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

COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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July 15, 2010

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SUMMARY

TIA's members know well the capital-intensive nature of the broadband marketplace and have first-hand experience with the financial impact of excessive regulation. TIA has commissioned Cambridge Strategic Management Group ("CSMG") to prepare a study that addresses the economic impact of the increased regulation of broadband Internet service contemplated in this proceeding. CSMG has found that an increased regulatory burden under Title II impairs the commercial case for investment and raises the level of any universal service subsidy that could be awarded.

Title I Regulation Should Not Be Replaced With The "Third Way" Approach. The Commission's longstanding oversight of broadband Internet service under its Title I "ancillary authority," as conditioned by the Internet Policy Statement, has been paramount to the success of the broadband marketplace. If the Commission truly wants to promote investment and innovation while at the same time protecting consumers of broadband Internet service, it will be best served by continuing to rely on this measured regulatory approach. Replacing Title I oversight with aggressive and intrusive regulation, including the proposed Third Way approach, will only lead to sustained upheaval in the marketplace and to a detrimental impact on consumers and the economy.

The flexibility afforded by a Title I ancillary authority approach has not resulted in an onslaught of alleged violations, but rather has facilitated breakneck network deployment and innovation – developments that have unquestionably benefited consumers. The recent *Comcast* decision did nothing to change the status quo and in fact is consistent with long-standing precedent upholding the Commission's Title I authority.

Although the Third Way approach was developed out of a desire to "restore" the status quo, it would, in fact, have the opposite result. The Third Way approach calls explicitly for regulating broadband Internet connectivity as a telecommunications service under Title II, a framework that unquestionably differs from the existing minimal regulatory framework under Title I. Even if the Commission simultaneously forbears from applying certain requirements, doing so does not change the fact that broadband service providers would be subject to more onerous Title II common carrier requirements now and in the future.

The Third Way Does Not Align With The Technical Characteristics Of Broadband Internet Service. The Commission wrongly presumes that broadband Internet services are appropriately conceived as the joint provision of two separate components. Broadband service is by no means a "dumb pipe" and remains an integrated offering of functions including protocol conversion, IP address number assignment, domain name resolution through a domain name system, and caching provided via telecommunications. Importantly, consumers perceive broadband service as an integrated offering. In addition, the separation of broadband Internet service into two distinct offerings – a regulated transmission component and a mostly unregulated processing component – could distort network-design decisions, leading to architecture choices driven by efforts to shift investment toward less regulated elements rather than by engineering considerations and consumer demand.

Any attempt to separate the transmission component from the information service component presents a unique set of challenges. Three such challenges are immediately apparent, but no doubt represent the proverbial "tip of the iceberg" of issues triggered by separation of the components:

- The end user telecommunications revenues associated with the transmission component of a broadband service, but not those associated with the information service component, would be subject to universal service contribution obligations.

- Depending upon how service providers maintain customer records, it could be very challenging for them to determine what exactly constitutes customer proprietary network information for purposes of compliance with Section 222.

- While broadband services under the National Exchange Carrier Association, Inc. tariffs are treated as Title II offerings, this does not necessarily suggest that the Internet connectivity component of the service can be easily separated.

The Third Way Will Not Work If Title II Regulations Are Not Limited. The Third Way approach is not necessary to meet the Commission's broadband goals, and TIA is particularly troubled by the potential impact of even limited Title II regulations, especially if such obligations are imposed without sufficient restraint. The application of even Sections 201, 202, and 208 to broadband services allows the agency to impose more onerous regulations on broadband services should this or a future Commission choose to do so. Relatedly, the NOI identifies at least 18 Title II provisions for discussion. As the CSMG Study indicates, the economic impact of a more fulsome body of Title II regulation is particularly harmful.

The Commission Need Not Alter Its Regulatory Approach. While the Commission appears quick to perceive limits to its current oversight approach following the *Comcast* case, the decision does not require the Commission to explore alternative legal theories for broadband regulation, particularly as the Commission retains direct authority over broadband service with respect to certain key policy goals.

The Commission's ability to fund broadband Internet service through the universal service mechanism is particularly strengthened if Section 254 is read in conjunction with Section 706. In addition, the *Comcast* court acknowledged that the Commission could exercise its ancillary authority over matters reasonably related to those Congressional statements of policy when combined with other "express delegations of authority." Because broadband Internet service is classified as an information service, the Federal Trade Commission also retains jurisdiction to enforce the prohibition of unfair, deceptive, or anticompetitive practices by broadband Internet service providers. Ultimately, with respect to areas not within its existing legal authority, the Commission should pursue a *fourth way* and turn to Congress for guidance on proceeding with a new broadband legal framework.

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I. INTRODUCTION

The broadband marketplace has greatly benefitted from the Federal Communications Commission's ("FCC" or "Commission") current (but longstanding) measured approach to broadband Internet service. The absence of heavy-handed regulation associated with Title I oversight has been a key driver in promoting a robust Internet ecosystem and in encouraging significant investment in the deployment of broadband infrastructure during the past decade. Notwithstanding recent judicial developments, the broadband marketplace can and should remain vibrant provided that the Commission continues its long history of treating broadband Internet service as an information service pursuant to Title I of the Communications Act of 1934, as amended (the "Communications Act"). Efforts to change the status quo will only result in confusion in the marketplace, a prolonged period of regulatory uncertainty, and a corresponding negative impact on broadband deployment. The attached study by Cambridge Strategic Management Group ("CSMG") underscores the potentially significant economic impact of the increased regulation contemplated in this proceeding.

As the leading trade association for the information and communications technology industry, Telecommunications Industry Association ("TIA") shares the Commission's goal of

promoting innovation and investment in broadband Internet services and empowering the businesses and consumers who depend on them.[1] TIA's 600 member companies manufacture or supply the products and services used in the provision of broadband and broadband-enabled applications. The issues involved in this proceeding are of great importance to the organization's member companies, as they impact investment in and deployment of next-generation broadband networks, applications, and devices across the United States, and, ultimately, the rest of the world. Just like the Commission, TIA wants to see broadband deployed everywhere and used by everyone.[2]

TIA strongly believes that Title I and provisions of Title II continue to provide the Commission with sufficient authority to effectuate important broadband policy. Moreover, the "information services" classification accurately reflects the technical characteristics of broadband Internet service, which is well settled to be an integrated information service. Efforts by the Commission to impose a Title II regulatory scheme on "broadband Internet connectivity" will create a significant negative economic impact on broadband investment and deployment, no matter how well intentioned the Commission's "Third Way" proposal may be. Ultimately, the Commission already has a number of legal and policy tools available to it that truly flow from the status quo, and thus it need not pursue the fundamental reclassification approach as contemplated in this proceeding.

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[1] *See Framework for Broadband Internet Service*, Notice of Inquiry (rel. June 17, 2010) at ¶¶ 1, 3, 10 ("NOI").

[2] *See generally* Federal Communications Commission, *Connecting America: The National Broadband Plan* (Mar. 16, 2010) ("National Broadband Plan").

