February 22, 2010

Julius Genachowski, Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52; *A National Broadband Plan for Our Future*, GN Docket No. 09-51

Dear Chairman Genachowski:

Virtually all commenters in the above-referenced proceedings share the Commission's goal of preserving the "open" nature of the Internet. Despite ongoing, productive efforts to reach consensus on how to best effectuate this goal, certain groups advocating an extremist form of "net neutrality" regulation have now asked the Commission to steer the debate in a radical new direction. They want the Commission to reverse a long series of decisions dating all the way back to the Kennard Commission in 1998 and classify broadband Internet access service, for the first time, as a "telecommunications service" subject to legacy common carrier regulation under Title II of the Communications Act.[1] Regulating the Internet as these parties propose would be a profound mistake with harmful and lasting consequences for consumers and our economy.

As discussed below, the 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. And it would threaten to extend common carrier regulation not just to broadband Internet access providers, but to huge swaths of the Internet at large, betraying decades of bipartisan support for keeping the Internet unregulated. 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, and that are so vital to achieving your "'100 Squared' initiative—100 million households at 100 megabits per second" by 2020—which you identified as a core objective of the National Broadband Plan.[2] In short, the Commission should keep this Pandora's Box of Title II classification nailed shut.

I. The Commission's Bipartisan Treatment Of Internet Access As A Title I Information Service Has Produced Huge Benefits For American Consumers

Through Democratic and Republican administrations alike, the Commission has ruled consistently on a key regulatory issue: the classification of Internet access as an "information

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[1] *See, e.g.*, Reply Comments of Public Knowledge on NBP PN No. 30, GN Docket No. 09-51 (Jan. 26, 2010) ("PK Reply Comments").

[2] Prepared Remarks of Chairman Julius Genachowski, "Broadband: Our Enduring Engine for Prosperity and Opportunity," at 6, NARUC Conference (Feb. 16, 2010).

service" subject to minimal regulation under Title I of the Communications Act. First, in its seminal 1998 *Report to Congress*, the Kennard Commission performed a thorough factual and legal analysis and found that Internet access is an integrated "information service" without a "telecommunications service" component. The Commission further concluded that a contrary finding could "seriously curtail the regulatory freedom that . . . was important to the healthy and competitive development of the enhanced-services industry."[3]

In reaching this conclusion, the Commission relied in part on a letter authored by a bi-partisan group of Senators, which emphasized that "[n]othing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services."[4] As these Senators explained:

> Th[e] unparalleled success [of the Internet] has emerged in the context of policies that favor market forces over government regulation—promoting the growth of innovative, cost-effective, and diverse quality services. It is this same pro-competitive mandate that is at the heart of the 1996 Act. . . . [W]ere the FCC to reverse its prior conclusions and suddenly subject some or all information service providers to telephone regulation, it seriously would chill the growth and development of advanced services to the detriment of our economic and educational well-being.
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> Some have argued that Congress intended that the FCC's implementing regulations be expanded to reclassify certain information service providers, specifically Internet Service Providers (ISPs), as telecommunications carriers. Rather than expand regulation to new service providers, a critical goal of the 1996 Act was to diminish regulatory burdens as competition grew. Significantly, this goal has been the springboard for sound telecommunications policy throughout the globe and underscores U.S. leadership in this area. The FCC should not act to alter this approach.

The Commission repeatedly heeded this sound advice when examining the regulatory classification of different forms of broadband Internet access service over the ensuing decade, including cable modem service in 2002, wireline broadband in 2005, and wireless broadband in 2007.[5] Each time, it reached the same conclusion: broadband Internet access service is a Title I

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[3] Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 46 (1998) ("*1998 Report to Congress*").

[4] *1998 Report to Congress* ¶ 38 (quoting Bipartisan Senate Letter to William Kennard, FCC, CC Docket No. 96-45 (March 20, 1998)). The block quote in the text above is taken from that letter at pp. 1-2.

