

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

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52

**REPLY COMMENTS OF
THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

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

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I. INTRODUCTION

On October 22, 2009, the Federal Communications Commission (FCC or Commission) sought public comment on “draft rules to preserve an open Internet.”¹ The draft rules included the transformation of the four policies in the Commission’s *Internet Policy Statement*² into binding rules, and the adoption of two new rules, on non-discrimination and transparency.

The opening comments on these proposed rules present a stark contrast between consumers and entities that use and create innovation on the Internet, and the owners of the networks that transport this content.

The large incumbent network owners and allied parties – AT&T Inc. (AT&T), Verizon & Verizon Wireless (Verizon), CTIA - The Wireless Association ® (CTIA), National Cable & Telecommunications Association (NCTA), Cisco Systems Inc. (Cisco), National Association of Manufacturers (NAM), Competitive Enterprise Institute, *et alia* – assert that this rulemaking is unnecessary and probably illegal.

Just about every *other* commenter in this proceeding, however, agrees that enforceable open network rules are necessary. The users of the network – ranging from content providers like Google and Netflix to pro-democracy, pro-consumer groups like Public Knowledge and Center for Democracy and Technology, and from business and manufacturing interests to competing carriers and network providers that “use” the

¹ *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52, Notice of Proposed Rulemaking, FCC 09-93 (rel. October 22, 2009) (NPRM), ¶ 2.

² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986, 14987–88, ¶ 4 (2005) (*Internet Policy Statement*).

underlying “network of networks” to complete transmission initiated on their own networks³ – all support the rulemaking and its goals, although some have concerns about the legal authority on which the Commission premised its proposed action. Even a large competitive carrier like Sprint Nextel Corp. (Sprint) offers qualified support, and sees “openness” as a key strategy to “address the wealth transfer from independent carriers like Sprint to vertically integrated carriers like AT&T and Verizon.”⁴ The cyber-libertarians at the Electronic Freedom Foundation (EFF) agree with some or all of the goals of the proceeding, but argue that there is no legal basis to implement the proposed rules (a subject we address below). Some competing carriers support the proposed rules but argue that they should only be applied to the largest carriers, and/or with a large carve-out for “managed services.”⁵

In its opening comments, the National Association of State Utility Consumer Advocates (NASUCA)⁶ strongly supported the Commission’s intent and program in this rulemaking. Several commenters – including BT Americas, an affiliate of British Telecom (BT) – have echoed our call to go beyond merely codifying the six principles, and to apply a more sophisticated significant market power (SMP) analysis to determine where the incumbent network owner enjoys SMP and can impose terms and conditions that customers

³ *See, e.g.*, Ad Hoc Telecommunications Users Committee (Ad Hoc) Comments; Covad Communications Company (Covad) Comments, BT Americas Inc. (BT) Comments, XO Communications LLC (XO) Comments, Vonage Holdings Corp. (Vonage) Comments, COMPTEL Comments, Skype Communications S.A.R.L. (Skype) Comments.

⁴ Sprint Comments, at ii.

⁵ *See, e.g., id.* at 37; Covad Comments at 4 *ff.*; XO Comments at 15 *ff.*

⁶ NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts.

may not choose if given the choice under more competitive market conditions.⁷ Some adopt our suggestion that separation principles similar to those adopted in the United Kingdom (U.K.) as well as in the Commission's *Computer II* decision are an important point of reference here, and perhaps the only market structure that makes long-range sense.⁸

In opposing the Commission's Open Internet initiatives, the network owners advance the following arguments, *inter alia*, against the Commission's proposed codification of network neutrality rules:

- the proposed rules are not justified by actual market failure;
- the proposed rules lack legal authority, an argument that has gained new momentum with the D.C. Circuit's decision in *Comcast v. FCC*;
- the proposed rules would violate the First Amendment rights of the carriers;
- the proposed rules would dampen the climate for investment; and
- the proposed rules, especially the anti-discrimination rule, would "ossify" the existing regulatory structure, prevent reasonable network management (RNM), and hamper network operators' ability to bring new services to market.

NASUCA will attempt to address these objections, with particular attention devoted to the Commission jurisdiction, legal authority and First Amendment issues. The questions raised by the D.C. Circuit as to the Commission's legal authority only underline what NASUCA has said throughout: The Commission must focus on the physical infrastructure on which the Internet runs, which in turn would allow the Commission to ground its Open Internet rules firmly in Title II of the Communications Act. The carriers' assertion of a First

⁷ BT January 14, 2010 letter comments, at 2 ("Commission should develop policies that encourage both intermodal and intramodal competition and apply common carrier regulation to broadband providers with significant market power where bottlenecks exist"). See further discussion in Sections III and VI below.

⁸ See discussion in Section VI below.

Amendment right to suppress others' speech, on the other hand, enjoys no such colorable justification, and is particularly distressing in light of the tremendous potential of the Internet as an outlet for speech uncensored by either government or powerful private interests.

Many of the opening comments in this docket refer to other recent and (in many cases) still-open proceedings at the Commission, making clear that the network neutrality issue cannot be viewed in isolation. The legal and factual issues among these proceedings are related, reflecting perhaps that the one converging, interconnected electronic network is becoming a platform for a host of different services. Thus, NASUCA's comments in this docket can and should be read in conjunction with its own and other parties' comments on the National Broadband Plan (NBP) (WC Docket No. 09-51 and related); the NBP's IP-to-PSTN transition inquiry (NBP Notice #25);⁹ Berkman Report (NBP Notice #13);¹⁰ special access rates for price cap local exchange carriers (LECs) (WC Docket 05-25); the Maine Public Service Commission Petition for declaratory ruling on access to dark fiber/line sharing (WC Docket No. 10-14); *High-Cost Universal Service Support* (WC 05-337 and related cases); the petition of competitive carriers regarding network elements pursuant to 47 U.S.C. § 271(c)(2)(B) of the Act (WC 09-222); the petition of Cbeyond regarding access to fiber networks (WC 09-223); *Developing a Unified Intercarrier Compensation Regime* (CC 01-

⁹ NASUCA December 21, 2009 Comments in GN 09-47, 09-51, and 09-137 regarding *Transition from Circuit-Switched Network to All-IP Network*. IP commonly refers to Internet Protocol.

¹⁰ GN 09-47, 09-51, 09-137, *Comments Sought on Broadband Study Conducted by the Berkman Center for Internet and Society*, Public Notice #13, available at http://hraunfoss.fcc.gov/edocs_public/index.do?document=293955, seeking comment on Berkman Center Study entitled *Next Generation Connectivity*, then found at http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf. Since publication of Public Notice #13, the Berkman Center's Report has been finalized and is available as *Next Generation Connectivity, a review of broadband Internet transitions and policy from around the world* (February 2010), available at http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Berkman_Center_Broadband_Final_Report_15Feb2010.pdf (hereinafter "Berkman Final Report").

92), and a host of follow-on intercarrier compensation petitions that seem to be filed on an almost-weekly basis.¹¹

Many of these proceedings concern competition issues, and all parties seem to accept that there is an (inverse) relationship between the amount of competition on the network and the need for network neutrality rules. Because the commenting parties differ on whether that competition exists, they also differ on the need for rules. In its clearest form, the incumbents' argument boils down to the assertion that facilities-based competition exists, or is at least possible. Even if, however, facilities-based competition were to expand beyond the current duopoly,¹² and four or five different facilities-based networks would range over the land doing battle for consumers' favor, would that in itself ensure an open Internet? Indeed, would we still have an "Inter-net," a network of networks, or would each of these four or five operators go their own way? This in itself points to the need for firmly embedded non-discrimination rules in order to preserve network inter-operability, if nothing else.¹³

A common characteristic of the incumbents' arguments against the proposed rules is an *empirical blindness* to facts on the ground. It is a blindness the Commission shared during much of the immediately preceding decade, in first positing an "inter-modal"

¹¹ A recent entry in this pool is the *Petition of Global NAPS for Declaratory Ruling and Preemption of State Commissions*, WC Docket 10-60, filed March 5, 2010. Global NAPs raises, perhaps disingenuously (see NASUCA initial comments in this docket), the question of what is a "net protocol conversion," a question that goes away if the Commission goes back to its *Cable Modem and Wireline Broadband Orders* and clarifies that cable and DSL modems and other such "information services" have a transmission component that is clearly separable and regulable. Regulation is needed because these last-mile transmission facilities owned by the cable and telecommunications incumbents are *de facto* "bottlenecks," where the incumbents can dictate terms and conditions of Internet connectivity.

¹² Even the concept of a duopoly is questionable. While the existence of a last-mile duopoly is an unassailable fact in most places in the country, cable providers remain in need of essential telecommunication service inputs, such as special access from their head-ends to Internet Points of Presence (POPs).

¹³ Kevin Werbach has pointed to the relationship between non-discrimination rules and interconnection rules, suggesting that the Commission would be on firmer ground if it based its rules on interconnection rather than non-discrimination principles, although to a common end. See, e.g., Werbach, *Off the Hook*, 95 Cornell L. Rev. 101 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371222.

competition and suggesting that such competition could be facilities-based when economics suggested otherwise, and then refusing to acknowledge that facilities-based competition had not developed as predicted. Indeed, the plain fact is that neither form of competition envisioned by the 1996 Telecommunications Act – facilities-based or shared network competition – has in fact materialized.¹⁴ The failure to acknowledge this actual state of affairs is discussed further in section III below.

II. CONTINUING CONFUSION ABOUT THE SUBJECT OF THIS PROCEEDING

NASUCA continues to focus on the physical layer of the Internet in its approach to these issues. This means transmission. It means wires, the tangible assets on which the Internet runs. The carriers also realize that this proceeding ultimately is about the physical infrastructure: “[T]he Internet is not some homogenous ‘cloud’.... The Internet is more aptly depicted as a growing, ever-shifting spaghetti tangle of thousands upon thousands of networks.”¹⁵ NASUCA notes that the author of this statement, AT&T, happens to own the largest of those “tangles.”

¹⁴ See Berkman Final Report, *supra* note 10, at § 4.5, p. 137 (“Between [2001] and the spring of 2002, the FCC passed a series of decisions that abandoned the effort to implement open access, and shifted the focus of American policy from the idea of regulated competition within each wire – competition over the copper plant of the telephone company and over the coaxial cable of the cable company – to competition between the owners of the two wires”); compare Selwyn et al, *Revisiting US Broadband Policy* (ETI 2010), available at <http://www.econtech.com/ETIRevisitingusbroadbandpolicy.pdf>, a study that Dr. Selwyn’s company prepared at the behest of a Canadian carrier, MTS Allstream, Inc. While NASUCA does not necessarily agree with every assertion made by Dr. Selwyn’s group, they make a strong, evidence-based case that the Commission’s assumption that deregulation would promote competition and investment was simply wrong on both counts. This report may be read in conjunction with another report by Dr. Selwyn’s company already before the Commission, *Regulation, Investment and Jobs – How Regulation of Wholesale Markets Can Stimulate Private Sector Broadband Investment and Create Jobs*, part of an *ex parte* submission by Public Knowledge, Cbeyond, and a number of other competing telecommunications carriers, including tw telecom, in the National Broadband Plan docket, GN 09-51, available at <http://www.econtech.com/ETIRegulationinvestmentandjobs.pdf>.

¹⁵ AT&T Comments at 21.

The word “tangle,” however, should not be allowed to unnecessarily evoke confusion in a situation that is complex but not impenetrable. Nor should confusion result from the incumbents’ discussion of content delivery networks (CDNs).¹⁶ The ILEC and cable network owners would elevate CDN networks such as Akamai, Limelight, and even Google’s server farms, to the status of competing networks. Again, transmission must be our touchstone. If we distinguish between transmission through the middle of the network and intelligence at the edge of the network, it is easier to place CDN technology in context. None of these “CDN” companies is primarily in the transmission business, although they may purchase (or even own) transmission inputs. Their business, as Akamai’s counsel describes it, is built on a “platform of servers that are at the edge of the network,” and “sophisticated software that allows most popular content to be stored or cached on our servers, and for us to communicate back with the websites who are our customers.”¹⁷ This is sometimes described as “edge caching,” and is offered in an effort to overcome network delays.¹⁸

Further confusion is introduced by commenters’ indiscriminate use of the term “Internet Service Provider” (ISP) to refer to both large facilities-based ISPs, and small non-facilities-based ISPs that are primarily providers of bandwidth and connectivity.¹⁹ AT&T

¹⁶ Verizon Comments at 13, 37; AT&T Comments at 4, 28, 69, 240; NCTA Comments at 6-7, 34-36.

¹⁷ Rough quote of comments of Akamai Deputy General Counsel at Commission’s January 13, 2010 Workshop on Innovation, Investment and the Open Internet, available at <http://www.openinternet.gov/workshops/innovation-investment-and-the-open-internet.html> (at 1:45 mins ff); *see also* Comments of Akamai Technologies Inc. at 12 (“Akamai does not operate at the physical transmission layer, like AT&T and other providers of broadband Internet access service to consumers. Akamai neither operates its own transmission facilities, nor does it control last-mile broadband access as the ILECs and cable companies do”).

¹⁸ *See generally* <http://www.upenn.edu/computing/web/central-host/caching/caching-description.html>.

¹⁹ *See, e.g.,* Verizon Comments at 20 (referring to Wireless Internet Service Providers Association (WISPA) “which represents more than 300 wireless ISPs...”). AT&T informs us that “End users — from residential subscribers to enterprise customers, including content providers—connect to the Internet through the ‘access’ portion of an ISP’s network,” and then in a footnote informs us that “[a]n ISP (‘Internet service provider’) may also operate a Tier 1 backbone, as described previously, or may operate a Tier 2 or 3 backbone that connects to a Tier 1 backbone.” AT&T Comments, at 24 and fn. 26.

tips its hand as to how malleable the vocabulary is in this field: “These comments use the terms ‘broadband Internet access provider’ and ‘ISP’ interchangeably.”²⁰ At page 25 of its comments, AT&T shows us a “schematic diagram of ISP network segments” that includes everything from last-mile to “backbone.”²¹ Clearly the reference is to a facilities-based carrier like AT&T. On the other hand, there are many ISPs that essentially resell and rely on the incumbent LEC’s (ILEC’s) local loop,²² as well as wireless ISPs that are dependent on the ILEC’s middle mile.²³ Again, transmission capability is key to making necessary distinctions. Facilities-based carriers provide primarily transmission; the other ISPs provide primarily bandwidth, connectivity, and what *are* accurately described under current law as information services (webpages, e-mail, etc.). The former are network operators with SMP; the latter are service providers that rely on the large facilities-based incumbents for essential transmission inputs. Network operators and service providers are in very different situations, even if the vertically integrated incumbents combine both functions.