II. TITLE I REGULATION CONTINUES TO ENABLE BROADBAND GROWTH AND SHOULD NOT BE REPLACED

The Commission's oversight of broadband Internet service under its Title I "ancillary authority" has been paramount to the success of the broadband marketplace in the United States. If the Commission truly wants to promote investment and innovation in broadband deployment while at the same time protecting consumers of broadband Internet service, it will be best served by continuing to rely on this measured regulatory approach.[3] Replacing Title I oversight with aggressive and intrusive regulation, including the proposed Third Way approach, will only lead to sustained upheaval in the marketplace, and to a detrimental impact on consumers and the economy.[4]

A. The Title I Regulatory Framework Has Fostered Significant Broadband Investment And Innovation

The success of the broadband market can be credited in large part to the Commission's light-handed oversight of broadband services adopted in a line of decisions during the past decade[5] – based on an approach that was upheld by the Supreme Court in *Brand X*.[6] This

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[3] *See, e.g.,* NOI at ¶ 10 ("Our questions instead are directed toward addressing broadband Internet service in a way that is consistent with the Communications Act, *reduces uncertainty that may chill investment and innovation* if allowed to continue, and accomplishes Congress's pro-consumer, pro-competition goals for broadband.") (emphasis added).

[4] *See, e.g.,* Letter from National Cable & Telecommunications Association, CTIA – The Wireless Association, United States Telecom Association, Telecommunications Industry Association, Independent Telephone and Telecommunications Alliance, Verizon, AT&T Inc., Time Warner Cable, and Qwest to Julius Genachowski, FCC, GN Docket No. 09-191, at 1 (Feb. 22, 2010) ("Regulating the Internet [under Title II] would be a profound mistake with harmful and lasting consequences for consumers and our economy. [] [T]he proposed regulatory about-face would be untenable as a legal matter and, at a minimum, would plunge the industry into years of litigation and regulatory chaos. . . . This misguided regulatory overreach would thereby suppress the private innovation and investment—at both the core and the edge of the network—that have made the Internet the most powerful engine of economic growth in our time . . .") ("Feb. 22 Group Letter").

[5] *See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for*

regulatory certainty created an environment of great investment and innovation that has led to the widespread development of broadband products, services, and applications.[7] In 1998, approximately 98 percent of U.S. households with Internet connections utilized traditional "dial up" service to access the Internet.[8] As of 2009, nearly 200 million Americans have broadband at home, compared to eight million in 2000.[9] In little more than a decade, broadband technology has redefined how consumers access the Internet. The widespread availability of broadband services over multiple platforms has allowed Americans to benefit from new opportunities on the local, national, and global level that were previously unimaginable.

The Commission should remain mindful of the dramatic growth of broadband under its existing regulatory structure. For example, in 2000, only 46 percent of households had access to high-speed Internet provided by a cable operator. Ten years later, that figure has doubled, as cable operators now offer high-speed Internet service to more than 92 percent of American

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Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("Cable Modem Order"); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, Declaratory Ruling, 20 FCC Rcd 14853 (2005) ("Wireline Classification Order"); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 5901 (2007) ("Wireless Classification Order").

[6] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1003 (2005) ("*Brand X*").

[7] *See* National Broadband Plan at 19 ("Due in large part to private investment and market-driven innovation, broadband in America has improved considerably in the last decade. More Americans are online at faster speeds than ever before.").

[8] *See Inquiry Concerning the Deployment of Advanced Telecommunications Services to All Americans in a Reasonable and Timely Fashion*, Report, 14 FCC Rcd 2398, 2446 (1999); *see also* Ind. Anal. & Tech. Div., Wireline Comp. Bur., Trends in Tel. Serv., 2-10, chart 2.10, 16-3, table 16.1 (Aug. 2008); NOI at ¶ 13.

[9] *See* National Broadband Plan at XI.

households.[10] In addition, by some estimates, cumulative capital expenditures by broadband providers from 2000-2008 were over half a trillion dollars, and, as a result of this massive private investment in infrastructure, more than 90 percent of U.S. households have a choice of either a wireline or a cable broadband service and more than 80 percent of U.S. households have access to both.[11] Finally, the biggest growth opportunity for broadband may well be mobile wireless, with 59 percent of adults now accessing the Internet wirelessly using a laptop or cell phone.[12]

The Commission has shown great foresight in maintaining the Title I classification of broadband Internet service, which has directly led to an unprecedented period of growth and development in the broadband marketplace. Ultimately, broadband access now is widely available via fiber and traditional wireline facilities, cable networks, satellites, and fixed and mobile third and fourth generation wireless technologies. Approximately 95 percent of all Americans have access to terrestrial, fixed broadband infrastructure that is capable of supporting actual download speeds of at least 4 Mbps, and these speeds already are growing in some areas to upwards of 100 Mbps.[13] Similarly, approximately 98 percent of the U.S. population lives in areas covered by third generation wireless networks, and service providers now are busy rolling

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[10] *See* National Cable and Telecommunications Association, Industry Data, http://www.ncta.com/Statistics.aspx (last visited July 9, 2010).

[11] *See id.*; United States Department of Commerce, National Telecommunications and Information Administration, Networked Nation: Broadband in America 2007, at 32-34 (Jan. 2008) (estimating capital expenditures cumulatively exceeded $500 billion, including payments for wireless spectrum licenses); Federal Communications Commission, High Speed Services for Internet Access: Status as of December 31, 2008, at 17 (February 2010).

[12] *See* Aaron Smith, *Mobile Access 2010*, Pew Internet and American Life Project, at 2 (July 2010), *available at* http://pewinternet.org/~/media//Files/Reports/2010/PIP_Mobile_Access_2010.pdf.

[13] *See* Marguerite Reardon, *100Mbps broadband may be closer than you think* (March 8, 2010), *available at* http://news.cnet.com/8301-30686_3-10465098-266.html (last visited July 7, 2010) ("Broadband service providers in most of the major markets around the country will soon be able to deliver 100Mbps broadband service with no problem.").

out fourth generation wireless networks nationwide.[14] Satellite providers also have announced plans to launch next generation satellites in 2011 and 2012 that will facilitate download speeds of up to 25 Mbps.[15]

In addition, service providers continue to invest significant resources into broadband research and development, despite the difficult economic times facing the country. One report estimated that capital expenditures of cable and telephone companies totaled approximately $48 billion in 2008 (about $20 billion of which was broadband-related) and $40 billion in 2009 (about $18 billion of which was broadband-related).[16] Broadband-related capital expenditures by wireless service providers totaled approximately $10 billion in 2008, and was projected to grow to $12 billion in 2010 and increase to $15 billion in 2015.[17] Indeed, as TIA has previously reported, the ICT sector has seen steady growth in investment since 2003, with 2008 investment levels of $455 billion (a staggering 22 percent of the country's total capital investment), with $65 billion dollars of that amount invested by communications services providers in 2008 alone.[18]

Our nation has been impacted to no small degree by these tremendous levels of broadband investment, availability and connectivity. Broadband has spurred the development of new technologies, equipment, devices, applications, content, and services. Entirely new industries have been created, making broadband central to the continued viability of our economy. As the National Broadband Plan noted, however, there is still work to be done.[19]

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[14] *See* National Broadband Plan at 20.

[15] *See id.* at 38.

[16] *See id.*

[17] *See id.* at 40.

