CINNAMON MUELLER

BARBARA S. ESBIN
Admitted in the District of Columbia
besbin@CinnamonMueller.com

WASHINGTON, DC
1875 Eye Street, NW
Suite 700
Washington, D.C. 20006

direct: 202-872-6811
fax: 202-683-6791

ST. LOUIS
1714 Deer Tracks Trail
Suite 215
St. Louis, MO 63131

CHICAGO
307 N. Michigan Ave
Suite 1020
Chicago, IL 60601

phone: 312-372-3930

January 12, 2015

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Washington, DC 20554

Re: American Cable Association Ex Parte Submission on *Protecting and Promoting the Open Internet, GN Docket No. 14-28; Framework for Broadband Internet Service, GN Docket No. 10-127*

Dear Ms. Dortch:

With the Federal Communications Commission poised to adopt new rules governing the offering of broadband Internet access service, the American Cable Association ("ACA")[1] urges it to draw these rules narrowly and not burden small and medium-sized broadband Internet service providers ("ISPs") with additional – and unwarranted – common carrier regulation. As ACA demonstrated in its comments, these smaller ISPs do not have the incentive or ability to engage in unreasonable or discriminatory practices, much less anticompetitive acts, which harm consumers and edge providers. Moreover, nowhere in the Notice of Proposed Rulemaking in this proceeding,[2] nor in any of the filings in the voluminous record is there evidence demonstrating the contrary. Accordingly, the Commission has no factual or policy basis to shackle smaller ISPs with regulations that go beyond those it adopted in the *2010 Open Internet Order*,[3] especially regulations that subject their broadband Internet access service for the first time to Title II common carrier regulation. In this *ex parte* submission ACA explains why reclassifying broadband Internet access service as a Title II service is the wrong approach for smaller ISPs from both a policy and legal perspective, and, should the Commission nonetheless adopt that approach, why it should forbear from applying to these providers the regulatory obligations and requirements applicable to Title II telecommunications carriers, including Sections 201, 202 and 208, and preempt inconsistent state telecommunications service regulation.

[1] ACA represents a unique group of broadband ISPs -- smaller, independent cable operators, rural telecommunications companies, municipalities, and overbuilders. The median number of homes served by these members is about 1,000. *See Protecting and Promoting the Open Internet*, Comments of the American Cable Associations, GN Docket Nos. 14-28, 10-127, at iii; Exhibit B, Connecting Hometown America at 1 (filed July 17, 2014) ("ACA Comments" and "Connecting Hometown America Report" respectively).

[2] *Protecting and Promoting the Open Internet,* Notice of Proposed Rulemaking, GN Docket No. 14-28 (FCC 14-61) (rel. May 15, 2014) ("Notice" or "NPRM"); *See Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks*, Public Notice, DA 14-748, GN Docket No. 10-127 (rel. May 30, 2014) (requesting commenters to refresh the record and establishing a pleading cycle to run concurrent with the Open Internet rulemaking).

[3] *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 (2010) ("*2010 Open Internet Order*"), aff'd in part, vacated and remanded in part sub nom. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) ("*Verizon*").

I. THE COMMISSION NEED NOT AND SHOULD NOT RECLASSIFY BROADBAND INTERNET SERVICE AS A TELECOMMUNICATIONS SERVICE

As an initial matter, as established by the *Verizon* decision,[4] the Commission possesses ample authority under Section 706 of the Act to adopt adequate rules – as ACA asserts the Commission has already done in the case of smaller providers – to preserve an open Internet and accelerate broadband deployment. Indeed, the Commission's "light touch" approach has been successful without the need to resort to Title II. ACA members have introduced broadband Internet access service to some of the hardest-to-serve regions of the country through significant investment in infrastructure to provide a suite of advanced communications services to homes, businesses and community institutions.[5]

ACA is not aware of any complaints against smaller ISPs deviating from the Commission's 2005 open Internet policy principles or its 2010 open Internet rules. The lack of net neutrality violations or purported violations on the part of smaller ISPs is corroborated by the record in this proceeding and is especially important when considered in light of the astronomical number of broadband connections made each day.[6] If anything, smaller ISPs are at the mercy of large Internet edge providers, some of who have blocked smaller ISP subscriber access to content the edge provider distributes for free online to the all other Internet users.[7]

