

**Before the
Federal Communications Commission
WASHINGTON, D.C. 20554**

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

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION
OF STATE UTILITY CONSUMER ADVOCATES
ON NOTICE OF INQUIRY**

David C. Bergmann
Assistant Consumers' Counsel
Chair, NASUCA Telecommunications
Committee
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Phone (614) 466-8574
Fax (614) 466-9475
bergmann@occ.state.oh.us

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

August 12, 2010

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY: ADDRESSING THE MYTHS OF BROADBAND RECLASSIFICATION.....	1
MYTH 1: TITLE I REGULATION PROVIDED CERTAINTY.	5
MYTH 2: TITLE II REGULATION MEANS UNCERTAINTY.....	5
MYTH 3: RECLASSIFICATION WILL LEAD TO MORE LITIGATION.....	7
MYTH 4: RECLASSIFICATION WILL KILL INVESTMENT.	10
MYTH 5: YOU CANNOT SEPARATE BROADBAND INTO TRANSMISSION AND INFORMATION COMPONENTS.	12
UNIVERSAL SERVICE SUPPORT CANNOT BE PROVIDED TO INFORMATION SERVICES.....	14
RECLASSIFICATION WILL NOT CAUSE A CONSTITUTIONALLY -SUSPECT TAKING.....	17
CONCLUSION.....	21

**Before the
Federal Communications Commission
WASHINGTON, D.C. 20554**

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

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION
OF STATE UTILITY CONSUMER ADVOCATES
ON NOTICE OF INQUIRY**

**INTRODUCTION AND SUMMARY: ADDRESSING THE MYTHS OF
BROADBAND RECLASSIFICATION**

On June 17, 2010, the Federal Communications Commission (“FCC” or “Commission”) released a Notice of Inquiry (“NoI”) seeking comment on the “legal framework for broadband Internet service.”¹ More specifically, the subject of the Commission’s inquiry was the legal framework for an “Internet connectivity service that is offered as part of a **wired** broadband Internet service....”²

More than 90 multipage comments were filed, including by the National Association of State Utility Consumer Advocates (“NASUCA”), along with thousands of one- or two-page comments from individual consumers. This clearly shows the interest within the telecommunications/broadband industry and of the public at large in this

¹ FCC GN Docket No 10-127 (rel. June 17, 2010).

² NoI, ¶ 2 (emphasis added). Notwithstanding this limitation, a number of wireless broadband providers filed comments seeking to ensure that they were excluded from any reclassification. Those comments will not be addressed in these reply comments.

question, which will impact consumers' (and the industry's) experience of the Internet for decades to come.

In its comments, NASUCA supported the reclassification of wired broadband transport service as a Title II service, consistent with how the service was treated prior to 2002. As NASUCA argued, this does not involve "regulating the Internet."³ But it does prevent the carriers that own the facilities over which transport is provided from using their significant market power ("SMP") to control the content and applications that are carried over their facilities.

NASUCA lacks the resources to respond to all of the voluminous comments of those who assert that the Commission cannot (and should not) classify as a Title II service Internet connectivity offered as part of a wired broadband Internet service. Those commenters are principally the owners of the networks, whose interest (financial and otherwise) is for those networks and the services provided over those networks to be subject to minimal regulation. Those commenters also include various doctrinaire free-market academicians, for whom virtually any regulation is anathema and destructive of economic welfare. (These views have also been expressed in numerous ex parte communications and other fora.)

Due to the lack of resources, these comments will attempt only to respond, on a high level, to the (mythical) propositions that underlie the views of those whose primary interest is in keeping their networks free of regulation. The comments of AT&T Inc.

³ Americans for Tax Reform says that 53% of Americans oppose regulating the Internet. Americans for Tax Reform Comments at 7, citing http://www.rasmussenreports.com/public_content/business/general_business/april_2010/53_oppose_fcc_regulation_of_the_internet. The question asked in that survey was "Should the Federal Communications Commission regulate the Internet like it does radio and television?" See http://www.rasmussenreports.com/public_content/business/econ_survey_toplines/april_2010/toplines_internet_regulation_april_7_8_2010. Not very helpful for this inquiry, to say the least.

(“AT&T”) are arguably the most extensive, so AT&T’s comments are the starting point and touchstone for NASUCA’s reply. Related issues from some of the other commenters will also be addressed.

The network owners’ comments are structured around five (5) myths:

- First, classification of broadband Internet transmission as a Title I service provided certainty.
- Second, that **reclassification** as a Title II service would provoke uncertainty.

Obviously, these two myths are closely related.

- The third myth is that reclassification will lead to excessive litigation.
- The fourth myth is that reclassification will limit broadband investment.
- And the fifth myth is that the transmission and content pieces of broadband Internet access cannot be separated.

