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

In the Matter of	)	
	)	
The D.C. Circuit Court of Appeal Decision in *Verizon v. FCC,* and What Actions the Commission Should Take, Consistent with its Authority under Section 706 and all other Available Sources of Commission authority, in Light of the Court's Decision	)	GN Docket No. 14-28

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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EXECUTIVE SUMMARY

The remand from the D.C. Circuit in *Verizon v. FCC* presents the Federal Communications Commission with an extraordinary opportunity to correct an error committed in 2002: the finding that broadband Internet access service should be classified as an information service rather than a transport service. With that error, the Commission rendered large parts of the 1996 Telecommunications Act inapplicable to broadband. A proper definition of broadband as a transport or telecommunications service would allow the FCC to take actions clearly necessary now.

The record in the proceeding leading is voluminous, and contains the National Association of State Utility Consumer Advocates's (NASUCA's) support for the proper definition. But the remand makes a review and restatement of the legal and policy issues on the Open Internet an urgent priority.

The Commission's earlier rulings answered incorrectly the fundamental question of the function of Internet access providers and whether they act as common carriers in providing the public with access to the Internet. The rulings harmed federal and state telecommunications regulation, and resulted in a loss of public oversight over the electronic network used by millions of Americans. NASUCA's comments show the many ways in which this mis-classification has disserved the public interest.

Consumers have asked this Commission in unprecedented numbers to keep the Internet open. The fundamental role of broadband access service (whether provided

by large incumbent telephone companies or smaller Internet Service Providers (ISPs)) is that of an onramp to the vast store of information, content, and services available on the Internet, that consumers need and desire.

From a policy standpoint, the nation's communications system cannot be anything but common carriage. It cannot be held hostage by the owners of underlying facilities. There is an inherent conflict when the owner of the telecommunications wire also has an interest in the content business.

Contrary to the views of some, treating broadband internet access service as common carriage is not tantamount to "regulating the Internet." As NASUCA has previously asserted, the Commission must focus on the physical infrastructure on which consumers rely to reach the Internet, indeed to the extent of being content-blind.

Now is the time to perform the reclassification. The DC Circuit decision provides a roadmap which the Commission should follow. The decision clearly identifies the 2002 mis-classification as the main problem with enforcement of the Open Internet Rules. As the Internet continues to grow as a vital resource, such rules are more and more necessary, as shown by the Comcast-Netflix dispute and its results.

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COMMENTS OF
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I. Introduction

A. Context of these Comments

On January 14, 2014, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) released its decision in *Verizon v. Federal Communications Commission,* No. 11-1355, which was Verizon's challenge to the "open network" or network neutrality rules adopted by the Federal Communications Commission (FCC or Commission).[1] The Court rejected the Commission's rules, not

[1] *Verizon v. Federal Communications Commission,* Appeal No. 11-1355 (D.C. Circuit, January 14 2014), available at http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/$file/

because the Commission lacked authority to impose them on broadband service (as Verizon had argued), but because the Commission had itself defined broadband out of the "telecommunications service" category where the Commission *would have had* such authority:

> Given that the Commission *has chosen* to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such. Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose *per se* common carrier obligations, we vacate those portions of the Open Internet Order.[2]

On February 19, 2014, the Commission issued a Public Notice that established a new docket (GN 14-28) for comment on the "court's decision and what actions the Commission should take, consistent with our authority under section 706 and all other available sources of Commission authority, in light of the court's decision."[3] On the same day, Chairman Wheeler and all four Commissioners issued statements on the issue,[4] supporting in principle "a free and open Internet."[5]

11-1355-1474943.pdf, and now published at 740 F3d 623 (D.C. Cir. 2014) (*Verizon v. FCC* or D.C. Circuit decision). These Comments will refer the pagination of the Slip Opinion (Slip Op.).

[2] Slip Op at 4 (emphasis added), citing *In re Preserving the Open Internet,* Report and Order, 25 FCC Rcd 17905 (December 2010) (*Open Internet Order*).

[3] Public Notice DA 14-211, "New Docket Established to Address Open Internet Remand" (February 19, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0219/DA-14-211A1.pdf.

[4] The Commissioners' statements, "fact sheet," and "explainer" are available at http://www.fcc.gov/document/statements-fccs-open-internet-rules.

[5] In response to what he characterized as the DC Circuit's "invit[ation] … to act to preserve a free and open Internet," Chairman Wheeler stated that he "intend[s] to accept [the DC Circuit's] invitation by proposing rules that will meet the court's test for preventing improper blocking of and discrimination

In light of the *Verizon* opinion and remand, this proceeding raises the fundamental question of whether Internet access providers in fact act as common carriers in providing the public with access to the Internet. The overarching problem is the Commission's counter-factual[6] and "too-clever-by-half"[7] 2002 *Cable Broadband Order,* which classified cable broadband service as an "information service," rather than a transport or telecommunications service.[8] The *Cable Broadband Order* was followed by further Commission decisions enlarging the "information service" regime to cover all or a good part of the broadband transport infrastructure.[9] The *Cable Broadband Order* was wrong when decided, and the error has become more obvious with each passing year. With that error, the Commission effectively made most of the regulatory framework of the 1996 Telecommunications Act inapplicable to broadband.

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among Internet traffic, ensuring genuine transparency in how Internet Service Providers manage traffic, and enhancing competition." *But see* Clement, "Five Epic Fails of the FCC's New Net Neutrality Plan," available at http://www.freepress.net/blog/2014/02/20/five-epic-fails-fccs-new-net-neutrality-plan.

[6] See discussion in Section IV below.

[7] *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"), at 1007 (Scalia, J., dissenting).

[8] *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 Broadband Order*), *aff'd sub nom. Brand X, supra.*

[9] Slip Op. at 10, *citing In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14853, 14862 ¶ 12 (2005) ("2005 Wireline Broadband Order"); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks,* 22 F.C.C.R. 5901, 5901-02 ¶ 1 (2007) ("Wireless Broad-band Order"); *In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service,* 21 F.C.C.R. 13281, 13281 ¶ 1 (2006).

One commentator described the 2002 classification error as a "FEMA-level fail."[10] Its results include disruption in federal and state telecommunications regulation, a loss of public oversight over the electronic network used by millions of Americans, and the Commission's now-rejected argument in *Verizon v. FCC.*[11] The problem here is that anything less than full common carriage would not do the job of keeping the Internet open, or prevent it from becoming a balkanized network, a collection of private fiefdoms battling each other for commercial advantage, as seen in the recent Comcast/Netflix standoff.[12]

From a policy standpoint, the nation's electronic communications system cannot be anything but common carriage. It cannot be held hostage by the owners of the underlying facilities. The broadband network in the United States transports an ever-larger share of the nation's commerce (and Internet content generally), it is an essential input for virtually every business in the country, and it functions as the

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[10] Washington Post interview with Tim Wu, at http://www.washingtonpost.com/blogs/the-switch/wp/2014/01/14/a-fema-level-fail-the-law-professor-who-coined-net-neutrality-lashes-out-at-the-fccs-legal-strategy/ (January 14, 2014) ("The FCC's legal strategy put it in the position of arguing that its rules are not common carrier rules when the two components of the regulation — anti-blocking and anti-discrimination — have been at the center of common carrier regulation since medieval times, around 1450").

[11] At the oral argument, Commission General Counsel Sean Lev argued brilliantly and valiantly for the Commission's position, but spent most of his time at the podium advocating that the non-discrimination and anti-blocking rules in the FCC's Open Internet Order were something other than common carrier rules. The oral argument is available at http://www.cadc.uscourts.gov/recordings/recordings2014.nsf/DCD90B260B5A7E7D85257BE1005C8AFE/$file/11-1355.mp3. As the DC Circuit explained, however, non-discrimination is the essence of common carriage. Slip Op. at 47-49. General Counsel Lev tried to convince the Justices that the Commission's rules were something short of common carriage, something akin to common carriage lite, a proposition they rejected. *Id.* at 49-56.

[12] *See, e.g.,* http://www.wired.com/business/2014/03/comcast-opinion/ ("in the months prior to the deal, Netflix customers on Comcast and Verizon's networks had been experiencing some very serious service issues.") See also discussion in Section VI below.

public square for over 300 million Americans. If the owners of the conduit can discriminate among content, they effectively pick winners and losers in the marketplace and on the political, cultural and social plane as well. As the D.C. Circuit stated, "[t]he primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently." [13]

As the D.C. Circuit noted, the *Cable Broadband Order* marked a sharp change in direction in the Commission's approach to advanced telecommunications services, and the original Title II treatment of Internet access, starting with the *Computer I, II,* and *III* decisions.[14] These decisions more accurately reflect the core function of Internet access providers. *Computer II* recognized the fact that access to information services is a transport function -- not an "information service," that transport is not the same as edge-provided content or services, and that such "pure transmission"[15] bears all the indicia and attributes of a common carrier.[16] It is time to reverse the 2002 *Cable Broadband* decision, and reclassify (or, more properly, re-reclassify) broadband, moving it from the "information services" category back to Title II treatment as a telecommunications common carrier service when it is used by ISPs in providing the public with access to the Internet.

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[13] *Verizon v. FCC,* Slip Op. at 48, quoting *National Association of Regulatory Utility Commissioners v. FCC,* 533 F.2d 601, 608 (1976) (*NARUC II*).

[14] *See, most importantly, In re Amendment of Section 64.702 of the Commission's Rules and Regulations,* 77 F.C.C.2d 384 (1980) (*Computer II*); *see also In re Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 13 F.C.C.R. 24012 (1998), and further discussion by the Court in *Verizon*, Slip Op. at 7-10.

[15] *Computer II, supra,* at ¶ 96.

[16] *Id.* at ¶¶ 5-7, 94, and 96-97.

Consumers have asked this Commission in unprecedented numbers to keep the Internet open.[17] A consumer who pays Comcast $66.95 a month for stand-alone broadband service is paying to access the Internet content of the consumer's choice, and to send communications and content of choice, without modification, distortion, or self-interested delay by the carrier.[18] As discussed further below, clear Title II common carrier regime provides regulatory certainty, administrative efficiency, and intellectual honesty.

B. NASUCA'S Role

NASUCA is uniquely situated to speak for these consumers. Its members regularly mediate between consumers and the utilities and other carriers that own and operate the nation's communications system.[19] NASUCA includes representatives from consumer advocate offices from 42 states, from Alabama to Wyoming.[20] Fourteen Attorneys General Offices are represented, as well as more than 20 independent consumer utility advocate offices, regulatory commission consumer

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[17] These Open Network proceedings are the most commented upon item on the Commission's website, by a factor of 8 or 9. *See* http://www.fcc.gov/rulemaking/most-active-proceedings.