Further, reclassification is not only unnecessary; it would create additional burdens without benefit. As ACA demonstrated in its comments, subjecting broadband ISPs to Title II regulation would impose significant direct and indirect economic costs on a flash-cut basis through increased Federal and State regulation and taxation, divert resources from deployment and improvement of broadband, create regulatory uncertainty, and disproportionately burden smaller providers.[8] ACA continues to maintain that the Commission has no policy need, therefore, to attempt either a complete or partial reclassification of broadband Internet service as a Title II service in order to adopt strong and enforceable rules for the protection and promotion of an open Internet.

[4] *Verizon,* 740 F.3d at 659 (upholding the Commission's authority to regulate broadband Internet access service to preserve the "virtuous circle" engendered by Internet openness disclosure rules under Section 706).

[5] *See* ACA Comments at 60 and n.154 ("Based on data from National Cable Television Cooperative, the National Broadband Map, and SNL Kagan, ACA members pass 18.2 million homes with broadband plant, and serve 6.3 million subscribers. ACA members serve a disproportionate share of customers in small cities and rural areas. While 28% of the US population lives in small cities and rural areas, 42% of the people covered by ACA members live in these areas.").

[6] *Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review-Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986, (2005) ("Internet Policy Statement"); *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 (2010).

[7] ACA Comments at 15-22; *Protecting and Promoting the Open Internet*, Reply Comments of the American Cable Associations, GN Docket Nos. 14-28, 10-127, at 30 (filed Sept. 15, 2014) ("ACA Reply Comments").

[8] ACA Comments at 62-66.

II. THE COMMISSION CANNOT JUSTIFY RECLASSIFICATION OF BROADBAND INTERNET ACCESS SERVICE AND IN ANY EVENT LACKS AUTHORITY TO COMPEL COMMON CARRIER STATUS

Not only should the Commission not reclassify the retail broadband Internet access service (or a component thereof) as a Title II service, it does not have the legal authority to do so. First, reclassification would conflict with the Commission's prior fact-based determinations that, under the Act's service and technology-specific regulatory framework, Internet access service providers are not providers of "telecommunications service." Second, the Commission lacks authority to compel common carrier status through the act of reclassifying simply to achieve policy objections.

A change in regulatory status for broadband Internet service is unwarranted. Administrative agencies may revisit prior decisions and change their regulatory policies concerning how they will implement statutory mandates, but the courts require that that they are neither "arbitrary" nor "capricious" in making those changes. Under the Supreme Court ruling in *FCC v. Fox Television Stations*, to pass this test, the Commission must acknowledge that it is changing its policy, provide a reasoned basis for the change, and take account of reliance interests stemming from the earlier policy.[9] Most importantly, the justification for the change must be more detailed where the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," or "when its prior policy engendered serious reliance interests that must be taken into account."[10] This the Commission cannot do with respect to the appropriate regulatory classification of broadband Internet access service on the record before it.

The Commission has on several previous occasions over the past fifteen years considered the terms of the statutory definitions together with the factual particulars of how broadband Internet access service was provisioned and offered to subscribers, and on that basis classified broadband Internet access service providers, regardless of platform, as "information service" providers under Title I of the Act.[11] Its conclusion, under the Communication Act's service and technology-specific framework, was that broadband Internet service providers were not providing consumers a pure transmission path, were not offering service on a common carrier basis, and therefore should not be treated as providers of a telecommunications service. The decisions referred to above – the *Cable Modem Declaratory Ruling, the Wireline Broadband Order, and Wireless Broadband Declaratory*

[9] *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502 (2009) ("*Fox*").

[10] *Id.* at 515.

[11] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 2 (2002) ("*Cable Modem Declaratory Ruling*") *aff'd sub nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 968 (2005) ("*Brand X*"); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era,* Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14,853, 14,980 (2005) ("*Wireline Broadband Order*"); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd. 13,281, ¶ 9 (2006) ("*Broadband Over Power Line Order*"); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd. 5901, ¶¶ 18, 22–26 (2007) ("*Wireless Broadband Declaratory Ruling*").