There are two further areas that NASUCA will focus on separately. That is universal service, which the Commission has periodically assumed applies to broadband, without ever making a specific finding that broadband actually fits into the framework of 47 U.S.C. § 254. That statute defines the Commission’s universal service responsibilities and capabilities. Various of the parties arguing against reclassification argue that the Commission can apply universal service principles to broadband without it being classified as a Title II service. They are wrong, and the future of universal service – and by extension an interconnected Nation – as partly encapsulated in the National Broadband Plan (“NBP”) – depends on reclassification.

NASUCA will also address the arguments of some parties that reclassification of broadband (or part of broadband) as a Title II service represents a taking in violation of the Fifth Amendment to the U.S. Constitution. These arguments are just another attempt on the part of the network owners to intimidate this Commission.

In the NoI, the Commission addressed “three specific approaches” to broadband regulation.⁴ The first was the “information service” classification, with regulation under Title I; the Commission asked whether that classification “remains adequate to support effective performance of the Commission’s responsibilities.”⁵ The second was “telecommunications service” classification, “to which all the requirements of Title II of the Communications Act would apply.”⁶

And the third approach, the so-called “third way,” is where “the Internet connectivity service that is offered as part of wired broadband Internet service (and only this connectivity service)” would be classified as a telecommunications service.⁷ As proposed, the Commission would forbear up-front under section 10 of the Communications Act from applying most provisions of Title II other than “the small number that are needed to implement the fundamental universal service, competition and small business opportunity, and consumer protection policies that have received broad support.”⁸

As can be seen from a review of NASUCA’s initial comments, NASUCA’s view lies somewhere between the second way and the third way, perhaps “way 2.5”?⁹ NASUCA fully supports classification of Internet connectivity service as a Title II

⁴ NoI, ¶ 2.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ NARUC has proposed a “Fourth Way,” which represents a partnership between state and federal regulators. See <http://www.naruc.org/Resolutions/Resolution%20Opposing%20Federal%20Preemption%20of%20State%20Jurisdiction%20over%20Broadband%20Service.pdf>. (Some of the commenters, such as Vonage, argue that the Commission should preempt all state regulation.) The “Way” metaphor has by this point become somewhat labored; indeed, the Third Way is more like a “Title II Lite” (lying between Title I and Title II) than something “on the other side of” Title II from Title I.

service, but questions whether the degree of forbearance suggested by the Commission is necessary, wise or workable.¹⁰

As stated in NASUCA's initial comments,

[T]he NoI's question about the "information service' classification of broadband Internet service" refers back to the Commission's 2002 *Cable Modem Order*, in which Commission classified Internet access over a cable modem as an "information service." NASUCA believes that this classification was incorrect when made, and has become ever more incorrect, inadequate, and destructive of broadband progress with each passing year. This docket offers the Commission the opportunity to correct this historic mistake.¹¹

On reviewing others' comments, it seemed that the comments opposing reclassification were so full of bombast and exaggeration that the best – and simplest – way to respond was to identify the myths that underlie those positions. And the best – and most effective – way to debunk those myths is through simple statements of opposition, rather than attempting a sentence-by-sentence parsing of the arguments.¹² That is the approach taken in the remainder of these reply comments (until we get to the universal service and takings issues).

MYTH 1: TITLE I REGULATION PROVIDED CERTAINTY.

MYTH 2: TITLE II REGULATION MEANS UNCERTAINTY.

These two myths are closely interrelated. The notion that the regulation of broadband as a Title I service – more precisely, the **lack** of regulation under Title I –

¹⁰ See NASUCA Comments at 22-23; see also Comments of the National Association of Telecommunications Offices and Administrators ("NATOA") at 4. NASUCA will not repeat its arguments in support of what seems to be the "best way" (see AT&T Comments at 15) to ensure that the benefits of broadband are universalized: that is, structural separation. See NASUCA Comments at 18-21.

¹¹ NASUCA Comments at 2-3 (footnotes omitted).

¹² Perhaps there is an element of hyperbole here, but it is only in response to the excesses of the network owners. See Americans for Tax Reform Comments at 7 (calling Free Press and Public Knowledge "special interest socialist groups").

provided certainty is a historical fiction. After all, it was not until 2005 that the Supreme Court upheld the Commission's classification of cable modem service as an information service.¹³ And that 6-3 decision was not a finding that the classification was required or otherwise compelled by law; as stated in NASUCA's initial comments,

[a]lthough the U.S. Supreme Court deferred to the agency's authority to make the *Cable Modem Order* classification, it did so under *Chevron* deference without ruling on the merits of the Commission's judgment. Three justices thought the *Cable Modem* ruling violated federal law. The majority found that either changed circumstances, or a mere "change in administration," could justify reversal of the policy.¹⁴

Thus the idea that reclassification will move us into an era of uncertainty depends on a false premise.¹⁵ One need only glance through the NBP to see that certainty is nowhere to be found in this world (or nation). As NASUCA stated in the initial comments, "The telecommunications transport service is or should be subject to regulation as a common carrier service like other telecommunications services, under Title II of the Communications Act, *as the service was prior to 2002.*"¹⁶

Reclassification of broadband transmission as a Title II service would be just as much within the Commission's authority under the Act as was the 2002 decision that found cable modem service to be a unitary information service. It should be noted that

¹³ *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"), affirming *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, FCC No. 02-77, 17 FCC Rcd 4798, 4870 (2002) ("*Cable Modem Order*").