[5] Declaratory Ruling, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4822 ¶ 38 (2002) ("*Cable Modem Order*"), *aff'd*, *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (intermediate history omitted); Report and Order, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14855-56 ¶¶ 1-3 (2005) ("*Wireline Broadband Order*"), *aff'd Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007); Declaratory Ruling, *Appropriate Regulatory Treatment for*

information service; it is *not* a Title II telecommunications service, nor does it have a telecommunications service component. And when the Commission's classification decisions were challenged in the courts of appeals, the Commission litigated the matter all the way to the Supreme Court and won.[6]

The Commission's longstanding recognition that retail broadband Internet access is an information service, without a severable telecommunications service component, has been a key stimulant of broadband investment in recent years. Broadband providers have already invested *hundreds of billions* of dollars in private risk capital to deploy next-generation networks to communities across our nation.[7] Indeed, in 2009 alone, they invested nearly $60 billion in broadband networks.[8] These substantial investments, made in reliance on the Commission's Title I classification decisions, have resulted in the deployment of increasingly robust networks and the emergence of new competitive options from every segment of the industry—from AT&T's U-verse and Verizon's FiOS, to the cable industry's DOCSIS 3.0 services, to Clearwire's WiMax network, to HughesNet's and WildBlue's satellite offerings, to 3G and soon 4G mobile wireless broadband services from multiple providers.

Moreover, broadband Internet access providers are making these investments even though some financial analysts believe they face "a dizzying challenge in earning a desirable return for shareholders," given that "the returns of building a new network of this magnitude are unappealing."[9] Broadband providers are also making these investments despite a severe global recession. While private investment *in general* had fallen by about 20% as of the third quarter of 2009 compared to the prior year, *broadband* investment in particular fell less than 10% and is expected to return to growth within the next year or two.[10] Our national recovery will depend in no small part on this continued private investment—not just because broadband build-out by itself supports tens of thousands of skilled jobs, but because a more robust and ubiquitous Internet is a powerful platform for growth, jobs, and investment throughout our economy.

Some net neutrality proponents believe that economic growth is propelled primarily by investment at the "edge" of the Internet, and not by network providers who operate the Internet's core and access networks, but that is a dangerously flawed vision.[11] Continued investment and

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Broadband Access to the Internet over Wireless Networks, 22 FCC Rcd 5901, 5902 ¶ 2 (2007); *see also 1998 Report to Congress* ¶¶ 13, 33-48, 59, 73 (concluding that ISP services are "information services" without a "telecommunications service" component, and that the two statutory classifications are "mutually exclusive").

6 *See Brand X*, *supra*; *Time-Warner Telecom*, *supra.*

7 USTelecom Comments, GN Docket 09-191, at 5-7 (Jan. 14, 2010) ("USTelecom Comments")..

8 *Id.* at 6-7 (citing Yankee Group analysis).

9 Craig Moffett *et al.*, *Verizon (VZ): Project FiOS . . . Great for Consumers, but What About Investors?*, Bernstein Research, at 3 (Jan. 14, 2008).

10 USTelecom Comments at 6-7.

11 Many of these same advocates claim that, until 2005, Internet access services had always been regulated as Title II telecommunications services as a result of the Commission's *Computer Inquiry* rules. That view illogically conflates two distinct issues: the threshold classification of a retail communications

innovation by each group mutually expands opportunities for the other. The greater the ability of network operators to offer innovative, revenue-generating enhanced capabilities and features to application and content providers, the greater the ability of the network operators to expand the potential reach and robustness of those networks for consumers. And the better the network capabilities available to "edge" providers, the greater the opportunity for them to develop innovative services that increase consumer demand for broadband. The current, stable Title I regulatory environment has facilitated this "virtuous cycle" of investment and innovation at all levels of the Internet, just as the Commission expected.[12]

This is certainly no time to retreat from those policies. Many of our nation's core priorities in education, health care, energy conservation, environmental protection, technological innovation, job-producing investment, and economic growth depend on the continued flow of private capital for deploying and expanding broadband networks. [13] But the robust, ubiquitous broadband networks necessary to achieve these priorities will not come cheap or easy. The Commission's staff has estimated that the cost of deploying ultra-fast broadband capability to all Americans will total some $350 billion.[14] To succeed, therefore, the Broadband Plan will need

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service as either an "information service" or a "telecommunications service," and the regulatory consequences that the legacy *Computer Inquiry* rules attached to services classified as "information services." Those rules, which applied only to wireline common carriers (and not cable modem service providers or wireless broadband providers), did not affect the classification of *retail* Internet access service as an information service. Instead, those rules required carriers offering Internet access services to *also separately offer* the transmission component of their Internet access services as a *wholesale* telecommunications service pursuant to tariff. *See Wireline Broadband Order* ¶¶ 23-24. *See also Brand X* at 996 (explaining that *Computer Inquiry* rules were not based on regulatory definitions, but rather policy choices stemming from historical market structure). And while the *Computer Inquiry* rules may have served the Commission's policy goals in the narrowband, circuit-switched "one-wire world" for which they were initially created 40 years ago, they would be a serious impediment to broadband investment and innovation in today's multi-platform broadband IP environment, which is why the Commission has categorically rejected applying those rules to cable, wireline and wireless broadband providers. *See supra* note 5.

