Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

Comments of the Competitive Enterprise Institute
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Reclassifying the transmission component of broadband Internet access as a Title II telecommunications service would undermine the Commission's statutory mission and harm consumers in several ways. First, it would discourage private investment in both broadband Internet networks and in networks yet to be imagined. Second, it would thwart the natural evolution of the dynamic telecommunications marketplace. Third, it would pave the way for a future Commission to regulate virtually every aspect of the Internet and digital communications in destructive and unforeseen ways.

It is no coincidence that America's most vibrant communications platform, the Internet, has evolved largely free from regulatory intervention. As this proceeding illustrates, the greatest threat to the evolution of communications wealth in the United States comes not from broadband providers or content companies, but from the Commission itself.

Congress Opposes Broadband Reclassification

The NOI suggests that Title II reclassification of broadband providers is necessary to ensure that the Commission has sufficient authority to accomplish its statutory objectives as established through acts of Congress. But the NOI makes no mention of three widely publicized letters recently sent to the Commission bearing the signatures of a majority of members of Congress in 2010. In the letters (one from 171 House Republicans,[1] one from 37 Senate Republicans,[2] and one from 74 House Democrats[3]) Congress advised the Commission against reclassifying broadband providers, warning that such a move would run counter to the public interest and result in serious unintended consequences.

Despite these explicit warnings, the Commission nevertheless points to the Communications Act, the statute that underpins the Commission's regulatory authority, as evidence that a move to reclassify broadband providers would align with the intent of Congress. Yet the statutory language cited by the Commission says more about the need for Congress to reform U.S. communications laws than it says about whether reclassification is what Congress intended when it last overhauled the Communications Act in 1996. At that time, broadband Internet was virtually non-existent in U.S. households, and the small segment of Americans with Internet access at home were primarily connected via dial-up.

In an era of communications convergence, however, the Communications Act's archaic regulatory distinction between "information services" and "telecommunications services" is

[1] http://www.docstoc.com/docs/41913268/GOPNetNeutralityletter

[2] http://thehill.com/blogs/hillicon-valley/technology/99553-republican-senators-not-happy-with-fccs-qthird-wayq

[3] Letter from the Honorable Al Green *et al.*, U.S. House of Representatives, to the Honorable Julius Genachowski, Chairman, FCC (May 24, 2010). http://netcompetition.org/House_Democrat_Letter.pdf

simply without a logical rationale. Wireless and wireline telecommunications are now largely interchangeable, while voice, video, and data all travel across the same networks, increasingly using the same protocols. The strained efforts by the Commission to delineate between the telecommunications component of broadband service and the information services component of broadband service – including the cable modem declaratory ruling and the DSL order – highlight the fundamental obsolescence of the 1996 Act.[4]

Yet instead of focusing on ways in which Congress could rewrite the Communications Act to better address the realities of the Internet age, the NOI devotes most of its attention to considering how the Commission might manipulate existing laws to maximize its regulatory authority. As if reclassification were a foregone conclusion, the NOI elaborates on numerous possible justifications for such a move without posing any serious questions about how reclassification might backfire.

If the Commission ultimately concludes that it lacks the authority under Title I to fulfill some of its statutory obligations, waiting for Congress to revise the Communications Act is a far less destructive approach than haphazardly reclassifying Internet providers as telecommunications services. Until Congress elects to change the laws, the Commission should resist the destructive temptation to pigeonhole broadband providers into an obsolete regulatory classification.

Consumers Have Broadband Choice, and Competition is Intensifying

Since the Commission issued the *Cable Modem Declaratory Ruling* in 2002*,* facilities-based competition among broadband providers has grown substantially, and it continues to intensify. The Commission's 2009 report on high-speed services found that DSL-based broadband was available to 83% of households served by a local telephone provider and that cable modem-based broadband was available to 96% of households passed by cable.[5]

While cable and DSL-based broadband subscriptions represent the majority of U.S. home broadband market, these services' market share is declining due to the growth of facilities-based broadband alternatives including fiber, satellite, and wireless Internet services. According to the Pew Internet and American Life Project, from 2007 to 2009, the percent of households subscribing to satellite or wireless broadband increased from 8 percent to 17 percent, an increase

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[4] See Adam Thierer and Mike Wendy, "**The Constructive Alternative to Net Neutrality Regulation and Title II Reclassification Wars**." Progress OnPoint, May 2010

[5] Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, "High-Speed Services for Internet Access: Status as of June 30, 2008," July 2009 (http://www.fcc.gov/Daily_Releases/Daily_Business/2009/db0723/DOC-292191A1.pdf).

of more than 100%. And 43 percent of American home broadband subscribers report they have *three or more* broadband choices available to them.[6]

Although many wireless broadband providers do not currently offer throughput on par with cable and DSL providers, these services nevertheless represent a formidable competitive threat. Even 3G wireless broadband, which offers average downstream throughput in the range of 500kbps to 1.0mbps, is a vastly superior substitute for cable or DSL broadband than traditional dial-up Internet service. And in the next few years, new wireless technologies that are currently being deployed promise to offer significantly greater throughput than existing 3G networks. Today, several companies offer WiMax-based broadband Internet services that compare favorably to typical DSL connections, both in terms of throughput and price. In late 2010, Verizon Wireless has announced that it will publicly launch a 4G Long-Term Evolution (LTE)-based network. While the network's footprint will initially encompass only a few dozen U.S. metropolitan areas, by 2012, Verizon Wireless anticipates that its network will cover the majority of U.S. households. In real-world tests, LTE offers downstream throughput in the range of 5mbps to 10mbps, which is comparable to today's typical cable broadband connections.