[18] *See* Comments of the Telecommunications Industry Association, GN Docket No. 09-191, WC Docket No. 07-52, at 17-18 (Jan. 14, 2010) ("TIA Open Internet Comments").

[19] *See* National Broadband Plan at 20.

Millions of Americans do not have broadband access at home, and TIA's members continue to work to develop the broadband tools necessary to improve education, health care, energy management, and public safety. Maintenance of the existing regulatory framework under the Commission's Title I ancillary jurisdiction, however, is essential to achieving these goals consistent with the recent growth documented above.

B. Title I Provides The Commission With Sufficient Authority To Effectuate Important Broadband Policy Goals

The Commission's regulatory approach, as reflected in its 2005 *Policy Statement*, has been successful in promoting a vibrant Internet ecosystem and in encouraging significant investment in the development and deployment of broadband infrastructure.[20] Importantly, as TIA has explained in the past, the Title I approach as conditioned by the *Policy Statement* provides the flexible framework under which the Commission and the industry can adapt more readily to the rapid evolution and convergence of technologies and innovations than under a detailed, inflexible regulatory regime.[21]

The flexibility afforded by a Title I ancillary authority approach has not resulted in an onslaught of alleged violations, but rather has facilitated breakneck network deployment and innovation – developments that have unquestionably benefited consumers.[22] In fact, the lack of

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[20] *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*").

[21] *See* TIA Open Internet Comments at 17-22.

[22] *See, e.g., Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13118 (2009) ("Since the adoption of the *Internet Policy*

detailed mandates and prohibitions has been critical to the strength of this longstanding framework. Industry and consumers have responded favorably with unprecedented levels of investment, innovation, and consumer demand as documented above. In the rare instances of alleged problems, such as the few examples raised by the Commission in the NOI, the situations have been (or are being) resolved without the need for Title II regulation.[23]

The recent *Comcast* decision by the U.S. Court of Appeals for the District of Columbia Circuit did nothing to change the status quo, and in fact is consistent with long-standing precedent upholding the Commission's Title I authority.[24] It is well-established that Title I of the Communications Act[25] allows the Commission to adopt measures that are "reasonably ancillary to the effective performance of the Commission's various responsibilities."[26] In other words, the Commission cannot use the generalized provisions of Title I to impose regulations, but can adopt regulations independently that are reasonably ancillary to the express statutory directives otherwise set forth in the Communications Act.

Contrary to assertions that the *Comcast* court created new limits on the Commission's Title I authority – or at the very least called into question the Commission's Title I authority –

Statement in 2005, alternative platforms for accessing the Internet have flourished, unleashing tremendous innovation and investment. In particular, wireless broadband Internet access has emerged as a technology that, from a consumer's perspective, now supports many of the same functions as DSL and cable modem service.") ("Open Internet NPRM").

[23] *See* NOI at ¶ 95 (FCC identifying "a number of reported incidents [that] suggest there is a role for the Commission").

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

[25] Section 1 directs the Commission in relevant part to promulgate rules "to make available, so far as possible, to all the people of the United States… a rapid, efficient, Nationwide, and world-wide wire and radio communications service with adequate facilities at reasonable charges." 47 U.S.C. § 151.

[26] *United States v. Sw. Cable Co*., 392 U.S. 157, 178 (1962), *accord United States v. Midwest Video Corp.,* 406 U.S. 649, 662 (1972); *see Am. Library Ass'n. v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

the *Comcast* court merely applied existing law in a fairly routine review of a Commission decision. Specifically, the court concluded only that the Commission's attempt to limit the network management practices of a broadband service provider was not demonstrated to be reasonably ancillary to the statutory obligations the Commission identified in its underlying decision.[27] Thus, the court merely confirmed (yet again) that the Commission cannot exercise its ancillary authority by relying only on "Congressional statements of policy" that in and of themselves do not create "statutorily mandated responsibilities."[28] The court did not reject the Commission's ancillary jurisdiction, nor did it opine on whether other provisions might have justified the actions under review.

Furthermore, the *Comcast* court did not overturn the *Policy Statement*. Rather, the statement continues to be an important guidepost that the industry follows in establishing and carrying out business plans and practices. It is undeniable that competition in the marketplace has been successful in policing anticompetitive behavior.[29] Although the Commission previously has suggested concerns about the current state of Internet openness,[30] the underlying facts paint a far different picture. First, the industry has extensively deployed broadband since the adoption of the Cable Modem Order.[31] Second, in the ten years of broadband Internet access, the Commission can only identify two occurrences of provider conduct that resulted in

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[27] *See Comcast,* 600 F.3d at 651-61.

[28] *Id.* at 644.

[29] As touched on above, the Commission has only been able to identify a handful of "reported instances" of potentially improper behavior, all of which have been or are being resolved under the longstanding light-handed regulatory approach. *See* NOI at ¶ 95.

[30] Open Internet NPRM at ¶ 8 (the Commission suggested that "broadband Internet access service providers may have both the incentive and the means to discriminate in favor of or against certain Internet traffic and to alter the operation of their networks in ways that negatively affect consumers, as well as innovators trying to develop Internet-based content, applications, and services.").

[31] *See supra* notes 13-18 and accompanying text.

enforcement action.[32] There simply is no legal basis to reverse the FCC's long standing approach to broadband Internet service, particularly when the decision is not based on changed factual circumstances but rather on a predetermined policy goal.[33]

The benefits arising from the FCC's Title I oversight stem from its flexibility and the signals the *Policy Statement* sends to market actors, rather from any prescriptive, heavy-handed requirements. Put differently, the fact that a measured Title I approach lacks a detailed list of mandates and prohibitions is not a sign of its weakness, but rather a critical component of its strength. Industry and consumers have responded positively through remarkable levels of investment, innovation and consumer demand. For these reasons, the Third Way approach would in fact be *harmful* to the public interest, as this approach to regulation would disrupt the longstanding and highly successful dynamic regime. In turn, to ensure the continued success of the Commission's minimal regulatory approach, including the *Policy Statement*, the Commission should continue to vigilantly monitor the market and take action against anticompetitive conduct in the rare instances in which competition does not thwart such behavior.[34]

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[32] Open Internet NPRM at ¶ 123 ("We have in the past found evidence of service providers concealing information that consumers would consider relevant in choosing a service provider or a particular service option. For example, in *Madison River* and *Comcast*, broadband Internet access service providers blocked specific applications desired by users without informing them."). It is worth noting that only one of these two cases occurred after the release of the 2005 Policy Statement. *See* Madison River Communications, *Order*, 20 FCC Rcd 4295 (2005); *Comcast*, 600 F.3d at 644. The Commission also cited a study that suggests wide-spread blocking of BitTorrent protocols. *See* Open Internet NPRM at ¶ 123.

[33] Indeed, the NOI even suggests that the Commission might *not* maintain Internet connectivity service as telecommunications service in the event a court struck down the Commission's forbearance, highlighting that the policy agenda is driving the classification, rather than changed factual circumstances. *See* NOI at ¶ 99.

[34] *See* TIA Open Internet Comments at 20. The Commission has the ability to oversee broadband Internet services both on its own and in conjunction with other Government actors. *See infra* Section V.