[12] *See* Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Next Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398 ¶¶ 95-96 (1999) ("We think of broadband facilities as an input product, like microprocessors or memory in the computer world. For such products, a so called 'virtuous cycle' can develop. Successive generations of input products provide more performance for the same amount of money. The greater performance enables current applications to perform better and fuels more demand for them, and demand for new applications that were not feasible before. . . . As the cycle gains momentum and cost decreases and performance increases, we expect that companies will provide new applications and services for broadband consumers. As a result, more consumers will demand broadband, and the virtuous cycle will accelerate.").

[13] *See* Robert C. Atkinson & Ivy E. Schultz, Columbia Inst. for Tele-Info., *Broadband in America: Where It Is and Where It Is Going*, 7 (Nov. 11, 2009) (finding that under current projections, within the next three to four years, broadband service providers will deploy next-generation broadband networks capable of supporting significantly higher speeds to approximately 90% of all U.S. households.)

[14] Staff Report, *September 2009 Commission Meeting*, at 45 (Sept. 29, 2009).

to focus on what you have described as "common sense" solutions that avoid "the danger of dogma" and that rely on "private enterprise, the indispensable engine of economic growth."[15] A stable, predictable regulatory environment is an indispensable component of any such common sense solutions.

But just when regulatory certainty is most needed to keep the private-enterprise engine running in high gear, some parties advocate abandoning the current Title I model in favor of public-utility-type regulation under Title II. Robert McChesney, the co-founder of Free Press and a current member of its Board, articulated that group's radical agenda in an interview with the *Socialist Project*:

> What we want to have in the U.S. and in every society is an Internet that is not private property, but a public utility. We want an Internet where . . . you don't pay a penny to use. . . . In the realm of Internet service provision, the telephone and cable companies play a parasitic and negative role. They do nothing positive. . . . Our struggle [is] to make the Internet into a public utility[.][16]

Consistent with this agenda, Free Press, Public Knowledge, and a handful of others are urging the Commission to classify broadband Internet access, either in whole or in part, as a Title II "telecommunications service" so that it can impose common carrier rules, designed for the monopoly telephone companies of 1934, on the competitive broadband industry of today.[17] As discussed below, that classification would inflict burdensome obligations not just on those providers, but on a wide variety of other Internet-based companies that have generally operated outside the Commission's purview. It is difficult to imagine a proposal more at odds with the Commission's historical commitment to keeping the Internet unregulated, to our national prospects for economic recovery, and to your own commitment to "common sense" solutions and to "private enterprise, the indispensable engine of economic growth."

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[15] Statement of Julius Genachowski, Nominee to Serve as Chairman of the Federal Communications Commission, U.S. Senate Comm. on Commerce, Science, and Transportation, at 3 (June 16, 2009), http://commerce.senate.gov/public/?a=Files.Serve&File_id=8ac48e3b-0986-4e11-88fa-60252680715b.

[16] "Media Capitalism, the State and 21st Century Media Democracy Struggles: An Interview with Robert McChesney," *The Bullet*, Socialist Project E-Bulletin No. 246 (Aug. 9, 2009), *available at* http://www.socialistproject.ca/bullet/246.php. McChesney also condemns the advertising-based business models prevalent in today's broadband Internet marketplace, notwithstanding the fact that Google and others consider advertising to be the "lifeblood of the digital economy." *See id.* ("Advertising is commercial propaganda. . . . Advertising is the voice of capital. We need to do whatever we can to limit capitalist propaganda, regulate it, minimize it, and perhaps even eliminate it."); Susan Wojcicki, *Making Ads More Interesting*, The Official Google Blog, Mar. 11, 2009, *available at* http://googleblog.blogspot.com/2009/03/making-ads-more-interesting.html ("Advertising is the lifeblood of the digital economy: it helps support the content and services we all enjoy for free online today, including much of our news, search, email, video and social networks.").

[17] *See* Free Press Comments, WC Dkt. 09-51, at 5 (June 8, 2009) ("The FCC should reverse the foundational mistake of its broadband policy framework by reclassifying broadband as a telecommunications service."); PK Reply Comments at 4 ("the Commission may reclassify broadband as a Title II service simply because it finds that Title II classification would better serve the goals of the National Broadband Plan than the current Title I classification.")