¹⁴ NASUCA Comments at 3 (footnotes omitted). Time Warner Cable's view (at ii) that the Supreme Court upheld Title I classification on a factual and policy basis is simply wrong. And Verizon's view (at 6) that the Commission is collaterally estopped from changing its view mistakes both the doctrine and the nature of regulation, per *FCC v. Fox Television Stations*, 129 S. Ct. 1800 (2009).

¹⁵ See, e.g., Comcast Comments at ii; Comments of Verizon and Verizon Wireless ("Verizon") at 1. And Verizon's complaint that a future Commission could change its mind as to the degree of forbearance (*id.* at 9), adds no uncertainty to the current situation.

¹⁶ NASUCA Comments at 4, citing, e.g., *AT&T Corp. v. Portland*, 216 F3d 871 (9th Cir., 2000) (emphasis in original).

the 2002 decision was – as specifically recognized by the Supreme Court – not based on specific direction from Congress.¹⁷ Thus reclassification does not require such direction, either.¹⁸

The Open Internet Coalition correctly states that, post-*Comcast*, continuing under the current Title I plus ancillary authority paradigm “perpetuates uncertainty.”¹⁹ Looked at another way, the only certainty now is that the Commission **cannot** enforce these consumer protection principles:

- consumers are entitled to access the lawful Internet content of their choice;
- consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;
- consumers are entitled to connect their choice of legal devices that do not harm the network; and
- consumers are entitled to competition among network providers, application and service providers, and content providers.²⁰

That is not a certainty that makes consumers comfortable.

MYTH 3: RECLASSIFICATION WILL LEAD TO MORE LITIGATION.

Another recurring theme is that reclassification will lead to endless litigation (which, of course, will lead to additional uncertainty). But, of course, it was litigation

¹⁷ As Free Press points out, “The last time Congress updated the Communications Act, it took at least five years.” Free Press Comments at 5.

¹⁸ See AT&T Comments at 5.

¹⁹ Open Internet Coalition Comments at 4; see also Comments of XO Communications, LLC (“XO”) at iii.

²⁰ Open Internet Coalition Comments at 6, citing *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33; *Review of Regulatory Requirements for Incumbent LEC Broadband Services*, CC Docket No 01-337; *Computer III Further Remanded Proceedings: bell Operating Company Provision of Enhanced Services*; *1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CS Docket Nos. 95-20, 98010; *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185; *Internet Over Cable Declaratory Ruling*; *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Policy statement, 20 FCC Rcd. 14986 (2005) (*Internet Policy Statement*).

that got us to this point, with Comcast challenging the Commission's condemnation of Comcast's hidden network-throttling policies, and the D.C. Circuit finding no authority for the Commission to do so under Title I.²¹

If there is any certainty regarding Commission orders, it is that some unhappy soul will appeal those orders.²² And, of course, another aspect of that certainty is that it is uncertain whether the order will be sustained, whether by the Circuit Courts of Appeal or the Supreme Court.²³

Opponents of reclassification all point to ways in which the Commission can use its Title I authority to achieve the ends it seeks for broadband service²⁴ (and some of those are commendable ends). It is, of course, far too much to expect that the current proponents of those measures will automatically and unanimously accept the Commission's decisions in those areas; it is even more unlikely that no other party will appeal such orders.²⁵ It is also clear that the forbearance decisions the Commission makes will be appealed.²⁶

²¹ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). The attempts to minimize the meaning and the impact of *Comcast* (see, e.g., Verizon Comments at 3) would likely be ignored by those very parties when they were unhappy with a result that purported to meet the *Comcast* limits. As Google Inc. ("Google") states, "[T]he Comcast decision means that ancillary authority ... is not a reliable tool for FCC oversight going forward." Google Comments at 2-3.

²² NASUCA has been among those unhappy souls on occasion. See, e.g., *National Ass'n of State Utility Consumer Advocates v. FCC*, 468 F.3d 1272 (11th Cir. 2007), cert. denied sub nom. *Sprint Nextel v. National Ass'n of State Utility Consumer Advocates*, 2008 U.S. LEXIS 1127.

²³ See *id.* Perhaps the premise of the arguments of the opponents of reclassification is the guarantee that **they** will be litigating reclassification. That is the sort of threat seen in other areas, as discussed below.