C. The Proposed "Third Way" Approach Would Fundamentally Alter The Status Quo

Although the Third Way approach "was developed out of a desire to restore the status quo light touch framework that existed prior to *Comcast*,"[35] it would, in fact, have the opposite result. The Third Way approach calls explicitly for regulating broadband Internet connectivity as a telecommunications service under Title II of the Communications Act, a framework that unquestionably differs from the existing minimal regulatory framework under Title I. Even if the Commission simultaneously forbears from applying certain Title II requirements to that service, doing so does not change the fact that broadband service providers would be subject to new, more onerous Title II common carrier requirements under the Third Way now and in the future.

Moreover, contrary to the stated intent of the NOI, subjecting broadband services to Sections 201, 202, and 208 of the Communications Act would not provide certainty to the broadband industry.[36] Rather, Title II regulation would raise *new* questions about the application of specific rules and the lawfulness of existing service rates and terms and business practices. In addition, questions over whether and how rules, such as those found in Part 64 (Miscellaneous rules relating to common carriers), will or will not apply would only confound the industry absent explicit direction by the Commission.[37] Application of the Commission's forbearance on a rule-by-rule basis will be a daunting task that will lead to many years of questions and potential

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[35] *See* NOI Statement of Chairman Julius Genachowski at 2; *see also* NOI at ¶¶ 69-73.

[36] *See id*. at ¶ 10 (noting the Commission's intent to address "broadband Internet service in a way that is consistent with the Communications Act*, reduces uncertainty that may chill investment and innovation* if allowed to continue, and accomplishes Congress's pro-consumer, pro-competition goals for broadband") (emphasis added).

[37] 47 C.F.R. §§ 64.0000 *et seq*.

litigation as broadband service providers attempt to navigate thousands of common carrier regulations.

In fact, the mere issuance of the NOI and the potential for application of even a limited number of Title II requirements to broadband services already have had a negative impact on the marketplace. The investment community is confused by the regulatory uncertainty created by this inquiry and the proposed Third Way.[38] Investors understandably are wary of sinking scarce and much needed capital into an industry that may become subject to a new regulatory framework and concerned about the litigation risks associated with the adoption of that framework.[39] A large bipartisan majority of Congress has recognized the damage that Title II regulation (even if limited to some extent under forbearance) will cause to the marketplace, noting that it could jeopardize much needed jobs and impede investment, to the detriment of the U.S. economy.[40] The Commission should heed these concerns and abandon its proposal to impose Title II regulation on broadband services, or at least wait for Congress to act.

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[38] *See* Amy Schatz and Spencer E. Ante, *FCC Web rules create pushback*, WALL ST. J., May 7, 2010, at B1 ("The FCC proposal adds another layer of uncertainty that industry executives say will cause them to delay investments in land-based and wireless Internet infrastructure."); Eric Savitz, *Will FCC Choose "The Nuclear Option" In Net Neutrality Fight?,* Tech Trader Daily, BARRON'S, Apr. 6, 2010, *available at* http://blogs.barrons.com/techtraderdaily/2010/04/06/will-fcc-choose-the-nuclear-option-in-net-neutrality-fight/ (quoting Bernstein Research analyst Craig Moffett as saying that "designating broadband as a Title II service 'would broadly throw into question capital investment plans for all broadband carriers, potentially for years, while the issue was adjudicated.'").

[39] *See, e.g.,* NOI Statement of Commissioner Robert McDowell at 3-4 ("McDowell Statement") ("Investors and international observers are expressing serious concerns about what the FCC is poised to do. In the past two weeks I have traveled to New York and Europe. I have met with a diverse assortment of investors, market analysts, regulators, business people and academics. At every turn, I was met with confusion and questions regarding the idea of regulating broadband as an old-fashioned phone service.").

[40] *See* Letter from Sam Brownback et al., U.S. Senators, to the Julius Genachowski, Chairman, FCC (May 24, 2010); Letter from Al Green et al., Members, U.S. House of Representatives, to Julius Genachowski, FCC Chairman, FCC (May 24, 2010); Letter from the Joe Barton, et al.,

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

A. Broadband Internet Services Are Not Comprised Of Two Distinct Components

The NOI wrongly presumes that broadband Internet services are appropriately conceived as the joint provision of two separate components.[41] Specifically, the NOI seeks comment on whether it might identify a separate "Internet connectivity service" (the potential telecommunications service component), asking in particular about the "catalog of Internet connectivity functions" that were mentioned in the Commission's Cable Modem Order concluding that cable broadband service is an integrated information service.[42] Broadband service is by no means a "dumb pipe" consisting only of the "transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received."[43] Rather, the service remains an integrated offering of functions including protocol conversion, IP address number assignment, domain name resolution through a domain name system ("DNS"), and caching provided via telecommunications. Importantly, consumers perceive broadband service as an integrated offering.

In addition, the separation of broadband Internet service into two distinct offerings – a regulated transmission component and a mostly unregulated processing component – could

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Members, U.S. House of Representatives, to Julius Genachowski, Chairman, FCC (May 28, 2010).

[41] *See* NOI at ¶¶ 58-60, 63-65.

[42] NOI at ¶¶ 64-65. "Internet connectivity service" is described in the NOI as a service that "allows users to communicate with others who have Internet connections, send and receive content, and run applications online." NOI at ¶ 1, n. 1.

[43] 47 U.S.C. § 153(44) (defining "telecommunications").

distort network-design decisions, leading to architecture choices driven by efforts to shift investment toward less regulated elements rather than by engineering considerations and consumer demand. As explained above, one of the key benefits of today's regulatory framework is that it creates flexibility within the current broadband ecosystem so that service providers can adapt quickly to consumer demand and rapid technological changes. A key aspect of this adaptability is the freedom to select architectures that use network resources most effectively. Some functions could be performed at the "transmission" layer or the "processing" layer of the service, and the decision where to perform those functions might take account of the relative availability of bandwidth and processing capability. However, the regulatory regime contemplated here will likely prompt service providers to protect themselves from regulation by locating as much functionality as possible into the mostly unregulated component, irrespective of the other merits. In extreme cases, this approach may cause providers to forego advances in network design to ensure compliance rather than responding to market forces through advancement and innovation.[44] Such a result would be extremely lamentable, given the unmitigated success of the broadband marketplace and the fact that additional regulation is unnecessary to ensure its continued success.

Indeed, 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

[44] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15670 (1996) (concluding that applying onerous regulations that require carriers to own local exchange facilities to obtain access to unbundled elements would lead to carriers responding "not to marketplace factors, but to regulation," delaying innovation and diminishing competition); *see also* Open Internet NPRM Statement of Commissioner Robert McDowell, 24 FCC Rcd at 13160 ("Freedom is best served if we promote abundance, collaboration and competition over regulation and rationing. No government has ever succeeded in mandating innovation and investment.").

which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account . . . It would be arbitrary or capricious to ignore such matters."[45] 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. Second, reclassification would necessarily be based on the (questionable) conclusion that the transmission and processing components of broadband Internet access now are separate.