Indeed, the Commission cannot seriously think that layering a 75-year-old regulatory structure on modern broadband facilities will not harm current and future levels of broadband investment. This concern is especially acute given that this antiquated regulatory structure would require all providers to divert time and resources from deploying broadband networks so that they can design and implement the myriad systems and processes necessary to comply with a bevy of newly imposed Title II obligations and requirements.[18] At best, this would lead to major market uncertainties that will hamper each company's ability to raise and deploy capital efficiently. At worst, it would seriously undermine the value of broadband investments already made and disincent new ones. In either case, the Title II classification proposal would dampen broadband investment and job-producing economic growth at the worst possible time. To run such risks now, when the nation is counting on the technology sector to help lead the U.S. out of the worst recession in generations, would not be a responsible course of action for this Commission.[19]

II. There Is No Factual Or Legal Basis For Classifying Broadband Internet Access Service As A Title II Telecommunications Service

As noted, 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. Free Press and Public Knowledge now suggest that the Commission should reverse this well-established precedent and conclude that broadband Internet access is (or contains) a Title II "telecommunications service" subject to legacy common carrier regulation. As discussed below, any such decision would likely be invalidated in court, but only after years of industry-destabilizing regulatory uncertainty.

In relevant part, a "telecommunications service" subject to Title II common carrier regulation is defined as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used," and "telecommunications" in turn is defined as "the transmission . . . of information of the user's choosing, *without change in the form or content of the information as sent and received*."[20] In contrast, an "information service," which lies outside the scope of Title II, is the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications.*"[21] After performing an exhaustive analysis of the 1996 Act, the Commission found that the term "offer" in the definition of "telecommunications service" means a *stand-alone* offering of telecommunications that transparently transmits information chosen by the user, which, from the user's perspective, is different in kind from the provision of data processing capabilities *integrated* with transmission capability that is the hallmark of an

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18 *See infra* at 10.

19 *See* Tom Lydon, *Home-grown rebound*, MarketWatch (Jan. 4, 2010) ("Emerging markets may unquestionably be leading the way out of the global recession, but on our own soil, there's mounting evidence that the U.S. technology sector is driving growth at home."), *available at* http://www.marketwatch.com/story/technology-etfs-will-lead-us-out-of-the-recession-2009-01-04.

20 47 U.S.C. § 153(43), (46) (emphasis added).

21 *Id.* § 153(20) (emphasis added).

"information service."[22] According to the Commission, "Congress intended the categories of 'telecommunications service' and 'information service' to be mutually exclusive," which ensures that "information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'"[23]

Under this statutory framework, the Commission concluded that broadband Internet access is properly construed as the offering of an integrated "information service" because it contains a range of integrated data-processing functions, including "DNS look-up" and often content caching. As the Supreme Court explained in *Brand X*, "[t]he entire question is whether the [broadband Internet access] products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes). That question turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance."[24] In other words, the Commission may reverse its longstanding statutory interpretation only if it has a *factual* basis to determine that—less than three years after it last examined this question—broadband Internet access is no longer offered as a "functionally integrated" information service, but rather as a stand-alone, naked transmission service.

The Commission could have no such basis because the relevant "factual particulars" of broadband Internet access services have not changed. Based on the dubious premise that consumers no longer rely on their ISPs for email and certain other functionalities, Public Knowledge concludes that the data-processing and transmission components of broadband Internet access are no longer "integrated." But the premise is false and would not support the conclusion even if it were true. To begin with, tens of millions of consumers continue to view ISP-provided email and similar applications as integral components of the broadband Internet access services offered to them, and Public Knowledge offers no basis for concluding otherwise.[25] More important, as the Commission itself has concluded, Internet access services are integrated information services "*regardless* of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service."[26] That is because, as the Commission found and the Supreme Court highlighted, Internet access service inherently involves information processing and interaction with stored data—functions that are the hallmarks of information services. As the Supreme Court put it:

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[22] *See 1998 Report to Congress*, ¶¶ 13, 33-48. *See also Brand X*, 545 U.S. at 990 ("One might well say that a car dealership 'offers' cars, but does not 'offer' the integrated major inputs that make purchasing the car valuable, such as the engine or the chassis. It would, in fact, be odd to describe a car dealership as 'offering' consumers the car's components in addition to the car itself.").

[23] *1998 Report to Congress*, ¶ 13. *See also id.* ¶ 43.

[24] *Brand X*, 545 U.S. at 991.

[25] Indeed, Public Knowledge itself concedes (at 8) that broadband providers do include "enhanced services such as email accounts and home pages" within the broadband Internet access services offered to consumers.

[26] *Cable Modem Order*, ¶ 38 (emphasis added).