²⁴ See AT&T Comments at 20-38; Comcast Comments at 3-16; Qwest Comments at 38-49.

²⁵ See AT&T Comments at 13.

²⁶ See AT&T Comments at 7; National Cable and Telecommunications Association ("NCTA") Comments at 61-77.

AT&T asserts that

[t]he communications industry suffered through similar regulatory chaos following the Commission's effort in 1996 to shape the industry around the [unbundled network element platform] UNE-P model of synthetic intramodal "competition" for voice telephony services. That model ultimately succumbed to judicial challenges – but only eight years later, in 2004, after multiple and increasingly skeptical remands by the Supreme Court and the courts of appeals.²⁷

One could address the erroneous substance of AT&T's statement (e.g., references to "synthetic" competition and "increasingly skeptical" remands; overlooking the fact that an earlier incarnation of AT&T was one of the greatest proponents of UNE-P²⁸), but the essential truth in the statement is the reality and inevitability of litigation.

AT&T cites numerous other authorities, agencies and methods that it claims would provide "more than ample authority to protect consumers against harmful regulatory practices," including the Federal Trade Commission, the Justice Department, private litigants, and generally applicable state laws...."²⁹ Apparently under AT&T's unique view, all that protection will proceed without any litigation.

So, like the myths of certainty and uncertainty, this myth rests on a false premise as to the nature of the current world. We live in an uncertain, litigious era, and the Commission's retreat on the reclassification issue will not cure or, indeed, have much effect on that. But the Commission can provide a bulwark of defense by adopting here a

²⁷ AT&T Comments at 6. Verizon asserts that the Brand X court "expressed deep skepticism about arguments that broadband Internet access could instead be said to include the offering of a telecommunications service...." Verizon Comments at 5. All the Brand X court said was that the Commission's interpretation was "at least reasonable...." Brand X, 545 U.S. at 990.

²⁸ And that the act of judicial activism that killed UNE-P also caused the earlier incarnation of AT&T (along with MCI) to fold its tent and allow itself to be sold to the victorious regional Bell operating companies ("RBOCs").

²⁹ AT&T Comments at 13.

bright-line view that the transport of bytes over a network constitutes a telecommunications transport service.³⁰

MYTH 4: RECLASSIFICATION WILL KILL INVESTMENT.

Independently, but also flowing from the first three myths,³¹ and possibly resounding more loudly in the public and political arenas, the network owners and their followers have asserted that classification of “broadband”³² as a Title II service will disincent investment in broadband.³³ And in these uncertain times, with investment in broadband and the services available over broadband viewed as the “best way” out of the economic depths and doldrums, that disincentive is obviously a “Bad Thing.”

This is not merely a self-fulfilling prophecy. It is more like a threat from the network owners, who do not wish to be regulated, so let it be known that if there is regulation, they will cut back or cease investment. So the investment advisors report the threat³⁴ (not characterizing it as a threat, of course), and the statement resonates throughout the political arena.³⁵ Free Press, among others, reports in its comments that

³⁰ It should be clear that NATOA’s desire for “stability, predictability, and flexibility” (NATOA Comments at 3) is probably futile, as least with regard to the first two characteristics. But NATOA does correctly point out that “[u]nder the [Title I] option, entities would have an incentive to file piecemeal lawsuits against every individual regulation that was not in their best interest. Under the [Title II and Third Way] options, any lawsuit would have to be against classifying broadband as a telecommunications service in general and would, therefore, be decided in a more efficient manner at the outset of the Commission’s plans.” NATOA Comments at 4.

³¹ As AT&T characterizes it, reclassification “even when accompanied by forbearance and portrayed a ‘third way’ alternatives to maximal dominant-carrier regulation, would create **enormous investment-detering regulatory uncertainty.**” AT&T Comments at 2 (emphasis added).

³² Typically treated as a uniform service, as part of “the Internet.”

³³ ITTA Comments at 3-11; NCTA Comments at 4; Qwest Comments at 2, 8.

³⁴ See AT&T Comments at 2-4; Qwest Comments at 2.

³⁵ See AT&T Comments at 4, n.15; Verizon Comments at 93.

more sober broadband providers and industry analysts recognize that a targeted Title II classification will not impair investment.³⁶

Of course, there are no guarantees that if the proposal to regulate is withdrawn, or if the final decision is to return to the uncertainty of Title I regulation (as discussed above), that the investment will actually occur. After all, Verizon pulled back from its FiOS deployment before the *Comcast* decision was issued and the current proceeding was opened.³⁷

Threats by the vertically integrated incumbents to withdraw their future investments in the network are almost laughable. Regardless of actions by the FCC in this or other related dockets, it is highly unlikely the dominant U.S. carriers are ready to walk away from their trillion-dollar networks that make it possible to generate hundreds of billions in revenues from video, broadband data, Internet access, mobility services, and, yes, even plain old voice telephony that is still preferred by millions of users. The “chill on investment” argument is empty chest-pounding intended to deceive and mislead decision-makers. Continued growth in revenues and profits in the broadband markets is dependent on maintaining the incumbents’ existing base and increasing their investment.³⁸

If broadband is reclassified, and if the proper level of regulation is applied, there will be investment by the network owners (as demand for the services continues to grow).