[18] While Comcast has a number of "teaser" packages, the average continuing customer pays $66.95/month for mid-level stand-alone broadband service. *Compare* http://www.comcast.com/internet-service.html.

[19] When consumers encounter problems with their service, they often turn to NASUCA members for help. For example, the Illinois Attorney General receives thousands of telecommunications related complaints each year, and telecommunications complaints are consistently the third largest number of complaints. See, *e.g.*, http://www.illinoisattorneygeneral.gov/pressroom/2014_02/20140211.html (1,870 consumer telecommunications related complaints in 2013); http://illinoisattorneygeneral.gov/pressroom/2013_03/20130305b.html (2,240 consumer telecommunications related complaints in 2012); The Illinois Citizens Utility Board conducts "telephone clinics" to assist consumers in navigating the new telecommunications landscape. http://www.citizensutilityboard.org/cubphonesaver_1.html (50,908 customer contacts).

[20] *See* http://nasuca.org/members/.

offices, and independent, non-state actors, such as The Utility Reform Network (TURN) (California), Citizens Utility Boards in Illinois, Oregon, and Wisconsin, and AARP.[21]

In this capacity, NASUCA provided opening and reply comments in the underlying *Open Network* and *Reclassification* proceedings (arguing in the main for reclassification),[22] and was an intervenor in the D.C. Circuit appeal (supporting the Commission's position).[23]

NASUCA members have a common responsibility: to protect the interests of consumers who use the services that are essential and fundamental to American life, i.e., telecommunications, electricity, natural gas for water and space heat, and water and wastewater. The providers of these services are often multi-billion dollar enterprises spanning large parts of the country with national policies that may not be responsive to local interests and needs.[24] Residential and small business consumers

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[21] See http://www.turn.org/consumer-tools/ct-telco.html (including consumer hotline); http://www.citizensutilityboard.org/ (Illinois); http://www.wiscub.org/index.php?module=cms&page=15 (Wisconsin); http://states.aarp.org/tag/utilities/ (AARP):

[22] *See* NASUCA's January 14, 2010 Opening Comments, and April 26, 2010 Reply comments, in GN Docket 09-191; and July 15, 2010 Opening Comments and August 12, 2010 Reply Comments in GN Docket 10-127.

[23] *See* brief of Intervenors Open Internet Coalition, Public Knowledge, Vonage Holdings Company, and NASUCA, filed in the *Verizon v. FCC* proceeding on November 12, 2012.

[24] Internet access providers AT&T, Verizon, and Comcast are multi-billion dollar enterprises, each providing wired access services in no fewer than 20 states. AT&T and Verizon also provide wireless Internet access services in all fifty states. AT&T describes its United States presence as serving 110 million wireless subscribers, holding spectrum licenses in all 50 U.S. states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands, and serving millions of customers, concentrated in 22 states, with wired services, including broadband, long distance and local voice. http://www.att.com/gen/investor-relations?pid=5711. Verizon claims nearly 103 million retail connections nationwide, as well as customers in more than 150 countries and more than $120 billion

rely largely on the state officers and non-profit advocacy groups included within NASUCA to represent their interests.

C. The Problem

Broadband access, and Internet-facilitated communication and exchange, are becoming the primary consumer communications services in the 21st Century.[25] The D.C. Circuit cited (with apparent approval) the Commission's description of the network as a "general purpose technology."[26] Today's broadband network is an inherently a multi-purpose electronic conduit. Its highest and best use, and its essential characteristic, is found in the separation of conduit and content, transport and service, which is precisely what enables the Internet as a "general purpose technology":

> Electronic communications networks [are] becom[ing] packet switched, mostly or completely based in the IP. They will be multi-service networks, rather than service specific networks for audio (including voice), video

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in 2013 revenues. At the end of 2010, Verizon's wireline network included 26 million voice connections in 12 states plus the District of Columbia. Verizon's wholesale businesses generated $8.4 billion in revenue 2010, as other telecommunications companies used the Verizon network to connect to customers' homes and businesses. http://www.verizon.com/investor/industryoverview.htm Comcast reported $62.6 billion consolidated revenues in 2012, up 12% from the prior year. It has four operating areas: cable communications, cable networks, broadcast television, filmed entertainment and theme parks, with cable communications, which includes video, Internet access and related services, generating 63% of its consolidated revenues. http://www.comcast.com/2012annualreview/d/CMCSA_AR12_10K.pdf?SCRedirect=true?SCRedirect=true (2012 Annual Report at 1-2). Comcast has recently agreed to purchase Time Warner Cable, expanding its reach further into major United States markets and reaching more than 30 million customers. http://money.cnn.com/2014/02/13/technology/comcast-time-warner-cable-deal/

[25] Anderson and Rainie, *Digital Life in 2025*, PEW INTERNET RESEARCH PROJECT, Mar. 11, 2014, http://www.pewinternet.org/files/2014/03/PIP_Report_Future_of_the_Internet_Predictions_031114.pdf (a compendium of utopian and dystopian projections about the growing importance of Internet Protocol enabled services and content in daily life).

[26] Slip Op. at 34.

> (including TV-services) and data networks, allowing a decoupling of service and transport provision… A core feature of IP networks is the separation of … transport and service. This distinction potentially allows competition along the value chain more easily than in the PSTN world. A crucial point is the adoption of open and standardized interfaces between each functional level in order to allow third parties to develop and create services independent of the network.[27]

This essentially describes common carriage. Unlike traditional single purpose networks (telegraph, telephone, cable television), a broadband network is inherently multi-purpose. IP technology allows a panoply of content and services to ride the single conduit, but only where there are "open and standardized interfaces."

Consumers' use of broadband service to access the Internet reflects its multi-purpose nature. Consumers use it to find and take advantage of essential services such as health and welfare services, to manage their financial affairs, to file federal and state income taxes, to obtain Affordable Care Act health insurance, to interact and transact business with governments and government agencies at all levels, to obtain employment information, to educate themselves in online courses, and to entertain themselves and communicate with others in their community.[28] Consumers use

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[27] European Regulators Group (ERG) Consultation Document on Regulatory Principles of IP-IC/NGN Core (ERG 08) 26rev1, at 96-97. The Consultation Document is available at http://www.irg.eu/streaming/ERG%20(08)%2026%20final%20NGN%20IP-IC%20CS%20081016.pdf?contentId=545360&field=ATTACHED_FILE. When so described, this is the world where "voice is just an app."

[28] *See, e.g.,* Anton Troianovski, The Web-Deprived Study at McDonald's, *The Wall Street Journal*, Jan. 28, 2013, available at http://online.wsj.com/news/articles/SB10001424127887324731304578189794161056954; Tracy Lustig (Rapporteur), *The Role of Telehealth in an Evolving Healthcare Environment: Workshop Summary*, Institute of Medicine of the National Academies, 2012, available at http://www.nap.edu/download.php?record_id=13466; Susannah Fox, *51% of U.S. Adults Bank Online*, PEW INTERNET RESEARCH PROJECT, August 7, 2013,

Internet access every time they go into a store or restaurant and use a credit card or go to an ATM, and when they talk on the telephone utilizing IP technology. And when they access the Internet, they are almost inevitably using the wires of the large telephone carriers, part of the Public Switched Telephone Network (PSTN).[29]

The fundamental role of broadband access service (whether provided by large incumbent telephone companies, cable companies, or smaller ISPs[30] is that of an onramp to the vast store of information, content, and services available on the Internet.[31] If the broadband access provider offers competing content and services,

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http://www.pewinternet.org/2013/08/07/51-of-u-s-adults-bank-online/; Aaron Smith and Maeve Duggan, *Online Dating and Relationships*, PEW INTERNET RESEARCH PROJECT, Oct. 21, 2013, http://www.pewinternet.org/2013/10/21/online-dating-relationships/ ("11% of American adults—and 38% of those who are currently "single and looking" for a partner—have used online dating sites or mobile dating apps"); Kathryn Zickuhr and Lee Raine, *E-Reading Rises as Device Ownership Jumps*, PEW INTERNET RESEARCH PROJECT, Jan. 16, 2014, http://www.pewinternet.org/2014/01/16/e-reading-rises-as-device-ownership-jumps/ ("[t]hree in ten adults read an e-book last year; half own a tablet or e-reader"); Maeve Duggan, *Photo and Video Sharing Grow Online*, PEW INTERNET RESEARCH PROJECT, Oct. 28, 2013, http://www.pewinternet.org/2013/10/28/photo-and-video-sharing-grow-online/ ("54% of adult internet users post original photos or videos online that they themselves have created").

[29] In its April 26, 2010 Reply Comments in GN Docket 09-191, NASUCA remarked (at 7-8) on the relationship between Internet access providers and the large incumbent telephone providers:

> 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… 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 [Significant Market Power]; the latter are service providers that rely on the large facilities-based incumbents for essential transmission inputs. Network operators and [Internet] service providers are in very different situations, even if the vertically integrated incumbents combine both functions. "

[30] *See* previous footnote.

[31] See generally, the Pew Research Internet Project, http://www.pewinternet.org/; E.g., *The Web at 25*, http://www.pewinternet.org/files/2014/02/PIP_25th-anniversary-of-the-Web_0227141.pdf; *Internet Pharmacies*, http://www.gao.gov/assets/660/655751.pdf ("nearly 1 in 4 adult U.S. Internet consumers have purchased drugs online.")

whether an email box, a news feed, or pay-per-view movies, a conflict of roles and/or interest exists. The D.C. Circuit accepted that this conflict gives carriers incentives to prefer their own content and services, and to discriminate against those of third party providers.[32]

The *Verizon* Court's remand has opened the way for the Commission to acknowledge that the years after the 2002 have shown that the *Cable Broadband Order's* technical understanding and predictive judgments were both flawed, and have resulted in much confusion[33] and loss of the enormous surplus value created by IP technology to market-dominant network owners.[34] Reclassification and imposition of a common carriage regime on broadband, even if the Commission forbears from imposing the whole spectrum of Title II obligations, are the first steps to protect an open Internet, and to address the obligations of those few entities that provide transport for, and give consumers access to, content and services on the Internet.

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[32] Slip Op. at 37.