Ruling, as well as the Supreme Court's decision in *Brand X* – were not based on the Commission's discretion as a policymaker, although its policy objectives were certainly taken into account at the time. These decisions instead turned on "the nature of the functions that the end user is offered"[12] by the broadband provider considered in light of the statutory definitions which bound, and still bind, the Commission's regulatory classifications of service, namely the definitions of "telecommunications service"[13] and "information service."[14]

Thus, for example, the Commission concluded in the 2002 *Cable Modem Declaratory Ruling*, that:

> [C]able modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications. As currently provisioned, cable modem service supports such functions as e-mail, newsgroups, maintenance of the user's World Wide Web presence, and the DNS. Accordingly, we find that cable modem service, an Internet access service, is an information service. This is so regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service. As currently provisioned, cable modem service is a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering.[15]

The Supreme Court in *Brand X*, agreed with these conclusions and analysis, finding that broadband Internet access service provided over a cable modem was an information service, that a user of the service "cannot reach a third-party without DNS functionality" and that "the Internet service provided by cable companies facilitates access to third-party Web pages by offering consumers the ability to store, or 'cache,' popular content on local computer servers."[16] In short, "'[t]he service that internet access providers offer to members of the public is internet access,' not a transparent ability (from the end user's perspective) to transmit information."[17] The Commission in 2005 subsequently found that wireline broadband Internet access service too "is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such

[12] *Cable Modem Declaratory Ruling*, ¶ 38.

[13] 47 U.S.C. §153(53) ("'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.").

[14] 47 U.S.C. §153(24) ("'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.").

[15] Cable Modem Declaratory Ruling, ¶ 38.

[16] *Brand X,* 545 U.S. at 979, 999-1000. *See also id.* at 988 ("[s]een from the consumer's point of view . . . cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access.").

[17] *Id*. at 1000.

that the consumer always uses them as a unitary service," i.e., an information service.[18] This was true in 2002 as it was in 2005 and remains true today.

ACA has submitted evidence in the record demonstrating that nothing fundamental has changed in the nature of the broadband Internet service offered to subscribers by its member today to warrant re-examination of these fact-based decisions.[19] Moreover, the record as a whole demonstrates that in recent years broadband Internet access service as offered by many broadband ISPs has included even more enhanced capabilities further bolstering the status of the service as a fully integrated information service as offered to and utilized by broadband Internet access subscribers. The Commission bears a heavy burden in justifying applying unchanged law to unchanged facts and arriving at the opposite conclusions with respect to the appropriate regulatory classification of broadband Internet access service. While the Commission is free to change its policy objectives if it can supply a reasoned basis for the change, it is not free to change the facts to achieve its policy goals without running the risk of being found arbitrary and capricious by the reviewing courts.[20] This is particularly true where, as here, broadband ISPs and their investors have relied upon the Commission's "light touch" regulatory approach and invested billions of dollars of risk capital for over a decade.

Similarly, if the Commission were to consider a partial reclassification by forcing broadband Internet access service providers to unbundle some pure transmission component from their services, it would face an extremely high hurdle before the courts in trying to justify reversal of its previous determination that such "radical surgery" was not required to protect consumers, particularly in light of the adequate and likely competition in the provision of broadband Internet services that has developed, as the Commission predicted in 2002.[21] Not only can this hurdle not be cleared as a general matter in this case, an even higher barrier is presented in the case of smaller broadband ISPs such as ACA members who are demonstrably not the source of any actual or potential open Internet violations.

Reclassification would be contrary to law and in excess of statutory jurisdiction. Not only must the Commission avoid making arbitrary and capricious decisions under the APA, but also its decisions must be "in accordance with law" and not "in excess of statutory jurisdiction, authority or limitations" in order to avoid reversal on judicial review.[22] The regulatory definitions in the Act are written in terms of what providers *are* offering the public, not in terms of what the Commission thinks they *should be* providing. The courts have made clear that the Commission may not impose Title II regulation based simply on its notions of good policy. Thus, even beyond merely having to explain its rationale for re-interpreting the meaning of "telecommunications service" to avoid its decision being found arbitrary and capricious, the Commission lacks the statutory authority to change the existing regulatory classification of an existing service purely for policy reasons. This would prevent the Commission both from imposing common carrier status on the existing integrated mass market broadband Internet service identified in the NPRM and on any newly recognized

[18] *See* Wireline Broadband Order, ¶ 12 (Wireline broadband service "is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service.").