NASUCA believes that the most productive approach in this rulemaking is to focus on the transmission element. That is where the bottleneck is, and is thus the primary threat to Internet openness. As discussed below, a Title II approach to transmission, even including a structural separation of carrier and content, could simplify these proceedings.

²⁰ *Id.* at fn. 26.

²¹ Compare Verizon Comments at 8 (“Internet Service Providers Have Not Been Subject To Regulation – Even in the Days of Dial-up Service”).

²² See, e.g., www.dslextreme.com; www.saber.net. These small ISPs total reliance on the ILECs’ local loop is plainly visible on their websites. On March 24, 2010, dslextreme.com advised its customers that “Some DSL subscribers in the ATT service area of Orange, Anaheim, CA may experience problems connecting to the Internet. Engineers are working to resolve the issue.” A week earlier, dslextreme.com made a similar announcement about “ATT service area of Southern California.”

²³ WISPA Comments at 7 (“Providers with market power (*e.g.*, large carriers with middle mile connectivity) should not be permitted to use over-inclusive network management techniques to hinder competition from other service providers”).

III. ARE THE PROPOSED RULES JUSTIFIED BY MARKET FAILURE?

AT&T argues that “[t]he NPRM cites no actual market failures – because there have been none – to justify its radical change in perspective on the need for regulation,”²⁴ and that the “Commission can resort only to theoretical speculation about ‘problems’ that might someday arise in the future....”²⁵ AT&T continues that “even if there *were* some basis for that speculation, the Commission identifies no reason why heavy-handed prescriptive regulation is needed *now*, rather than in the *future*, if and when any problem actually takes shape.”²⁶ It indicates that the Commission should “intervene in the market only after a demonstration of some concrete need for intervention.”²⁷

CTIA echoes AT&T: “It would be unlawful and unwise for the Commission to change course by adopting prescriptive rules based upon speculative predictions of consumer harm....”²⁸ NCTA asserts that “[b]ottleneck power for system providers has essentially vanished in many markets,” thus eliminating the possibility for consumer harm.²⁹

So why intervene in the market now, and why the urgency? Is market failure real and/or inevitable, or is it speculative? The answer to these questions depends on the definition and metrics of market failure one uses, and on the level of proof required before the Commission finds a market failure. NASUCA submits that, under multiple definitions

²⁴ *Id.*, at 94.

²⁵ *Id.*, at 96.

²⁶ *Id.* (emphasis in original).

²⁷ *Id.*

²⁸ CTIA Comments at 2. CTIA claims that the proposed net neutrality rules “would be unprecedented around the world” *Id.*, p. 27. It cites the U. K., for instance, without mentioning that the U.K. Office of Communication (“Ofcom”) has implemented a much more robust form of neutrality, namely functional separation of carriers from content, imposing essentially and has imposed open access requirements on network providers. It is not clear that CTIA would approve of this approach in the U.S., particularly as it might apply to wireless. See, similarly, AT&T at 87-93.

²⁹ NCTA Comments at 56.

and in multiple places throughout the network, there is both significant market power and the failure of markets to be even reasonably competitive.

Market failure may be defined in terms of specific cases of abuse. The NPRM cites two well-known instances of market-distorting behavior – the *Madison River* case, and the *Comcast* case.³⁰ The network owners would like to keep the focus on these few adjudicated cases,³¹ although other reports of censorship by network operators come to mind.³² The reported cases, however, may be just the canary in the coal mine, warning us what may come when network owners solidify “editorial” control over the networks, as underscored in the discussion of First Amendment issues below.

Moreover, these blocking and censorship cases are not the market failure itself: They are *symptoms* of a failure located in the last-mile and middle mile *transmission* markets that support Internet services. Thus, as BT argues, we should look at the “upstream” market for broadband access, i.e., the physical layer.³³ Here, market failure is defined in the availability of *facilities-based* alternatives. At present, there are simply no viable competitors to the incumbent telco-cable duopoly, a fact Netflix Inc. (Netflix) pointed out in its comments:

The incentives to discriminate or otherwise hinder the workings of an open Internet arise from a lack of meaningful consumer choice in broadband access and from vertical integration among network operators, service providers and content owners. In most parts of the country, broadband access is effectively a duopoly between

³⁰ NPRM at ¶¶ 32, 47 (fn. 113), 123.

³¹ See, e.g., AT&T Comments at 94-95.

³² See, e.g., Liptak, “Verizon Blocks Messages of Abortion Rights Group,” N.Y. Times, September 27, 2007, available at http://www.nytimes.com/2007/09/27/us/27verizon.html?_r=1; compare Fisher, “Verizon flip-flops on censoring ‘unsavory’ political group SMS messaging,” Ars Technica, September 27, 2007, available at <http://arstechnica.com/tech-policy/news/2007/09/verizon-censoring-unsavory-political-group-sms-messaging.ars>; see also Anderson, “Pearl Jam Censored by AT&T, Calls for Neutral ‘Net,’” Ars Technica, August 9, 2007, available at <http://arstechnica.com/old/content/2007/08/pearl-jam-censored-by-att-calls-for-a-neutral-net.ars>; compare Van Buskirk, “Pearl Jam’s AT&T-‘Censored’ Segment,” at http://www.wired.com/listening_post/2007/08/video-pearl-jam/#Replay

³³ BT letter comments at 1-3.

incumbent cable and telephone providers. In addition, the high switching costs associated with changing network operators creates a significant barrier to the effectiveness of any limited competition.³⁴

Nor are Wi-Fi or municipal networks viable facilities-based alternatives. Wi-Fi, like wireless telephony generally, is a last-mile technology. It remains to a large extent dependent on the “special access” lines purchased primarily from ILECs,³⁵ a point made clearly in Sprint’s comments.³⁶ Because the middle mile is often owned by the ILECs, and because the biggest wireless carriers are affiliates of the ILECs, the wireless industry itself is characterized by “growing concentration.”³⁷ Cable is also dependent on ILEC special access for transport from the cable headend to the Internet.³⁸ Another potential facilities-based competitor, municipal broadband, has been inhibited by the network owners’ campaigns against them, and has not emerged as once thought imminent.³⁹

The concerns about the network owners’ market power are shared not just by other content providers, users, and public interest groups seeking to preserve the Internet as a democratic forum, but also by competitive carriers and large enterprise customers.⁴⁰ As BT puts it, the Commission’s policies

have since 2001 led to the maintenance of market power in residential broadband access in many local areas across the US, as well as to monopoly power in facilities-based business broadband services. Coupled with the

³⁴ Netflix Comments at 5

³⁵ See Blevins, *Death of the Revolution: The Legal War on Competitive Broadband Technologies*, 12 Yale J. L. & Tech 85 (2009-10).

³⁶ Sprint Comments at 12-13 and note 37; see discussion of same in Section VI below.

³⁷ *Id.* at 92-95.

³⁸ This may be one reason that, while Time Warner Cable filed comments in this proceeding, TW Telecom did not. TW Telecom, in fact, often lines up on the other side of the ball, joining a coalition that lobbies against the ILECs’ monopoly grip on special access. See <http://www.nochokepoints.org/about-coalition>.

³⁹ Blevins, *Death of the Revolution: The Legal War on Competitive Broadband Technologies*, 12 Yale J. L. & Tech at 103-15.

⁴⁰ See, e.g., Comments of Sprint, XO, Covad, COMPTTEL, Vonage, Skype, *et alia*.

vertical integration of the main broadband access providers this has given rise to concerns about the potential, and indeed the incentive, for such providers to raise additional charges or impose unreasonable restrictions on their customers' Internet use.⁴¹

Vonage also acknowledges this effective lack of competition: "In the best case scenario, retail consumers often only have a choice between two wired broadband providers: an incumbent telecommunications service provider, and an entrenched, incumbent cable operator."⁴² Ad Hoc points out how insidious that power can be, particularly when a competing carrier seeks interconnection with the ILECs: "The negotiation of 'voluntary' interconnection agreements pursuant to section 252(c) ... demonstrates that negotiations between parties with dramatically disproportionate market power resemble the unilateral imposition of adhesion contracts dictated by the party with market power."⁴³

The ILEC consolidation and resulting market failure has, according to some analysts, allowed the ILECs to charge supracompetitive rates and earn supracompetitive profits.⁴⁴ It is a reasonable inference, supported by recent and long-term history, that the same market power which allows the ILECs to act anti-competitively with regard to rates will also allow them to act as private censors in the Internet marketplace, undisciplined by true competition.

This brings us to a third (but perhaps most important) focus of market failure: the customer. One can analyze the results of the "upstream" market failure in terms of downstream market share – what percentage share of the market do the large duopolists have in each geographic locale, zip code, or similar? And what percentage of consumers obtain their broadband from some vendor *other than* the duopoly network owners *or their resellers*?

⁴¹ BT Comments at 1, citing BT Comments in WC Docket 07-52 (June 15, 2007).

⁴² Vonage Comments at 8.

⁴³ AdHoc Comments at 16.

⁴⁴ Selwyn et al, *Revisiting US Broadband Policy*, *supra* note 14, at 22-23, *passim*.

What choices does a consumer have who: (a) is fully informed about actual network practices; and (b) wishes to switch to another provider? Most commenters agreed that choice is predominantly limited to the two duopolists, that – as shown by their comments here – seem to have similar ideas about network management.

Ad Hoc points out a further aspect of market failure at the customer level. Once a customer chooses a broadband provider, “even if broadband Internet access markets were robustly competitive ... that competition cannot constrain the market behavior of broadband Internet access providers toward non-affiliated content.”⁴⁵ This lock-in occurs when customers cannot change networks because of early termination fees (ETFs), sunk costs (modem), and even e-mail addresses.

In the final analysis, the arguments of the incumbent network owners amount to a stunning denial of empirical reality: a failure to even acknowledge the commanding portion of the public network that they control, the conflicts inherent in the vertical integration of their networks and other communications services, and their own history of anti-competitive conduct.⁴⁶ It is urgent that the Commission act promptly to provide some sense of reality and regulatory certainty. There is evidence that Internet entrepreneurs are chilled *right now* by the present uncertainty as to the legal status, price, terms and conditions of future transmission inputs.⁴⁷ NASUCA believes that a clear separation – functional or structural⁴⁸ –

⁴⁵ Ad Hoc Comments at 9-10.

⁴⁶ See, e.g., Werbach, *Separation Anxiety: An American Story*, powerpoint available at <http://www4.gsb.columbia.edu/citi/networkseparation> (summarizing repeated government interventions to curb AT&T’s monopoly power, from the Kingsbury Commitments of 1913 through the Bell System divestiture in the 1980s).

⁴⁷ See, e.g., Testimony of Barbara van Schewick, at *en banc* hearing on broadband and network management practices, available at <http://cyberlaw.stanford.edu/system/files/van%20Schewick%20FCC%20Oral%20Testimony%20April%2017%202008.pdf>; see also van Schewick testimony at Commission’s Innovation, Investment and the Open Internet workshop, *supra* note 17.

would provide the level playing field and the regulatory clarity now lacking. This, in turn, would be a boon to the Internet marketplace, and to all U.S. industry that relies significantly on telecommunications inputs.

IV. DOES THE COMMISSION HAVE JURISDICTION TO ENSURE AN OPEN INTERNET?

The April 6, 2010 decision of the D.C. Circuit Court of Appeals in *Comcast v. FCC*, which rejected the authority relied on by the Commission in enforcing its *Internet Policy Statement* of 2005 through the 2008 *Comcast Order*, has clearly cast this proceeding in a different light.⁴⁹ The Court held that the “Commission has failed to make [the requisite] showing” that enforcement of the policies in its *Internet Policy Statement* was “reasonably ancillary to the ... effective performance of its statutorily mandated responsibilities.”⁵⁰ More particularly, the Court found that the Commission had failed to “link ... the cited policies to express delegations of regulatory authority.”⁵¹

⁴⁸ As referenced in the literature, functional separation refers to the placement of network assets into a “ring-fenced” *division* of the network corporation –“operational separation within BT that would ensure that those responsible for overseeing BT’s bottleneck assets had real incentives to wish to serve other operators in practice and on the ground with the same zeal, efficiency and enthusiasm as they served the remainder of BT’s downstream activities,” whereas structural separation refers to a regime like that of *Computer II* which required that network operation and information services be offered through two separate corporate entities. See Frieden, *What Do Pizza Delivery and Information Services Have in Common*, 32 Rutgers Comp. & Tech. L.J. 247, 291-292, and fn 149 (2006); as to the “ring-fenced” nature of Ofcom solution, see Kiedrowski, *Functional Separation: the UK Experience*, powerpoint presentation available at <http://www.wik.org/content/erc/Kidrowski.%20Tom%20-%20%200408.pdf>.

⁴⁹ April 6, 2010 decision in *Comcast v. FCC*, D.C. Circuit Appeal 08-1291 (available at <http://pacer.cadc.uscourts.gov/common/opinions/201004/08-1291-1238302.pdf>) (Slip Opinion), vacating the Commission’s Memorandum Opinion and Order in *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Application*, 23 FCC Rcd. 13028 (2008) (*Comcast Order*), in which the Commission enforced its *Internet Policy Statement*, *supra* note 2. See also Transcript of January 8, 2010 oral argument in *Comcast v. FCC* (available at <http://static.arstechnica.com/CaseN08-1291ComcastvFCC.pdf>).

⁵⁰ Slip Opinion at 3, quoting *Am. Library Ass’n v. FCC*, 406 F3d 689, 692 (D.C. Cir. 2005).

⁵¹ Slip Opinion at 24. As a threshold matter, we note that the Commission has let itself be placed in this difficult position by attempting to mollify the network owners through use of policies or guidelines instead of final rules. Industry went along with the game until challenged, at which point the owners argued that the

Indeed, the D.C. Circuit may have done the Commission (and Internet users) a favor by specifying “just the kind of connection to statutory authority missing [in the *Comcast Order*].”⁵² The network owners and their associations – Verizon, AT&T, SureWest Communications, NCTA, *et alia*⁵³ –all argued or implied in their opening comments that the Commission lacked **any** authority to implement the rules that it proposes. Most user groups, consumers, public interest advocates, and competitive carriers came to the opposite conclusion; NASUCA joined this latter group, although with a focus firmly on Title II and broadband as a physical transmission facility.⁵⁴ The D.C. Circuit has now made clear that the Title I justification for ancillary jurisdiction set out in the NPRM was not sufficiently grounded in a clear and specific grant of statutory authority.⁵⁵ Here again, a focus on the

Commission had no authority to enforce the *Internet Policy Statement*, and that there was nothing to enforce because there were no final rules, even though the Commission said previously it would enforce the *Internet Policy Statement*. See January 8, 2010 Transcript, *supra* note 49, at 26:20-25 (NCTA argument that *Comcast Order* created new “legally binding set of standards ... that did not exist before”), and 67:2-8 (FCC assertion that it had put Comcast on notice that policy statement would be enforced). This itself demonstrates the need for such rules now, accompanied by the clear and unambiguous statement of Commission authority suggested herein.