[33] See Selwyn and Golding, *Revisiting the Regulatory Status of Broadband Internet Access, A Policy Framework for Net Neutrality and an Open Competitive Internet*, 63 Fed. Comm. Law Journal 91, 116 (2010):

> Despite advances in technology in transmission media (e.g., copper loop to coaxial cable or fiber), switching (manual to electromechanical to digital), and carrier systems (direct current to frequency-division multiplexing (FDM), then to time-division multiplexing (TDM), and then packet-based systems such as Frame Relay, MPLS, and Ethernet), the access function within telecommunications networks remains largely unchanged. ... Whatever occurs on the Internet is unaffected by whether a user relies upon copper, coaxial cable, fiber, wireless, or any other transmission medium to connect to the Internet from home.

[34] *Cf. id.*, at 136, quoting the Commission's *Qwest Phoenix Forbearance Order*, 2010 FCC LEXIS 3841, at ¶ 34; at 114, citing *Computer II* at ¶ 100 (the FCC "recognized that "[t]ransmission networks have benefitted [sic] from some of the productive breakthroughs which this relatively new field [of computer technology] has made possible"),and at 131 ("For the ILEC, incumbency and the existence of a legacy network provide both unique cost advantages and unique revenue opportunities").

Contrary to some claims,[35] this is not tantamount to "regulating the Internet." As NASUCA has previously asserted, the Commission must focus on the physical infrastructure on which consumers rely to reach the Internet.[36] This will allow the Commission to ground its Open Internet rules firmly in Title II of the Communications Act, recognizing that broadband Internet access is "pure transmission," the essential function of which is to enable consumers to reach or send the content of their choice without alteration or modification.[37]

As shown below, broadband access fits squarely within the statutory definition of a telecommunications service. The Internet's rapid development relied on ISPs giving consumers the ability to create and/or reach content without interference or modification – the key function of a common carrier and statutory definition of "telecommunications."[38] As the *Verizon* Court pointed out, in the Telecommunications Act of 1996, Congress acted

> against the backdrop of the Commission's long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which end users accessed the Internet. Indeed, one might have thought, as

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[35] See http://www.heritage.org/research/reports/2014/02/net-neutrality-rules-still-a-threat-to-internet-freedom; Hands Off the Internet, https://www.facebook.com/handsofftheweb. But see http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=2007803 (identifying corporate sponsors of Hands Off the Internet). *See also* discussion below, in section IV(D).

[36] January 14, 2010 Comments in GN Docket No. 09-191, at 2, *passim*.

[37] *In the Matter of Preserving the Open Internet, Broadband Industry Practices,* GN Docket No. 09-191 and WC Docket No. 07-52, Reply Comments of the National Association of State Utility Consumer Advocates at 3 (April 8, 2010). See also Selwyn and Golding, *Revisiting the Regulatory Status of Broadband Internet Access, supra.*

[38] 47 U.S.C. §153(50) ("The term "telecommunications' means 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.")

> the Commission originally concluded, that Congress clearly contemplated that the Commission would continue regulating Internet providers in the manner it had previously.[39]

Both Congress and the Commission itself had every reason to believe that the Commission would continue to treat "advanced telecommunications services," broadband Internet access, as telecommunications services.

The 2002 *Cable Broadband Decision* and its *sequellae* were based on the new and erroneous premise that broadband ISPs did more than simply transport consumers' requests and information to and from the Internet cloud, and that this "more" was an information service that not only was inseparable from the transport function, but in fact completely subsumed it.[40] These decisions have led to years of expensive litigation across the country, embroiled state regulatory agencies in resource-draining appeals in almost every state, and allowed the owners of the nation's network to elude common carrier oversight while helping themselves to monopoly (or at least market-dominant) profits.

The erroneous classification of broadband Internet access as an information service rather than a telecommunications service has blocked or impinged on a broad spectrum of policies the Commission says it wants to promote:

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[39] Slip Op. at 24 (internal citations omitted).

[40] For a description of the technical functions of broadband Internet service providers, and the conclusion that they transmit content essentially unchanged, see Selwyn and Golding, *Revisiting the Regulatory Status of Broadband Internet Access, supra*, at 106- 116.

- Promote universal access to the Internet – As broadband is the communications medium of the 21st century, the Commission has rightly been concerned with ensuring that all Americans have access to it, and that there is not a digital divide between those with access to an adequate high-speed connection and those without. The authority to do this, however, is found in 47 U.S.C. § 254, which applies only to telecommunications carriers;[41]

- Ensure interconnection – The classification of broadband as an information service has led to endless semantic gamesmanship between the carriers and regulators, but also between carriers. Are voice over Internet protocol (VoIP) and data meant to be included in the 47 U.S.C. §§ 251-252 interconnection regime, and do states have the delegated power to adjudicate those issues?[42]

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[41] The fact that broadband when defined as an information service does not fit neatly, if at all, into the 47 U.S.C. § 254 construct is a recurring theme in the appeal of the Commission's *Transformation Order* in the 10th Circuit. *See, e.g., Connect America Fund; A National Broadband Plan for Our Future;* WC Docket No. 10-90, et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, (2011) ([*USF/ICC*] *Transformation Order*), *pets. for review pending sub nom. In re FCC 11-161*, No. 11-9900 (10th Cir. oral arg. held November 19, 2012). *See in particular* arguments against the "broadband condition," for instance, Appellants' Uncited Joint USF Reply Brief, filed June 5, 2013.

[42] *See, e.g., Transformation Order*, at ¶ 937:

> As the Commission recognized in the USF/ICC Transformation NPRM, the lack of clarity regarding the intercarrier compensation obligations for VoIP traffic has led to significant billing disputes and litigation. Both state commissions and courts have been called upon to address disputes regarding intercarrier compensation for VoIP traffic in a range of contexts and with a range of outcomes. For example, some states have held that the same intrastate access charges that apply in the context of traditional telephone service also apply to at least some VoIP traffic. Others have applied lower intercarrier compensation charges in certain circumstances, and still others have deferred to the Commission. Courts likewise have addressed disputes about the intercarrier compensation payments associated with VoIP traffic, reaching divergent outcomes. In a number of cases, the state commission's or court's decision hinged in part on the language of particular tariffs or agreements. Disputes also remain pending in a number of courts and state commissions

Citing, inter alia, at fns. 1180-85, *Global NAPS California v. Pub. Util. Comm'n of State of Calif.*, 624 F.3d 1225, 1231-32 (9th Cir. 2010) (affirming state commission decision that access charges apply to VoIP); *Sprint v. Iowa Telecom*, Docket No. FCU-2010-0001, Order (Ia. Util. Bd. rel. Feb. 4, 2011) (applying intrastate access charges); *Palmerton v. Global NAPS*, Docket No. C-2009-2093336, Motion of Chairman James H. Cawley (Pa. PUC rel. Feb. 11, 2010) (same); *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Tel. Co., and Wilton Telephone Co.*, DT 08-28, Order No. 25,043 (NH PUC Nov. 10, 2009) (same). *See also Transformation Order*, at ¶ 975 ("We decline to address the classification of VoIP services generally at this time").

- Promote competition – The Commission's failure to classify broadband as a telecommunications service has prevented access to the last mile facilities at the wholesale level, and destroyed the once-thriving ISP industry that brought the Internet to small and large communities throughout the country before broadband technology became generally available.[43] Further, state commissions are unable to get basic information about utility plant or interconnection agreements, the predicate information for any study of competition.[44]

- Promote consumer protection and affordability -- It is undisputed that telephone service provided over the PSTN is a "telecommunications service" subject to common carrier regulation. However, incumbent telephone companies as well as new entrants often insist that telephone service provided via IP is somehow different and not a statutory telecommunications service subject to common carrier regulation despite the transmittal of conversations "without change in form or content." 47 U.S.C. §153(50)&(51). As a result, carriers have resisted state reporting requirements, consumer protections, price protections and service quality protections on the premise that VoIP telephone service is somehow not a "telecommunications service"[45] and therefore not subject to state oversight.[46]

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[43] Prior to the development of broadband connections, consumers would dial a telephone number supplied by an ISP to access the Internet, such as America Online (AOL) or, Earthlink., *See* PEW RESEARCH INTERNET PROJECT, *The Broadband Difference, Part 6* (June 23, 2002) ("telephone companies, as common carriers, are required to allow any ISP to offer service"), available at http://www.pewinternet.org/2002/06/23/main-report-the-broadband-difference/. Early line-sharing obligations allowed independent ISPs to purchase the high frequency portion of the local loop from incumbent local exchange carriers, enabling ISPs to sell consumers access to the Internet using the underlying the physical connection between the end user and the Internet. FCC's Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd. 20912 (Dec. 9, 1999)("Line Sharing Order"); *In The Matter Of Deployment Of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, 15 FCC Rcd 17806 (Aug. 10, 2000).

[44] *See* discussion of Comcast-Netflix dispute, in Section V below.

[45] "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. §153(53).

[46] *See, e.g.*, November 13, 2013 Comcast Motion to Dismiss Investigation, in California Public Utilities Commission Investigation 13-10-003 (regarding Comcast's admitted disclosure of over 74,000 unlisted/non-published residential customer numbers on the Internet), available at http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=81522842 (arguing that CPUC has no jurisdiction because Xfinity is a VoIP service); See also *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, 394 F.3d 568 (8th Cir. 2004).

- Ensure a unified network – The Commission's broadband decisions have essentially fragmented the communications world into two halves, a regulated world of time-division multiplexing (TDM) telephony, and an unregulated world of IP telephony and data. This fragmentation creates traps for unwary consumers and ignores the fact that the use of IP technology should be seen as simply a further step in the technological evolution of the PSTN.[47]

II. A Common Public Network: "Slip Slidin' Away"[48]

The problem the FCC addressed with its open network rules overturned in *Verizon* was one of long standing: *the inherent conflict when the owner of the telecommunications wire also has an interest in the content business.*[49]

Historically, there was a strict separation between conduit and content for common carrier telephone corporations: carriers carried, and the content was supplied by end-users. It was on this common carrier substrate that the Internet became what it is today. The DC Circuit documented this fact in detail.[50]

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[47] Commission staff in Illinois and California are informed and believe that AT&T, for instance, often induces customers to shift from regulated landline service to partially or completely unregulated U-Verse service, without informing the consumers of the lack of regulatory recourse in the latter instance, or the limitations imposed by the lack of backup power.

[48] NASUCA is indebted to Jeff Silva's Medley Advisors Telecom Update for January 14, 2014 ("Net Neutrality: Slip Slidin' Away") for the idea of applying Paul Simon's song title to the present situation.