Thus, for the Commission to reclassify broadband Internet service as a telecommunications service would be to ignore the overwhelming evidence that market for high-speed Internet access is increasingly vibrant and competitive. Compared to 2002, today's broadband market is characterized by greater competition among providers, significantly faster throughput, and rapid technological innovation. Private sector investment in both wireline and wireless network infrastructure has continued to increase, while average home broadband prices have declined in real terms.

Regulating Broadband Network Management Practices Harms Consumers

The NOI frets that in light of the April 2010 *Comcast* decision, in which the D.C. Circuit ruled that the Commission lacked the authority to order Comcast to cease its practice of secretly interrupting lawful Internet transmissions, the Commission now lacks the authority to regulate the broadband providers' network management techniques in order to prevent allegedly "harmful" practices. Yet the Commission has not demonstrated that it needs such authority to accomplish any statutory objectives, nor has it demonstrated that the benefits of regulating ISP network management practices outweigh the costs.

In numerous proceedings that have taken place over the past several years, many commenters have documented the severe damage so-called "Open Internet" regulations could wreak on the

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[6] Horrigan, John, "Home Broadband Adoption 2009," June 2009, Pew Internet & American Life Project. http://pewinternet.org/~/media//Files/Reports/2009/Home-Broadband-Adoption-2009.pdf

Internet ecosystem.[7] Nevertheless, until the *Comcast* ruling, the Commission had continued to move forward with promulgating network management rules, continually ignoring the conclusive evidence that these rules would likely do much more harm than good. To this day, the Commission has not demonstrated that it has the capacity to accurately distinguish between "reasonable" network management practices and "harmful" ones, nor has it demonstrated that there is any reasonable likelihood that harmful network management practices will hurt consumers in the future. Moreover, the Commission has repeatedly ignored the crucial role that marketplace experimentation with novel network access and pricing models plays in spurring infrastructure wealth creation, signaling to market participants the values and preferences of Internet users, and incentivizing network operators to invest in building advanced networks. [8]

To the extent the *Comcast* decision merits a reexamination of how broadband Internet providers are regulated, it should spur the Commission to rethink the rationale behind establishing federal oversight of private network management practices. If anything, the Commission should be considering forebearing from existing regulations that apply to broadband providers. Especially due to the complex, dynamic, and increasingly competitive nature of the broadband marketplace, relaxing federal oversight of Internet providers is among the best steps the Commission could undertake if it wishes to minimize consumer harm and maximize the development of advanced telecommunications networks. Unfortunately, the NOI seems to foreclose the very possibility that reducing regulatory burdens might be superior to either reclassifying broadband providers or relying on ancillary authority.

Voluntary Network Management Standards and Private Dispute Resolution

The Commission should not assume an expansive role in network management oversight. Both the Commission and Congress clearly recognize that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." [9] The NOI notes that commenters such as Verizon and Google have suggested that technical advisory groups could play a valuable role in setting industry standards and resolving private disputes over network access.

While Internet Service Providers and online content providers are often seen as being adversaries in the context of network neutrality, these companies have vested interests in retaining constructive working relationships with one another. During the Commission's January 2010 hearings on "Open Internet" rulemaking, Verizon and Google made a joint statement concerning

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[7] Adam Thierer, http://techliberation.com/2010/02/25/the-5-part-case-against-net-neutrality-regulation-debate-vs-ben-scott-of-free-press/

[8] See Wayne Crews, Comments to the FCC in the matter of "Open Internet," http://fjallfoss.fcc.gov/ecfs/document/view?id=7020373533

[9] Communications Act, 47 U.S.C. § 230(a)(4)

a set of core network management principles they agreed upon.[10] Since then, a number of providers, including AT&T, Comcast, Time Warner and Verizon, have partnered with Google, Microsoft, and Cisco to form a Broadband Internet Technical Advisory Group ("BITAG").[11] These rationally self-interested firms recognize that if the Internet is to continue to grow and users are to remain satisfied with their online experiences, compromises must be reached.

These industry players, combined with leading academics and other experts in fields such as network engineering and the economics of the information age, are much better suited than the Commission to shape the best practices of the dynamic Internet marketplace. When disputes between firms do arise, they need not be resolved through federal intervention; voluntary associations, including but not limited to BITAG, can play a central role in arbitrating private industry tensions over network pricing and access. These voluntary institutions, unlike regulatory agencies, can easily adapt and evolve in response to new technologies and marketplace shifts. Given the long history of rulemaking by the Commission lagging far behind the technological platforms it aims to regulate, we should rely on non-coercive, non-governmental institutions to promulgate voluntary, competing standards and address disputes when they arise.