⁵² Slip Op. at 25.

⁵³ See, e.g., Verizon Comments at 10 (“no statutory provision gives the Commission any authority – ‘ancillary’ or otherwise – to impose the sweeping rules it proposes. In fact, the proposed rules would violate, rather than implement, Congress’s statutory directives. The rules – and in particular the nondiscrimination requirement – would effectively impose legacy common carrier requirements on Internet access services”); see also the extended discussion *id.*, at 86-130; AT&T Comments at 16-17 (same); SureWest Comments at iv-v (“It is elementary that the Commission only has such authority as is delegated to it by Congress. Yet, the Act itself is generally devoid of any reference to the Internet, except in Section 230. However, Section 230 is merely a general policy statement ... The same is true for Section 706(a)”). NCTA Comments at 24 (“the Commission’s statutory authority to enforce such obligations is questionable at best and is under review by the United States Court of Appeals for the District of Columbia Circuit in the currently pending appeal of the *Comcast Network Management Order*”).

⁵⁴ See, e.g., XO Comments at 19-21 (“XO agrees with the Commission’s determination that it has authority to adopt rules governing the network practices of broadband network providers that control the last-mile bottleneck access to the Internet”).

⁵⁵ Slip Opinion at 3, 24, *passim*, citing NPRM ¶¶ 83-86, where the Commission relied largely but not completely on the Title I rationale of the *Comcast Order*. At ¶ 84, for example, the Commission points to Section 201(b) as “giv[ing] the Commission specific authority ‘to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e] Act’,” thus suggesting that the Commission’s authority can be rooted in Title II. The Court in *Comcast*, moreover, cited Section 201(b) as an argument that it was not going to consider because the Commission had not raised it. Slip Op. at 34 (“Whatever the merits of this position, the Commission has forfeited it by failing to advance it here”). At ¶ 87, the

physical transmission underpinnings of the Internet proves helpful, pointing the way to firmer Title II footing for the proposed rules.

The opening comments of some unaffiliated groups anticipated the D.C. Circuit’s reasoning. The EFF, for example, argued:

The Supreme Court has made it clear that “the Commission was not delegated unrestrained authority” and does not have “unbounded” jurisdiction. Yet the Commission’s theory of ancillary jurisdiction as set forth in the NPRM effectively gives the agency plenary authority to regulate the Internet.⁵⁶

As TxOPC, EFF, and others pointed out, the purported basis of the *Comcast Order* – Section 230(b) – is at best an ambiguous source for broadband rules.⁵⁷

Prof. Werbach has also been skeptical about the Commission’s perception that the brief and ambivalent sentences of Section 230(b) contained the seeds of a national Internet policy which it could then implement under Title I. He delves into the legislative history of Section 230(b) to show that it was in fact intended as a “lead in” to the anti-pornography,

Commission “invites comment on our view that we have jurisdiction over broadband Internet access service sufficient to adopt and enforce the proposed rules, or other rules that commenters propose.” As noted here, NASUCA and others commented that such jurisdiction is found most properly in Title II.

⁵⁶ EFF Comments at 7, citing *FCC v. Midwest Video*, 440 U.S. 689, 706 (1979) (*Midwest Video II*). The Texas Office of Public Utility Counsel (TxOPC) elaborated:

By invoking its ancillary jurisdiction, the FCC has implicitly acknowledged that it has no *express* authority to regulate the Internet. When Courts have affirmed the FCC’s ancillary jurisdiction they have done so when the FCC’s actions were an adjunct to a regulated service under Title II or III of the Communications Act. As noted previously, the *Comcast Network Management Practices Order* currently on appeal has at its core whether the FCC can exercise ancillary jurisdiction over the Internet solely on the provisions contained in Title I of the Act.

TxOPC Comments at 4 (emphasis in original), also citing *Midwest Video II*. (TxOPC is a NASUCA member.) Technically, the Commission’s Order in *Comcast* did not rely “solely” on Title I. It tied its ancillary jurisdiction to a number of provisions in Title II, including 47 U.S.C. §§ 201, 230, 256, and 257. See Werbach, *Off the Hook*, *supra* note 13, 95 Cornell L. Rev. at 122, fns. 116-17, citing *Comcast Order*, *supra* note 49; see also *Comcast v. FCC* Oral Argument Transcript, *supra* note 49.

⁵⁷ On the one hand, Section 230(b) contains what EFF calls “aspirational, hortatory statements of policy” (EFF Comments at 8) *inter alia*, to “promote the continued development of the Internet and other interactive computer services” (47 U.S.C. §230(b)); on the other hand, the statute contemplates an Internet marketplace “unfettered by Federal or State regulation” (47 U.S.C. §230(b)(2)).

child-protection “substantive provisions” in Section 230(c) and (d), and not as a “broad invitation to create a national Internet policy.”⁵⁸

As NASUCA does, Prof. Werbach focuses on infrastructure, and suggests that the Commission re-ground its ancillary authority in the interconnection provisions of the 1996 Telecommunications Act, primarily Section 251, but with a supporting role for Section 256.⁵⁹ Werbach finds a common thread in Section 251’s mandate that carriers interconnect with one another, and Section 256’s direction that requiring the Commission “coordinate network planning by telecommunications carriers and other providers of telecommunications service” in order to “promote nondiscriminatory accessibility”:

[S]ection 251 (requiring interconnection), and section 256 (requiring coordination for interconnectivity) ... have a common theme of open

⁵⁸ *Off the Hook*, *supra* note 13, at 127.

⁵⁹ *Id.* at 159 *ff.* The D.C. Circuit disapproved of the Commission’s reliance on Section 256 because it also contains a proviso that “[n]othing in this section shall be construed as expanding ... any authority [of] the Commission.” Slip Op. at 32, quoting from Section 256(c), which reads in its entirety: “Nothing in this section shall be construed as expanding *or limiting* any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996” (emphasis added). In general, Section 256’s mandate to the Commission to “establish procedures for ... oversight of coordinated network planning” must be read in conjunction with Section 251, which clearly *did expand* the Commission’s authority into (among other things) local interconnection design, which had hitherto been the province of state regulatory agencies. *AT&T v. Iowa Utilities Bd.*, 525 US 366, 371-72 (1999). Prof. Werbach also recognizes that while Section 256 “does not change the scope of existing authority,” nonetheless

Section 256 states that one of its purposes is “to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks.” *This statement recognizes that information services travel via telecommunications networks.* Interconnection standards for those networks can shape the information-services markets that they support. Section 256(c) states that Congress did not intend to reduce (or expand) the FCC’s preexisting authority. That would be the case if a broadband-access provider could use its legal classification to avoid oversight of its behavior entirely.

Werbach, *Off the Hook*, *supra* note 13, at 165 (citations omitted, emphasis added). Werbach’s assertion (at 159) that Section 251’s interconnection requirements “would replace the traditional environment of regulated common carriers” may go too far, however. A better statement of the law may be that the interconnection requirements exist on top of the common carrier obligations, that they adapt the common carrier regime to an interconnected, more competitive environment rather than replace it – and in fact Werbach states as much near the end of his article. See *id.* at 168 (“the 1996 Act layered rules on telecommunications providers, such as the section 251 interconnection mandate, on top of the more intensive but less broadly applicable rules for common carriers”). Prof. Werbach notes that both of these statutes are contained in a subchapter of the U.S. Code entitled “Development of Competitive Markets.” *Id.* at 160.

interconnection. Providers of telecommunications services must interconnect, they must do so through open standards, and they must share infrastructure. There is therefore a clear Congressional vision to promote open, interconnected networks.

...

Section 256 states as one of its purposes, “to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between telecommunications networks.” *This statement recognizes that information services travel via telecommunications networks.*⁶⁰

The latter statement is key to understanding Werbach’s concept.⁶¹ The notion that information services inevitably have a telecommunications “input,” and that the Internet runs largely on what has been called the PSTN, is not new to Commission thinking.⁶²

Although Werbach views the mandate of Sections 251 and 256 merely as an anchor or “link” for ancillary jurisdiction and the implementation of the proposed rules, NASUCA believes that a simpler way to ground the proposed rules, also within this Commission’s power, is to return to the *status quo* prior to the Commission’s 2002 *Cable Modem Order*; when both DSL and (arguably) cable broadband were considered to be Title II telecommunications services.⁶³ Here, such diverse voices as Commissioner Copps and

⁶⁰ *Id.* at 160, 165 (emphasis added).

⁶¹ See Werbach, *The Centripetal Network: How the Internet Holds Itself Together, and the Forces tearing It Apart*, 42 U.C. Davis Law Rev. 343, 398 (2008) (“The Internet and the public switched telephone network ... use the same physical infrastructure”).

⁶² The telecommunications transmission input is acknowledged even where the Commission has not definitively defined a service (such as VoIP) as an “information service.” The Commission has explained that interconnected VoIP services necessarily use telecommunications to reach the PSTN. *In the Matter of Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7539-49, ¶ 41 (“we find interconnected VoIP providers to be ‘providing’ telecommunications regardless of whether they own or operate their own transmission facilities or they obtain transmission from third parties”).

⁶³ As to cable, this is a contested statement. Werbach notes multiple occasions when the Commission had the opportunity to clearly classify cable modem service as a telecommunications service and failed to do so. *Off the Hook*, *supra* note 13, at 135. On the other hand, the Commission had never taken cable modem service out of Title II, and in fact the Ninth Circuit had “ruled that cable modem providers were indeed ‘telecommunications service [providers]’ under the 1996 Telecommunications Act.” Crawford, *Transporting Communications*, 89 B.U.L.Rev 871, 902 (2009), citing *AT&T Co. v. City of Portland*, 216 F.3d 871, 876-80 (9th Cir. 2000).

Justice Scalia agree that the *Cable Modem Order* was a wrong turn. As Commissioner Copps stated in his 2002 dissenting opinion:

The decision the Commission will make today strays far afield from the regulatory construct established by Congress. Congress provided statutory frameworks for cable and for telecommunications carriers under Title VI and Title II, respectively. The statute makes clear that, to the extent that a cable operator serves as a common carrier subject to the provisions of Title II, the regulations prescribed by Title VI do not apply ... [T]he statutory provisions accommodate cable system operators' delivery of new or hybrid services, even where those services may not fit neatly into the existing regulatory classifications. For example, there is widespread agreement that telephony provided over the cable plant is subject to Title II regulation. A powerful case has been made that cable modem services should also be subject to Title II.⁶⁴

Three years later, Justice Scalia followed up with his 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.⁶⁵

⁶⁴ *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*), *aff’d sub nom. National Cable & Telecommunications Ass’n. v. Brand X Internet Services*, 545 U.S. 967 (2005) (“*Brand X*”).

⁶⁵ *Brand X*, *supra*, 545 U.S. at 1007 (Scalia, J., dissenting) (citations omitted, including to *Cable Modem Order*, 17 FCC Rcd at 4823, ¶39). Indeed, paragraph 39 of the *Cable Modem Order* appears self-contradictory: the Commission both *admits* that the purported broadband “information service” is provided “via telecommunications,” and *denies* that there is a “telecommunications service inherent in the provision of cable modem service.” The Commission there relied on a perception that “[a]s provided to the end user the telecommunications is part and parcel of the cable modem service,” i.e., it is inseparable from the information service.

In the related *National Broadband Plan* docket, Public Knowledge has explained why the “inseparability” theory of the *Cable Modem Order*, even if it was correct in 2002, is no longer empirically supported, and why broadband transmission is more properly understood under a the common carriage regime: (1) broadband transmission is becoming ever more fungible, commoditized, and separable from the information services, applications, and content found throughout the Internet;⁶⁶ and (2) the market is much less competitive than the *Cable Modem Order* hoped it would become.⁶⁷

Today, eight years after the *Cable Modem Order*, the Commission also has available to it empirical data from other countries’ experience with functional and/or structural separation. This data ratifies its previous determination in *Computer II* that a “basic transmission service ... limited to the common carrier offering of transmission capacity for the movement of information” is in fact capable of segregation from the information,⁶⁸ and

⁶⁶ January 26, 2010 Public Knowledge Comments in *National Broadband Plan*, GN 09-47, 09-51, and 09-137, at 8 (noting that the “rise of web-based email and ‘cloud computing’” has diminished the importance of services formally associated with the ISP: “email, newsgroups, and the ability to create a webpage”), citing *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, ¶43 (2002) (*Cable Modem Order*). In fact, most ISPs purchase transmission from the incumbent ILECs – see www.dslextrême.com, www.saber.net – and operate almost completely as information services. In either case, the transmission component is separable.

⁶⁷ *Id.* at 10, noting the failure of facilities- or platform-based competition to emerge (consumers still have “*exactly* the same facilities based choice [as] when the Commission established the existing regulatory classification”); compare *Cable Modem Order* at ¶ 73 (“we seek to encourage facilities-based broadband competition”).