[49] This concern was reported as early as 2002 by the Pew Research Internet Project: "As Stanford law professor Larry Lessig has documented in *The Future of Ideas*, there are reasons to believe that the authority to control the flow of content may result in actual restrictions on content availability. Some companies are developing technologies to allow providers to develop 'walled gardens' online that give preference to content specified by a service provider. And some cable networks, which presently are legally able to restrict content flows, have imposed restrictions on subscribers." The Broadband Difference, Part 6 (June 23, 2002), http://www.pewinternet.org/2002/06/23/main-report-the-broadband-difference/.

[50] Slip Op. at 7-9 ff.

Ever since the possibilities of computer-driven data processing became evident in the 1970s, however, the FCC has worried that carriers' ownership and control of the wires would give them an unfair advantage in the data processing markets at the edge of those wires. In its *Computer II* decision, for example, the FCC sought to separate telecommunications transport from data processing (a classic common carrier solution).[51]

In 2002, however, the nature of the problem shifted when the FCC issued the first of a series of decisions stating, essentially, that consumer broadband access to the Internet was *not* a telecommunications service, and therefore could not be regulated as a common carrier.[52] Embedded within this series of decisions were repeated FCC assurances that the Commission would continue to use its Title I powers to monitor the situation to assure that carriers did not abuse their gatekeeper power.[53] A first wave of concern was that broadband providers would either block traffic they felt was

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[51] *See id.* at 7-8, discussing *Computer II, supra. Computer II* imposed conditions on any ILEC that wanted to get into the information processing business, including, most significantly, requirements that such entities offer enhanced services only through a completely separate corporate entity and that they offer their transmissions facilities to other enhanced service providers on a common carrier basis." Slip Op. at 8, citing *Computer II* at ¶¶228–29. A *Computer III* decision in the 1990s loosened these conditions, but the dam really broke in 2002, when the *Cable Broadband Decision* moved broadband fully out of the common carrier category.

[52] *See* discussion of *Cable Broadband Order, supra,* and Slip Op. at 9-10, *citing* inter alia *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* 20 FCC No. 05-150, FCC Rcd 14853 (2005) (2005 *Wireline Broadband Order*) (DSL modem not common carrier telecommunications service).

[53] *See, e.g., 2005 Wireline Broadband Order,* at ¶ 120 ("we do not agree that classifying wireline broadband Internet access service as an information service would deny us the ability to oversee broadband interconnectivity … our actions in this proceeding will not constrain our ability to address network reliabiliyty and interoperability issues [or] 'to ensure the ability of users and information providers to seamelessly and transparently transmit and receive information between and across telecommunications networks'," quoting 47 U.S.C. § 256).

too burdensome to carry (which they, in fact, did),[54] and/or would create a "fast lane" for those willing to pay the premium, while the Internet commoner would be relegated to the slow lane.[55] A second wave of concern related to the expressed desire of Verizon and other broadband providers not only to charge the broadband consumer for access to content, but also to charge "edge [or content] providers" to reach those consumers. This is sometimes called a "two-sided market."[56] A two-sided market would allow a carrier to charge edge providers like Google, Netflix and the New York Times for access to the carrier's customers, in addition to charging the subscriber for broadband Internet access (which would presumably include access to Google, Netflix and the New York Times).[57] The Commission's Open Internet rules were designed as a response to both of these concerns.

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[54] *In re the Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028 (2008) (*Comcast Order*), vacated, *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (*Comcast Decision*).

[55] Slip Op. at 17 (possibility of a "fast lane"); *see also* Commission's *Comcast Order, supra.* See also "Netflix customers who use Comcast Fact Streaming Hiccups (Feb. 12, 2014), http://www.twincities.com/business/ci_25116477/netflix-members-who-use-comcast-face-streaming-hiccups; Netflix HD streaming over Comcast broadband, http://www.dslreports.com/forum/r28820834-Speed-Netflix-Comcast-does-not-support-HD-streaming (Nov. 17, 2013).

[56] Slip Op. at 12, 53. Verizon was quite frank in its briefs, and at the September 9, 2013 oral argument, about its desire to experiment with "two-sided" payment models. In its 2010 Order, the FCC noted the "likely detrimental effects of access and prioritization charges on the virtuous circle of innovation … Less content and fewer innovative offerings make the Internet less attractive for end users than would otherwise be the case." *Open Internet Order*, at ¶28 and fn. 79.

[57] Content providers pay independent and competitive backbone providers, e.g., Level 3 or Sprint, which aggregate Internet content in "the cloud." Companies like Comcast or Verizon that offer broadband Internet access to consumers maintain connection points to the backbone providers so that their customers can access the content connected to the backbone providers. Ordinarily the content provider does not pay the broadband Internet access provider, which gets its revenue from the consumer. *See generally* Rudolph van der Berg, "How the 'Net Works – an Introduction to Peering and Transport," *Ars Technica,* Sept. 2, 2008, available at http://arstechnica.com/features/2008/09/peering-and-transit/;

In its *Verizon* opinion, the D.C. Circuit found that the Commission had "adequately supported and explained its conclusion" that broadband Internet access providers "have incentives to interfere with the operation of third-party Internet-based services that compete with the providers' revenue generating telephone and/or pay-telephone services."[58] To combat this threat, the Commission had first adopted four "principles" or "freedoms" in 2005 (free choice of content, applications, devices, and service provider).[59] Its attempt to enforce these principles against Comcast in 2008 was rejected by the DC Circuit in 2010.[60] After the DC Circuit's decision rejecting the *Comcast Order,* the Commission: (1) opened (but never pursued) an Inquiry into "whether and to what extent it should reclassify broadband Internet services as telecommunications services";[61] (2) reassessed its previous conclusion that section 706 was not an independent grant of power;[62] (3) made a finding that broadband markets were not competitive, triggering 706(b) (see below); and (4) decided, finally, "rather than reclassifying broadband," to try again with its asserted authority over

[58] Slip Op. at 36-37, *citing Open Internet Order* at ¶¶22-23.

[59] On the same day that it issued its *Wireline [DSL] Broadband Order,*, the FCC promulgated a "Policy Statement" concerning the "four principles." *In re Appropriate Framework for Broadband,* 20 FCCR 14986 (2005).

[60] Slip Op. at 12, citing *Comcast Order* and *Decision, supra.*

[61] Slip Op. at 13, *citing In re Framework for Broadband Internet Service, Notice of Inquiry,* GN 10-127, 25 FCC Rcd 7866 ¶2 (2010) (*Reclassification Inquiry*).

[62] The Commission did this within the *Open Internet Order* itself. *See* Slip Op. at 20-21, *citing Open Internet Order* at ¶ 119 ("the Commission has offered a reasoned explanation for its changed understanding of section 706(a)").

"advanced telecommunications services" under section 706 of the 1996 Telecommunications Act.[63]

Pursuant to this asserted authority, in late 2010 the FCC adopted transparency and anti-blocking requirements for both fixed and mobile broadband, and an anti-discrimination requirement applicable to only wireline or fixed broadband.[64] Almost immediately, Verizon appealed the rules. The recent D.C. Circuit decision, while rejecting much of Verizon's rationale, nevertheless agreed with Verizon that the non-discrimination and no blocking requirements were essentially common carriage regulations, which were legally prohibited due to the information service classification in the Commission's *Cable Broadband Order.* The Court upheld only the transparency (disclosure) requirements. This leaves the Commission with a problem: what is the best way to classify broadband Internet access, consistent with its operation and function, in order to prevent ISPs and network owners from discriminating between and blocking content?

III. The D.C. Circuit Decision Is a Roadmap and Justification for Re-Reclassifying Broadband as a Telecommunications Service, and Preserving an Open Internet.

The *Verizon v. FCC* opinion is clear that the Commission does have authority to protect the consumers who access the Internet through broadband connections to their homes and business, as well as the "edge providers" who produce the content

[63] *See* Slip Op. at 27, *citing Sixth Broadband Deployment Report,* 25 F.C.C.R. 9556, 9668 at ¶2.

[64] Slip Op. at 13-14, describing *Open Internet Order, supra.*

and services these consumers want.[65] To do that, the Commission must recognize the essential function of broadband access as a transmission service.

As the D.C. Circuit stated, "What distinguished 'enhanced' services from 'basic' services was the extent to which they involved processing information *rather than simply its transmission.*"[66] "'Basic' telephone service also involves a 'pure' transmission that was virtually transparent in terms of its interaction with customer supplied information."[67] The re-classification of broadband as a transmission service, i.e., a telecommunications service, accurately reflects the operation and function of broadband Internet access and would trigger the application of 47 U.S.C. §202(a), which prohibits providers from engaging in "unjust or unreasonable discrimination in charges."[68]

A. The D.C. Circuit Ratified the Commission's Crucial Findings of Fact in the *Open Network* Proceeding.

The D.C. Circuit cites with approval the following Commission findings, rejecting in many cases the factual and other assertions made by appellants:

- "[B]roadband providers' potential disruption of edge-provider traffic [is] itself the sort of 'barrier' that has 'the potential to stifle overall investment in Internet infrastructure'";[69]

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[65] As used in the D.C. Circuit's opinion, and in the literature generally, edge providers "are those who, like Amazon or Google, provide content, services, and applications over the Internet." Slip Op. at 5.

[66] Slip Op. at 7 (emphasis added).

[67] *Id.*

[68] *Id.*

[69] *Id.* at 32

- "Internet openness fosters the edge-provider innovation that drives this 'virtuous cycle' [where innovation and growth drives the buildout of the underlying infrastructure]";[70]

- Broadband Internet access providers "have incentives to interfere with the operation of third-party Internet-based services that compete with the providers' revenue generating telephone and/or pay-telephone services";[71]

- Broadband Internet access providers have "the technological ability to distinguish between and discriminate against certain types of Internet traffic";[72]

- "[B]roadband providers' position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers…the provider functions as a 'terminating monopolist' … [and has] this ability to act as a 'gatekeeper'";[73]

- "[E]nd users are unlikely to react [to a carrier's discrimination] in this fashion [immediately switching to a competing broadband provider]" as "end users may not know" that their broadband provider is imposing access costs on edge providers, and "even if they do have this information [consumers] may find it costly to switch."[74]

- Prior incidents support the Commission's conclusion "that the threat that broadband providers would utilize their gatekeeper ability to restrict edge-provider traffic is not … 'merely theoretical'";[75]

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[70] *Id.* at 35.

[71] *Id.* at 36-37 ("As the Commission noted, Voice-Over-Internet Protocol (VoIP) services such as Vonage increasingly serve as substitutes for traditional telephone services, and broadband providers like AT&T and Time Warner have acknowledged that online video aggregators such as Netflix and Hulu compete directly with their own 'core video subscription service.'" … Broadband providers also have powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users"), citing *Open Internet Order* at ¶¶ 22-24.