A false distinction between the transmission and processing components of broadband Internet service also will create unnecessary uncertainty for a number of important features of that service. For example, Internet security services – such as anti-virus protection, pop-up blockers, and spam protection – are integral parts of residential broadband access offerings because they help keep the transmission path clear and the network safe. Similarly, operations support systems ("OSS"), which support pre-ordering, ordering, provisioning, maintenance and repair, and billing, are integrated into broadband offerings. It is unclear whether such management tools would be classified as part of the access offering's "telecommunications" or "information" components, and thus how much leeway providers will have in designing and deploying such tools to protect their end users. As a result, this uncertainty is likely to chill investment and innovation, in direct conflict with FCC goals.[46]

[45] *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) ("*Fox*"). 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.

[46] *See supra* note 36.

B. Efforts To Separate The Transmission Component Of Broadband Internet Services Will Distort Engineering Decisions

Moreover, any attempt to separate the transmission component from the information service component presents a unique set of practical challenges even if the Commission has no intention to require providers to offer either component on its own. Three such challenges are immediately apparent, but no doubt represent the proverbial "tip of the iceberg" of issues triggered by separation of the components. First, the end user telecommunications revenues associated with the transmission component of a broadband service, but not those associated with the information service component, would be subject to universal service fund contribution obligations.[47] Service providers generally do not (and, in fact, may not be able to) readily distinguish between or charge customers for the different elements that comprise a broadband service. Thus, it may be difficult, if not impossible, for providers to accurately calculate the revenues that are associated with the purported Internet connectivity component of the service.

In addition, depending upon how service providers maintain customer records, it could be very challenging for them to determine what exactly constitutes customer proprietary network information ("CPNI") for purposes of compliance with Section 222. For example, it is unclear whether CPNI obligations would be limited to the transmission component of broadband service, and, if so, how service providers would distinguish between the customer information associated with the transmission component and the information service component. Similarly, it is unknown whether CPNI might include information about a customer's broadband usage (e.g., amount of usage, when the customer is on-line, content accessed, etc.). Furthermore, more

[47] *See* 47 C.F.R. § 54.706(a) (imposing universal service contribution obligations on interstate and international telecommunications service providers). Other regulatory support mechanisms, such as those for telecommunications relay service, local number portability and administration of the North American numbering plan similarly are based upon a service provider's "telecommunications" end user revenues.

efficient providers have developed more integrated systems for their broadband Internet access service, making separation of customer, billing, and usage information even more difficult. This could be especially significant in the event a service provider becomes subject to a Section 208 complaint about billing or installation practices, given that there is no clear determination as to whether these practices are properly associated with the transmission or processing components.

Finally, while broadband services under the National Exchange Carrier Association, Inc. ("NECA") tariffs are treated as Title II offerings, this does not necessarily suggest that the Internet connectivity component of the service can be easily separated.[48] The Commission allowed service providers to offer wireline broadband transmission on a common carrier basis in its Wireline Classification Order simply to ensure that rural carriers had the flexibility to offset the cost of broadband deployment in rural areas under the Commission's rate of return regulations.[49] This does not mean, however, 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.

IV. THE THIRD WAY APPROACH MOST CERTAINLY WILL FAIL IF THE COMMISSION DOES NOT SUFFICIENTLY LIMIT THE SCOPE OF TITLE II REGULATIONS

While TIA opposes any regulatory approach that imposes Title II regulations on broadband Internet service, its members are equally concerned with a Third Way approach that

[48] *See* NOI at ¶¶ 54, 66.

[49] *See* Wireline Classification Order, 20 FCC Rcd at 14900-03, n. 269 (2005). Rural carriers could lower the cost of broadband deployment in rural areas through participation in NECA's pooling or other tariffed rate structures. Participation in a NECA pool, however, requires a service provider to offer interstate telecommunications service pursuant to NECA's federally filed tariff, which sets forth the same rates, terms, and conditions of service for all participating carriers based upon the carriers' averaged costs. According to the Commission, "without the ability to continue tariffing broadband transmission services, rural incumbent LECs explain that they would be unable to afford the investment necessary to deploy facilities necessary to provide broadband Internet access services." *Id.*

likewise repudiates the Commission's commitment to "restrained oversight of broadband Internet service."[50] In describing its Third Way approach, the Commission indicates that it will classify the Internet connectivity portion of broadband Internet service as a telecommunications service, but would "simultaneously forbear from all but a *small handful* of provisions necessary for effective implementation of universal service, competition and small business opportunity, and consumer protection policies."[51] TIA believes that the Third Way approach is not necessary to meet these stated goals and is particularly troubled by the potential impact of even limited Title II regulations, especially if such obligations are imposed without sufficient restraint. In fact, the NOI identified at least 18 Title II provisions for discussion, and TIA is concerned that the Commission's "restrained" approach only seems to eliminate rules that could not possibly work for the broadband marketplace.

TIA and its members know well the capital-intensive nature of the broadband marketplace and have first-hand experience with the financial impact of excessive regulation in the broadband sector. In this regard, TIA has commissioned Cambridge Strategic Management Group ("CSMG"), a strategic consulting group with expertise in wireless, media, technology and telecommunications, to prepare a study that addresses the economic impact of the increased regulation of broadband Internet service contemplated in this proceeding.[52] As detailed in their analysis, CSMG has found that an increased regulatory burden under Title II "impairs the commercial case for network investment" and raises "the required level of any universal service

[50] NOI at ¶ 7. *See also* NOI at ¶ 4 ("For the broadband Internet services that most consumers now use to reach the Internet the Commission has refrained from regulation when possible . . .").

[51] *Id.* at ¶ 28 (emphasis added).

[52] *See* CSMG, *FCC Reclassification NOI, Economic Impact Assessment* (July 15, 2010) ("CSMG Study").

subsidy that could be awarded."[53] Moreover, if this Commission (or any future Commission) fails to strictly follow its Third Way approach and allows for greater Title II regulation than currently proposed (or is forced to do so by a reviewing court), this would lead to a particularly detrimental financial impact that would limit broadband deployment across multiple platforms in smaller rural and non-urban markets.

A. Even A Limited Number Of Statutory Provisions Could Have A Significant Effect On Broadband Investment

The Title II Regime. As the Commission approaches this proceeding, it must acknowledge the impact of even a limited set of Title II provisions on investment in the broadband marketplace.[54] The CSMG Study makes clear that "[i]n every case, increasing the degree of regulation reduces the NPV [Net Present Value] of an investment."[55] Thus, in proposing to keep "core statutory provisions," the Commission is in fact embarking on a significant regulatory effort that could have a profound impact on the marketplace and, contrary to the stated intent in the *NOI*, would not provide certainty to the broadband industry.[56] Subjecting broadband services to Sections 201, 202, and 208 of the Communications Act, as well as other Title II oversight, undoubtedly would lead to protracted debates over the application of specific rules and the lawfulness of existing service rates, terms, and business practices.

For example, many of the Commission's rules (*e.g.,* Part 64) are based in part on Section 201 or other statutory provisions from which the NOI does not propose to forbear. Indeed, Section 201 states that "[i]t shall be the duty of every common carrier engaged in interstate or

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

[54] NOI at ¶ 98 ("We seek comment on whether, if we forbore from applying those provisions of Title II that go beyond *minimally intrusive* Commission oversight, that decision would likely endure.") (emphasis added).

[55] CSMG Study at 5.