⁶⁸ *In re Section 64.702 of the Commission’s Rules and Regulations*, Final Decision, 77 FCC 2d 384 (1980) (*Computer II*), at ¶ 96. Prof. Werbach argues that “telecommunications carrier” under the 1996 Act is “expressly broader than ‘common carrier,’” citing section 153(44)’s mandate that “A telecommunications carrier shall be treated as a common carrier under this chapter *only* to the extent that it is engaged in providing telecommunications services.” *Off the Hook*, *supra* note 13 at 168. Whether “telecommunications carrier” includes categories other than “common carrier” seems a moot question, however, in light of the further statutory definitions. “Telecommunications” is defined by section 153(43) as the “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received ...,” suggesting that a common carrier separation between conduit and content continues to be essential to the statute’s meaning: While common carriage is often associated with telephony, there is no statutory provision limiting common carriage to telephony, and common carrier “telecommunications services” explicitly carry all “information of the user’s choosing. Compare subsections 153(43) (44) and (46). The definition of common carriage is itself circular. See 47 USC § 153(10) (“‘common carrier’ or ‘carrier’ means any person engaged as a common carrier for hire”). *Computer II*’s association of

that the separation of physical conduit from the services and content offered on same would in fact enhance competition in the communications marketplace.⁶⁹ Further antecedents and templates for such a separation may be glimpsed in other sections of the Communications Act.⁷⁰

A common carrier or separation regime under Title II, applied directly rather than under Title I ancillary jurisdiction, has the further virtue of reducing the uninformed chatter about the Commission “regulating the Internet.” A direct Title II approach would make clear that the Commission was *not* regulating the Internet, i.e., the content carried on the wires, but merely the wires themselves, i.e., the underlying transmission network or physical layer. The proposed rules are thus understood as necessary to ensure that broadband carriers’ “telecommunications” – i.e., the “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received”⁷¹ – occur in a non-discriminatory way as required under both Sections 202 and 251.⁷² With this statutory “link” firmly in place, the Commission

“basic transmission service” with common carriage was made prior to the 1996 Act, but we see no insuperable barrier to applying a common carriage regime to broadband telephony within the definitional matrix of the 1996 Act.

⁶⁹ *Computer II*, *supra* note 68, ¶¶ 93 and 202 *ff* (“separate subsidiary requirement operates on the vertically integrated structure of the firms subject to it”); *aff’d sub nom. Computer & Comm’n Ind. Ass’n v. FCC*, 693 F.2d 198, 203-06 (DC Cir. 1982); *see also* discussion of expanded competition following separation in NASUCA’s opening Comments, and in Section VI below.

⁷⁰ *See* 47 U.S.C. § 272 (“separate affiliate required for competitive activities”); *see also* § 259 (ILECs required to “make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested”).

⁷¹ 47 U.S.C. § 153(43) (definition of telecommunications).

⁷² Direct Title II regulation of broadband *transmission* facilities would mean that Section 202’s non-discrimination rules would directly apply. Section 202 provides:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person,

could adopt the further Internet-specific rules set forth in the NPRM. Once Title II was reasserted, the Commission could forbear from rate and other common carrier regulation that proved unnecessary as market conditions developed.

Prof. Werbach rejects the legal separation of “broadband access from its underlying telecommunications platform” as a “disaggregated alternative,” arguing that it would just “reopen the vexing issues that led the Commission down its current path.”⁷³ A look back at the *Cable Modem Order* from today’s perspective, however, reminds us just how often the Commission had to admit that transmission was a necessary and separately describable input to information services.⁷⁴ NASUCA submits that the original “disaggregated alternative,” the *Computer II* separations regime, was factually appropriate, and was abandoned not because of insoluble problems but because of political pressure and due to the Commission’s hope that the competition envisioned in *Computer III* would in fact occur.⁷⁵

The Center for Democracy & Technology (CDT) also suggests that the Commission could reclassify broadband Internet as a telecommunications service under Title II (although CDT sees in this rather more problems than NASUCA does):

Although it would require careful consideration and a Further NPRM, the Commission could establish clear jurisdiction if it were

class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

See also Section 251(c) (interconnection “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory”).

⁷³ *Off the Hook*, *supra* note 13, at 171.

⁷⁴ *See, e.g., Cable Modem Order* at ¶¶ 10 (“subscribers can often send ... content with much less transmission delay”), 13 (“flow of data between cable subscribers and the Internet”), 17 (“Internet connectivity functions enable cable modem service subscribers to transmit data communications to and from the rest of the Internet”), *passim*.

⁷⁵ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986) (*Computer III*), at ¶¶ 2, 42 (“pursuant to the AT&T divestiture ... the unified Bell System has been replaced with a set of companies that increasingly seek to compete with each other”).

to return broadband Internet access service to be regulated as a telecommunications service under Title II. As the Supreme Court has plainly said the FCC can do, the Commission could “change course” and bring Internet access back under Title II, while at the same time forbearing from rate regulation and other unneeded aspects of that regime. Such an approach would provide ample – but appropriately focused – authority for the FCC to issue its proposed neutrality rules.⁷⁶

Apparently alarmed that the record in this proceeding (as well as the D.C. Circuit’s framing of the issues at oral argument) might justify the Commission’s reimposition of Title II classification or duties on broadband network providers, the network owners filed an *ex parte* letter on February 22, 2010 arguing that the Commission was barred from doing just this. Suggesting that net neutrality rules might be part of some “socialist project,” the heads of the largest cable and ILEC networks argued that the Commission is now somehow without power to go back to where it was in *Computer II*.⁷⁷ The “Commission could have no such [factual] basis [to determine broadband is no longer a ‘functionally integrated’ information service, but a stand alone, naked transmission service],” the incumbents argued, because the relevant ‘factual particulars’ of broadband Internet access services have not changed.”⁷⁸ This ignores the experience of the intervening eight years, and the successful experiments in functional separation in other countries that prove that broadband transmission can indeed be

⁷⁶ CDT Comments at 22 (footnote omitted). No attempt to level the broadband playing field will be unproblematic, although we believe the Title II approach is a more efficient and empirically-rooted approach than the previous Title I justification. The D.C. Circuit warns only that the Commission “may not ... depart from a prior policy *sub silentio*” (Slip Op. at 31, citation omitted), but nothing would stand in the way of this Commission setting forth a Title II justification and/or “link” for its proposed rules. See NPRM, at ¶¶ 109 and 115, noting familial relationship of proposed antidiscrimination rule to two different Title II requirements, and asking for “comment on the relationship between the proposed rules and the requirements of Title II of the Act.”

⁷⁷ February 22, 2010 *Ex Parte* communication in GN 09-191, signed by NCTA, CTIA, USTA, TIA, ITTA, Verizon, AT&T Inc., Time Warner Cable, and Qwest, available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020389406>, citing at 5 a pro-net neutrality interview in “the *Socialist Project*. ”

⁷⁸ *Id.* at 7.

treated as a stand-alone service. The incumbents' argument is really not that Title I is more appropriate than Title II, but that the Commission generally lacks the power to do *anything* about the changing broadband landscape, as reflected in AT&T's comment that "[t]he Commission cannot lawfully reverse course now and conclude, in the teeth of all available market data, that the Internet is somehow imperiled."⁷⁹

If the "available market data" shows that the Commission was wrong in its earlier assessment, however, it can and should "reverse course." NASUCA believes that the comments of virtually every competing carrier and carrier group (Sprint, XO, Covad, BT, COMPTTEL, Skype, Vonage), as well as the comments of large enterprises that depend on Internet *transport* as a critical input for their businesses (Ad Hoc, Amazon, Data Foundry Inc., Google, Netflix, etc.), are powerful evidence that the Commission's market predictions have not in fact been correct, and that the incumbents still exercise significant market power over the bottleneck last and middle miles. Third-party studies also confirm that the Commission's predictions have been wrong, and that categorization of broadband facilities as "information services" has not produced the robust facilities-based competition envisioned.⁸⁰

We agree with AT&T (and the Commission⁸¹) that policy should be made on a factual basis. The Commission now has data about the outcome of its market experiment, data that it did not have eight or five or even three years ago, as well as data from the very

⁷⁹ AT&T Comments at 16-17.

⁸⁰ See, e.g., Berkman Final Report, *supra* note 10, at 137-38; *Revisiting US Broadband Policy*, and *Regulation, Investment and Jobs – How Regulation of Wholesale Markets Can Stimulate Private Sector Broadband Investment and Create Jobs*, *supra* note 14, at 3 ("this approach has failed to yield either competition or investment").

⁸¹ NPRM at ¶ 16; see also Statements of Chairman Genachowski and Commissioners Copps and McDowell appended to the NPRM, expressing their insistence on a fact-based inquiry.

different market experiments in Britain and elsewhere, and can hopefully make more informed predictive judgments than it previously did.

V. DO OPEN NETWORK RULES VIOLATE THE FIRST AMENDMENT?

Verizon argues that “the [proposed] rules would raise serious constitutional problems under both the First and the Fifth Amendment’s Takings Clause.”⁸² AT&T flatly asserts that “the proposed rules would violate the First Amendment” rights of AT&T as a network owner.⁸³ NCTA follows suit, alleging that “government attempts to dictate ‘parity’ with respect to private speech are fundamentally illegitimate.”⁸⁴

For the casual reader, the network owners’ contentions are disconcerting and even perverse – an inversion of the commonly-held belief that the Internet’s *most salient characteristic is the free flow of speech and information it enables*:

The architecture of the Internet, as it is right now, is perhaps the most important model of free speech since the founding. This model has implications far beyond e-mail and web pages. Two hundred years after the framers ratified the Constitution, the Net has taught us what the First Amendment means.⁸⁵

As strange as it may seem for a few network owners to assert their speech rights against the speech and information rights of millions of Internet users, this is a long-evolving development:

Although the telephone industry had been regulated as a carrier of others’ goods for most of a century, by the mid-1990s, telephone

⁸² Verizon Comments at 11.

⁸³ AT&T Comments at 235-41; *see also id.* at 16-17 (“Such rules are particularly indefensible when they implicate First Amendment concerns, as these would, by precluding market actors from enhancing particular messages to communicate more effectively with the public. The rules also would create an uncompensated taking of broadband networks in the service of dubious social objectives”).

⁸⁴ NCTA Comments at 50.

⁸⁵ LAWRENCE LESSIG, CODE (1st Ed., 1999), at 167.

companies had assaulted regulations, which confined them to serve as pure vehicles, with a barrage of lawsuits claiming a First Amendment right to provide content as well. Like the cable companies before them, the telephone companies chafed at the restricted role of transporter and moved to embrace a dual function as both content suppliers and carriers. To effect this shift in status, telephone companies claimed they were being unconstitutionally deprived of their right to speak by regulations the government claimed merely constrained the economic structure of the communications industry.⁸⁶

In pursuing this strategy, the large ILECs have followed the path trod earlier by: (a) cable companies that successfully argued that the selection of programs to be carried on their systems (not unlike a shopkeeper's selection of items for the shop's shelves) is legally a form of editorial activity entitled to First Amendment protection;⁸⁷ and (b) businesses generally that have used the First Amendment in successful attempts to overturn all types of consumer protection and economic regulation.⁸⁸ Because this defense, if successful, would almost

⁸⁶ Ross, *First Amendment Trump?* "The Uncertain Constitutionalization of Structural Regulation Separating Telephone and Video," 50 Fed. Comm. L.J. 281, 288-89 (1998) (citations and footnotes omitted).

⁸⁷ See, e.g., *City of Los Angeles v. Preferred Comm'ns*, 476 U.S. 488, 494-95 (1986) (cable owner's putative First Amendment rights trumped municipality's attempt to extract public interest undertakings); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 699-70 (1979) (agreeing that network owners' desire to be free of community access requirements raised "grave First Amendment problems").

⁸⁸ See Symposium, *First Amendment Lochnerism? Emerging Constitutional Limitations on Government Regulation of Non-Speech Economic Activity*, 33 N. KY. L. REV. 365 (2006) (Prof. Katkin, noting that "the Supreme Court and some lower courts have arguably begun to apply stringent First Amendment 'free speech' standards when reviewing the constitutionality of a variety of government efforts to regulate business or economic activities -- often in cases in which the regulations at issue do not appear directly to implicate traditional First Amendment concerns about government censorship"), citing *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (invalidating on First Amendment grounds provisions of the Food, Drug, and Cosmetic Act that prohibited manufacturers from marketing drugs for uses not yet proven safe and effective); see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (rejecting legislation protecting children from tobacco advertising, because "tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication"); see also Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 616-18 (1990), citing *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* 447 U.S. 557, 574 (1980) (First Amendment used to invalidate state regulation banning utility promotion of electricity use during energy crisis), *PG&E v. California Public Utilities Commission*, 475 U.S. 1 (1986), invalidating mandated use of extra space in PG&E billing envelopes for consumer-related messages), as well as First Amendment attacks on SEC disclosure requirements and rules affecting stock offerings cited by Prof. Katkin.

completely bind the hands of this Commission, NASUCA deems it worthy of an extended response.

The cable cases cited above, even if decided correctly on their facts, are limited to the cable network operator as a provider and editor of video programming, and not as the operator of an all-purpose electronic transport system. If the incumbents' First Amendment arguments were to prevail it would lead to the *absurd* result that there would effectively be only two fully enfranchised First Amendment speakers throughout the country: the cable company and the telephone incumbent, with every other speaker dependent on the “editorial” decisions of the network operators in order to exercise the speaker’s own speech and information rights.⁸⁹

⁸⁹ The foremost proponent of this point of view, besides the incumbent carriers themselves, is Prof. Christopher Yoo. *See, e.g., Yoo, Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 Geo. L.J. 245, 286 (2003) (“the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media”); *see also Beyond Network Neutrality*, 19 Harv. J. Law & Tech. 1 (2005), in which Yoo is even more specific about his vision for the fully enfranchised conduit owner:

[E]xisting regulatory tools ...were developed with respect to the person-to-person communications associated with common carriage. As a result they are not well suited to regulating networks used for conveying media content. When content is involved, policymakers have long recognized *the importance of giving the conduit editorial control over the information being conveyed.*”

Id. at 45 (emphasis added), *citing* with approval (at fn. 169) early studies “of how application-aware networks can play editorial functions that help manage clutter and attention costs.” Yoo seems little concerned with the First Amendment rights of individuals attempting to communicate or find information through this conduit, subsuming them under the rubric of the “collective,” and pitting that against what he sees as the specific “autonomy” of the network owner *qua* speaker. *Rise and Demise, supra*, 91 Geo. L.J. at 311 *ff.* For Yoo, it appears that the entire meaning of the First Amendment is locked in the speaker’s autonomy, and only the owner is a “speaker”; he thus views with suspicion any attempt to recognize other “republican, “self-governmental or “instrumental” purposes behind the First Amendment. *Id.*

Yoo’s writings see “scarcity” as an outmoded and discredited justification for government action, and appears blind to the new scarcity represented by the incumbents’ SMP in last-mile and middle-mile facilities; he therefore can posit a grand vision of networks competing against each other, offering “differentiated” products to a passive consumer base as the supreme vindication of the First Amendment. *See, e.g., Spulber & Yoo, Toward a Unified Theory of Access to Local Telephone Networks*, 61 F. Comm. L.J. 43, 58*ff.*; and 111 (2008-9) (attempting to discredit the naturally monopolistic economics of network building, and arguing against unbundled network access as “delay[ing] the emergence of facilities-based competition by deterring investment in alternative last-mile facilities”). Yoo seems not to acknowledge the breakdown of the UNE program, and the failure of any facilities-based competition – beyond the ILEC-cable duopoly – to take its place. *Compare Rise*

In asserting here that the First Amendment protects them, the network owners are seizing on one unfortunate phrase in the NPRM that refers to “access providers’ speech.”⁹⁰ NASUCA vehemently disagrees with the notion, advanced by the network owners and their apologists, that communication network owners *qua* owners have a special speech right.⁹¹ As shown here, ownership of a cable or telephone system in and of itself is not speech. This does not mean, of course, that a cable or telecommunications corporation, under the First Amendment, is not protected in its right to speak on a channel or website on its system.⁹²

It is important to distinguish cable’s role in its early years, when it was primarily a purveyor of unidirectional video programming offered to its customers, from its role today as an all-purpose electronic carrier, offering video, telephony, and broadband. The decisions from that era categorizing cable as closer to the print than the broadcast model, and therefore possessed of First Amendment protection, relied on the cable operator’s *choice* of programs

and Demise, supra at 267 *ff* and 279 *ff* (“analytical” and “technological” critiques of scarcity in the broadcast context).