[72] Slip Op. at 38

[73] *Id.* at 38.

[74] *Id.* at 39.

[75] *Id.* at 42.

- "By comparison to the benefits of [its] prophylactic measures, the costs associated with the open Internet rules … are likely small."[76]

The Commission can now use these upheld findings to support classification of broadband as a telecommunications service, and to support reasonable non-discrimination and non-blocking rules.

B. The D.C. Circuit Established the Commission's Authority to Act, and Banished the Myth that a Telecommunications Act Rewrite Is Necessary for the Commission to Act.

While the *Verizon* Court granted Verizon the relief it sought and rejected the rules that NASUCA and other intervenors had defended, its decision demonstrates clearly that the Commission *does have the authority under existing law* to adopt regulations "designed to achieve a particular purpose: to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.'"[77] The Court rejected the argument that Sections 706(a) and 706(b) were merely Congressional statements of intent or policy -- and held that "Section 706(a) thus gives the Commission authority to promulgate only those regulations that it establishes will fulfill this specific statutory goal."[78]

Section 706(a) of the Telecommunications Act of 1996 states:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services *shall encourage* the deployment on a reasonable and timely basis of advanced telecommunications capability to

[76] *Id.* at 44.

[77] *Id.* at 26.

[78] *Id.* at 26-27.

> all Americans (including, in particular, elementary and secondary schools and classrooms) by *utilizing,* in a manner consistent with the public interest, convenience, and necessity, *price cap regulation, regulatory forbearance, measures* that *promote competition* in the local telecommunications market, *or other regulating methods that remove barriers* to infrastructure investment.[79]

Section 706(d) clearly includes broadband Internet access, defining "advanced telecommunications capability" as "without regard to any transmission media or technology, high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."[80]

Contrary to the arguments of network owners that the Commission would have to go to Congress for authority to regulate broadband, the Court noted that:

> When Congress passed section 706(a) in 1996, it did so against the backdrop of the Commission's long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which the end users accessed the Internet. *See, e.g., Second Computer Inquiry,* 77 FCC2d at 473-74, PP 228-29. Indeed, one might have thought, as the Commission originally concluded, *see Advanced Services Order,* 13 FCCR at 24029-30 P35, that *Congress clearly contemplated that the Commission would continue regulating Internet providers in the manner it had previously.*[81]

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[79] Telecommunications Act of 1996, Public Law 104-104, 110 Stat. 56 (1996) (Section 706 was classified as a note under 47 U.S.C.A. § 157, and was later codified as 47 U.S.C. §1302 (2008)) (emphasis added).

[80] 47 U.S.C. §1302(d).

[81] Slip Op. at 24 (emphasis added).

The Court addressed Section 706(b) separately, and concluded that it provided a separate source of Commission authority to address broadband access. The Court said:

> [T]he Commission has reasonably interpreted Section 706(b) to empower it to take steps to accelerate broadband deployment if and when it determines that such deployment is not 'reasonable and timely.' ... We think it quite reasonable to believe that Congress contemplated that the Commission would regulate this industry, as the agency had in the past, and the scope of any authority granted to it by section 706(b) – limited, as it is, both by the boundaries of the Commission's subject matter jurisdiction and the requirement that any regulation be tailored to the specific statutory goal of accelerating broadband deployment — is not so broad that we might hesitate to think that Congress could have intended such a delegation.[82]

Section 706(b) directs the Commission to ascertain whether in fact advanced telecommunications capability is being adequately deployed. It provides:

> [T]he Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, *it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.*[83]

[82] *Id.* at 29-30.

[83] 47 U.S.C. 1302(b) (emphasis added).

The Commission has conducted that inquiry, and the Court accepted the Commission's conclusion that broadband deployment has not been "reasonable or timely."[84]

Crucially, the Court found "rational and supported by substantial evidence" the Commission's conclusion that infrastructure investment would be promoted and accelerated if the Internet content providers were protected from blocking and discrimination because the proliferation of content and services would increase customer demand and drive infrastructure investment.[85] Although labeled a "triple-cushion shot" by Verizon,[86] this was just another way of saying that by protecting the interests of Internet consumers to access the content of their choice without modification or interference from the Internet service provider, the Commission reasonably expected that consumers would use the expanded services produced by "edge providers," and that additional demand would drive build-out of advanced telecommunications services. For example, Netflix expands its services in reliance on the Commission's non-discrimination rules; consumer demand for Netflix's services expands; and that demand simultaneously pushes up demand for Comcast's services

[84] Slip Op. at 28-29.

[85] *Id.* at 34 ("Under these standards, the Commission's prediction that the Open Internet Order regulations will encourage broadband deployment is, in our view, both rational and supported by substantial evidence.")

[86] *Id.* at 33.

and its need to expand its advanced telecommunications capability to meet demand.[87] Indeed, Verizon itself referred to this as a "virtuous cycle."[88]

Although the Court found that the anti-blocking and anti-discrimination rules of the Open Internet Order could be justified under Section 706 of the Telecommunications Act of 1996 as a method to encourage advanced telecommunications capability, it concluded that the Commission could not classify broadband service as an "information service" and therefore not eligible for common carrier treatment, but then turn around and impose anti-blocking and anti-discrimination rules that are the essence of "telecommunications service" common carrier obligations.[89]

C. The D.C. Circuit Identified the Classification Error as the Barrier to Enforcement of Open Internet Rules.

While recognizing the Commission's expansive powers under section 706 and that the "virtuous cycle" (or "triple cushion shot") justified the adoption of anti-blocking and anti-discrimination rules relative to broadband Internet access providers, the *Verizon* court specifically identified the Commission's failure to classify broadband as a telecommunications service subject to Title II protections as the reason basic protections could not be applied to broadband Internet access service.

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[87] *Id.* at 32 ("the rules advance this statutory goal of broadband deployment") and 34 ("the Commission has more than adequately supported and explained its conclusion that edge-provider innovation leads to the expansion and improvement of broadband infrastructure").

[88] *Id.* at 35.

[89] *Id.* at 57 ("Significantly … the Commission never argues that the *Open Internet Order's* 'no unreasonable discrimination' standard somehow differs from the nondiscrimination standard applied to common carriers generally").

The Commission's §706 powers thus find their limit in the prohibition (in 47 U.S.C. § 153) of common carrier regulation, *except where* the FCC has found that a "telecommunications carrier" is "providing telecommunications services." The D.C. Circuit found that the FCC's non-discrimination and no-blocking rules were classic common carriage regulations.[90] It therefore held that "given the manner in which the Commission has chosen to classify broadband providers, the [no-discrimination and no-blocking] regulations cannot stand." [91] Placing the issue squarely before the Commission, the Court stated: "Despite calls to revisit these classification orders [*Cable Broadband* and its *sequellae*], the Commission has yet to overrule them."[92]

IV. The Case for Reclassification Now.

A. The Opportunity Presented by the D.C. Circuit.

As NASUCA stated in this Commission's short-lived 2010 reclassification proceeding, the 2002 re-classification of cable broadband service (and later of broadband over other facilities) "was incorrect when made, and has become ever more incorrect, inadequate, and destructive of broadband progress with each passing

[90] Slip Op. at 56 ("We have little hesitation in concluding that the anti-discrimination obligation ... has 'relegated [those providers], *pro tanto,* to common carrier status'"), *citing FCC v. Midwest Video*, 440 U.S. 689, 700-701 (1979).

[91] Slip Op. at 46-47, 56 ff.

[92] *Id.* at 10, *citing* concurring statement of Commissioner Copps in *Open Internet Order,* 25 FCCR at 18046.

year."[93] The D.C. Circuit decision once again offers the Commission an opportunity to correct this historic mistake.

Although the United States Supreme Court in *Brand X* accepted the agency's *Cable Broadband Order* classification, it did so under *Chevron* deference without ruling on the merits of the Commission's judgment.[94] Four justices suggested that the *Cable Broadband* ruling was "implausible," and/or beyond the agency's authority.[95] The majority commented that either changed circumstances or a mere "change in administration" could justify reversal of the policy.[96]

A long list of reasons justifies reversal **now**: Changed circumstances; the failure of the Commission's assumption that it would be able to protect consumers under a Title I approach; regulatory uncertainty and inconsistency; a better understanding and acceptance of broadband Internet access as a fungible and separate service that merely transmits and delivers consumers' content without modification; and a change of administration and regulatory philosophy. These all argue for reclassification.

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[93] NASUCA's July 15, 2010 Comments in the *Reclassification NOI,* GN 10-127, at 3, citing its previous January 14, 2010 [Opening] Comments and April 26, 2010 Reply Comments in *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) (*Open Internet NPRM*).

[94] *Brand X, supra,* 545 U.S. at 980.

[95] *Id.* at 1003 (Breyer concurrence, "within the agency's discretion, but barely") and 1006 *ff* (dissenting opinion of Justice Scalia, joined by Justices Souter and Ginsburg for the "pizza" analogy, *infra*); *see also id.* at 1005 ("implausible reading of the statute").

[96] *Id.* at 981 ("'the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis,' [citing *Chevron, supra, at 863-864*] ... for example, in response to changed factual circumstances, or a change in administrations").

As the Court related, and the Commission found in its *Sixth Broadband Deployment Report*, approximately 14-24 million Americans had no access to broadband,[97] cutting them off from a primary engine of social communication and creativity, as well as easy access to economic, social and political information, entertainment, the medical and social welfare services available online, and the subtext of much of modern life. End users with inadequate service "may have no option to switch, or at least face very limited options," due to the fact that "as of December, 2009, nearly 70 percent of households lived in census tracts where only one or two wireline or fixed wireless firms provided broadband service."[98] **A 2013 Pew Research study found the situation roughly unchanged, with almost 30 percent of Americans still without broadband access in their homes.**[99]

These consumers, or Internet "end users," have not had the benefit of a truly competitive market for Internet access service. Even for those consumers with broadband, there are limited choices, and limited ability to switch. Assuming, *arguendo,* that a consumer was aware of an access provider's discriminatory practices, that consumer often cannot respond because of the costs of switching from one broadband provider to another, which include high early termination charges, the

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[97] Slip. Op. at 28, *citing Sixth Broadband Deployment Report, supra,* 25 F.C.C.R. at 9574, ¶ 28 (finding also that 80 million Americans do not have broadband at home).

[98] Slip P. at 40 (the Court cited an FCC Working Paper, relating December 2009 data. However, the Commission's 2010 National Broadband Plan found that 96% of households had access to no more than two wireline broadband options. See footnote 125 below).