³⁶ Free Press Comments at 97-99; see also XO Comments at iii.

³⁷ See http://www.syracuse.com/news/index.ssf/2010/04/some_cny_communities_wont_get.html.

³⁸ See the annual reports of AT&T and Verizon.

But there will also be investment from the competition unleashed by reasonable restraints on the SMP of the network owners.³⁹

MYTH 5: YOU CANNOT SEPARATE BROADBAND INTO TRANSMISSION AND INFORMATION COMPONENTS.⁴⁰

In *Brand X*, Justice Scalia, in opposing the Commission’s determination that cable modem service was a unitary information service, wrote his justly-famous pizza analogy:

If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common “usage” would prevent them from answering: “No, we do not offer delivery – but if you order a pizza from us, we’ll bake it for you and then bring it to your house.” The logical response to this would be something on the order of, “so, you *do* offer delivery.” But our pizza-man may continue to deny the obvious and explain, paraphrasing the FCC and the Court: “No, even though we bring the pizza to your house, we are not actually ‘offering’ you delivery, because the delivery that we provide to our end users is ‘part and parcel’ of our pizzeria-pizza-at-home service and is ‘integral to its other capabilities.’” Any reasonable customer would conclude at that point that his interlocutor was either crazy or following some too-clever-by-half legal advice.⁴¹

The network owners continue to argue that you cannot separate the delivery from the pizza (and that regulating the delivery necessary means regulation of the pizza toppings).

MetroPCS Communications, Inc. (“MetroPCS”) says that looking at “the Internet” as a unitary service “tracks the Supreme Court’s holding in *Brand X* that a service is defined

³⁹ See Economic and Technology, Inc., “Regulation, Investment and Jobs: How Regulation of Wholesale Markets Can Stimulate Private Sector Broadband Investment and Create Jobs” (February 2010).

⁴⁰ See, e.g., AT&T Comments at 67-77; see also *id.* at 96 (addressing the “logical implications for the Internet as a whole....”).

⁴¹ *Brand X*, 545 U.S. at 1007 (Scalia, J., dissenting) (emphasis in original, citations omitted). The fact that “most Internet service providers ... include ... ‘information service’ ... as part of their overall service....” (Americans for Tax Reform Comments at 3) is irrelevant; most pizza parlors offer delivery, but many do not.

by ‘what the consumer perceives to be the integrated finished product.’”⁴² But looking at broadband transmission and content as car parts is as inaccurate as Justice Scalia’s analogy was on the mark. As Free Press states, “Consumers want fast connections at low prices from their broadband providers; any other services are simply incidental.”⁴³

AT&T asserts that:

If the Commission were to reclassify such Internet connectivity services as a “telecommunications service,” its decision would necessarily extend to *IP-based communications through the Internet backbone to all points on the Internet*. Any suggestion that this “third way” proposal would address only the “on-ramps” to the Internet, rather than “the Internet itself,” is incoherent.⁴⁴

Clearly, incoherence is in the eye of the beholder.⁴⁵ AT&T’s view is self-interested and wrong.

It is clearly possible to separate the elements.⁴⁶ Smaller carriers – as opposed to the AT&T, Comcast and Verizon behemoths – offer their broadband transport service as a Title II service.⁴⁷ And regulating broadband transport in no way contravenes

⁴² MetroPCS Comments at 3, citing *Brand X*, 545 U.S. at 990.

⁴³ Free Press Comments at 5; see also Comments of the Center for Democracy & Technology at 1.

⁴⁴ AT&T Comments at 8 (emphasis in original); see also Comcast Comments at 26-30; Americans for Tax Reform Comments at 2-3.

⁴⁵ If there is any incoherence here, it is AT&T’s allegation that “despite the NOI’s pervasive yet unsupported assumption to the contrary, no exigent circumstances support a sea-change in regulatory policy to address *net neutrality* issues now....” AT&T Comments at 12 (emphasis in original). *Comcast* itself is an exigent circumstance.

⁴⁶ See Verizon Comments at 6-7.

⁴⁷ See NECA, et al. Comments at 1-2. The fact that the larger carriers have not chosen common carriage (see Verizon Comments at 7) – based on the Commission’s erroneous prior classification – does not mean that, if the Commission had made the right decision in the first place (or if the Commission makes the right decision now) – the carriers would not be compelled to be common carriers. See *id.* MetroPCS appears to be unaware of this nationwide phenomenon. MetroPCS Comments at 5.