⁹⁰ The NPRM at ¶ 116 reads in its entirety as follows:

We also seek comment on whether our proposed nondiscrimination rule will promote free speech, civic participation, and democratic engagement. Would discrimination by access providers interfere with those goals? Conversely, would our proposed rule impose any burdens on *access providers’ speech* that would be cognizable for purposes of the First Amendment, and if so, how? Would any burden on access providers’ speech be outweighed by the speech-enabling benefits of an open Internet that provides a non-discriminatory platform for the robust interchange of ideas?

(Emphasis added.)

⁹¹ See discussion in footnote 89, *supra*; see also Yoo, *Architectural Censorship and the FCC*, 78 S. Cal. Law Rev. 669, 673-74 (2005) (structural regulations like “must carry” provisions, ownership restrictions, and even rate regulation demonstrate “how structural regulation can have unintended effects on media content ... [and] represent a form of ‘architectural censorship’”).

⁹² See generally *Citizens United v. Federal Election Commission*, 175 L.Ed.2d 753 (January 21, 2010) (corporations as First Amendment speakers).

for its customers,⁹³ and simply do not apply to cable as a multi-directional broadband transmission conduit.⁹⁴

Even when cable operators provided only unidirectional television, however, the Supreme Court held that the operator's rights were not absolute, and that cable systems *qua* systems could be required to carry the speech of others.⁹⁵ Today, cable systems as broadband carriers do much more than deliver their own video content, they are clearly and primarily a conduit for third-party content. While their video selection still may be viewed (with some effort) as an editorial undertaking, the rest of the system is not about their speech, it is *carriage, transportation, capacity, functionality* – delivered to millions and millions of people. To say otherwise is simply to indulge again in the empirical blindness characteristic of the network owners' arguments.

One must pause here to appreciate the breadth and audacity of the network owners' claims. The incumbents want to be free of any rules that would “compel [them] to carry the messages of *all* [read any] content and application providers,” particularly those competing with the owner for downstream customers, or “bar [their] editorial discretion” (to do what?

⁹³ Compare *Los Angeles v. Preferred Comm'n.*, *supra*; *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (“[Cable] is engaged in ‘speech’ under the First Amendment, and is, *in much of its operation*, part of the ‘press.’”) (emphasis added).

⁹⁴ As the Court in *FCC v. Midwest Video* stated:

A cable system may operate as a common carrier with respect to a portion of its service only. See *National Association of Regulatory Utility Comm'rs v. FCC*, 174 U. S. App. D. C. 374, 381, 533 F.2d 601, 608 (1976) (opinion of Wilkey, J.) (“Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others”).

440 U.S. 689, 701, fn. 9 (1979).

⁹⁵ *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 227 (1997) (*Turner II*).

ensor websites at will?), or “make it more expensive for [them] to speak by necessitating capacity upgrades” (the capacity upgrades promised for the last twenty years?).⁹⁶

Let us be clear: If the cable or telecommunications network owners are allowed to control the entirety of what transpires on “their” networks, that is the end of the Internet as we know it. This is not alarmist, but factual. Today, there is no overt private censorship on the web; if the network owners’ speech views prevail, there will be overt private censorship on the web. The Commission has recognized that the Internet today is a vehicle for ever-expanding information access and reinvention of speech itself.⁹⁷ Current marketplace evidence and the incumbents’ history over the last hundred years support the conclusion that this expansion of speech will be limited, materially distorted, or halted entirely if cable or telecommunications carriers are recognized in their carrier capacity as First Amendment actors.

The Commission first put us on this path in 2002, and continued in 2005, when it decided that certain parts of the embedded electronic communications networks would no longer to be required to offer common carriage.⁹⁸ Economists and competitors have seen the

⁹⁶ See AT&T Comments at 236. Former SBC Chairman Whitacre provided the translation “Now what they would like to do is use my pipes free, but I ain't going to let them do that ...” *Business Week, At SBC It's All About “Scale and Scope”* (Nov. 7, 2005), available at http://www.businessweek.com/@n34h*IUQu7KtOwgA/magazine/content/05_45/b3958092.htm.

⁹⁷ See NPRM at ¶ 75 (footnotes omitted):

Congress has recognized that the Internet “offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” Numerous judicial opinions have noted the Internet’s potential for facilitating speech. The bipartisan Knight Commission recently reported that the Internet has brought about “new forms of collaboration between full-time journalists and the general citizenry,” opening the age of networked journalism. It also observed that “[p]olitical leaders and many government agencies are staking out ambitious agendas for openness,” and “[t]he potential for using technology to create a more transparent and connected democracy has never seemed brighter.”

⁹⁸ *Cable Modem Order*, *supra* note 75, 17 FCC Rcd at 4798, *aff'd as. Brand X*; *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC No. 05-150, FCC Rcd 14853

consequences of this in diminished competition,⁹⁹ and legal scholars have noted the threatened balkanization of the public electronic network.¹⁰⁰ In any event, the forbearance from common carrier regulation was a *change* from the then-existing *status quo*, the traditional notion that the only speech on a telecommunications network was that of the subscribers, and that in fact there was a *strict separation* and high wall between the system owner and the subscriber's speech.¹⁰¹

One of the ironies of history is that the first recommendation of President Nixon's 1974 Cabinet Committee Report on Cable Television was that there should be an equally high wall between conduit and content on cable systems, that "control of cable distribution facilities should be separated from control of programming and other services provided over the channels on those distribution facilities."¹⁰² The Nixon Cabinet saw such a separation not as heavy-handed regulation, but as *reducing* the "dangers of governmental intrusion":

We recommend adoption of a policy that would separate the ownership and control of cable distribution facilities, or the means of communications, from ownership and control of the programming or

(2005) (*Wireline Broadband Order*) (DSL modem not common carrier telecommunications service); *aff'd sub nom. Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007).

⁹⁹ Selwyn, *Revisiting US Broadband Policy*, *supra* note 14. See generally BT letter Comments.

¹⁰⁰ Werbach, *The Centripetal Network*, *supra* note 61; *Revisiting US Broadband Policy*, *supra* note 14, Appendix A, *passim*.

¹⁰¹ Comments of Prof. Tim Wu (Wu) at 3-5, tracing birth of telephone regulation to the regulatory scheme in the Interstate Commerce Act of 1887 which "barred 'undue or unreasonable' discrimination both as between customers, 'localities' and forms of traffic"; see also Ross, *First Amendment Trump?*, *supra*, 50 Fed Comm. L.J. at 284 ("nearly a century of statutory and common law excluding common carriers from content control"); *Industrial Radiolocation Service*, 5 FCC 2d 197, 202, ¶ 19 (1966) ("fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and between such points and points on the systems of other carriers connecting with it; and that a carrier provides the means or ways of communication for the transmission of such intelligence as the customer may choose to have transmitted so that the choice of the specific intelligence to be transmitted is the *sole responsibility or prerogative of the customer and not the carrier*") (emphasis added); POOL, TECHNOLOGIES OF FREEDOM (1983) at 172 ("At the maturity of cable, it cannot in a free society be other than a [common] carrier").

¹⁰² See *Cable: Report to the President, 1974* (sometimes called the "Whitehead Report"), at 29, available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/37/1c/5a.pdf.

other information services carried on the cable channels. By separating the distribution function in cable, which is a natural monopoly, from the programming functions, which can be highly competitive, the dangers of governmental intrusion and influence in programming can be avoided while the wide variety of competitors vying for the public's attention can be expected to produce a diversity of programming.

This policy would create an essentially neutral distribution medium, and require control of the medium to be separated from control of the messages on it. The effects of private economic power on the means of distribution would cease to be a danger to the free flow of information, and there would be little need for the continued application, or threatened application, of Government power.¹⁰³

This was a road not taken, however, as the 1984 Cable Act specified that cable television was not to be treated as a common carrier.¹⁰⁴ Cable pressed its advantage and secured the aforementioned rulings that the cable operator *qua* editor was possessed of First Amendment rights.¹⁰⁵

NASUCA submits that a fundamental First Amendment misunderstanding is at bottom of the current attempt to extend to cable and telecommunications incumbents *qua* carriers some sort of speech protection, i.e., an ill-founded belief that constitutional protection extends to the mere *ownership* of a megaphone, printing press, or electronic network -- completely devoid of and apart from any *speech* act.¹⁰⁶

¹⁰³ *Id.* at 20.

¹⁰⁴ 47 USC § 541 (“Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service”).

¹⁰⁵ *Los Angeles v. Preferred Comm., supra; Leathers v. Medlock, supra.*

¹⁰⁶ As CDT states in its comments:

The NPRM asks whether a non-discrimination rule would infringe on the First Amendment rights of broadband providers – an assertion similar to First Amendment claims made by cable companies in the late 1990s in the “open access” debates. This simple answer is “no,” for a number of reasons. Most simply, broadband providers are not engaging in their own speech through the provision of Internet access – they are simply communications conduits, and as such they do not have First Amendment objections to a requirement that they carry all communications. Just as a telephone company cannot challenge a common carriage

*Even if one finds some speech in ownership, however, that is but one side, an individualized, “subjective” side of the First Amendment. The Supreme Court has repeatedly recognized another, “objective” aspect of the First Amendment, one that protects the democratic institution itself, is not specific to an individual, and holds within it the generalized right of citizens to know, to receive information, and to have access to data and opinion.*¹⁰⁷ As the Court stated recently in *Citizens United*:

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. *See Buckley, supra*, at 14-15 ... (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential”). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.¹⁰⁸

This echoes what the Court said forty years earlier in *Red Lion v. FCC*: “It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here.”¹⁰⁹ A generalized right to *receive* information has been developed in a long line of Supreme Court decisions and weighed favorably when balancing competing First Amendment interests.¹¹⁰

requirement under the Constitution, a broadband provider could not overturn a nondiscrimination requirement.

CDT Comments at 31 (footnotes omitted).

¹⁰⁷ Some, such as Prof. Cass Sunstein, refer to objective rights as “positive rights.” CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993) at 47 (“First Amendment, even as currently conceived, is not entirely a negative right. ...[Its] positive dimensions consist of a command to government to take steps to ensure that the system of free expression is not violated by legal rules giving too much authority over speech to private people”); *see also id.* at 77-81 (re positive speech values in other countries); Witteman, *Constitutionalizing Communications: The German Constitutional Court’s Jurisprudence of Communications Freedom*, 33 *Hastings Int’l & Comp.L.Rev.* 95, 125-36 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1540906.

¹⁰⁸ *Citizens United, supra*, 175 L.Ed. 2d at 781-82 (Opinion of the Court, by Justice Kennedy).

¹⁰⁹ *Red Lion v. FCC*, 395 U.S. 367, 390 (1969).

¹¹⁰ *See, e.g., Associated Press v. U.S.*, 326 U.S. 1, 20 (1945) (First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public”); *Grosjean v. American Press Co.*, 297 U.S. 233, 247 (1936) (“dominant and controlling aim [of

Professor Wu connects the proposed network neutrality rules to these free speech values, and does so with a clarity that justifies extended quotation:

I write to describe more precisely the link between Net Neutrality rules and the encouragement of diverse speech in the United States. While the ban on blocking is the most obvious, I suggest that a far more realistic and subtle threat to speech comes from demands for “Internet Payola.”

... The rule [against blocking] makes it illegal for AT&T, for example, to block the website of the Christian Coalition or NARAL.

That ban is important, for it prevents carriers from functioning as the nation’s *de facto* private censors. It prevents the American Internet from becoming the Chinese, where most of the blocking is, in fact, practiced by private companies.¹¹¹

Nonetheless, I would like to suggest that the more subtle threat to speech on the Internet will come from *Internet Payola schemes* – carrier demands for payment to reach listeners.

...[W]hat makes possible such diverse speech on the Internet is the relative *cheapness* of being an Internet speaker; the platform reduces the barriers to entry, we might say, to the marketplace of ideas. But why exactly is it less expensive to be an Internet speaker? One crucial reason is the absence of Internet Payola, also known as *termination fees*. It is the absence of additional fees paid to the carrier in order for a speaker to reach listeners that makes it easy to be an Internet speaker.

... It is underappreciated how important that fact is to the Internet as a speech platform. Blogs could not exist in a world of payola. A non-

British newspaper stamp tax] was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect to their governmental affairs”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-76 (1980), quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) and *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (“In a variety of contexts this Court has referred to a First Amendment right to ‘receive information and ideas’”); *Herbert v. Lando*, 441 U.S. 153, 187-89 (1979) (Brennan dissent) (“great mistake to understand ... the First Amendment solely through the filter of individual rights ... the ‘press and broadcast media’ have played a dominant and essential role in serving the ‘information function’ protected by the First Amendment”) (citations omitted); *Houchins v. KQED*, 438 U.S. 1 (1978) (Stevens dissent) (“The question is whether petitioner’s policies, which cut off the flow of information at its source, abridged the public’s right to be informed about these conditions”).

¹¹¹ Wu Comments at 8 and fn 18, citing JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET, ch. 6 (2006). Although we tend to think of the Chinese government itself as the censor, Wu explains otherwise: “China’s information barrier was built primarily by Cisco ... Chinese officials have ordered Chinese Internet Carriers like China Telecom to deploy Cisco’s equipment as a checkpoint.” *Id.* at 93.

profit website like Wikipedia, which reaches billions, could never afford to reach its audiences if it had to pay a fee to reach, say, AT&T, Verizon and Comcast users.¹¹²

Confronted with the immense social value of the Internet, and with their own obvious self-interest in censoring it, the incumbents play their hole card, the state action limitation.