[56] *See supra* note 36.

foreign communication by wire or radio to furnish such communication service upon reasonable request therefor," and permits the Commission to prescribe rules and regulations to ensure that "[a]ll charges, practices and classifications, and regulations for and in connection with such communication service, shall be just and reasonable . . .."[57] While the NOI is silent as to the issue of wholesale access to broadband Internet service, FCC General Counsel Austin Schlick has stated that the wholesale requirements will not apply because the "Computer II" rules have been eliminated.[58] But, this statement is cold comfort when this Commission already has demonstrated a willingness to view the state of innovation, investment, and competition in the broadband and wireless markets in the most negative possible light.[59] As Commissioner Baker notes, it will be particularly telling if the upcoming Section 706 report examining the availability of advanced telecommunications services determines that broadband is not being timely and reasonable deployed, in contrast to the affirmative finding that has been made in every prior

[57] 47 U.S.C. § 201.

[58] *See A Third-Way Legal Framework For Addressing The Comcast Dilemma*, Austin Schlick, General Counsel, FCC, at 7 (May 6, 2010) ("Nor would identifying a separate telecommunications component of broadband access service afford competing ISPs any new rights to the incumbents' networks on a wholesale basis under the old Computer Inquiry rules. The Commission 'eliminate[d]' those requirements for wireline broadband access providers in 2005, no matter whether they provide a Title I or Title II access service.") ("Schlick Third Way Statement").

[59] *See* NOI Statement of Commissioner Meredith Baker at 1-2 ("It is also important to view this proceeding in context of other recent statements in which the Commission has conveyed a pessimistic view of competition and market conditions. First, we had the National Broadband Plan that did not conclude that having more that 80 percent of Americans living in markets with more than one provider capable of offering download speeds in excess of 4 Mbps was a success. Last month, the Commission was silent as to whether a wireless market in which 91.3 percent of Americans can choose from four or more providers is competitive. Then, in releasing consumer survey results this month, the Consumer & Governmental Affairs Bureau's headline was that 80 percent of households do not know their broadband speeds. The more important and positive fact to me was that 91 percent of consumers are satisfied with their broadband speed, yet that finding received significantly less attention.").

report.[60] Such a finding could undercut the suggestion that Sections 201 and 202 will only be invoked on a limited and restrained basis.

The Scope Of Sections 201, 202, And 208. Despite the suggestion that the Commission would show restraint in exercising authority under Title II, the application of Sections 201, 202, and 208 to broadband services still allows the agency to impose more onerous regulations on broadband services should this or future Commissions choose to do so. For example, by subjecting broadband service providers to the Section 208 formal complaint process, the Commission opens the possibility of creating an ad hoc approach to broadband regulation, which could subject providers to extensive requirements over time under the auspices of Section 201's "just and reasonable" language. Even the availability of the Section 208 complaint process will by definition engender uncertainty, as practices not specifically barred by the rules could give rise to a complaint and a subsequent finding that the practice was unreasonable and unlawful. Government efforts to impose detailed regulatory regimes have tended to inhibit deployment by prompting litigation and regulatory arbitrage, undermining investment incentives, and deterring entry.[61]

As the CSMG Study indicates, the economic impact of a more fulsome body of Title II regulation is particularly significant.[62] For example, CSMG modeled the economics of an incumbent local exchange carrier deploying a fiber-to-the-home ("FTTH") network to an urban area with existing DSL and voice services – which would bring triple-play retail services,

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[60] *See id.*

[61] *See* Comments of the Telecommunications Industry Association – NBP Public Notice #13, GN Docket Nos. 09-47, 09-51, 09-137, at 10 (Nov. 16, 2009).

[62] *See generally* CSMG Study.

including broadband, into a new market.[63] CSMG determined that, with the application of wholesale and other obligations under Sections 201 and 202,[64] the net present value of the FTTH deployment becomes negative – falling from $7.4 million to (-)$5.3 million.[65] In other words, even limited Title II regulation could result in higher operating expenses and lower revenue from forced resale associated with Section 201 and 202 regulations, which causes the business case for FTTH expansion to fail. Thus, it can be no surprise that those closest to broadband deployment, such as TIA and its members, are skeptical of the Third Way framework as it puts in place all of the tools for the Commission to take a more burdensome approach to broadband regulation.

B. The Third Way Seems To Move Beyond The Proposed Restrained Application Of Limited Provisions And Would Be Devastating For Broadband Investment And Innovation

The Scope Of Title II Regulation. Although descriptions of the Third Way indicate that the Commission would apply only six Title II provisions to broadband service (*i.e.,* Sections 201, 202, 208, 222, 254, and 255),[66] the NOI suggests that the current Commission may not be able to forbear, or may chose not to forbear, from several other Title II provisions not previously identified. By TIA's estimate, the Commission has identified at least 18 specific Title II provisions for discussion within the context of the NOI:

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[63] *Id.* at 14-16, 33-48.

[64] *See, e.g.,* Reply Comments of Public Knowledge – NBP Public Notice #30, GN Docket No. 09-51 at 5 (Jan. 26, 2010) ("[T]he Commission's stated goal of maintaining an "open Internet" would benefit from the mandatory interconnection and non-discrimination requirements of Title II.") (citing Sections 201, 202, 205, & 251). *See also* Reply Comments of Public Knowledge, GN Docket No. 09-191 at 10 (Apr. 26, 2010) ("These statutes provide ample authority for the six principles proposed in the NPRM. In fact, those six principles serve as manifestations of the Congressional intent expressed in Sections 201 and 202, guiding enforcement of those sections under the auspices of Section 208.").

[65] CSMG Study at 16.

[66] *See, e.g.*, NOI at ¶ 74; *The Third Way: A Narrowly Tailored Broadband Framework*, Julius Genachowski, Chairman, FCC, at 5 (May 6, 2010) ("Genachowski Third Way Statement").

- 201 (Service and Charges);[67]
- 202 (Discrimination and Preferences);[68]
- 203 (Schedules of Charges);[69]
- 206 (Liability of Carriers for Damages), 207 (Recovery of Damages), 208 (Complaints to the Commission), and 209 (Orders for Payment of Money);[70]
- 214 (Extension of Lines);[71]
- 218 (Inquiries into Management);[72]
- 222 (Privacy of Consumer Information);[73]
- 224 (Regulation of Pole Attachments);[74]
- 225 (Telecommunications Services of Hearing-Impaired and Speech-Impaired Individuals);[75]
- 229 (Communications Assistance for Law Enforcement Compliance ("CALEA")[76]
- 251(a)(2) (Interconnection: obligation to comply with Section 255 guidelines and standards);[77]
- 253 (Removal of Barriers to Entry);[78]
- 254 (Universal Service);[79]
- 255 (Access by Persons with Disabilities);[80] and
- 257 (Market Entry Barriers Proceeding).[81]

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[67] NOI at ¶ 76.

[68] *Id*.

[69] *Id*. at ¶ 91.

[70] *Id*. at ¶ 77.

[71] *Id*. at ¶¶ 86, 88, 91.

[72] *Id*. at ¶ 88.

[73] *Id*. at ¶¶ 82-83.

[74] *Id*. at ¶ 87.

[75] *Id*. at ¶ 86.