[19] ACA Comments, Exhibit C, Declaration of Edward H. McKay, at 2, Exhibit D, Declaration of Christian Hilliard, at 2.

[20] *Fox,* 556 U.S. at 515.

[21] *Cable Modem Service Declaratory Ruling*, ¶ 28 ("EarthLink invites us, in essence, to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act. Such radical surgery is not required.").

[22] Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (C).

"telecommunications service" extracted by the Commission and required to be offered on a stand-alone basis to the public in this proceeding.

If a company wants to offer service on a common carrier basis, it may do so without seeking the Commission's permission. An entity becomes a common carrier, under the terms of the Act, essentially by acting like one.[23] The circularity of the statutory definition requires the FCC and the courts to consult the common law of carriers. The two part definition developed by the D.C. Circuit in *NARUC I* and *NARUC II* for communications common carriers looks to whether the entity: (i) holds itself out to serve indifferently all potential users, either voluntarily or under legal compulsion; and whether (ii) the system be such that customers '"transmit intelligence of their own design and choosing."'[24] In other words, the test looks not only on how the provider is holding itself out, but also at whether the entity is offering to subscribers, for a fee, a transparent path for transmission of information of the user's choosing. This same common law formulation of common carriage was carried into the new statutory definitions of "telecommunications" and "telecommunications service" enacted by Congress through the Telecommunications Act of 1996.[25] Once undertaken, the regulatory obligations and rights of Title II automatically attach. Because ISPs are not "holding themselves out" as common carrier providers of pure transmission service, any move to reclassify their service in whole or in part would result in the *de facto* involuntary imposition of common carrier status by the Commission. But nowhere does the Act expressly give the Commission the power to compel a non-common carrier to offer its service on a common carrier basis.

Thus, in *Midwest Video II* the Supreme Court found that without Congressional authority, the Commission cannot "compel cable operators to provide common carriage."[26] Although advocates in this proceeding describe the action they desire as one of "reclassification," the practical result would be the involuntary imposition of common carrier status on non-carrier broadband ISPs. In *Southwestern Bell*, the Commission similarly attempted to subject a local exchange carrier's private dark-fiber service to common carrier regulation.[27] The D.C. Circuit reversed, holding that Title II regulation could only be imposed where the entity was, in fact, providing a common carrier service. If an "entity is a private carrier for that particular service … the Commission is not at liberty to subject the entity to regulation as a common carrier."[28] "While the Commission may look to the public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance."[29]

---

[23] 47 U.S.C. § 153(11) ("The term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.").

[24] *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.) ("*NARUC I*"); *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (1976) ("*NARUC II*").

[25] Telecommunications Act of 1996, Pub. L. No. 104-104; 47 U.S.C. § 153(43) ("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."); 47 U.S.C. §153(53) ("'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."). These definitions track the NARUC I and II formulations as to the manner and nature of an offering of communications service that renders it a common carrier offering.

[26] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 (1979).

[27] *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1995) ("*Southwestern Bell")*.

[28] *Id.* at 1481.

[29] *Id.*

Southwestern Bell follows a long line of cases denying the Commission the ability to impose Title II regulation simply on its notions of good policy. In *NARUC I*, for example, the D.C. Circuit upheld the Commission's decision to create a private mobile radio service, including a new class of entrepreneurial operators knows as "special mobile radio systems," in the absence of any indication that the systems would in practice behave as common carriers or that it rules would require them to.[30] The court, however, further stated that "we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities."[31]

Although the matter is not free from ambiguity, the *NARUC I* court's pre-1996 Act analysis could be read to suggest that the Commission is empowered to impose common carrier status on a non-common carrier, thus supplying the "legal compulsion" to serve the public indifferently. Such a reading, however, is contradicted by the court's rejection of "those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve …. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so."[32] This strongly suggests that although an entity may take on the obligations of common carriage by holding itself out indifferently to provide a pure transmission path service to the public, the Commission was not delegated the authority by Congress to force common carrier status on entities currently providing service on a non-common carrier basis. This situation is distinguishable from those cases in which the Commission has created a new service, and specified that those wishing to provide it must

[30] *NARUC I,* 525 F.2d 630.