As Verizon puts it:

The First Amendment does not regulate private parties – it protects them. The First Amendment comes into play only when *the government* imposes restrictions affecting speech. Net regulations therefore cannot be justified on the theory that they further First Amendment rights or values.¹¹³

There are several responses to this. One response is to note that the Commission does not “justify” its proposed regulations on any First Amendment theory. Instead, the Commission correctly notes that it is carrying out its statutory obligations,¹¹⁴ and that it is primarily concerned with preserving the Internet as an “open platform that enables widespread innovation and entrepreneurship.”¹¹⁵ Thus, the proposed rules are justified by the same pro-competitive Title II concerns that animated the Commission’s regulation of last-mile communications facilities prior to 2002, and that still animate its adjudication and enforcement policies with regard to interconnection disputes under Sections 251-52 of the Communications Act. This is the course that Prof. Werbach recommends, essentially placing

¹¹² Wu Comments at 8-9 (emphasis in original).

¹¹³ Verizon Comments at 111 (emphasis in original).

¹¹⁴ NPRM, ¶ 5 (“statutory responsibility to preserve and promote advanced communications networks that are accessible to all Americans and that serve national purposes”) citing 47 U.S.C. § 254(b)(2) (“Access to advanced telecommunications and information services should be provided in all regions of the Nation.”), citing in addition 47 U.S.C. §§ 230, 1302, and 1305(k)(2) (“The national broadband plan required by this section shall seek to ensure that all people of the United States have access to broadband capability”). Other countries, however, do rely on the free speech provisions of their constitutions as a positive command to put structures in place that preserve the rights of all citizens to express and inform themselves from the widest variety of information sources. *See, e.g.,* Wittman, *Constitutionalizing Communications*, *supra* note 107, at 125, 138.

¹¹⁵ NPRM, ¶ 8.

the proposed rules within the frame of economic regulation.¹¹⁶ Indeed, the D.C. Circuit recently confirmed that the cable open access statute there under review was “content-neutral on its face because it ‘regulate[d] cable programmers and operators on the basis of the ‘economics of ownership,’ a characteristic unrelated to the content of speech,’” and thus passed the more deferential “intermediate scrutiny” test.¹¹⁷

Which is not to say that First Amendment concerns are not near the surface here. The Commission repeatedly notes that its proposed rules are *consistent* with First Amendment principles.¹¹⁸ Thus, the second response is to balance the alleged First Amendment interests on both sides of this dispute, as suggested by Justice Breyer in *Turner*¹¹⁹: on the one hand, the speech interests, if any, of network owners as carriers and providers of transmission; on the other hand, the speech and information interests of millions of Internet users, as well as the “objective” interest of the United States in protecting its core democratic values.¹²⁰

¹¹⁶ See discussion in Section IV, *supra*, of a Title II underpinning for neutrality regulations, in part as proposed by Prof. Werbach in his article *Off the Hook*, *supra* note 13.

¹¹⁷ *Cablevision Systems v. FCC*, Case No. 07-1425 (D.C. Cir., March 12, 2010), Slip Op. at 10, available at <http://pacer.cadc.uscourts.gov/docs/common/opinions/201003/07-1425-1234601.pdf>, citing *Time Warner v. FCC*, 93 F.3d 957, 977 (D.C. Cir. 1996).

¹¹⁸ NPRM, ¶¶ 4, 23 (“The open Internet has also provided an unprecedented platform for speech, democratic engagement, and cultural development”), 75-78.

¹¹⁹ *Turner II*, 520 U.S. at 227 (Breyer concurrence) (finding that must-carry statute at issue “strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences”). Although the Court inevitably ends up balancing competing speech interests in this sort of a case, the word “balancing” remains a loaded term in First Amendment jurisprudence, implicating the old debate among First Amendment “absolutists” and “relativists.” See, e.g., *Konigsberg v. State Bar of California*, 366 U.S. 36, 61 (1961) (Black, J., dissenting) (“I believe that the First Amendment’s unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the ‘balancing’ that was to be done in this field”); Stembridge, *Adjusting Absolutism: First Amendment Protection for the Fringe*, 80 B.U. Law R. 907, 911-919 (2000) (describing the different strains of absolutism of Justice Black and Prof. Meikeljohn, and noting that “the Supreme Court has never accepted the absolutist position”). Many of the classic “balancing” cases pitted First Amendment “rights” against other interests, whereas with the evolution of First Amendment law and electronic networks the Court is now more prone to see “important *First Amendment* interests on both sides of the equation.” *Turner II*, 520 U.S. at 227.

¹²⁰ An example of an “objective” or “positive” (or “instrumental” as Prof. Yoo would describe it) First Amendment value would be Justice Cardozo’s formulation that “freedom of thought and speech ... is the matrix, the indispensable condition of nearly every other form of freedom.” *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937). See Sunstein and Wittman, both *supra* note 107.

NASUCA submits that even under the “intermediate scrutiny” test advanced by Verizon and AT&T, these principles would also constitute “important or substantial government interests” that would survive that test.¹²¹

CDT’s comments explain why that balancing tilts so much more compellingly in the non-affiliated speaker’s direction than it did in *Turner* (which ultimately did vindicate the non-affiliated speaker), now that the context is the Internet:

Even if the speech rights of broadband providers were arguably implicated [by the proposed neutrality rules], the standards set out in the *Turner* line of “must carry” cases would not be met. Unlike in those cases – where cable companies were exerting “editorial control” over which channels to carry – broadband providers are offering access to the entire Internet, and a non-discrimination principle would not be a content-based imposition on that offering. Moreover, unlike with cable channels, there is no reasonable possibility that broadband users would be confused to think that their ISPs “approved of” or was otherwise associated with all of the myriad websites available on the Internet (and thus the “compelled speech” arguments made in *Turner* would not be present). In any event, the speech burdens that the Supreme Court *upheld* in *Turner* were constitutionally more burdensome than those presented by a non-discrimination rule, and thus such a rule would be upheld even under the “intermediate scrutiny” approach taken in *Turner*.¹²²

There are paradoxes in the confluence of cable and broadband network arguments for First Amendment treatment, that only underscore how absurd these claims are: (1) cable television networks were originally understood, as noted above, as natural monopolies on which common carriage was appropriate;¹²³ (2) until 2005, broadband service offered by

¹²¹ AT&T Comments at 237 and fn 522, citing *Turner I*, 512 U.S. at 662.

¹²² CDT Comments at 31 (emphasis in original).

¹²³ See *Cable: Report to the President, 1974*, *supra* note 102; see also text accompanying note 103. The irony turns cruel when one reads of the Committee’s buoyant hopes for the new media:

Cable offers countless Americans a chance to speak for themselves and among themselves in their own way, and a chance to share with one another their experiences, their opinions, their frustrations, and their hopes.

Id. at 15.

telephone companies over the same wires that provided PSTN transmission, was likewise considered to be common carriage;¹²⁴ and (3) broadband network operators and ISPs have in fact *rejected* exercising the very editorial control that they now claim justifies their First Amendment claims, for fear that they might have “intermediary liability” “[a]s publishers” for the material carried on their systems.¹²⁵

The third response goes to the network owners’ implied and sometimes explicit claims that their censorship is immune from any First Amendment scrutiny under the *state action* doctrine (see Verizon excerpt above), and inquires into the *state action* involved in and essential to the network owners’ proposed ability to privately censor online activity.¹²⁶ As the Internet runs to a very large extent on ILEC wires and coaxial cable, in ducts under public streets, through public and public utility easements,¹²⁷ or hung from poles pursuant to pole attachment statutes,¹²⁸ it becomes clear that the ILECs and their duopoly cable

¹²⁴ The year 2005 is significant because that is when the Commission categorized (or re-categorized) telephone company DSL modems as an information service. See *Wireline Broadband Order*, *supra* note 98.

¹²⁵ *Off the Hook*, *supra* note 13, at 126-27.

¹²⁶ Compare *PUC v. Pollak*, 343 U.S. 451, 462 (1952) (state action found because of pervasive regulation of private streetcar operator, and regulatory review of action in question); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (state action in enforcement of discriminatory deed); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724-25 (1961) (state action in restaurant’s discrimination because of close, symbiotic relationship between public Authority and private business); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (state action in judicial enforcement of libel laws between private parties); *Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967) (state action in statute which allowed private discrimination); *Cohen v. Cowles Media*, 501 U.S. 663, 668 (1991) (state action in judicial enforcement of promissory estoppels between private parties). A badly fractured Court considered this precedent (except for *Cohen v. Cowles*) in *CBS v. Democratic National Commission*, 412 U.S. 94 (1973), but could not muster a majority either way. Only three Justices joined that part of the majority opinion finding no state action, on the grounds that government was neither a partner nor engaged in a symbiotic relationship with CBS. *Id.* at 119. Three other Justices (White, Brennan, Marshall) indicated that they would have found state action, Brennan and Marshall because “the reach of the First Amendment depends not upon any formalistic ‘private-public’ dichotomy but, rather, upon more functional considerations concerning the extent of governmental involvement in, and public character of, a particular ‘private’ enterprise.” *Id.* at 172. Brennan and Marshall also referenced *Red Lion’s* finding that “‘existing broadcasters have often attained their present position,’ not as a result of free market pressures but, rather, ‘because of their initial government selection. . . . the fruit of a preferred position conferred by the Government’.” *Id.* at 175, citing *Red Lion*, *supra*, 395 U.S. at 400

¹²⁷ See, e.g., Cal. Govt. Code § 53066.

¹²⁸ 47 U.S.C. § 224.

competitors would not be sitting on top of one of the largest electronic networks in the world without substantial state action. Network owners also rely on the courts, and/or the state utility commissions in interconnection cases, to vindicate their property, collection, and interconnection rights on an almost daily basis.¹²⁹ It should not be forgotten that the Internet was *all state action* at its inception, sponsored as it was by the U.S. Defense Advanced Research Projects Agency (DARPA), as a “means for researchers and defense contractors to share information.”¹³⁰

Given the pervasive state cooperation necessary to provide broadband, it is not inappropriate for this Commission to apply a “rule of reason”¹³¹ here: Would the proposed rules increase or decrease the amount, diversity, and comprehensiveness of information and opinion available to the public?¹³² *At a minimum*, the speech interests of the few network

¹²⁹ The interconnection regime under 47 U.S.C. §§ 251-52, for example, requires state arbitration and (in conjunction with state laws) adjudication of interconnection and collection disputes between network owners, frequently also involving the dispatch of state attorneys to U.S. District Courts to defend state commission decisions (and effectively vindicate the winning network’s rights). *See, e.g., Verizon v. Peevey*, 462 F.3d 1150 (9th Cir. 2006); *Global NAPs, Inc. v. Mass. Dep’t of Telcoms. & Energy*, 427 F.3d 34 (1st Cir. 2005).

¹³⁰ *See, e.g.,* CHRIS SHERMAN & GARY PRICE, *THE INVISIBLE WEB* (2002) at 1; *see also* Barry Leiner, Vint Cerf, Robert Kahn *et al.*, *A Brief History of the Internet*, at <http://www.isoc.org/internet/history/brief.shtml#darpa> (“A key to the rapid growth of the Internet has been the free and open access to the basic documents, especially the specifications of the protocols”); *see also* <http://www.nitrd.gov/NCOSearch.aspx?SearchText=telecommunication> (ongoing government research in IP/telecommunications issues).

¹³¹ The Rule of Reason is generally applied in an antitrust context. Rahm, *Watching over the Web*, 24 Yale J. on Reg. 1, 28, and fn. 128 (2007), *citing* Justice Brandeis’ iteration of the rule in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (“The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business [and] ... the reason for adopting the particular remedy... because knowledge of intent may help the court to interpret facts and to predict consequences”).

¹³² A First Amendment Rule of Reason would ask whether the remedy or law in question was reasonably calculated to provide more or less information and opinion to the public space. *Cf.* SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 103, at 37 (“Do the rules promote greater attention to public issues? Do they ensure greater diversity of view?”). Here, the First Amendment “absolutists” (*supra* note 119) might object that the proponent of this view was wandering far afield from the Founders’ original intent. To which Prof. Geoffrey Stone would reply:

owners must be balanced against the speech interests of the millions of network users. If the millions' speech and information freedoms mean anything in the digital age, they require (as a threshold matter) ensuring the neutral operation of the transport layer in order to protect this new "model of free speech."¹³³

To protect a democratically constitutive plurality of voices, opinions, and information on next generation networks, lawmakers on both sides of the Atlantic will need the political will to legislate a transport system with "open and standardized interfaces."¹³⁴ This is where common carrier and First Amendment interests meet. Separation of conduit and speech, the physical transport layer and speech, is the first condition of speech in the 21st century.¹³⁵

[T]he Constitution ... defines our most fundamental rights and protections in open-ended terms: "freedom of speech," for example, and "equal protection of the laws," "due process of law," "unreasonable searches and seizures," "free exercise" of religion and "cruel and unusual punishment." These terms are not self-defining; they did not have clear meanings even to the people who drafted them. The framers fully understood that they were leaving it to future generations to use their intelligence, judgment and experience to give concrete meaning to the expressed aspirations.

Stone, "Our Fill-in-the-blank Constitution," New York Times Op-Ed, April 14, 2010. For general overview of literature on Framers' intent (or lack of specific intent) as to the free speech clause, see Powe, *A SYMPOSIUM COMMEMORATING THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION: Scholarship and Markets*, 56 Geo. Wash. L. Rev. 172 (1987).

¹³³ CODE, *supra* note 85, at 167.

¹³⁴ *ERG Consultation Document on Regulatory Principles of IP-IC/NGN Core*, at 96-97. Available at http://www.erg.eu.int/doc/publications/consult_ngo_2008/erg_08_26rev1_consul_ip_ngo_080604.pdf.

¹³⁵ Separation of transport and service/content layers of the Internet is by no means a new suggestion. See, e.g., *Computer II*, *supra* note 70, 77 FCC 2d at 395 and ¶ 28 ("carriers owning such transmission facilities may provide 'enhanced non-voice' services only through a separate corporate entity on a resale basis").

VI. OTHER COMMENTERS ECHO NASUCA’S SUGGESTION THAT THE COMMISSION ADOPT A SUBSTANTIAL MARKET POWER (SMP) TEST, AND CONSIDER A SEPARATION REMEDY WHERE SMP IS FOUND.