[99] Pew Internet Fact Sheet, available at http://www.pewinternet.org/fact-sheets/broadband-technology-fact-sheet/.

costs of equipment, the risks of a lapse in service, the loss of a carrier specific email address, and the burden and cost of returning a carrier's equipment.[100]

NASUCA has consistently argued that the correct treatment of broadband Internet access must be based on the fact it is a last mile service that performs an essential transport or transmission service. In order to protect that function, the Commission's classification of broadband Internet access must recognize the real and meaningful separation between network access facilities and the content and services offered over the network, particularly where the network owner competes in those product and service markets.[101]

As the *Verizon* Court noted, the Commission had applied the common carrier non-discrimination rules that have characterized plain old telephone service ("POTS") for the better part of the last century, and it was on that regulatory scheme that the Internet as we know it today grew and flourished.[102] Significantly, broadband Internet access providers perform much the same function performed by POTS, i.e., they provide the last mile connection to the consumer.

While the "pure transmission" portion of broadband access services is provided by the one or two facilities providers with last mile connections,[103] there are many

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[100] Slip Op.at 39.

[101] *Id.; see also* April 26, 2010 NASUCA Reply Comments in GN 09-191, at 13 ("conflicts inherent in the vertical integration of their networks and other communications services").

[102] Slip Op. at 24 (Congress enacted section 706(a) "against the backdrop of the Commission's long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which end users accessed the Internet.") See also *id.* at 7-9.

[103] Residential and small business consumers are ordinarily limited to two broadband Internet access providers: the incumbent local exchange carrier and the incumbent cable company, both of which

competitive providers that offer content and services similar to what the carriers might bundle with their transmission, *e.g.*, email, web browsers, search engines, pop-up blockers, virus protection and innumerable other applications. Even when the transport provider also offers these services, however, they are no less severable from the transmission component than a pizza is from its delivery, as Justice Scalia pointed out in his dissent in *Brand X*:

> 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.[104]

The Commission does not regulate pizzas, and it does not regulate content on the Internet (or – for the most part – on the traditional phone system). In addressing the regulatory treatment of broadband Internet access, the Commission must begin and end with the delivery service, with the statutory definition of telecommunications, and with the reality of broadband's functionality.

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originally built out their networks as regulated monopolies. To date, very few companies have been able to replicate these last mile networks.

[104] *Brand X, supra,* 545 U.S. at 1007 (Scalia, J., dissenting) (internal citations omitted).

B. The Commission's Primary Classification Decision – the *Cable Broadband Order* – Was Founded on Flawed Legal Analysis.

Functionally, broadband Internet access has always been telecommunications, if measured in a common sense way against the definition in the Telecommunications Act of 1996: "The term 'telecommunications' means 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."[105] A "telecommunications service …means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[106] The "offering" may be the provision of a wholesale product, and may include wholesale service offered indirectly to the public.[107] This is key, because only when a "telecommunications carrier" offers a "telecommunications service" does the service come under the Title II "common carrier" provisions of the Code.[108]

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[105] 47 U.S.C. § 153(43) (emphasis added).

[106] *Id.* at § 153(46).

[107] *See* 47 U.S.C. §251(c)(4). The FCC has interpreted "telecommunications service" to include both retail and wholesale services:

> The Commission has previously held that the phrase "to the public" in the definition of "telecommunications service" does not mean a service must be offered to the entire public to qualify as a telecommunications service. A service offered to a defined class of potential customers is a telecommunications service as long as the service provider "holds itself out indiscriminately to serve all within that class." To qualify as a telecommunications carrier, companies only need to offer indiscriminate service to whatever public their services may legally and practically be of use.

Compass Global, Inc., 23 F.C.C.R. 6125, 6132-33, ¶ 15 and n.62 (2008) (footnotes omitted).

[108] 47 U.S.C. at § 153(44).

In fact, it was abundantly clear by 2002, and remains clear today, that telecommunications was entirely separable from content and enhanced or information services. The Commission could only arrive at a contrary conclusion by allowing cable company marketing to dictate the Commission's regulatory classification holding, and focusing on that to the exclusion of any serious functional or system analysis. [109]

In 2002, the Commission ignored the fact that the Internet had grown exponentially for over ten years **based on a common carrier regime,** a development that now has also been recognized by the DC Circuit.[110] The DC Circuit pointed out that the *Cable Broadband Order* was a break with the traditional notion that the only speech on a telecommunications network was that of the subscribers, and that there was in fact and law a *strict separation* between the system owner and the subscriber's speech.[111]

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[109] *Cable Modem Order* at ¶58 ("the mere existence of [a telecommunications] component, without more, does not indicate that there is a separate offering of a telecommunications service to the subscriber").

[110] Slip Op. at 8-9 (referring to the common carrier regime in place when section 706 of the Telecommunications Act of 1996 was enacted), *id.* at 24; *see also, AT&T Corp. v. Portland,* 216 F.3d 871, 876-80 (9th Cir., 2000) (cable modem providers telecommunications carriers); *In re Section 64.702 of the Commission's Rules and Regulations,* Final Decision, 77 FCC 2d 384 (1980) (*Computer II*).

[111] Slip Op. at 9 ("[f]our years later, however, the Commission took a different approach ..."); *see also* Comments of Prof. Tim Wu in 09-151, at 3-5, tracing birth of telephone regulation to the regulatory scheme in the Interstate Commerce Act of 1887 which "barred 'undue or unreasonable' discrim ination both as between customers, 'localities' and forms of traffic"; *see also* Ross, *First Amendment Trump? The Uncertain Constitutionalization of Structural Regulation Separating Telephone and Video,* 50 Fed Comm. L.J. 281, 284 (1998) ("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

In the *Cable Broadband Order* and subsequent decisions, the Commission acted on the assumption that it retained the ability to protect the public interest notwithstanding the elimination of the common carrier protections previously applicable.[112] First *Comcast* and now *Verizon* have thrown that assumption into doubt.[113] The Commission's ability to achieve consumer protection, universal service and a narrower digital divide, broadband build-out, competition among Internet Service Providers, and an open Internet has been severely truncated because of the erroneous 2002 classification of broadband as a largely unregulated information service. Even if the Commission found some traction with a Title I approach, anything less than a bright line test (or as bright a line as the Commission can draw) would likely invite continued regulatory uncertainty, inconsistent treatment of services such as essential telephone service, and more years of litigation.[114]

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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").

[112] *See, e.g.,* 2010 *Reclassification Inquiry, supra,* 25 FCC Rcd 7866, at ¶ 23 ("the Commission acted with the express understanding that its information service classifications would not impair the agency's ability to protect the public interest").

[113] Slip Op. at 55-56; *Comcast v. Federal Communications Commission, supra.*

[114] Slip Op. at 37 (broadband providers may be motivated "to interfere with the operation of third-party Internet-based services that compete with the providers' revenue-generating telephone and/or pay-television services."). In addition, traditional telephone companies such as AT&T and Verizon have argued that their own telephone service, when provided using IP technology, should not be under Title II common carrier regulation by virtue of its use of IP technology, relying on the *Cable Broadband* and *Wireline Broadband Orders.* See, *e.g.*, 2013 Annual Report on Communications Markets in Illinois at 11 (reported reductions in wireline telephone lines in Illinois between 2001 and 2009 likely were attributable, in part, to the fact that both nomadic and nonnomadic VoIP lines were

C. The *Cable Broadband Order's* Faulty Predictions, Factual Mistakes, and Absurd Results

The Commission recognized in its 2010 *Reclassification Inquiry* that "Congress's aims" of "encouraging widespread deployment of broadband" were based on a belief that the 1996 Act would bring more competitors into the marketplace.[115] The *Cable Broadband Order* itself imagined a new world of competition.[116] But the promised competition, particularly the notion of facilities-based competition for broadband, has simply not materialized in the years since the *Cable Broadband Order* and classification, a fact that the *National Broadband Plan* acknowledged.[117]

Prior to the classification of broadband Internet access as an information service, a vibrant market of small and large independent ISPs brought dial-up Internet service to urban and rural communities alike.[118] Today, the only Internet access

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not fully accounted for in the total reported line counts), https://www.icc.illinois.gov/reports/report.aspx?rt=10.

[115] *Reclassification Inquiry, supra,* 25 FCC Rcd 7866 at ¶22.

[116] *Cable Broadband Order,* 17 FCCR 4798, at ¶ 6 ("We recognize that residential high-speed access to the Internet is evolving over multiple electronic platforms, including wireline, cable, terrestrial wireless and satellite. By promoting development and deployment of multiple platforms, we promote competition in the provision of broadband capabilities, ensuring that public demands and needs can be met. We strive to develop an analytical approach that is, to the extent possible, consistent across multiple platforms"); *see also 2005 Wireline Broadband Order, supra,* 20 F.C.C.R. 20853, *at* ¶ 1 and *passim.*

[117] *National Broadband Plan,* at section 4.1 (even if cost of entry were lowered, it "is unlikely to create several new facilities-based entrants competing across broad geographic areas"), and Exhibit 4-A (78% of housing units have access to two wireline broadband providers, 13% to only one provider, and 5% have no wireline broadband provider. Only 4% have access to more than two wireline providers.)

[118] For pre-*Cable Broadband Order* competition, *see, e.g.,* line sharing orders such as FCC's Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, released December 9, 1999, 14 FCC Rcd. 20912 (*Line Sharing Orders*); and *In re Deployment of*

providers left to compete with the facilities-based duopolists appear to be a few companies who are still able to utilize the incumbents' local loops and earn a small margin by offering better customer service,[119] and an even smaller coterie of facilities-based service providers, *i.e.,* cable over-builders, who provide service in small pockets of cities like Chicago (RCN) and San Francisco (Astound). Even here, the vertical and horizontal integration of the cable companies (witness the Comcast-NBC merger creating a company offering Internet access, video, and content, and the Comcast and Time Warner mergers as well as several smaller Comcast acquisitions) should give the Commission pause.

The incumbent local exchange carriers (ILECs), which are the only wired alternative to cable broadband service in most parts of the county, have significant market power in all three segments of the communications marketplace: last mile; middle-mile or "special access"; and backbone.[120] In addition, both Verizon and AT&T now offer television or video services as well as Internet access and telephone service.[121] All this is part of the "changed circumstances" that call into question the Commission's reliance on Title I in the *Cable Broadband Order* and subsequent

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Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147 15 FCC Rcd 17806 (Aug. 10, 2000).

[119] *See, e.g.,* www.sonic.net and www.dslextreme.com.