> A user cannot reach a third-party's Web site without DNS, which (among other things) matches the Web site address the end user types into his browser . . . with the IP address of the Web page's host server. *See* P. Albitz & C. Liu, DNS and BIND 10 (4th ed. 2001) (For an Internet user, "DNS is a must. . . . [N]early all of the Internet's network services use DNS. That includes the World Wide Web, electronic mail, remote terminal access, and file transfer"). . . . Similarly, the Internet service provided by cable companies facilitates access to third-party Web pages by offering consumers the ability to store, or "cache," popular content on local computer servers. . . . In other words, subscribers can reach third-party Web sites via "the World Wide Web, and browse their contents, only because their service provider offers the 'capability for … acquiring, [storing] … retrieving [and] utilizing … information.'" "The service that Internet access providers offer to members of the public is Internet access," not a transparent ability (from the end user's perspective) to transmit information."[27]

That, of course, remains the essence of Internet access service. Nothing has changed to justify abandoning that judgment, which the Commission last reaffirmed in 2007. Broadband Internet access services are, if anything, even more integrated with enhanced functionality today. For example, even apart from such core functionalities as DNS look-up, which by themselves suffice to support an information service classification, broadband Internet access providers often include some or all of the following as part and parcel of their residential Internet access service: security screening, spam protection, anti-virus and anti-botnet technologies, pop-up blockers, parental controls, online email and photo storage, instant messaging, and the ability to create a customized browser and personalized home page that automatically retrieves games, weather, news and other information selected by the user—all of which involve "generating, acquiring, storing, transforming, processing, retrieving [and/or] utilizing" information.[28] In addition, a

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[27] *Brand X*, 545 U.S. at 999-1000 (citations and some internal brackets omitted) (quoting *Report to Congress*, at ¶¶ 76-79); *see also id.* at 987 (the Commission concluded that cable modem service is an information service "because it provides consumers with a comprehensive capability for manipulating information using the Internet via high-speed telecommunications. That service enables users, for example, to browse the World Wide Web, to transfer files from file archives available on the Internet via the 'File Transfer Protocol,' and to access e-mail and Usenet newsgroups."); *Cable Modem Order*, ¶ 38 n. 153 (explaining that even if users do not use email and other cable modem service offerings, "[n]early every cable modem service subscriber, . . . accesses the DNS that is provided as part of the service."). Although Public Knowledge suggests in passing that consumers can theoretically obtain access to third-party DNS look-up services, virtually all consumers today rely on broadband providers to offer that functionality as an integral part of broadband Internet access service, and Public Knowledge does not suggest otherwise. Indeed, if broadband Internet access providers suddenly chose to disable DNS functionality, Internet access services would be essentially useless to virtually all of the tens of millions of broadband Internet access customers in the U.S. today. In any event, the fact that competitors may offer their own service says nothing at all about the appropriate classification of integrated services offered to consumers.

[28] *See* 47 U.S.C. 153(20) (definition of "information service"); AT&T U-verse High Speed Internet, *available at* http://www.att.com/u-verse/explore/internet-landing.jsp; Cablevision Optimum Online, What's Included, *available at* http://www.optimum.com/online/included.jsp; Comcast High-Speed Internet, *available at* http://www.comcast.com/corporate/learn/highspeedinternet/highspeedinternet.html; Cox Essential Internet, Features, *available at* http://ww2.cox.com/residential/arizona/internet/essential-

significant and growing number of providers offer their Internet access services with a variety of network-oriented, security-related information processing capabilities that are used to address broader threats against their Internet access service and customers. These include processing Internet access traffic flows to check for telltale patterns of worms, viruses, botnets, denial of service attacks and the like; scrubbing email traffic to remove spam; and other techniques that involve interaction with stored information (e.g., databases of known computer threats) to address security concerns. In many cases, these network security-related features are fully integrated with the Internet access service offering; a consumer cannot utilize the service without also receiving the functionality provided by these security mechanisms.[29]

Given the range of information processing capabilities that are integrated with modern broadband Internet access services, a reviewing court would view any Title II classification decision as a bald, ends-based effort to achieve the Commission's regulatory agenda, without regard to the facts on the ground or the logic of its prior determinations. While the Commission is certainly free to make reasoned changes in policy to the extent the governing statute allows, it is *not* free to ignore facts in order to shoehorn its policy preferences into the existing legal framework.[30] This is particularly so here, given the Commission's unequivocal conclusion that "the language and legislative history" of the 1996 Act "make explicit the intention of the drafters of both the House and Senate bills that the two categories [information services and telecommunications services] be separate and distinct, and that information service providers not

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internet/features.cox; Time Warner Cable Road Runner High Speed Online, *available at* http://www.timewarnercable.com/WV-VA-KY/learn/hso/roadrunner/default.html; Verizon FiOS Internet, Features and Services, *available at* http://www22.verizon.com/Residential/FiOSInternet/Features/Features.htm.