Those competing carriers that operate smaller portions of the “spaghetti tangle” network of networks identified by AT&T, and which are in the best position to know about ILEC market power, universally ask the Commission to adopt some sort of market power analysis and remedy that would protect them from the power of the incumbent network owners.

BT, which operates under a functional separation scheme in Britain, argues that the Commission should address “upstream access bottlenecks both in the residential and business service markets,” and should “apply common carrier regulation to broadband providers with significant market power where bottlenecks exist.”¹³⁶

Sprint also sees “anti-competitive upstream markets,” particularly in “the price we must pay incumbent LECs for the special access facilities we need to connect our base stations with our mobile switching centers.”¹³⁷ These “backhaul facilities constitute

¹³⁶ BT Americas January 14, 2010 letter comments, at 1-2. NASUCA’s opening Comments (at 19-20, and fn. 67) set out the definition of “significant market power” found in the EU Framework Directive: “A position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.” What this means in practice, however, is considerably more complex. Some cite the inverse corollary – “the Framework Directive allows such ex ante regulation of telecommunications carriers *only where* there is a firm with ‘significant market power.’” Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 Yale J. Reg. 55, 96 (2007) (emphasis added) (noting that “France recently put the Framework Directive into practice in deregulating the retail rates of France Telecom”). NASUCA submits that the large incumbent networks are in fact acting “independently of competitors, customers and ultimately consumers,” as reflected by the almost unanimously dissatisfied comments of competitors and consumers in this docket. Compare Ofcom findings of SMP in multiple retail and wholesale offerings in BT’s network, in *Final Statement on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002*, published September 22, 2005, available at http://www.ofcom.org.uk/consult/condocs/statement_tsr/statement.pdf (2005 *Final Statement*), at Appendix A (Undertakings), ¶¶ 5.4 ff.

¹³⁷ Sprint Comments at 12-13, and note 37, clarifying that the reference is to “backhaul facilities” in a “range of capacity levels, speeds and technologies, from TDM-based DS1 to packet-based Ethernet circuits.”

‘bottleneck facilities’,” as wireless carriers most often “have no competitive alternatives to the ‘special access’ backhaul facilities that incumbent LECs provide.”¹³⁸ This echoes the conclusion reached by Ofcom with regard to the backhaul market in the U.K., which led Ofcom to include backhaul facilities in the functionally separated network assets now controlled by Openreach.¹³⁹

Prof. Wu places the proposed non-discrimination rule into context of historical non-discrimination and separations rules: These rules are not “in some sense radical, unprecedented or beyond anything the Federal Government has done before,” but rather “similar to rules that have governed communications since 1910.”¹⁴⁰ He implicitly makes the point that the functional separation concept would in fact allow the network operators more freedom than they had under *Computer II*, translating *Computer II*’s “maximum separation” remedy into today’s terms: “[T]he *Computer Inquiries* would, in today’s context, bar the telephone or cable companies from using any of their existing network equipment (routers, etc.) to help a subsidiary offer Internet or applications services.”¹⁴¹ Under the Ofcom model, by contrast, BT is allowed to offer retail phone and other services on the network operated by its “Openreach” division.¹⁴²

¹³⁸ *Id.* at 13.

¹³⁹ NASUCA Comments at 21; *see also Impact of the Strategic Review of Telecoms*, published May 29, 2009, available at http://www.ofcom.org.uk/telecoms/btundertakings/impact_srt/impact_srt_fulldoc.pdf (2009 *Strategic Review*) at 8, ¶ 1.33 (noting “Openreach’s new NGN Ethernet product” which Ofcom believes “has the potential to drive competition in the backhaul network as it allows for greater aggregation and development of scale by BT’s competitors”).

¹⁴⁰ Wu Comments at 2-4, *citing inter alia*. the Interstate Commerce Act of 1887 and the Mann-Elkins Act of 1910.

¹⁴¹ Wu Comments at 7.

¹⁴² *See, e.g., 2005 Final Statement, supra* note 136, at ¶ 5.5 (“once equality of access to upstream bottlenecks has been achieved, steps can be taken to remove *ex ante* regulation in downstream retail markets”).

Wu makes another key point: “Many critics of the Net Neutrality rules make the mistake of confusing regulation of the Internet with regulation of the [firms] that *carry* Internet traffic. This distinction is crucial.”¹⁴³ Following this logic, it is also important to remember that the target of functional separation is not the broadband access provider (BAP) or ISP *per se*, but the underlying physical transport as it exists in the last and middle miles, on which the BAP or ISP may operate (of course, if one obtains broadband from, *e.g.*, AT&T and Verizon, these functionalities are fused).¹⁴⁴

Google goes furthest, and is most explicit, in its description of separation remedy as one possible approach to the underlying problem of the incumbents’ control of the network:

The FCC could mandate full structural separation between the incumbent’s transmission services from its other lines of business, as previously required in the *Computer II* decisions. Structural separation of content and conduit also was proposed in the cable context, beginning in the 1970s. By using completely separate subsidiaries, the network provider is required to treat all information, applications and other network overlay services in a nondiscriminatory manner. Detailed oversight and regulation is required to ensure continued nondiscrimination. While largely disfavored in the U.S., this is the preferred approach in many nations.¹⁴⁵

Google continues that there is “well-founded evidence” that regulatory regimes like functional or structural separation “have proven successful at driving network competition, reducing retail prices, increasing broadband speeds, and boosting network-based innovation.”¹⁴⁶ The recent report of the Berkman Center (cited by Google), the subject of this Commission’s Public Notice #13 in the National Broadband Docket, confirms that

¹⁴³ Wu Comments at 6 (emphasis in original).

¹⁴⁴ See discussion in Section II, *supra*, regarding the confusion between facilities-based and non-facilities based ISPs.

¹⁴⁵ Google Comments at 51, *citing Computer II, inter alia* (footnote omitted).

¹⁴⁶ *Id.* at 53.

competition exploded, prices fell, and speed increased when this Commission's British counterpart imposed functional separation.¹⁴⁷ This market test is compelling evidence that a neutrality regime, particularly one structurally anchored, will drive competition, not dampen it.¹⁴⁸

AT&T's comments also reference the Berkman Center report, but in support of the supposed general proposition that net neutrality rules are "out of step with the regulatory policies of other nations."¹⁴⁹ AT&T goes on to say that "[r]egulators in the United Kingdom ... have repeatedly refused calls to interfere with Internet service providers' management of their networks."¹⁵⁰ Indeed, AT&T quotes the U.K.'s Ofcom to the effect that the U.K.'s "*existing regulatory framework* will be sufficient to address issues that arise in relation to network neutrality."¹⁵¹ And there lies the rub: Net neutrality regulations are largely unnecessary where the *existing regulatory framework* ameliorates conflicts of interest inherent in a vertically integrated network operation by a separation of network from services.

¹⁴⁷ Final Berkman Report, *supra* note 10, at 160 ("price of a basket of residential broadband services decreased by per year between 2005 and 2007"). Unbundled local loops went from 200,000 lines in 2005 to over 5 million in 2008. *Id.* See further discussion in NASUCA January 14, 2010 [Opening] Comments in this proceeding, at 21-23.

¹⁴⁸ Functional separation was also mentioned positively in a January 15, 2010 *ex parte* meeting of the Participatory Cultural Foundation, Berkman Center, and others with Commission staff. See *ex parte* notice at <http://fjallfoss.fcc.gov/ecfs/comment/view?id=6015531220>. Separation was also discussed in a January 24, 2010 *ex parte* between Public Knowledge and staff.

¹⁴⁹ AT&T Comments at 88, and fn. 164. AT&T here cites its own Nov. 16, 2009 Comments on the Berkman Center Report, in response to NBP Public Notice #13, *supra* note 3. AT&T there criticizes the Berkman Center for everything from allegedly inaccurate numbers to an alleged conflict of interest, without, however, actually discussing the Berkman Center's conclusion that functional separation, like other open access regimes, is likely to increase broadband speed and penetration, and lower price. Indeed, "functional separation" (or any type of "separation") is mentioned only once in AT&T's comments here (at 25), and not discussed at all. Berkman's response to some of the initial econometric criticisms of its Report is found at <http://cyber.law.harvard.edu/node/5751>.

¹⁵⁰ AT&T Comments at 89.

¹⁵¹ *Id.* at 88, quoting Ofcom, Regulation of VoIP Services: Statement and publication of statutory notifications under section 48(1) of the Communications Act 2003 modifying General Conditions 14 and 18, at 80-81 (Mar. 29, 2007), <http://www.ofcom.org.uk/consult/condocs/voipregulation/voipstatement/voipstatement.pdf>.

In its seminal *Final Statement on the Strategic Review of Telecommunications* in September, 2005, Ofcom described the problem and its remedy:

In fixed telecoms, we concluded that there were enduring economic bottlenecks – part of the network where effective and sustainable competition was unlikely in the short to medium term. Therefore we adopted the principle that regulation should promote competition between competing infrastructures *as deep in the network as such competition was likely to be effective* and sustainable. However we noted that companies who wished to compete on this basis *had to rely on BT for access to parts of the network where competition was not sustainable*. We concluded that in order for competition in fixed telecoms to be effective, BT needed to make such access available *on the same terms as it made it available to itself*: an approach we called equality of access.¹⁵²

In 2005, Ofcom accepted a settlement (the “Undertakings”) offered by BT to potential antitrust claims, which had two essential pillars: functional separation into an independent division of those “parts of the network that are enduring economic bottlenecks”;¹⁵³ and the “equivalence of inputs,” i.e., the sale of wholesale network access to third parties on the same terms as it made available to itself.¹⁵⁴

Four years later, in an “implementation review” entitled *Impact of the Strategic Review of Telecoms*, Ofcom noted the success of the Undertakings, while maintaining a keen eye for where problems still remained.¹⁵⁵ A little over three years after the full implementation of functional separation, Ofcom found that fixed broadband adoption “reach[ed] over 60% of UK households,” up from “41% at the end of 2005.”¹⁵⁶ Unbundled

¹⁵² *2005 Final Statement*, *supra* note 135, at ¶ 1.5 (pp. 1-2) (emphasis added).

¹⁵³ *Id.* at ¶ 7.7.

¹⁵⁴ *Id.* at ¶ 7.6, applying equivalence of inputs to full metallic path facilities, wholesale line rental, backhaul extension services, WAN extension service, and IP streams.

¹⁵⁵ *2009 Strategic Review*, *supra* note 139, at ¶ 1.5 (p.3) (“Since our last review, and nearly four years on since the Undertakings were given, our annual evaluation continues to indicate that the net effect of the Undertakings to date, both for competition and consumers, has been positive”).

¹⁵⁶ *Id.* at 4, ¶ 1.7.

lines “have increased from 200,000 at the end of Q4 2005 to 5.5 million at the end of December 2008.”¹⁵⁷ With this increased competition, prices have come down, with residential broadband prices decreasing on average by 16.3% per annum.¹⁵⁸ NASUCA believes that similarly dramatic price reductions could be achieved in this country with a similar separations approach, and that this price factor – more than any other – would lead to substantially higher adoption rates, particularly in low-income and minority groups traditionally on the other side of the digital divide.¹⁵⁹ Again, this is a fairly obvious empirical reality that the 200+ page tomes of the incumbent carriers cannot disprove: Lower price brings greater adoption.

Ofcom’s positive assessment of its own functional separation experiment is echoed by the conclusion of the Berkman Center, which reported that the introduction of functional separation” in the U.K. “introduced new competitors, increased penetration, and decreased prices.”¹⁶⁰ While U.S. incumbents claim that the U.K. case is distinguishable as there was no substantial cable competition,¹⁶¹ the Berkman Final Report notes otherwise:

Unlike France, Britain has a significant cable network. It could, in principle, have been a candidate for regulatory abstention in the name of an effort to support intermodal competition between cable and telephone infrastructure. Instead, Ofcom chose a “both” approach. It enabled competition over the telecommunications/telephone network through unbundling, implemented by functional separation, while also preserving an opening for cable competition.

¹⁵⁷ *Id.* at 59, ¶ 5.67.

¹⁵⁸ *Id.* at 4, ¶ 1.7.

¹⁵⁹ Here in the U.S., data suggests that the opposite is occurring. The Pew Internet Adoption survey shows a “statistically significant” increase in U.S. broadband prices from 2008 to 2009. See <http://pewinternet.org/Reports/2009/10-Home-Broadband-Adoption-2009/3-Connections-costs-and-choices/4-What-people-pay-for-online-access.aspx?r=1>.

¹⁶⁰ Berkman Final Report, *supra* note 10, at 160.

¹⁶¹ *See, e.g.*, November 16, 2009 NCTA Comments on NPB Public Notice #13 (Berkman Report), at 17 (comparison to “countries with a single dominant national provider ... simply ignores U.S. marketplace realities”).

The result has been a three- or more way competition in parts of the country covered by Virgin Media....¹⁶²

Most importantly for our purposes, the Berkman Final Report noted two advantages of functional separation that are applicable to open network issues: (1) “it is expected to be neutral – in the business interest sense – among its customers, and should have less incentive and latitude to favor BT over the competitors”; and (2) “it is easier to monitor and benchmark its transactions, because these all occur at arms length.”¹⁶³

In looking at the history of British regulators’ attempts to address the market power of the dominant incumbent carriers, Berkman drew three conclusions:

1. unbundling and open access are difficult to enforce;
2. functional separation is a potential solution to this difficulty. It requires less direct monitoring of, and intervention in, the day-to-day operations of the dominant incumbent; and
3. the introduction of functional separation had a much more significant effect than the introduction of formal unbundling without effective enforcement.¹⁶⁴

Another voice here makes clear that what is at issue here is not only competing visions for the Internet, but also competing versions of its history. NAM argues that the Internet’s “incredible growth is often attributed to the lack of central administration, which allows organic growth of the network ... A major factor in the success of the Internet is the government’s light regulatory touch.”¹⁶⁵ What NAM overlooks – aside from the empirical evidence of the U.K. approach as described above – is the historical evidence: The Internet established itself as what it is today in the period leading up to 2005, at which point the

¹⁶² *Id.*

¹⁶³ *Id.* at 159. NASUCA would add that if “neutral in the business sense,” then a separation regime is also likely to be neutral as to content and applications.

¹⁶⁴ *Id.* at 161.

¹⁶⁵ NAM, at 2-3.