[31] *Id.* at 644. In drawing this conclusion, the *NARUC I* court stated that, "[f]or purposes of the Communications Act, a common carrier is 'any person engaged as a common carrier for hire …,'" 47 U.S.C. § 153(h) (1970), whereas the Commission's regulations offered a "slightly more enlightening definition: 'any person engaged in rendering communication service for hire to the public,'" 47 C.F.R. § 21.1 (1974). The concept of "the public," according to the court, "is sufficiently indefinite as to invite recourse to the common law of common carriers to construe the Act." *Id*. at 640. "A good deal of confusion," the court observed, "results from the long and complicated history of that concept." *Id*. After surveying relevant authorities, the *NARUC I* court identified as key "the quasi-public character implicit in the common carrier [which] is that the carrier 'undertakes to carry for all people indifferently….'" *Id.* at 641. The court explained, "[A] carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so." *Id.* Because private and common carriers may be indistinguishable in terms of the clientele actually served, the dividing line between them must turn on the manner and terms by which they approach and deal with their customers. Thus, in determining whether to overturn the FCC's classification of Specialized Mobile Radio Systems (SMRS) as non-common carriers, the court examined the likelihood that SMRS would hold themselves out indifferently to serve the public, or such portion of the public as could reasonably make use of the service. "In making this determination, we must inquire, first, whether there will be any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of SMRS operations to expect an indifferent holding out to the eligible user public." *Id*. at 642. The court concluded that the answer was no. There was nothing in the proposed FCC regulations that would either compel SMRS to serve any particular applicant, or more importantly, limit "their discretion in determining whom, *and on what terms*, to serve…." *Id*. The court thus affirmed "the Commission's classification not because it has any significant discretion in determining who is a common carrier, but because we find nothing in the record to cast doubt on its conclusions that [specialized mobile radio systems] are not common carriers." *Id.* at 643.

[32] *Id.* at 644.

operate as common carriers,[33] or is authorizing submarine cable landing rights and fiber optic facilities operations that it permits to be operated on either a private or common carrier basis.[34] In the latter instance, the Commission required common carrier operations only upon a finding of market power, a finding it cannot make with respect to smaller broadband ISPs on the record before it in this proceeding.

Thus, while these decisions and some others suggest that the Commission may supply the "regulatory compulsion" to require a non-common carrier to provide service on a common carrier basis and in certain instances may compel a carrier already offering telecommunications without enhanced capabilities on a private carrier basis to offer that telecommunications on a common carrier basis, ACA is unaware of any case or Commission decision to date suggesting that the agency can compel a broadband Internet access service provider, let alone *all* broadband Internet access service providers nationwide, to split out the underlying telecommunications component and offer it on a common carrier basis. To require telecommunications that is being offered on a private carrier basis to be offered to the public on a common carrier basis, which was what was at stake or discussed in those cases, is a fundamentally different thing than requiring an integrated information service to be unbundled and the telecommunication component offered as a completely different service. Notwithstanding any debate over the Commission's ability in the former case, the latter is quite clearly something the Commission may not do under the Act.[35]

Even the cases that consider whether a private carrier telecommunications offering should be offered on a common carrier basis require a finding of market power before reclassification occurs.[36] Thus, even assuming the Commission has the same authority to require broadband Internet access service providers to offer the underlying transmission component of their service on a common carrier basis, the Commission must make a finding of market power. This it cannot do, particularly with respect to smaller ISPs. The record in this docket and elsewhere reveals that the broadband marketplace is competitive already and becoming even more so. Moreover, even if one were to accept for the sake of argument that broadband ISPs operate as "terminating monopolies" with respect to Internet edge provider access to ISP subscribers, it is clear that not all ISPs are equal in their ability to leverage that position in an anti-consumer or anticompetitive manner. As ACA pointed out in its filings, the record in this proceeding and the records of the contemporaneous merger

[33] *See, e.g., Id.* at 639-642 (upholding FCC authority under Titles II and III to allocate 30 MHz of spectrum to operators of SMR systems to be operated on a non-common carrier basis); *In the Matter of Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems and DBSC Petition for Declaratory Rulemaking Regarding the Use of Transponders to provide International DBS Service*, Report and Order, 11 FCC Rcd. 2429, ¶ 45 (1996).