[29] The Commission's Network Reliability and Interoperability Council (NRIC) website catalogues more than 200 cybersecurity best practices for network operators to implement within their networks. *See* NRIC Best Practices website, *available at* https://www.fcc.gov/nors/outage/bestpractice/BestPractice.cfm. Among other things, these best practices address surveillance of the network (Detailed Information for the Best Practice: 7-7-0401, *available at* https://www.fcc.gov/nors/outage/bestpractice/DetailedBestPractice.cfm?number=7-7-0401), protection against denial of service attacks (Detailed Information for the Best Practice: 7-6-8047, *available at* https://www.fcc.gov/nors/outage/bestpractice/DetailedBestPractice.cfm?number=7-6-8047), and protection of the domain name system from poisoning (Detailed Information for the Best Practice: 7-6-8048, *available at* https://www.fcc.gov/nors/outage/bestpractice/DetailedBestPractice.cfm?number=7-6-8048).

[30] *See Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *see also County of L.A. v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) (announcing that "[w]here the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action") (internal quotation marks omitted). As the Supreme Court recently explained, an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when "its new policy rests upon factual findings that contradict those which underlay its prior policy" or "when its prior policy has engendered serious reliance interests that must be taken into account." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-1811 (2009). Here, the Commission could not reclassify broadband Internet access service without *both* (1) "contradict[ing]" the still-unchanged facts (such as the pervasive use of DNS look-up) that it has correctly deemed sufficient to characterize broadband Internet access as a unitary "information service," and (2) defeating the "serious reliance interests" the industry has developed in the maintenance of the existing regime.

be subject to telecommunications regulation."[31] Indeed, in the absence of any new statutory directive from Congress, the Commission could have no plausible basis for reversing its conclusive analysis of Congressional intent regarding the Title I classification of Internet access service.

III. Classifying Internet Access As A Title II Telecommunications Service Would Have Negative Consequences Across The Entire Internet Ecosystem

Quite apart from the many *factual* and *legal* impediments to changing the classification of the service broadband Internet access providers "offer" to customers, the Commission should be equally concerned about the far-reaching and destructive *policy* consequences that would inexorably flow from any decision to "reinterpret" this statutory scheme to encompass broadband Internet access within the scope of Title II "telecommunications services." While some parties have suggested that "[c]lassification of broadband access as a Title II service need not entail any new regulation on providers,"[32] the Commission provided a far more accurate description of the dramatic consequences of such a decision in its certiorari petition to the Supreme Court in the *Brand X* case:

> If allowed to stand, the Ninth Circuit's decision would fundamentally change the regulatory environment in which cable modem services are offered. It would require the Commission (and the courts, see 47 U.S.C. 206, 207, 401) to regulate cable modem providers for the first time as telecommunications common carriers under Title II of the Communications Act, 47 U.S.C. 201 et. seq. Service providers would be under a new federal duty to furnish "communication service upon reasonable request therefore"; to charge "just and reasonable" rates; to refrain from engaging in "unjust or unreasonable discrimination"; to comply with FCC requirements for filing and abiding by written tariffs; and to interconnect with other carriers. See 47 U.S.C. 201(a) and (b), 202(a), 203, 251(a). They would be required to contribute to federal universal service support mechanisms, 47 U.S.C. 254(d), as well as to other funds that support telephone number portability and telephone relay services for the hearing impaired. See 47 C.F.R. 52.17, 64.604(c)(5)(iii). . . . The effect of the increased regulatory burdens could lead cable operators to raise their prices and postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas.[33]

The Commission's bleak assessment is, of course, as applicable to other forms of broadband Internet access as it is to cable modem service, and it is reason enough to reject Title II regulation. But the Commission should be under no illusion that it can confine any such decision to broadband Internet access providers. In the Supreme Court's words, if the Communications Act were construed to "classif[y] as telecommunications carriers all entities that use telecommunications inputs to provide information service," as the losing side in *Brand X*

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31 *1998 Report to Congress*, ¶ 43. *See also id.* ¶ 82.