Congress’s “intent to ensure a free market for Internet services ‘unfettered by Federal or State regulation’.”⁴⁸

Thus Time Warner Cable’s assertion that the Commission is looking at reclassification for “broadband Internet access providers”⁴⁹ is looking at the wrong piece and the wrong functionality. Likewise, NCTA’s assertion that this would be interfering with “the vibrant and competitive free market that presently exists for the Internet and interactive computer services....”⁵⁰ Is also looking at the wrong services and the wrong functionality. As NASUCA stated in the initial comments, “It’s the Wires!”⁵¹ Wires are wires, whether they are owned by telephone companies or cable companies,⁵² or someone else. And this means that there need not be Title II regulation of content providers.⁵³

UNIVERSAL SERVICE SUPPORT CANNOT BE PROVIDED TO INFORMATION SERVICES

The network owners argue, in support of their arguments against reclassification, that the issues the Commission identifies with universal service support for broadband are *de minimis*.⁵⁴ They are wrong.

⁴⁸ Time Warner Cable Comments at ii, quoting 47 U.S.C. § 230(b)(2).

⁴⁹ Time Warner Cable Comments at iv. It is not the “use” of broadband transmission (id.), but the **providing** of transmission that makes the difference.

⁵⁰ NCTA Comments at 35, quoting 47 U.S.C. § 230(b)(2).

⁵¹ NASUCA Comments at 7-11.

⁵² See NCTA Comments at 10-12.

⁵³ See Verizon Comments at 4. The Broadband Institute of California and the Broadband Regulatory Clinic “BBIC/BRC”) provide an interesting alternative characterization of the separation as between “data in transit” and “data at rest.” BBIC/BRC Comments at [8-9].

⁵⁴ Comcast refers to the earlier arguments of NCTA and AT&T, and need not be addressed separately. Comcast Comments at 6.

Let us begin with the definition: “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.”⁵⁵ And that paragraph states further that “[t]he Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which **such telecommunications services**” meet certain criteria.⁵⁶ The fact that the following paragraph refers to modifications of the definition of “the **services** that are supported”⁵⁷ (emphasis added) cannot change the fact that those services are specifically defined to be telecommunications services. Likewise, reference to § 254(d)’s requirement of “specific, predictable and sufficient mechanisms ... to preserve and advance universal service...”⁵⁸

Although it is true that the definition is to evolve,⁵⁹ the evolution is nonetheless one of **telecommunications** services. And it is true that Congress had an interest in promoting access to advanced services,⁶⁰ but Congress limited **support** to telecommunications services.

⁵⁵ 47 U.S.C. § 254(c)(1) (emphasis added).

⁵⁶ (Emphasis added.) Among the criteria, of course, is whether these telecommunications services “are being deployed in **public telecommunications networks by telecommunications carriers...**” 47 U.S.C. § 254(c)(1)(C).

⁵⁷ AT&T Comments at 23 and NCTA Comments at 39, both citing 47 U.S.C. 254(c)(2).

⁵⁸ See Qwest Comments at 40.

⁵⁹ AT&T Comments at 23.

⁶⁰ NCTA Comments at 38; Verizon Comments at 22; Qwest Comments at 40; Comments of Vonage Holding Corp. (“Vonage”) at 7.

AT&T's citation to *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999)⁶¹ is unavailing. In arguing that the Fifth Circuit authorized § 254 support for non-telecommunications carriers, AT&T overlooks the fact that the Commission argued, and court also tied its ruling to, §§ 254(c)(3) and (h)(1)(B), which specifically refer to support for "services," not just telecommunications services.⁶²

NCTA argues that because, under § 254(h),

the Commission has made clear that support is available "in a place of instruction," and not just on school property[,] ... [i]t would be a logical extension of these policies to provide E-rate support for broadband services to the homes of elementary and secondary students, since the use of broadband services for educational purposes today extends beyond the physical boundaries of the school and reaches into the home. In addition, relying upon Section 254(h) to underpin universal service support for residential broadband service would also be consistent with recent Commission orders relaxing the requirement that E-rate funding must be strictly limited to educational purposes.⁶³

This stretches logic almost beyond recognition. Why would not the "educational" use of broadband for education also not extend to coffee shops and public parks? On the other hand, how could the Commission (or anyone else) ensure that the broadband being supported in homes was being used only for educational purposes, and not for games, Internet shopping, or other purposes?⁶⁴ (It is hoped that there is some such assurance in schools.)

Finally, AT&T's and Verizon's citations to § 1 and § 706 of the Act as the basis to allow universal service funding for broadband⁶⁵ relies on the same extension of

⁶¹ See AT&T Comments at 23-24; see also ITTA Comments at 13, NCTA Comments at 38.