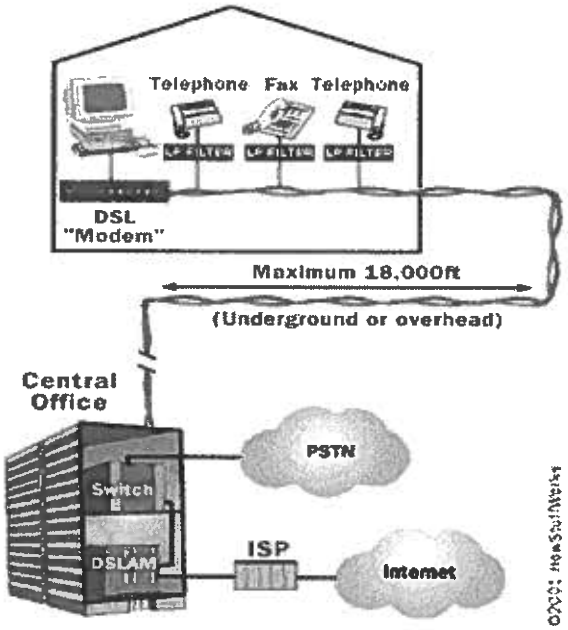
[120] *Compare,* NTCA Comments in National Broadband Plan docket, at 36 ("Commission should require all vertically integrated Internet backbone and special access (middle-mile) transport provider rates to be cost-based and non-discriminatory"), available at http://fjallfoss.fcc.gov/ecfs/document/view?id=6520219973; *see also* Taglang, "Netflix, Comcast and Our Changing Internet," at http://benton.org/node/175498.Benton Foundation, (merger of Verizon and MCI gave Verizon substantial backbone assets).

[121] AT&T offers U-verse television, and Verizon offers television over its FIOS network. See http://www.att.com/shop/tv.html#fbid=WHQuKlAVYOq and http://www.verizon.com/home/fiostv/

decisions, and strongly suggest that the *Cable Broadband Order* and its progeny have obstructed rather than promoted competition.

Leaving aside the bleak competitive landscape that has left U.S. broadband in the middle or rear of the pack,[122] *Cable Broadband's* primary mistake – a factual as well as legal mistake as discussed above – was its assumption that broadband transport could not be separated from information processing.

In traditional telephony, telecommunications transport was a clearly identifiable service; in the world of the *Cable Broadband Order,* however, transport was no longer separable, *even though broadband and traditional telephony could run on the same wires at the same time,* as the following chart shows:



[122] *See generally,* Berkman Center, *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.

It was an error in 2002 or 2005, and especially in 2014, to divide electronic transport to a residence or office into two artificial halves, where – for example – part of the ILECs' wire into the house is classified as an information service (digital subscriber line service, or DSL), and part is classified as telecommunications service (telephone).[123]

The problems with this position increase when one considers that many carriers still use both regulated TDM technology and unregulated IP technology in the course of a single call, i.e., they use IP for long-distance routing while retaining traditional technology for call origination and termination.[124] The unnecessary and artificial legal distinctions among transmission technologies or protocols have led to years of unnecessary interconnection disputes and litigation, and a less efficient system.[125]

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[123] *See, e.g., In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* 20 FCC No. 05-150, FCC Rcd 14853 (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). Similarly, VoIP telephone service, which provides the same function as POTS, runs over the same network as cable Internet, transporting voice calls without modification of the content.

[124] See, e.g., *In the Matter of Petition for Declaratory Ruling that AT&T'sPhone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, (2004) (commonly known as the *IP-in-the-Middle* decision).

[125] A central question in much of this litigation is the hairsplitting as to what constitutes a "net protocol conversion." See, e.g., *S. New Engl. Tel. Co. v. Global NAPs*, 2005 U.S. Dist. LEXIS 25898, at *14-15. The absurdity of this is clear when one considers that protocol conversions are ubiquitous in the network – conversion of calls from wireless to wireline protocols, for example. *See also In the Matter of Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, Gen. Docket No. 80-756, 95 F.C.C.2d 584 (1983) ("*Communications Protocols Order*"); *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Order on Reconsideration, 12 FCC Rcd 2297, 2298 (1997) (internetworking protocols not enhanced services).

C. A Clear Title II Separation Between Conduit and Content Has Always Been the Most Rational Way to Approach Regulation of Broadband Transmission.

When analyzing the broadband marketplace, the Commission should not focus solely on how it is held out to customers, or "customers' understanding of that service."[126] Of far greater importance is the inherent "characteristics of the services being provided."[127]

In the *National Broadband Plan* docket, Public Knowledge explained why the "inseparability" theory of the *Cable Broadband Order,* even if it was correct in 2002, is no longer empirically supported, and why broadband transmission is more properly understood under a common carriage regime: (1) the market is much less competitive than the *Cable Broadband Order* hoped it would become;[128] and (2) broadband transmission is becoming ever more fungible, commoditized, and separable from the information services, applications, and content found throughout the Internet.[129]

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[126] *Reclassification NOI*, ¶53, and n. 150, quoting from *Wireline Broadband Report and Order,* 20 FCCR at 14910, ¶ 104.

[127] *Reclassification NOI*, ¶ 53.

[128] Slip Op. 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").

[129] 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.dslextreme.com, www.saber.net –. In either case, the transmission component is separable.

Whereas a broadband Internet access provider might bundle content or services with this physical, last mile connection, the importance (to consumers) of these "bundled" information services has eroded considerably in the intervening services.[130]

Today, twelve years after the *Cable Broadband* decision, the Commission also has available to it empirical data from other countries' experience with functional and/or structural separation.[131] The data ratify the FCC's determination in *Computer II* that a "basic transmission service ... limited to the common carrier offering of transmission capacity for the movement of information" can and should be -- conceptually and transactionally -- separate from the information, applications and services *transported by that transmission service.*[132] NASUCA has argued that a clearer separation of conduit from content would in fact enhance competition in the

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[130] While broadband Internet access provides typically include a suite of miscellaneous "information" resources in the bundle of features that come with their broadband offerings, their importance to consumers has diminished, and many now view such features as throw-aways. For example, consumers had historically relied on their broadband provider to act as their e-mail host, but many have since come to understand that by doing so they become locked in to a particular provider (e.g., name@att.com) and cannot change to an alternate broadband offering without also changing their e-mail address. The growth and popularity of provider-indepenent e-mail services like gmail (from google) and ymail (from Yahoo) demonstrate this. Other bundled "information" like news, sports, weather, entertainment news, financial news, and similar content is readily available from numerous other sources.

[131] Functional separation is a more extensive form of common carriage, one where not only are conduit and content separated, but wholesale network services are separated from retail services (end-user voice and data). NASUCA's January 14, 2014 Comments in the *Open Network Proceeding* (GN 09-191) contain an extended discussion about the functional separation regime in the U.K.; *see also* update, *BEREC Guidance on Functional Separation – Functional Separation in Practice: EU Experiences* (February 2011) available at http://www.irg.eu/streaming/BoR%20%2810%29%2044%20Rev1b%20BEREC%20Guidance_on_FS_Annex_final.pdf?contentId=547128&field=ATTACHED_FILE.

[132] *In re Section 64.702 of the Commission's Rules and Regulations,* Final Decision, 77 FCC 2d 384 (1980); *Computer II*, 77 FCC 2d 384 at ¶ 96.

communications marketplace.[133] Antecedents and templates for such a separation may be glimpsed in various sections of the Communications Act.[134]

D. Title II Classification Does Not Constitute "Regulating the Internet."

A common carrier or separation regime under Title II has the further virtue of reducing the uninformed chatter about the Commission "regulating the Internet." A Title II approach would make clear that the Commission is *not* regulating the "Internet," i.e., the content carried on the wires, but assuring that the broadband Internet access provider, as a common carrier, will not "make any unjust or unreasonable discrimination" or "preferences"[135] in regard to connecting end users with providers of content or connecting with transport or backbone service providers. The proposed Open Internet rules are thus best understood as necessary to ensure that

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[133] *See 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'ns 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 January 14, 2010 Opening Comments in GN 09-141, at pp. 16-23.

[134] *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").

[135] As discussed above, 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, 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").

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"[136] – occurs in a non-discriminatory way as required under both Sections 202 and 251.[137] In other words, Title II classification authorizes the Commission to prevent unreasonable discrimination, preference or prejudice or disadvantage in connection within the physical network, while protecting content by ensuring that the transmission of content will occur "without change in the form or content of the information as sent and received." With this statutory and regulatory "link" firmly in place, the Commission could adopt the appropriate non-discrimination, no-blocking, and open Internet rules.

V. The Comcast-Netflix Dispute – Why Reclassification is Crucial to Solve the Open Network Problem at the Wholesale as Well as Retail Level

As described above, the neutrality problem can be located either in the last mile, or in a carrier's upstream connections with other carriers, content delivery networks (CDNs), and large content providers like Netflix and Google. It is in this latter instance that the problem of the two-sided market discussed above raises its head: A carrier's interest is in charging not only the customer for access to the Internet and its content, but also charging the content provider for access to the customers. Both the Commission and the D.C. Circuit have recognized the threat to

[136] 47 U.S.C. § 153(50) (definition of telecommunications).

[137] 47 U.S.C. §§ 201, 251(a), 251(c)(2).

continued innovation on the web posed by carriers' willingness to impose fees for differential access to consumers is the problem of the "terminating monopolist":

> The Commission also convincingly detailed how broadband providers' position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers. Because all end users generally access the Internet through a single broadband provider, that provider functions as a '"terminating monopolist,'" id. at 17919 ¶ 24 n.66, with power to act as a "gatekeeper" with respect to edge providers that might seek to reach its end-user subscribers, id. at 17919 ¶ 24[138]

As if to prove the Commission and D.C. Circuit prescient, shortly after the D.C. Circuit rejected the Commission's non-discrimination and anti-blocking rules, Comcast and Netflix announced resolution of their long-standing dispute about Netflix's access to Comcast customers who pay for broadband access to the Internet.[139] In response to months of troubled service,[140] Netflix agreed to pay for speedier access to Comcast's customers, although the precise terms of the agreement are unknown.[141]

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[138] Slip Op. at 38, *citing Open Internet Order*, 25 F.C.C.R. 17919, ¶ 24, and n. 66.

[139] *See, e.g.,* Ramachandran ,"Netflix Will Pay Comcast for Speed," February 24, 2014 *Wall Street Journal,* A1.