[76] TIA recognizes that Section 229 already applies to providers of broadband Internet access. NOI at ¶ 89. *See Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 14991-92 (2005), *aff'd, Am. Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006).

[77] NOI at ¶ 86.

[78] *Id*. at ¶¶ 87, 110.

[79] *Id*. at ¶¶ 78-81

[80] *Id*. at ¶¶ 84-85.

[81] *Id*. at ¶ 90.

This list is long and significant, and is radically different than the narrow regulation suggested in the initial description of Third Way approach.[82] Indeed, the direction of the NOI's discussion on forbearance[83] significantly calls into question the Commission's ability to effectuate the Third Way as previously proposed and undermines the entire goal of "forbearing to maintain the deregulatory status quo."[84]

As contemplated, several specific Title II provisions would have a devastating impact on broadband innovation and investment. For example, in applying Section 214, the Commission could subject ISPs to an approval process for entry, transfers of control and/or discontinuance of service. In a competitive marketplace, a requirement to secure Commission approval before extending or modifying services would impose costs, raise barriers to entry, and could directly affect business plans and the ability of companies to quickly respond to changed market conditions, in some cases discouraging entry in the first instance. More significantly, if portions of Section 251 are allowed to stand in some form, broadband service providers could find themselves subject to new interconnection requirements or other intrusive mandates associated

[82] *See generally* Genachowski Third Way Statement; Schlick Third Way Statement. Moreover, many of the remaining Title II provisions, such as Sections 210 (Franks and Passes) and 228 (Regulation of Carrier Offering of Pay-Per-Call Services), are on their face difficult if not impossible to apply to broadband. Consequently, one is left to wonder how much different the Third Way approach will be from straightforward Title II regulation.

[83] NOI at ¶ 70 ("The forbearance analysis here has a different posture. The Commission would not be responding to a carrier's request to change the legal and regulatory framework that currently applies. Rather, it would be assessing whether to forbear from provisions of the Act that, because of our information service classification, do not apply at the time of the analysis. In this situation, could the Commission simply observe the current marketplace for broadband Internet services to determine whether enforcing the currently inapplicable requirements is or is not necessary to ensure that charges and practices are just and reasonable and not unjustly or unreasonably discriminatory, whether application of the requirements is or is not necessary for the protection of consumers, and whether applying the requirements is or is not in the public interest?") (footnotes omitted).

[84] NOI at ¶ 69, heading II.B.3.a.

with the local competition regime. Having been an active participate in the "Triennial Review" proceeding as a member of the High Tech Broadband Coalition, TIA is more than familiar with the drain on resources and investment that invariably results from such obligations.[85]

The Impact Of Rate Regulation. It has been suggested that the Commission will not attempt to regulate broadband rates because such an approach would be a throwback to "monopoly-era price regulation" and that the Commission intends to follow the regulatory approach for wireless services pursuant to which the Commission rejected rate setting.[86] Yet, it cannot be disputed that, under Sections 201 and 202, this Commission or future Commissions could in fact impose price regulation with respect to broadband Internet connectivity, subject to antidiscrimination requirements. This scenario is not difficult to picture since, as touched on above, this Commission already has shown a willingness to take a skeptical view of broadband competition and market conditions.[87] Even if the Commission did not act to regulate rates, a third party could file a Section 208 complaint alleging unreasonable rates, forcing the Commission to rule. Ultimately, the Commission is treading on new ground here with respect to broadband regulation.[88] TIA is concerned that despite the current Commission's best intentions, the Third Way is in reality a direct path to heavy-handed regulation either now or in the future – and that even the prospect of such regulation will chill investment. Moreover, the NOI's

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[85] *See e.g.,* Comments of High Tech Broadband Coalition, CC Dockets 01-338, 96-98, 98-147 (April 5, 2002).

[86] Schlick Third Way Statement at 8 ("There is no reason to anticipate the Commission would reach a different conclusion about prices or pricing structures for broadband access.").

[87] *See supra* notes 59, 60 and accompanying text.

[88] *See* Feb. 22 Group Letter at 6 ("a long line of Commission precedent from 1998 to 2007, along with a Supreme Court decision, confirm that broadband Internet access service is a Title I 'information service' without a Title II 'telecommunications service' component.").

attempts to downplay the potential for future Commissions to re-impose forborne regulations[89] ring hollow when that same NOI proposes to casually reverse a series of prior Commission decisions declaring broadband services to be information services. Comments from parties supporting Title II classification would appear to validate TIA's concerns.[90]

The CSMG Study highlights in great detail the damaging effect of resale at regulated rates, particularly with respect to significant new network investments such as new cable plant deployment, FTTH, or fiber-to-the curb.[91] The revenue loss inflicted by such a regulatory approach renders broadband buildout untenable in many situations, and would directly lead to reduced investment activity or an increased demand on universal service. For example, CSMG modeled a build by an existing cable provider into a new geographic area – which would bring triple-play retail services, including broadband, into a new market.[92] CSMG determined that the net present value of such an investment opportunity for a small town deployment would fall over two-fold from $7.2 million to (-)$11.5 million because of the impact of Title II regulations.[93] It

[89] *See* NOI at ¶¶ 98-99.

[90] *See* Comments of Public Knowledge, Media Access Project, The New America Foundation, and U.S. PIRG, GN Docket No. 09-51 at 24-26 (June 8, 2009) ("[U]nder Title II, more competitors will have access to networks they wouldn't have otherwise, leading to more competition, lower prices and more innovation – but only if the regime is strictly enforced."). *See also* Comments of Public Knowledge, CCTV Center for Media and Democracy, Media Access Project, Media Alliance, and U.S. PIRG – NBP Notice #13, GN Docket No. 09-51 at 18 (Nov. 16, 2009) ("Classifying all types of broadband as Title II services would allow the Commission to extend the unbundling policies that currently apply to voice communications to broadband."); Reply Comments of Public Knowledge – NBP Public Notice #30, GN Docket No. 09-51 at 5 (Jan. 26, 2010) ("[T]he Commission's stated goal of maintaining an "open Internet" would benefit from the mandatory interconnection and non-discrimination requirements of Title II." (citing sections 201, 202, 205, & 251)).

[91] *See* CSMG Study at 28-32, 44-48.

[92] *Id.* at 17-32.

[93] *Id.* at 13.

is difficult to see how such a result would support "Congress's pro-consumer, pro-competition goals for broadband."[94]

V. THE COMMISSION SHOULD RELY ON AN APPROACH THAT IS MORE CONSISTENT WITH THE REAL STATUS QUO

While the Commission appears quick to perceive limits to its longstanding approach to broadband oversight following the *Comcast* decision,[95] TIA agrees with other commenters who have suggested that the *Comcast* decision does not require the Commission to explore alternative legal theories for broadband regulation.[96] As discussed in greater detail below, and indeed even within the NOI, the current legal framework continues to provide the Commission with sufficient authority to pursue a number of key broadband policy objectives.[97]

Direct And Ancillary Authority. First and foremost, TIA believes that the Commission retains direct authority over broadband service with respect to certain key policy goals. This direct authority is most clearly found with respect to the Commission's authority to provide universal service funding for broadband services under Section 254.[98] Section 254 establishes the principle that all consumers should have access to reasonably comparable telecommunications *and* information services, and explicitly authorizes the Commission to take "into account advances in telecommunications and *information technologies and services*" in

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[94] *See supra* note 36.