⁶² *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d at 441.

⁶³ NCTA Comments at 41.

⁶⁴ And how could one ensure that broadband was being extended only to the homes of "elementary and secondary students," and not to the homes of childless couples, the elderly, or school drop-outs?

⁶⁵ AT&T Comments at 24-27; Verizon Comments at 23-24.

ancillary authority with regard to broadband that the D.C. Circuit rejected in *Comcast*. The idea that providing funding for broadband capex and opex is the same as removing barriers to infrastructure investment⁶⁶ confuses the direction of the relief.⁶⁷

RECLASSIFICATION WILL NOT CAUSE A CONSTITUTIONALLY-SUSPECT TAKING

In what almost seems a make-weight argument, which nonetheless will likely turn up when the network owners challenge a Commission decision to reclassify, there are allegations that reclassification will represent a “regulatory taking” that will “expose the public fisc to the risk of just-compensation liability.”⁶⁸ AT&T states:

A regulatory taking occurs when government action causes significant economic harm that interferes with settled, investment-backed expectations, particularly where the action is extreme and unjustified. All of the factors for a regulatory taking are met here. First, the proposed reclassification would plainly interfere with substantial investment-backed expectations. As discussed, the industry has long operated on the explicit understanding that the Commission meant what it said when it classified broadband Internet access as an integrated information service. And based on such assumptions, broadband providers have invested hundreds of billions of dollars of private capital in expanding their networks and deploying technology and new services.⁶⁹

⁶⁶ AT&T Comments at 26; see also Verizon Comments at 22-23.

⁶⁷ Comcast does assert that the Commission has “a theory” that allows the extension of ancillary authority to § 254. Comcast Comments at 7, citing *See In re Universal Serv. Contribution Methodology*, Report & Order & FNPRM, 21 FCC Rcd. 7518 ¶¶ 46-49 (2006) (“*VoIP Universal Service Contribution Order*”), *aff’d sub nom., Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1241 (D.C. Cir. 2007). Requiring USF contributions **from** interconnected VoIP providers is quite a different thing from providing USF support **to** broadband providers. Notably, the *Vonage* court did not address this theory. See 489 F.3d at 1241.

⁶⁸ AT&T Comments at 109.

⁶⁹ *Id.* at 110 (footnotes omitted).

“Interfering” with the investment is one thing; NCTA argues that such regulation “inherently diminishes the value of ISPs’ facilities and investment.”⁷⁰ Of course, it is AT&T (and the other network owners) who argue that this action is “extreme and unjustified.”⁷¹

AT&T cites two cases as authority for its position: *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (“*Penn Central*”) and *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984).⁷² It should be noted that in *Penn Central*, the Supreme Court rejected a takings argument, and its explanation deserves quotation at length:

The question of what constitutes a “taking” for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the “Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” . . . this Court, quite simply, has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely “upon the particular circumstances [in that] case.” . . .

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from

⁷⁰ NCTA Comments at 34.

⁷¹ AT&T also asserts that Title II classification would constitute a taking if it “required providers to support services they would otherwise have excluded – as could be the case, for example, if AT&T were prohibited from exercising discretion concerning the applications that are supported on its IP platform.” AT&T Comments at 110, n. 187. That is exactly the bottleneck control that requires Title II classification.

⁷² *Id.* at n.186.

some public program adjusting the benefits and burdens of economic life to promote the common good. “

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,” ... and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. ...

More importantly for the present case, in instances in which a state tribunal reasonably concluded that “the health, safety, morals, or general welfare” would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. ... Zoning laws are, of course, the classic example, ... which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.⁷³

The availability of broadband service is obviously bound up with the general welfare, sufficient to justify reclassification to prevent the network owners from exercising a stranglehold on the services transported over those networks.⁷⁴ Qwest’s citation to *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), which included a successful takings argument,⁷⁵ does not change this principle. Indeed, the facts in *Kaiser Aetna* that governed the taking are fundamentally different from the network issues here.⁷⁶

The second case cited by AT&T, *Ruckelshaus v. Monsanto*, establishes a compensable taking as one involving a “reasonable investment-backed expectation.”⁷⁷

⁷³ *Penn Central*, 438 U.S. at 124-125 (citations omitted).

⁷⁴ *Penn Central* decimates Verizon’s argument (at 91) that use for a public purpose is dependent on the property owner’s good will.

⁷⁵ Qwest Comments at 33-34.

⁷⁶ *Kaiser Aetna*, 444 U.S. at 178-179 (a pond that “prior to its improvement ... was incapable of being used as a continuous highway for the purpose of navigation in interstate commerce. Its maximum depth at high tide was a mere two feet, it was separated from the adjacent bay and ocean by a natural barrier beach, and its principal commercial value was limited to fishing.... It consequently is not the sort of ‘great navigable stream’ that this Court has previously recognized as being ‘[incapable] of private ownership.’ ... And, as previously noted, Kuapa Pond has always been considered to be private property under Hawaiian law.”) (citations omitted).