32 PK Reply Comments at 1.

33 Petition for Writ of Certiorari, U.S. Dept. of Justice & FCC, *FCC v. Brand X Internet Services*, No. 04-277, at 25-26 (Aug. 27, 2004) ("*FCC Petition for Certiorari*").

contended, the Act "would subject to *mandatory* common-carrier regulation *all* information-service providers that use telecommunications as an input to provide information service to the public."[34] Indeed, this approach could extend Title II common carrier regulation not only to broadband Internet access providers, but to the farthest reaches of the Internet, including the millions of application and content providers that "use telecommunications as an input to provide information service to the public."[35]

For example, Internet transport companies like Level 3, Akamai, and Limelight, which offer backbone and content-delivery services to thousands of large and small business customers by means of facilities they either own or lease, could find themselves subject to regulation. Indeed, in a single stroke, the Commission could subject the core of the Internet ecosystem, including all traditionally unregulated Internet peering arrangements, to common carrier regulation designed for the legacy telephone network. The same is true for providers of other services that incorporate a transmission element, including:

- Providers of on-line video services like YouTube, Netflix, and Hulu that self-provide or lease transmission capacity to offer video content on the Internet.

- Providers of cloud computing services, like Amazon.com, that enable the transmission of customer data to and from cloud computing server farms.

- Providers of eReaders, like Amazon.com (the Kindle) and Barnes & Noble (the Nook), that include 3G connectivity in the purchase price of their devices.

- Providers of machine-to-machine services, such as smart utility meters, wireless heart monitors and myriad other products, which incorporate wireless or wired transmission capability in their service offerings.

- Providers of Internet search advertising services, like Google, Microsoft and Yahoo, that use Internet connections to transmit their customers' advertising messages to end users.

Internet-based companies could not avoid the consequences of that Title II classification decision by arguing that they do not themselves own last-mile facilities—or, indeed, any transmission facilities. As the *Brand X* Court explained, because "the relevant definitions do not distinguish facilities-based and non-facilities-based carriers,"[36] reinterpreting the statutory scheme to place broadband Internet access services within the "telecommunications service" category would "subject to common-carrier regulation non-facilities-based ISPs that own no transmission facilities."[37] This holding comports with decades of telecommunications regulations, under which non-facilities-based resellers of long-distance services to the public (such as calling card providers) have always been regulated under Title II.

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34 *Brand X*, 545 U.S. at 994 (emphasis added).

35 *Id.*

36 *Id.* at 997.

37 *Id.* at 994.

Accordingly, as the Commission itself acknowledged and the Supreme Court reiterated, if the Commission "interpreted the statute as breaking down the distinction between information services and telecommunications services, so that some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category."[38] Thus, any "reinterpretation" of this statutory scheme could extend full-blown common-carrier regulation to every corner of the Internet ecosystem. At best, it would indisputably mire all aspects of the Internet in *years* of investment-deterring, innovation-stunting legal uncertainty while the Commission and the courts sort through a new generation of mind-glazing statutory characterization disputes.[39] That should not be this Administration's legacy for American technology policy.[40]

The Commission also could not avoid the many unintended consequences of this proposed Title II classification simply through selective application of its forbearance authority, as some have argued. This, too, is an argument the Commission considered and rejected more than a decade ago:

> An approach in which a broad range of information service providers are simultaneously classed as telecommunications carriers, and thus presumptively subject to the broad range of Title II constraints, could seriously curtail the regulatory freedom . . . important to the healthy and competitive development of the enhanced-services industry. In response to this concern, Senators Stevens and Burns maintain that the Commission could rely on its forbearance authority under Section 10 of the Act to resolve any such problems. . . . *Notwithstanding the possibility of forbearance*, we are concerned that including information service providers within the "telecommunications carrier" classification *would effectively impose a presumption in favor of Title II regulation of such providers. Such a*

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[38] *1998 Report to Congress*, ¶ 57; *see also* note 11, *supra* (addressing arguments that illogically conflate the threshold classification of communications services with the legacy regulatory consequences of classifying such a service as an "information service"). Moreover, any attempt by the Commission to somehow limit the reach of such a policy to only certain players in the Internet ecosystem (e.g., only facilities-based providers) not only would be legally invalid, but also would raise serious policy concerns in that it might leave out parties that have just as big a role to play in the "openness" of the Internet as facilities-based providers of broadband Internet access service. In addition to being underinclusive, such an approach also would be devastating in terms of the uncertainty and disruption of settled expectations for companies that are making the investments necessary to create the underlying broadband networks upon which they and third parties rely to deliver increasingly bandwidth-intensive content, services, and applications.

[39] Indeed, the Commission has taken years to resolve questions about the proper classification of prepaid calling cards, enhanced prepaid calling cards, IP-in-the-middle voice services, IP-to-IP telephony services, and—after more than a dozen years—it still has not provided any guidance on the classification of interconnected VoIP.