[140] *See, e.g.,* http://www.wired.com/business/2014/03/comcast-opinion/ ("in the months prior to the deal, Netflix customers on Comcast and Verizon's networks had been experiencing some very serious service issues."). *See also* "Netflix customers who use Comcast Face Streaming Hiccups (Feb. 12, 2014), http://www.twincities.com/business/ci_25116477/netflix-members-who-use-comcast-face-streaming-hiccups; "Netflix HD streaming over Comcast broadband," http://www.dslreports.com/forum/r28820834-Speed-Netflix-Comcast-does-not-support-HD-streaming (Nov. 17, 2013).

[141] *Id.;* see also Taglang, supra note 120.

Many commentators saw nothing wrong with this. Both parties may have made a smart deal: Netflix received priority access to customers for perhaps not much more than it had been paying for competitive backbone service to Level 3 and other parties to deliver its traffic to Comcast, and Comcast removed a potential issue in its planned merger with Time-Warner (the combined network's greater power to dictate terms to content providers, Netflix being among the biggest).[142] Other commentators, seeing the power of the "terminating monopolist" at work, viewed the deal as the beginning of the end for an open Internet, and a harbinger of a pay-to-play network where the network owner determined both the ease of access and the content available to its customers.[143] Most commentators agreed that there was a dearth of information about exactly what the agreement required, and lack of transparency in this area.[144]

The Comcast-Netflix agreement can be analyzed as a regulatory or policy problem, an economic problem, or an operational-legal problem. As a regulatory policy milestone, the agreement may represent the triumph of the cable model over the common carrier telecommunications model, making the broadband world more

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[142] *See, e.g.,* DeNardis, "Five Things You Should Know About the Comcast/Netflix Deal," *Slate* (February 28, 2014), available at http://www.slate.com/blogs/future_tense/2014/02/28/netflix_comcast_net_neutrality_five_things_you_need_to_know_about_the_traffic.html ("This is not a death knell for net neutrality"); *see also* George Ou, "Comcast vs. Level 3, a Peering Dispute Turned Political," video tutorial at http://www.youtube.com/watch?v=tR1sLLOYxnY&feature=youtu.be.

[143] *See, e.g.,* Crawford, "Introducing the Comcast Tax," BloombergView (February 24, 2014), available at http://www.bloombergview.com/articles/2014-02-24/introducing-the-comcast-tax; *In re Access Charge Reform,* 16 FCC Rcd 9923, at ¶ 38 (2001) ("ILECS are subject to the monopoly power that [terminating] CLECs wield over access to their end users").

[144] *See, e.g.,* DeNardis, *supra* ("What would be useful, however, and what might have pre-empted current confusion about interconnection, is network operator transparency about the terms of interconnection agreements and a set of industry best practices for these agreements").

into a "walled garden" where carriers control content.[145] Economically, it opens the door to a two-sided market, where carriers charge both the broadband subscriber and the content provider (again closer to a cable or newspaper model than a telecommunications model). It also reflects the economic power of the cable-telco duopoly consisting of the incumbent local exchange carrier and the incumbent cable company, each of which is a terminating monopolist as to their end-user customers. This leaves the content provider little choice but to pay additional fees to reach consumers who have also paid these same carriers for unfettered access to these content or edge providers.

The Commission and the Court's use of the phrase "terminating monopolist" suggests the third way the Comcast-Netflix dispute and agreement can be understood, operationally or contractually, as an interconnection dispute. Here, we are in the territory mapped out by the 1996 Act, 47 U.S.C. §§ 251-252. As one observer wrote about the dispute and agreement:

> With this, another layer of Internet architecture—interconnection and peering—is under the microscope. The Internet is not actually a cloud but a collection of networks that technically conjoin, or "interconnect," and exchange traffic based on negotiated business arrangements known as "peering" or "transit" agreements.[146]

The Commission has encountered the problem of terminating monopolists and the power they can bring to bear, producing market anomalies such as conference

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[145] Crawford, "Introducing the Comcast Tax," *supra.*

[146] Denardis, *supra.*

calling, other forms of access stimulation,[147] and disproportionate terminating access fees.[148] Understanding Comcast-Netflix in this vein, as an interconnection dispute, allows the Commission to address it as a "terminating monopoly" problem, and brings the entire instrumentarium of Sections 251 and 252 (and incorporated section 256) of the Communications Act to bear: duty to interconnect; duty to provide access to rights-of-way; duty to negotiate; "duty to provide, to any requesting telecommunications carrier … nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just a, reasonable and nondiscriminatory";[149] duty to collocate equipment necessary for interconnection, again on reasonable rates, terms and conditions; arbitration of agreements,[150] and determination if necessary by the State commission of just and reasonable rate for the interconnection of facilities;[151] transparency by carriers of "generally available terms"[152] and public filing of arbitrated interconnection agreements;[153] and "Commission oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications

[147] *See, e.g.,* Transformation Order, *supra,* 26 FCC Rcd 17663, at ¶¶ 656-701.

[148] *See ISP Remand Order,* 16 FCC Rcd 9151, ¶ 5, *passim* (2001) (asymmetric traffic and fees collected by terminating carrier).

[149] 47 U.S.C. § 251(c)(3).

[150] *Id.* at § 252(b).

[151] *Id.* at § 252(d).

[152] *Id.* at § 252(f); *see also* § 252(i) ("availability to other telecommunications carriers").

[153] *Id.* at § 252(h).

service for the effective and efficient interconnection of public telecommunications networks."[154]

The Comcast-Netflix dispute challenges the Commission, and all of us, to think about open networks and network neutrality in a new way. In contrast to arbitrated telecommunications interconnection agreements, the Comcast-Netflix agreement is not public – in itself a good argument for reclassification. Other countries, regulatory bodies, and technical experts have pushed to identify the correct regulatory framework for "Connected TV" and peering relationships when they no longer can be based on mutual interest and symmetrical traffic.[155]

One way or the other, the telecommunications interconnection regime of sections 251-252 provides a framework for analysis and dispute resolution. Reclassification of broadband Internet access service is key. Without the telecommunications framework, the public network becomes a Darwinian battleground and a "mosh pit" of special interests.[156] This is not the model Congress created in the Telecommunications Act of 1996, and is not where we want to see our

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[154] *Id.* at § 256(b)(1), incorporated by § 251(a).

[155] *See, e.g., Connected Television, Convergence and Digital Business Models,* OECD Digital Economy Paper 231 (December 2013), available at http://www.oecd-ilibrary.org/science-and-technology/connected-televisions_5jzb36wjqkvg-en; Rudolph van der Berg, "How the 'Net Works – an Introduction to Peering and Transport," *Ars Technica,* Sept. 2, 2008, available at http://arstechnica.com/features/2008/09/peering-and-transit/; W.B.Norton, "The Art of Peering," at http://www.blogg.ch/uploads/peering-playbook.pdf; Hyun-Cheol Chung, Developments in Cable Broadband Networks, OECD Digital Economy Paper 170 (2010), available at http://www.oecd-ilibrary.org/content/workingpaper/5kmh7b0s68g5-en.

[156] Susan Crawford used the phrase "mosh pit of stakeholders" to describe what might occur if and when Congress attempts a rewrite of the Communications Act. Crawford, *The Communications Crisis in America,* 5 HARV. L. & POL'Y REV. 245, 261 (2011). Our use of a similar phrase here is meant to suggest that the mosh pit has moved onto the network, and is being played out in interconnection and other disputes similar to Comcast-Netflix.

public network headed. Only reclassification of broadband as common carriage in response to the *Verizon v. FCC* remand is adequate to the tasks and importance of this general purpose technology. As one observer stated:

> Arrangements of technical architecture are also arrangements of power. Interconnection is a public interest issues because it provides the basic infrastructural foundation for the digital public sphere, because it promotes Internet growth and efficiency. [157]

Comcast-Netflix poses the open network problem in a new context, and with new urgency. It is time, it is past time, for this Commission to act.

VI. CONCLUSION

Chairman Wheeler's iBook, *Net Effects*, emphasizes the economic effects of "our" electronic network: "Whereas earlier networks enabled the economic activities of their eras, our network revolution *defines* virtually all aspects of the current economy."[158] NASUCA agrees. "Our network" is an essential input for businesses great and small across the country. People use the network every time they use a credit card or go to an ATM. Electronic commerce rides in large part on the wires of cable operators and large incumbent telephone carriers (whose wires used to be called the PSTN).

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[157] Denardis, *supra.*

[158] Tom Wheeler, *Net Effects – the Past, Present, and Future Impact of Our Networks* (2013), at 4, available at http://transition.fcc.gov/net-effects-2013/NET_EFFECTS_The-Past-Present-and-Future-Impact-of-Our-Networks.pdf (emphasis in original).

But "our network" not only carries (and defines) an increasing share of the nation's economy, it also carries (and defines) an increasing share of the nation's culture. It is our public square; it brings together a public sphere; it constitutes a national identity.[159] The network should serve everyone similarly; it should be a common carrier for all communications. Discrimination, the creation of fast and slow lanes, private streets paralleling public, all sap the IP network of its inherent vitality.

Some associated with industry have threatened a "Regulatory World War III" if the Commission reclassifies.[160] There is little doubt of outcry among some network owners as well as some on Capitol Hill. But that's where leadership comes in. The Chairman and the Commissioners need to recognize and describe what the nation's communications system does: how one interconnected electronic network carries not only a large and increasing share of the nation's economy – as Chairman Wheeler recognized in his iBook – but also carries the nation's culture, its politics, and ultimately its self-identity. Some 300 million Americans communicate online, accessing the Internet through last mile transmission lines **without modification of their accessed content**. The Commission needs to ensure that the owners of the wires will not be able to pick winners and losers the way the railroad barons did in the

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[159] *See generally* Lawrence Lessig, *Code and Other Laws of Cyberspace* (2000) ("code is law"); Jürgen Habermas, *The Structural Transformation of the Public Sphere* (1962); Witteman, "Constitutionalizing Communications, the German Constitutional Court's Jurisprudence of Communications Freedom," 33 *Hastings Int'l & Comp. L.Rev.* 95 (2010); "Information Freedom, a Constitutional Value for the 21st Century," 36:1 *Hastings Int'l & Comp. L.Rev* 145 (2013), both available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1372934.

[160] *See, e.g.* Thierer, "Esbin on What the FCC is Up Against with Title II Reclassification"(April 2010), available at http://techliberation.com/2010/04/15/esbin-on-what-the-fcc-is-up-against-with-title-ii-reclassification/.

19th century. The Commission needs to confidently assert that regulating the wires, the telecommunications substrate, is not "regulating the Internet" or the services and content on it, but will maintain access to those services and content and protect both consumers and edge providers from discrimination or content blocking and degradation.

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