[95] *See id*. at ¶ 9 ("*Comcast* makes unavoidable the question whether the Commission's current legal approach is adequate to implement Congress's directives.").

[96] *See, e.g.,* Letter from National Cable & Telecommunications Association, CTIA – The Wireless Association, United States Telecom Association, Telecommunications Industry Association, Independent Telephone and Telecommunications Alliance, Verizon, AT&T Inc., and Time Warner Cable to Julius Genachowski, Chairman. FCC, GN Docket No. 09-191, at 2 (Apr. 29, 2010) ("The Commission is not free to change that [Title I] classification simply because some parties might now prefer a different outcome.").

[97] *See* NOI at ¶¶ 30-51.

[98] 47 U.S.C. § 254.

determining which services should be supported by the universal service fund.[99] It also authorized the Federal-State Joint Board to "recommend changes to . . . the definition of the *services* that are supported by Federal universal service support mechanisms," without limitation to "telecommunications services."[100] While there is some tension in the text of Section 254 with respect to the funding of information services,[101] TIA agrees with AT&T and others that the Commission is free to interpret this ambiguity as permitting universal service support for information services.[102]

The Commission's ability to fund broadband Internet service through the universal service mechanism is particularly strengthened if Section 254 is read in conjunction with Section 706 of the Telecommunications Act of 1996. That provision directs the Commission to encourage deployment of advanced telecommunications services to all Americans on a reasonable and timely basis.[103] Thus, there is a strong argument that providing universal service funding for broadband services would be consistent with the statutory directives expressly set

[99] 47 U.S.C. §§ 254(b)(3), 254(c)(1) (emphasis added).

[100] 47 U.S.C. § 254(a)(1) (emphasis added).

[101] *Contra id.* ("Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.").

[102] *See* Attachment to Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-47, 09-137, WC Docket Nos. 05-337, 03-109, at 4 (Jan. 29, 2010); Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-137, WC Docket Nos. 05-337, 03-109 (April 12, 2010); Letter from Kyle McSlarrow, President & CEO, National Cable & Telecommunications Association, to Julius Genachowski, Chairman, FCC, GN Docket Nos. 09-51, 09-191, WC Docket No. 07-52 (March 1, 2010).

[103] 47 U.S.C. § 1302.

forth in Section 254, as informed by Sections 1 and 706 of the Communications Act.[104]

In addition, the *Comcast* court acknowledged that the Commission could exercise its ancillary authority over matters reasonably related to those Congressional statements of policy when combined with other "express delegations of authority."[105] Of note, the court did not foreclose other alternatives by which the Commission could use its Title I ancillary authority to regulate broadband services. For example, the *Comcast* court left open the option for the Commission to rely on Section 706 when it specifically agreed that Section 706 includes a direct mandate for the Commission to "encourage" deployment of advanced services.[106] Indeed, the D.C. Circuit previously highlighted the scope and breadth of Section 706 in a 2009 decision: "The general and generous phrasing of § 706 means that the FCC possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband."[107] The *Comcast* court ultimately concluded that the Commission could not rely on Section 706 as an independent grant of authority because it remains bound by its earlier conclusion that Section 706 grants no regulatory authority.[108] However, the *Comcast* court did not foreclose the option for the Commission to revisit that prior decision.

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[104] *Contra Comcast*, 600 F.3d at 656 ("The crux of our decision in CCIA was that in its Computer II Order the Commission had linked its exercise of ancillary authority to its Title II responsibility over common carrier rates—just the kind of connection to statutory authority missing here.").

[105] *Id.* at 652.

[106] *See Comcast*, 600 F.3d at 658-59.

[107] *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 906–07 (D.C. Cir. 2009).

[108] *See Comcast*, 600 F.3d at 658-59 (citing *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24044 (1998)).

Finally, it should be noted that while the Commission contends that the *Comcast* court rejected the agency's reliance on Section 201,[109] the actual language of the *Comcast* decision reveals that the court declined to rule on the Section 201 argument because the argument raised in the Commission's brief had not been discussed in the underlying order.[110] Thus, the court determined that "[w]hatever the merits of this position, the Commission has forfeited it by failing to advance it here."[111]

Other Governmental Oversight And Congressional Action. Because broadband Internet service is classified as an information service, the Federal Trade Commission ("FTC") also retains jurisdiction to enforce the Federal Trade Commission Act's prohibition of unfair, deceptive, or anticompetitive practices by broadband Internet service providers.[112] Indeed, the National Broadband Plan included a recommendation that the Commission work with the FTC on broadband privacy issues because of this dual jurisdiction.[113] As some analysts have noted, a regime in which the FTC oversaw enforcement of online privacy rules with technical guidance from the FCC might best play to the two agencies' respective strengths.[114] In any case, though, it is important for the Commission to acknowledge that under the status quo, the FTC continues to

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[109] NOI at ¶ 27 ("The court also rejected the agency's reliance on sections 201, 256, 257, and 623 of the Communications Act.").

[110] *See Comcast*, 600 F.3d at 630.

[111] *Id.*

[112] *See* NOI at ¶ 83. The judicial system also remains an important vehicle to resolve alleged anti-competitive behavior in the broadband marketplace. *Id.* at ¶ 95 (referencing class action law suits against AT&T and RCN in Ohio and New York, respectively).

[113] *See* National Broadband Plan at 55-57.

[114] *See* Robert D. Atkinson and Philip J. Weiser, *A "Third Way" on Network Neutrality*, at 10-11 (May 2006). *See also id.* at n.32 ("We do not evaluate here whether the FTC would be a better agency to superintend the regime we have in mind, but note that such an evaluation calls for a weighing of the relative importance of the FTC's capabilities for managing adjudications versus the FCC's technological expertise.").

retain its oversight over broadband and could work with the Commission to develop a dual jurisdictional regime, if the Commission believes it lacks jurisdiction to address certain policy goals for broadband Internet service.

The Commission is right to emphasize that the purpose of this proceeding is "to ensure that the Commission can act within the scope of its delegated authority to implement Congress's directives with regard to the broadband communications networks used for Internet access."[115] Indeed, a large bipartisan majority of Congress has provided the Commission with guidance on the Commission's efforts to stray from the status quo and reclassify broadband Internet service.[116] Ultimately, with respect to areas *not* within its existing legal authority, the Commission should pursue a *fourth* way and turn to Congress for guidance on proceeding with a new broadband legal framework.[117]

[115] *See supra* note 36.

[116] *See* McDowell Statement at 4 ("In fact, a large bipartisan majority of Congress – consisting of at least 291 Members – has weighed in asking the Commission to discard this idea or at least to wait for Congress to act. In other words, a commanding majority of the directly elected representatives of the American people do not want the FCC to try to regulate broadband Internet access as a monopoly phone service.").

[117] *Cf.* NOI Statement of Chairman Julius Genachowski at 1 ("A limited update of the Communications Act could lock in an effective broadband framework to promote investment and innovation, foster competition, and empower consumers.").

VI. 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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July 15, 2010