In numerous industry sectors, and particularly in the technology sector, economic incentives have driven companies toward standardization that promotes innovation, competition, and consumer welfare. In the United States, the Information Technology Industry Council (ITIC) is the leader in promoting voluntary, market-based standards, particularly through the International Committee for Information Technology Standards (INCITS). Industry has also led the way in voluntary biotech and biosecurity regulation. For instance, the International Association Synthetic Biology has set standards that are followed voluntary by firms representing 80% of the industry – standards that are in many ways stricter than the corresponding governmental regulations.[12] Similarly, the voluntary Private Card Industries Security Standards Council, which counts as members Visa, MasterCard, and a number of other payments firms, has established universal compliance standards for banks and retailers. PCI's private, detail-oriented enforcement has proven to be finely attuned to technological developments over time, including the prolific rise of e-commerce.

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[10] Joint Comments of Google & Verizon, GN Docket No. 09-191, WC Docket No. 07-52, at 4-7 (Jan. 14, 2010).

[11] Declan McCullagh, "Net neutrality group signals cooling of hostilities", CNET News, June 9, 2010, http://news.cnet.com/8301-13578_3-20007238-38.html.

[12] Comments of Stephen Maurer, Acting Director, Information Technology and Homeland Security Project, University of California, Berkeley. Issues in Science and Technology: Standards for synthetic biology. Available at: http://www.issues.org/26.4/forum.html.

To be sure, voluntary standards are not always ideal, and any set of rules promulgated by a voluntary industry association could turn out to do more harm than good. Network management techniques ratified by BITAG, for instance, might run the risk of foreclosing innovative, pro-consumer business models. Perhaps the future of telecommunications will be characterized by a diverse array of proprietary "splinternets," rather than the global Internet that exists today. These questions simply cannot be answered definitively in the year 2010. But while voluntary institutions can and do fail, the self-correction inherent to competitive markets ensures that such failures will be corrected swiftly. Yet government failure tends to get worse over time, in large part because government is insulated from the disruptive forces of the marketplace.

A one-size-fits-all, overbroad regulatory approach by the FCC, on the other hand, could have disastrous consequences. Even if rules are promulgated by technical advisory groups composed of leading experts, such entities invariably lack a crucial feature of voluntary institutions: competitive discipline. No amount of brilliance or expertise can overcome the mismatched incentive structure that characterizes governmental agencies. Whether binding or not, governmental standards chill the dynamic and diverse solutions to specific, micro-level concerns and disputes that naturally arise in evolving markets. Industry organizations and standards are developed over time, in response to marketplace developments, and we are already seeing companies come together to establish principles for broadband network management. Especially at this juncture, overbroad actions by the Commission in the sphere of network oversight are likely to thwart voluntary institutions like BITAG, causing them to evolve in unnatural and harmful directions.

The role of the Commission in the ongoing, rapid evolution of the Internet should be as minimal as possible. It is crucial that private agreements are enforced, but again, the Commission is ill-equipped to enforce such arrangements. Private civil action and binding arbitration are perfectly capable of punishing wrongdoers and dissuading firms from breaking their promises. While the Commission ordered Comcast to cease filtering its customers' lawful Internet traffic in 2008, this action by the Commission was not the only punitive measure successfully levied against Comcast. After a 2008 class action lawsuit was filed against Comcast on behalf of its customers, the company was ordered to pay a civil judgment in the tens of millions of dollars.[13] Even if the Commission had not intervened in the dispute whatsoever, Comcast would have arguably learned its lesson the hard way, and broadband providers would have still been deterred from employing practices in violation of their service agreements.

Reclassification Discourages Private Investment in Advanced Telecommunications Networks

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[13] http://www.zeropaid.com/news/89869/comcast-settlement-final-up-to-16-per-user/

The Commission can best protect consumers of Internet services by allowing providers to experiment with competing business models free from unpredictable regulatory intervention.

As an overwhelming body of economic evidence indicates, when an economic activity is subjected to significant regulatory uncertainty, private investment declines, and firms' aversion to risk increases. The potential impacts of greater regulatory uncertainty are particularly troubling in the context of broadband, an industry characterized by substantial private investment and a great deal of long-term financial risk. As telecom analyst Mike Rollins of Citigroup recently observed, "investors like certainty and visibility of policy." By reducing investors' confidence that pouring capital into broadband networks will yield sufficient "payback," Rollins argues, reclassification would likely chill investment in broadband. [14]

The Commission notes that since the passage of the 1996 Act, it has never reversed a decision to forebear telecommunications services from specific regulations. But this is hardly reassuring. In recent years, the Commission has on several occasions pondered restoring legacy regulations in various situations, and there is little preventing a future Commission from fully implementing Title II regulations on broadband Internet providers.[15]

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[14] **TR DAILY, "**PANELISTS: NEUTRALITY, TITLE II BROADBAND ISSUES BREEDING INVESTOR UNCERTAINTY" July 14, 2010

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http://online.wsj.com/article/SB10001424052748704009804575308740137159622.html?mod=rss_whats_news_us_business