[34] *See, e.g., Virgin Islands Tele. Corp. v. FCC,* 198 F.3d 921, 925 (D.C. Cir. 1999) ("Vitelco") (upholding FCC determination under Cable Landing License Act and Section 214 that cable landing license and facilities authorization on a non-common carrier basis upheld based on finding that AT&T did not intend to provide service indiscriminately to the public and that lacked market power in the relevant market that would justify requiring it to operate the facility on a common carrier basis*); Cable & Wireless, PLC*, *Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between the United States and the United Kingdom*, 12 FCC Rcd 8516, ¶¶ 12-17 (1997) (authorization for a private cable submarine system granted where the applicant did not plan to operate on a common carrier basis and the public interest did not require common carrier operation of the proposed facility in light of adequate competition in the market).

[35] Even if the Commission were to require broadband Internet access service providers to offer the transmission component as a telecommunications offering, the Commission cannot preclude providers from continuing to offer separately integrated broadband Internet access service as an information service offering on a non-common carrier basis.

[36] *See Vitelco*, 198 F.3d at 925.

reviews involving Comcast and Time Warner Cable and AT&T and DirecTV make clear that only the largest "Eyeball ISPs" have sufficient market power due to their enormous subscriber bases to adversely impact the operations of Internet edge providers or demand payments so as to threaten Internet openness.[37]

Accordingly, should the Commission find that certain ISPs had market power in certain geographic localities, that finding could not justify an order compelling a common carrier offering of the telecommunications component of broadband Internet access service by all such providers on a nationwide basis. In any event, there can be little doubt that smaller providers, such as ACA members, do not have such power relative to edge providers. Quite the contrary. As ACA explained in its filings in this docket, because smaller providers lack market power, "the experience of the smaller ISPs who comprise ACA's membership has been . . . blocked and degraded access for their customers at the hands of large Internet edge providers."[38]

III. EVEN IF THE COMMISSION COULD LAWFULLY RECLASSIFY BROADBAND INTERNET SERVICE AS A TITLE II SERVICE, IT SHOULD FORBEAR FROM ALL TITLE II REGULATION OF THE SERVICE

Assuming for the sake of argument the Commission has the authority to reclassify broadband Internet access service, in whole or in part, as a Title II service and that it chose to do so for the purpose of bolstering the legal basis for its proposed open Internet rules,[39] then the Commission should simultaneously grant all small and medium-sized ISPs immediate forbearance from all of the operative regulatory obligations and restrictions of Title II, including Sections 201, 202 and 208.

---

[37] ACA Comments at 13; ACA Reply Comments at 12 n.22 (citing *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of Level 3 at 7-11 (filed July 15, 2014) (describing how "some big mass-market ISPs are attempting to exploit their control over access to their customers to extract interconnection tolls from providers like Level 3—at levels that frequently equal or even exceed the entire price Level 3 charges its customers for transit to reach those ISPs' networks as well as the rest of the Internet"); Ex Parte of Level 3 at 2-4 (filed Sept. 8, 2014) ("Level 3 Ex Parte") (seeking interconnection regulation for only the largest "eyeball ISPs," defined as "those serving several million customers each" as having congested their ports in an attempt to extract tolls). Netflix and Level 3's position that only the largest ISPs have the ability to threaten to effectively block or degrade edge provider access to ISP customers is echoed by others in dockets as well such as the comments of both Cogent and Roku in the Comcast-TWC docket. *See also, e,g., Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, GN Docket No. 14-57, Petition to Deny of Netflix at 52 (filed Aug. 26, 2014). *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, GN Docket No. 14-57, Comments of Cogent Communications Group, Inc. at 27 (filed Aug. 26, 2014) ("Cogent Comments in GN Docket No. 14-57") (Cogent alleges that when it began carrying Netflix's traffic, Comcast began refusing to upgrade connections with Cogent. Cogent states that "smaller residential broadband networks continued to upgrade both peering and transit ports and Cogent has had no congestion problems with those networks."); Comments of Roku, Inc. at 11 (filed Aug. 26, 2014) ("Roku Comments in GN Docket No. 14-57") (distinguishing the behavior of Comcast not permitting its customers to use third-party applications to that of the far smaller Time Warner Cable who developed its own Roku app that enables their cable customers to access virtually the entire Time Warner cable service offering)).

