighs against the Notice's "presumption of forbearance,"[85] and cites a litany of provisions that must, in its view, be applied to broadband Internet service. These include, in whole or in part, Sections 203 (tariffing), 205 (rate prescription), 206 (damages), 207 (recovery of damages), 209 (orders for payment of money), 211 (filing of contracts), 212 (interlocking directorates), 213 (valuation of carrier property), 214 (transfer of control and discontinuance), 215 (common carrier transaction), 216 (application to trustees and receivers), 218 (inquiries to management), 219 (annual and other reports), 220 (form of accounts, depreciation), 251(a) (interconnection), 256 (coordination for interconnectivity), and 257 (market entry barriers proceeding), all *in addition to* the six core provisions first associated with the "Third Way."[86] Free Press, similarly, urges the Commission to retain Sections 214, 251(a) and 256,[87] and to forbear from Sections 251(b) and (c) only on a market-by-market basis.[88] The Center for Media Justice, Consumers Union, Media Access Project, and New America

[85] Comments of Public Knowledge at 35 (filed July 15, 2010).

[86] *See id.* at 43-44.

[87] Free Press Comments at 65-72.

[88] *Id.* at 73-74. The Center for Media Justice *et al*. similarly urge market-by-market forbearance determinations. *See* Comments of Center for Media Justice *et al*. at 28 (filed July 15, 2010) ("Center for Media Justice *et al*. Comments") ("[T]he Commission should not determine at this time to forbear too broadly on a geographic scope. It may be true that some of the Title II provisions may not be currently necessary, applicable, or desirable, in some or all of the thousands of geographic markets in which broadband Internet connectivity service is offered. However, the Commission should not order wholesale forbearance without fully considering the effect such a decision would have on prices, on consumers, and on the public interest generally."). Needless to say, this approach would be not only an administrative burden but especially disruptive to investment.

Foundation, meanwhile, urge continued application of Sections 214, 251, 256 and 257.[89] These parties can be expected to continue pressing their arguments for maximal broadband regulation before the Commission and the courts alike. Under such circumstances, investors will be forced to account for the risk of increased future regulation, and to discount expected returns to account for this additional risk.

Even if the Commission could somehow bind future Commissions to any forbearance (and it cannot), the risk that a court might overturn such forbearance, leaving broadband service subject to much or all of Title II, would remain. Courts could vacate Commission forbearance decisions, or remand those decisions for further consideration, heightening uncertainty all the more. Although the Commission seeks comment on ways to predicate any reclassification decision on ultimate affirmation of the associated forbearance decisions, it is not at all clear how it could do so, given that the factors governing classification (*i.e.*, the extent, if any, to which the transmission and processing elements of broadband Internet service are separate as a matter of technology or consumer perception) and forbearance (the need for regulation to police prices and provider behavior, protect consumers, and further the public interest) differ so broadly.[90] Further, various parties have argued that reclassification should not be premised at all on judicial approval of associated forbearance.[91]

Finally, even if adopted as proposed, the "Third Way" is likely to have serious unintended consequences arising entirely outside the context of communications law. For

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[89] *Id.* at 26-29.

[90] The Center for Media Justice *et al*. make this point as well, stating that "[i]t would be improper and illogical to bind in some way the classification decision, which is a basic question of statutory interpretation, to the outcome of such judicial review." *Id.* at 29.

[91] *See, e.g.*, *id.* at 29 ("In no event should the Commission attempt to create 'mechanisms' that would tie the validity of its classification decision to the ultimate outcome of appellate review for any subsequent forbearance decision.").

example, Charter Communications explained in its comments the ways in which reclassification of broadband Internet service could drastically alter the treatment of such offerings for state taxation purposes:

> In general, states impose taxes on utility property (including telecommunications) on a central assessment basis, while non-telecommunications property (like cable and broadband) is taxed on a local assessment basis. Central assessment establishes tax valuation on a corporate-wide basis, essentially assessing taxes on the imputed value of an entire enterprise, while local assessment establishes tax valuation on property residing only within the state. Consequently, tax liability is usually much higher under central assessment than under local assessment. If broadband is reclassified as telecommunications subject to Title II pursuant to the Commission's proposals, states could arguably tax broadband networks in their state as telecommunications on a central assessment basis. By our estimates, this would result in an increase in property taxes of 2-3 times current levels, and as much as 4-6 times in some states.[92]

Of course, this is but one example of the unintended consequences that could result from broadband reclassification across a large variety of contexts.

In sum, then, both the adoption of additional regulations above and beyond those initially proposed, and the mere *threat* of such regulation in the future, would seriously undermine broadband investment and deployment. This chilling effect militates strongly against the reclassification of broadband Internet service.

[92] Charter Comments at 7.

V. CONCLUSION

For the foregoing reasons, TIA encourages the Commission to take action in this proceeding consistent with the recommendations set out above.

Respectfully submitted,

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