[40] *See* Remarks of FCC Acting Chairman Michael J. Copps, FCBA Seminar: The Communications Act and the FCC at 75, at 3 (Feb. 24, 2009) ("Our agency must also cultivate the virtue of predictability. Nobody says 'FCC' and 'predictability' in the same breath any more. . . . Thunderbolts from above are not the way for an independent agency to make policy or to discharge its public interest obligations.").

presumption would be inconsistent with the deregulatory and procompetitive goals of the 1996 Act. In addition, uncertainty about whether the Commission would forbear from applying specific provisions could chill innovation.[41]

Subsequent experience has validated the Commission's concerns about relying too heavily on forbearance to mitigate the harms of Title II regulation. Although the Commission has used its forbearance authority to exempt non-dominant common carriers from the most onerous aspects of Title II regulation, such as the tariffing obligations of Section 203, the Commission stated that it will *not* forbear from Sections 201, 202, and 208.[42] Those provisions alone, however, would subject a vast range of Internet companies to unaccustomed, unnecessary, and innovation-deterring regulatory scrutiny about whether the rates, terms, and conditions of their diverse services are "unjust and unreasonable" or "unreasonably discriminatory."

Moreover, forbearance petitions are fiercely contested before the Commission and routinely appealed to the courts. No matter what the outcome of any given forbearance fight, the inevitable regulatory uncertainty during the interim would, as the 1998 Report warned, "chill innovation."[43] In Commissioner McDowell's words, this would not be the kind of "environment needed to attract up to $350 billion in private risk capital to build out America's broadband infrastructure."[44] And even once the Commission made the requisite findings needed to forbear from the application of particular rules to particular Internet-based providers, its decisions would be context-specific and highly subjective, and would thus be prone to reversal by subsequent Commissions. No issue would ever be settled, and the Internet would forever bear a legacy of deep regulatory uncertainty, all attributable to a single misguided decision to change the classification of broadband Internet access service.

* * *

Congress, the Administration, and the public are all counting on this Commission to produce a pragmatic broadband plan that brings all Americans fully into the 21st century. The Commission would betray those expectations if it re-exposed this industry to years of

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41 *1998 Report to Congress*, ¶¶ 46-47 (emphasis added). *See also FCC Petition for Certiorari* at 28 ("Forbearance proceedings would be time-consuming and hotly contested and would assuredly lead to new rounds of litigation, and there is no way to predict in advance the ultimate outcome of such proceedings. Moreover, the speculative possibility of eventual freedom from regulation under Section 10 would not relieve the industry or regulators of the immediate burdens and uncertainties that would be created by imposing common carrier obligations on cable modem providers. In short, the FCC's forbearance authority is not in this context an effective means of 'remov[ing] regulatory uncertainty that in itself may discourage investment and innovation.'").

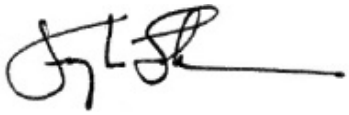
42 Mem. Op. and Order, *PCIA's Petition for Forbearance for Broadband Personal Communications Services*, 13 FCC Rcd 16857, ¶¶ 15-31 (1998); *see also* Mem. Op. and Order, *Qwest's Petition for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules With Respect to Broadband Services*, 23 FCC Rcd 12260, ¶ 64 (2008).

43 *1998 Report to Congress*, ¶ 47.

44 Commissioner Robert McDowell, "The Best Broadband Plan for America: First, Do No Harm," Free State Foundation Keynote Address, at 13 (Jan. 29, 2010).

investment-deterring uncertainty and litigation by re-opening a long-settled debate over arcane regulatory classifications.[45] Instead, the Commission should focus on preserving the stable regulatory environment needed to encourage massive job-producing private-sector investment that is vital to ensuring "all people of the United States have access to broadband capability," as Congress intended.

Sincerely,



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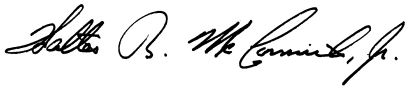

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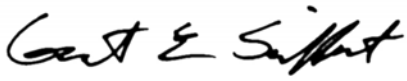

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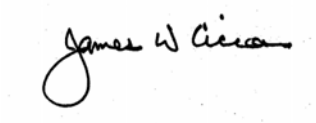

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Qwest

[45] *See* Remarks of FCC Acting Chairman Michael J. Copps, Pike & Fischer's Broadband Policy Summit V, at 3 (June 18, 2009) (cautioning the Commission against engaging in debates that have "too frequently deflected us from the real issues of broadband because we spent so much time parsing arcane language rather than confronting real-world challenges.").