[38] ACA Comments at iv; ACA Reply Comments at 32. *See also Protecting and Promoting the Open Internet*, Comments of WISPA, GN Docket Nos. 14-28, 10-127, at 22 (filed July 17, 2014) ("[i]n contrast to larger broadband providers, small businesses lack market power and, in some cases, the bandwidth to negotiate for monetary payments from edge providers and content delivery networks.").

[39] Again, ACA believes that additional basis is unnecessary and that the *Verizon* court made clear that Section 706 alone is sufficient for the Commission, upon proper findings of need, to adopt open Internet rules to address blocking, unreasonable discrimination, and paid prioritization. Title II reclassification is not, in a word, necessary.

Immediate and blanket forbearance would mitigate many of the potential and significant harms that otherwise would result from reclassification which ACA detailed above and in its comments in this proceeding. Moreover, such streamlined forbearance would be consistent with Commission discussions in the *Cable Modem Declaratory Ruling* when it tentatively concluded that although cable modem service is functionally an information service, as it remains today, forbearance from Title II regulations would be prudent if in the future some cable modem service providers started offering a service that could be considered grounds for common carriage regulation. The Commission explained that "the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent cable modem service is classified as a telecommunications service."[40]

More importantly, for years, without any need for Title II obligations to compel them, smaller ISPs have delivered innovative, high-performance broadband Internet access service at competitive rates to consumers. For this reason, Title II regulations, individually and as a whole, are demonstrably, if not inherently, unnecessary to protect competition, consumers, or the public interest in markets served by smaller ISPs. Accordingly, the standard for forbearance from Title II regulation of broadband Internet access service would be easily satisfied for these providers. This is true regardless of whether the Commission, in the case under discussion, would be classifying broadband ISPs as common carriers for the first time simply in order to bolster the justification for open Internet rules that will be primarily crafted under Section 706 authority or because it wishes to subject broadband ISPs to some but not all of the requirements of Title II. In either case, the Commission it should forbear from enforcing any such common carrier regulation on smaller ISPs in order to maintain the "status quo." This is especially true where, as here, the Commission has an independent grant of authority to adopt rules under Section 706 to promote making broadband service – an advanced telecommunications capability – to all Americans.

The Commission's authority pursuant to Section 10 to grant forbearance from Title II for broadband Internet access service to smaller ISPs is well established. Any forbearance analysis under the three prongs of Section 10[41] should be straightforward, particularly because the industry has not been subject to such regulation and is competitive at a more compelling level than in other circumstances where forbearance from Title II regulation was granted, as the record in this proceeding demonstrates.[42]

---

[40] *Cable Modem Declaratory Ruling and Notice of Proposed Rulemaking*, ¶95. Of course, in the *Cable Modem Declaratory Ruling* the Commission did not, to any extent, classify cable modem service (i.e., broadband Internet access service) as a telecommunications service. Industry-wide forbearance has a further precedent in the case of Commercial Mobile Radio Service ("CMRS"). In 1994, the Commission forbore from applying the tariffing and other core requirements of Title II to CMRS providers pursuant to Section 332 of the Act, with the objective of promoting robust competition among CMRS providers (typically only two to a market at the time) and avoiding subjecting CMRS carriers to the harmful economic effects of unnecessary Title II regulation. *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411 (1994). It is important to note that the Commission, in 1994, did not have the ability to forbear generally from applying Section 201 and 202 to CMRS carriers. Hence, the limited extent of forbearance in the CMRS case under the more restrictive Section 332 forbearance standard should not have any relevance for the extent of forbearance applied to broadband Internet access service providers under Section 10 of the Act.