Commission changed course and decided that service over a DSL modem, *i.e.*, communications signals entering the residence on the same line that carried the residential telecommunications service, was to be re-classified as an information service.¹⁶⁶ In other words, the Internet's foundation was laid on the basis of a common carrier regime, and the Commission's move away from that regime is a large part of why this proceeding is necessary and overdue.

VII. WILL OPEN NETWORK REQUIREMENTS DISCOURAGE INVESTMENT?

From the first page of their comments, AT&T and Verizon repeat again and again the mantra of investment, *i.e.*, that any regulation of the underlying transport mechanisms will cut off future investment.¹⁶⁷

To this, NASUCA has two responses. First, there is no empirical proof that this is so. In fact, the best record evidence – the experience of countries that have implemented effective unbundling, like the U.K. functional separation described above -- supports the opposite conclusion.¹⁶⁸ In the U.K., the introduction of functional separation led to

¹⁶⁶ *Wireline Broadband Order*, *supra* note 98.

¹⁶⁷ AT&T Comments at 2, 10, *passim*; Verizon Comments at 2, 12-20, *passim*; Comcast at *i, ii, iii, iv, 1, 3, 5-9, passim*, NCTA at 8 *ff, passim*; see also Larry Darby, *The Informed Policy Maker's Guide to Regulatory Impacts on Broadband Network Investment*, at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020386376>. Darby repeats and extends the incumbents' arguments regarding investment, and critiques as "frivolous" the claims of Free Press and others that incumbent network owners have actually disinvested in their networks in the years following the effective deregulation of much transmission capacity after 2000. *Id.* at 7 *ff*; compare Selwyn *et al.*, *Revisiting US Broadband Policy*, *supra* note 14, at 6-8, *citing inter alia* ARMIS data to critique the "myth connecting deregulation and broadband investment." As the Commission has discontinued the regular collection of much of the ARMIS data, neither side of this debate can conclusively claim victory, but objective evidence continues to mount that the U.S. international competitive position in broadband deployment is slipping. Moreover, as noted in succeeding footnotes and in Section VI above, the regulation by separation in the U.K. has produced a marked increase in competition and investment.

¹⁶⁸ *See generally* Berkman Final Report, *supra* note 10.

“aggressive investment to build capacity to use [the] unbundled loops.”¹⁶⁹ As BT, the very subject of this experiment, points out, in the years since separation was instituted, separation has been a boon for competition.¹⁷⁰ BT’s Openreach Division is proceeding with great rapidity to build and place into service next generation fiber broadband networks.¹⁷¹ Rather than go along with the program, however, and remake themselves as first-class transmission businesses, the ILECs imply a threat to simply stop investing in next generation networks if they do not get the ruling they seek here.

So NASUCA’s second response to this development points back at a “*National Broadband Plan*,” and the urgent need for the Commission to foster *public and municipal broadband*, despite the cable and telecommunication incumbents’ opposition to such initiatives.¹⁷²

VIII. HOW TO ALLOW REASONABLE NETWORK MANAGEMENT WHILE PROHIBITING ANTI-COMPETITIVE, ANTI-COMMUNICATIVE DISCRIMINATION.

NASUCA does not pretend to bring any unique expertise to bear on the fierce battle waged in the Comments over the proposed new anti-discrimination rule. The incumbents wish either no rule on point, or one with such a vaporous “reasonableness” standard that anything goes. “Reasonableness” in this case needs to be articulated beyond the “unjust and unreasonable” common-carrier standard under Title II (although Title II is a good foundation

¹⁶⁹ *Id.* at 160.

¹⁷⁰ 2009 Strategic Review, *supra* note 139, at ¶ 1.5 (p.3), *passim*; Final Berkman Report, *supra* note 10, at 160.

¹⁷¹ See Openreach schedule for “Super Fast Fiber Exchange Area Rollout” at http://www.openreach.co.uk/orpg/products/nga/downloads/FTTC_%20pot_exchs.pdf; see generally Openreach’s homepage at <http://www.openreach.co.uk/orpg/home/home.do> (tabs for “next generation access” or “NGA”).

¹⁷² See, e.g., July 21, 2009 NASUCA Comments on *National Broadband Plan*, GN 09-51, at 17 *ff.*

on which to build).¹⁷³ Otherwise “reasonable network management” will be used to “facilitate[e] anticompetitive abuses,” an exception that could consume the anti-discrimination rule.¹⁷⁴

NASUCA sees several useful points of reference here. First, the simple rule of fairness espoused by Ad Hoc and others, that a transporting carrier may not discriminate *within categories* of traffic, should be applied:

[T]he exception for reasonable network management [should] never permit discriminatory or preferential treatment of traffic based on the specific identity of a content or application service provider. Thus it would be permissible for an Internet access service provider to manage an *entire category* of network traffic in a particular way but it would be impermissible to manage a particular provider’s traffic, including the Internet access service provider’s own traffic or its affiliate’s, in a discriminatory or preferential manner. For example, an Internet access service provider might need to prioritize all VoIP traffic to avoid latency problems and would be permitted to do so under the rule (provided that such prioritization is reasonable), but it could not prioritize solely the traffic of a particular VoIP provider, such as the traffic provided by an affiliate or “strategic partner” of the Internet access service provider.¹⁷⁵

Second, the discussion of this issue by Prof. van Schewick at the Commission’s panel on innovation opened up a useful dichotomy between “bad discrimination” (operators offer network differentiation to further monetize their networks, without providing user-choice or disclosure) and “good discrimination” (network offers different levels of service and the user decides).¹⁷⁶ Third, where appropriate, a “least restrictive means” test might be applied.¹⁷⁷

¹⁷³ 47 U.S.C. § 202(a) provides that “[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or service for or in connection with like communication service ...”

¹⁷⁴ WISPA Comments at 7.

¹⁷⁵ Ad Hoc Comments at 26.

¹⁷⁶ Innovation, Investment and the Open Internet Workshop, *supra* note 17, at 1:58 ff. NASUCA takes no position on whether the specific mechanisms suggested by Dr. Van Schewick would serve consumers well in the long run, but they are in any event useful models of neutral quality of service (QoS) strategies.

IX. FUNCTIONAL SEPARATION, THE UNITARY NETWORK, & MANAGED SERVICES

Functional or structural separation also provides a useful touchstone in addressing the issue of managed services.¹⁷⁸ The problem of managed services becomes easier to conceptualize and to solve when one starts from the premise of functional separation. COMPTTEL tacitly makes this point, echoing the European Regulators Group in asserting that the “technology framework of the future will give rise to fundamentally different network services riding on a common platform,”¹⁷⁹ that “the same physical networks [will] support multiple different services,” and that “any such distinction [between the Internet and the PSTN] is rapidly fading and will eventually disappear.”¹⁸⁰ COMPTTEL draws different conclusions from these facts, however. Whereas NASUCA believes that the model should be the one that brought us this far, i.e., the common carrier PSTN, COMPTTEL is ambiguous on this point and wants freedom for private network managed services that would “rel[y] upon IP as its Layer-3 protocol, and tunnel[] through or interconnect[] with the Internet.”¹⁸¹

NASUCA’s concern here is the same as the Commission’s: The growth of managed services “might supplant or otherwise negatively affect the open Internet.”¹⁸² As Netflix

¹⁷⁷ WISPA Comments at 7 (“unless network management techniques are required to be narrowly tailored to accomplish the ‘reasonable’ objective, the Commission would be facilitating anticompetitive abuses in the name of ‘reasonable network management’ ...”).

¹⁷⁸ “Managed services,” as used in the NPRM, is only loosely defined. NPRM at ¶ 148 (using the terms “managed” or “specialized” services to describe “Internet-Protocol-based offerings (including voice and subscription video services, and certain business services provided to enterprise customers), often provided over the same networks used for broadband Internet access service, that have not been classified by the Commission”). The very vagueness of this definition argues for the definitional clarity of a separation regime.

¹⁷⁹ COMPTTEL Comments at 6; *compare* NASUCA Comments at 7, citing ERG Report and referencing the “*lingua franca*” of IP that will allow such differentiation of service.

¹⁸⁰ COMPTTEL Comments at 4, and fn. 13.

¹⁸¹ *Id.* at 6.

¹⁸² NPRM, ¶ 149; *compare* Open Internet Coalition (ONC) Comments at 92 (“premature for the Commission to adopt a separate category for ‘managed services’” when “the Notice does not provide much detail as to how

points out, the problem of managed services is especially acute when they are offered by the same operator that provides transmission:

The fact that network operators control the delivery pipes and generate significant revenue from content that travels over those pipes provides both the means and motive for discriminating against new ventures that might threaten revenue sources of the network operators. It is also important to note that these same network operators, through their affiliated video services companies, exercise significant content purchasing power which they can use to extract discriminatory concessions from unaffiliated video content providers.¹⁸³

Public Knowledge also states concerns regarding managed services and bandwidth rivalry:

It would violate the open Internet rule against discrimination for a managed service to “borrow” bandwidth from the provider’s Internet access service. Some of the services that the Commission recognizes as “managed services,” while not themselves Internet services, are delivered over the same pipe as broadband Internet access. An entity offering managed services, therefore, may also be a broadband Internet access service provider, subject to the open Internet rules. It is possible for a broadband Internet access service provider to run afoul of the proposed open Internet rules by allowing managed services to interfere with its Internet offering. Provided that both services have their own dedicated bandwidth and one service cannot interfere with or take precedence over the other, the mere fact that Internet access and other services are delivered over the same wire or fiber does not violate the rule against discrimination. However, a provider of broadband Internet access would violate the rule against nondiscrimination if it allowed a managed service to dynamically “borrow” bandwidth from its broadband Internet offering, thereby reducing the quality of service available to Internet applications in favor of its own. This sort of dynamic sharing of capacity between broadband Internet access and non-Internet managed services would effectively be a form of prioritization, and would create an incentive for broadband Internet access service providers to “skim the cream” off of the top of Internet services and repackage them as managed services, without having to invest in additional dedicated capacity for those new managed services. However, as this form of

such a category would be defined” or set forth any “evidence that there is any application or content that cannot work over an open, best efforts Internet”).

¹⁸³ Netflix Comments at 5 (footnotes omitted).

discrimination already violates the proposed rules, no additional rule is required to prevent it.¹⁸⁴

In the vertically integrated silo, it becomes very difficult to keep track of which entities are in fact using network capacity, and whether managed services are in fact cannibalizing the public Internet. Here again, functional separation offers a structure upon which these conflicts and calls on network capacity would be substantially clearer.

X. FUNCTIONAL SEPARATION AND ENFORCEMENT

Because it is “it is easier to monitor and benchmark ... transactions” on a functionally separated network, as “these all occur at arms length,”¹⁸⁵ enforcement of reasonable anti-discrimination, transparency, and other rules would be easier as well. A separation regime also aids enforcement by eliminating or ameliorating the network owner’s conflicts of interest that often drive the use of network filtering and discrimination techniques.¹⁸⁶

XI. CONCLUSION

NASUCA hopes that reports of the premature death of open access reform in this country are overstated.¹⁸⁷ An open Internet continues to prove itself as an economic necessity on an almost daily basis. To pick one recent headline in this regard: Netflix-

¹⁸⁴ Public Knowledge Comments at 33-34; *compare* ONC, *supra* note 182, at 92-93 (“policies should ensure that ‘managed services’ do not prevent broadband access providers from providing robust, ‘best-efforts’ broadband connections ... and that any such category is not used by network operators as a pretext for discriminating in favor of affiliated services”).

¹⁸⁵ *Id.* at 159. NASUCA would add: if “neutral in the business sense,” then a separation regime is also likely to be neutral as to content and applications.

¹⁸⁶ NASUCA Comments at 14, note 49, quoting Cisco marketing materials for its “next generation” routers: “Regaining control of networks and the services that run on them to increase control of the business ... [in order to] offer new value-added services (far beyond connectivity) for top-line revenue growth.”

¹⁸⁷ *See, e.g.*, Benkler, “Ending the Internet’s Trench Warfare,” March 19, 2010 *New York Times* (“senior commission staff members have essentially conceded in interviews that lobbying pressure from the monopolies is too strong even to begin exploring open access right now”).

spinoff Roku has released a software developers' kit for its set-top box,¹⁸⁸ and the company may soon provide an information and entertainment resource to rival cable operators, an "Internet-based cable company."¹⁸⁹ But if Comcast and the other incumbents succeed in preserving vague and unenforceable Title I "policies" in place of bright-line rules, the viability of such unanticipated "black swan" innovation, tied as it is to the availability of an open and neutral broadband transmission network, is obviously at risk.

Moreover, the importance of a true free speech platform, accessible to all, is perhaps clearer than ever in the wake of *Citizens United*. In striking down limitations on campaign financing, the Supreme Court effectively made traditional broadcasting media the province of the largest moneyed interests in campaign season, if not year-round. With the slow death of the newspaper, and the continued anemic existence of public broadcasting, the Internet may be the last authentically democratic medium. Its fate should not be entrusted to corporations legally required to maximize shareholder profit, which are not only "too big to fail," but also "too big to control."¹⁹⁰

This is not an issue that can wait until future years or future administrations, and it will not adequately be addressed by half-measures. A clear Title II regime provides regulatory certainty, administrative efficiency, and intellectual honesty. Broadband transmission is a commodity, it is an essential input to a large segment of the economy (not

¹⁸⁸ See <http://www.roku.com/developer>.

¹⁸⁹ Schenck, *Roku to have 100 streaming channels within one year* (January 27, 2010), available at <http://www.obsessable.com/news/2010/01/27/roku-to-have-100-streaming-channels-within-one-year/> ("it's starting to look like an internet-based cable company"); Levy/Satariano, *Netflix Spinoff Roku Seeks Cash for 100-Channel Set-Top Service* (January 27, 2010), at <http://www.bloomberg.com/apps/news?pid=20601204&sid=aK2.zQizDac> ("We're not far away from the time when you'll be able to get the same kinds of channels that any cable operator can offer").

¹⁹⁰ See, e.g., February 22, 2010 Incumbents' *Ex Parte*, supra note 77, at 13-14 (the Commission's implementation of net neutrality rules could subject it to "years of ... litigation by re-opening a long-settled debate over arcane regulatory classifications").

to mention social discourse), and it is effectively controlled by incumbent networks with last- and middle-mile market power. NASUCA again urges the Commission to act boldly and re-implement the separation of transport from content, services, and applications that characterized its *Computer II* decisions, in addition to promulgating the proposed rules.

Respectfully submitted,

David C. Bergmann
Assistant Consumers' Counsel
Office of the 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

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