⁷⁷ *Ruckelshaus v. Monsanto*, 467 U.S. at 1005-1006.

How much of the owners' investment in broadband networks⁷⁸ was based on a "reasonable" expectation that the networks would stay forever as Title I services? And how much was dependent on their assessment of the public desire and need for the services? One cannot just look at the level of investment **after** 2005 and the Brand X decision, of course, because whatever expectations the owners had at that point were more than matched by public demand.

And, of course the network investment has not been exclusively investor capital. Network owners have received federal and state high-cost fund support, schools and libraries fund support, and price cap regulation trades such as Chapter 30 of the Pennsylvania Public Utility Code.⁷⁹

Verizon argues that "compelled common carrier status and the resultant Title II burdens would ... necessarily constitute a taking," citing to *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).⁸⁰ It should be noted that *Bell Atl.* involved the "physical taking" of "physical collocation," which the 1996 Act subsequently required the ILECs to provide. Verizon's argument boils down to the same as AT&T's: Reclassification would violate the network owners' expectations.⁸¹ Verizon also states, "Reclassification of broadband Internet service by compelled common carrier status would violate those [property] rights and investment-backed expectations by forcing network operators to dedicate their network facilities to the use of others on terms to

⁷⁸ AT&T Comments at 111.

⁷⁹ Rural carriers have also received funds from the Rural Utility Service and the American Recovery and Reinvestment Act.

⁸⁰ Verizon Comments at 90; see also Qwest Comments at 30-31.

⁸¹ Verizon Comments at 90; see also *id.*, at 94.

which the operators would not agree.”⁸² Verizon’s unitary view of “broadband Internet service” depends on Myth 5, and also requires an assumption that there are parts of the network that carry only broadband service and no traditional common carrier services.⁸³

NCTA argues that “the regulatory action consists of imposing on a service that has never been deemed a common carrier service and that, indeed, was specifically and repeatedly determined *not* to be subject to common carrier regulation – or, for that matter, to *any* regulation – the comprehensive regulatory framework of Title II of the Communications Act.”⁸⁴ As discussed above under “Myths 1 and 2,” this argument is both historically and legally wrong.⁸⁵

CONCLUSION

In recent weeks, there has been much talk about Commission-sponsored negotiation sessions among members of the industry, attempting to seek a consensus on regulatory or legislative solutions to the current conundrum.⁸⁶ That effort was recently

⁸² Id.

⁸³ See GN Docket No. 09-51, et al., NASUCA Reply Comments (January 27, 2010). NASUCA must also note that Verizon’s assertion that exercise of §§ 201, 202 and 208 authority (although not actually contemplated by the Commission) would “reduce[e] providers’ ability to earn reasonable returns on their infrastructure investments...” (Verizon Comments at 93) has the proposition precisely backwards: Those statutory requirements of justness and reasonableness **include** the opportunity to earn a reasonable return; what the requirements preclude is the carriers’ ability to charge unjust and unreasonable rates that will yield **unreasonably high** returns.

⁸⁴ NCTA Comments at 35.

⁸⁵ Among others, there were T1 service, 1.544 Mb channel service, D3 channel banks, and coaxial video feeds, all provided under both interstate and intrastate tariff authority. There was also Series 8000 interstate channel service, and Vista 10 service.

⁸⁶ See <http://www.bloomberg.com/news/2010-08-04/google-verizon-are-said-to-have-reached-deal-on-how-to-handle-web-traffic.html>.

abandoned, after a reputed (and disputed) announcement of an “agreement” between Google and Verizon.⁸⁷

If there is one thing to be taken away from these events, it is the simple and eloquent statement of Commissioner Copps:

It is time to move a decision forward – a decision to reassert FCC authority over broadband telecommunications, to guarantee an open Internet now and forever, and to put the interests of consumers in front of the interests of giant corporations.⁸⁸

The arguments of the “giant corporations” – mostly the network owners – should be disregarded.⁸⁹ The Commission should reclassify broadband transport as a Title II service.

Respectfully submitted,

/s/ David C. Bergmann

David C. Bergmann
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
614.466.8574
Chair, NASUCA
Telecommunications Committee

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
301.589.6313

August 12, 2010

⁸⁷ See http://www.pcworld.com/article/202694/fcc_calls_off_net_neutrality_negotiations.html and <http://bits.blogs.nytimes.com/2010/08/09/live-blogging-google-verizon-call-on-net-neutrality/>.

⁸⁸ http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-300754A1.pdf.

⁸⁹ The opposition of the Chamber of Commerce of the United States of America to reclassification is clear evidence of “associational capture.”