[41] 47 U.S.C. § 160(a)(1)-(3).

[42] *See e.g.* ACA Comments, Connecting Hometown America Report, at 1 (describing the role of small and medium sized cable broadband providers as competitive options in both urban and rural markets); *Protecting and Promoting the Open Internet*, Comments of NCTA, GN Docket Nos. 14-28, 10-127, at 13 (describing the competitive market for broadband Internet access services).

The case for blanket forbearance is particularly strong for ACA members because, as smaller ISPs, it is evident that they wholly lack the market power over edge providers or in their local markets that would justify any need for regulation. First, applying any regulation or provision of Title II is unnecessary "to ensure that the charges, practices, classifications, or regulations by, for, or in connection with [broadband Internet access services] are just and reasonable and are not unjustly or unreasonably discriminatory" given the extent of competition in markets served by smaller ISPs and the fact that Section 706 is available as a fully sufficient regulatory backstop.[43] Second, the record is devoid of evidence that that there have been any harms caused by smaller ISPs that makes Title II regulation "necessary for the protection of consumers" of broadband Internet access service.[44] Indeed, absent any Title II regulation of broadband Internet access service, consumers in these markets have reaped tremendous and increasing benefits from these ISPs. Third, and finally, forbearance would be consistent with the public interest and promote continued broadband investment and competition,[45] as demonstrated by the plethora of providers and broadband options available in the marketplace today, as well as the scale of investment by providers, which developed in the absence of Title II regulation.[46] Were the Commission to decline to forbear as a general matter, the industry – and consumers – would be burdened with new costs and potentially tremendous uncertainty with the costs and unanticipated consequences of Title II regulation with no offsetting benefit.

For the foregoing reasons, the Commission should forbear from all Title II regulation for smaller ISPs, including Sections 201, 202 and 208, in the event it decides to reclassify broadband Internet access service, despite the serious legal questions about its legal authority to find that broadband Internet access service is a telecommunications service (or that broadband Internet service providers should be compelled to provide the transmission component of their service as a telecommunication service).

Further, to ensure that broadband Internet service, as intended, remains "unfettered by Federal or State regulation"[47] and that the impact from reclassification is contained as narrowly as possible – i.e., appropriately tailored open Internet rules – the Commission should find that broadband Internet access service (or the component of broadband Internet service that the Commission compels providers to offer as a common carrier service) is an interstate telecommunications service. In so doing, the Commission will prevent potential burdensome actions by state legislatures and public utility commissions that might seek to impose state common carrier regulation on ISPs. The Commission would have ample authority to do so. The Commission long ago found that dial-up Internet access service was jurisdictionally interstate because the end points of the service were unknown generally although, the Commission concluded, predominantly interstate in nature.[48] If telecommunications services used to access the Internet and ISPs are properly categorized as jurisdictionally interstate because of the nature of the Internet service providers' service, then it is a very small and logically necessary step, to find that broadband Internet service itself is an interstate service.

---

[43] *See* 47 U.S.C. § 160(a)(1).

[44] *See* 47 U.S.C. § 160(a)(2).

[45] *See* 47 U.S.C. §§ 160(a)(3) and 160(b).

[46] Congress, in amending Section 230 of the Act, made this very observation, finding that a "vibrant and competitive free market . . . presently exists for the Internet . . . , unfettered by Federal or State regulation." 47 U.S.C. § 230(a)(4).

[47] 47 U.S.C. § 230(a)(4).

[48] *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order,*17 FCC Rcd 27409 (1998).

If you have any questions, or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,

Barbara Esbin

Barbara S. Esbin
Counsel for the American Cable Association

cc (*via email*): Priscilla Delgado Argeris
Amy Bender
Nicholas Degani
Rebekah Goodheart
Jonathan Sallet
Julie Veach
Philip Verveer
Stephanie Weiner
Matthew DelNero