

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

COMMENTS OF THE CENTER FOR DEMOCRACY & TECHNOLOGY

Leslie Harris
David Sohn
John Morris
Alissa Cooper
Andrew McDiarmid
Elizabeth Allen
Matthew McHale

Center for Democracy & Technology
1634 I Street, N.W., Suite 1100
Washington, DC 20006
(202) 637-9800

July 15, 2010

TABLE OF CONTENTS

I.	Introduction and Summary	1
II.	Scope of FCC Regulatory Authority.....	2
A.	The Commission Should Stay Narrowly Focused and Expressly Disclaim Authority Over Internet Content and Applications.....	2
III.	Reliance on Ancillary Authority.....	5
A.	Relying on Ancillary Authority Would Leave the FCC with a Highly Unstable Legal Foundation That Would Take Many Years To Sort Out.	5
B.	The FCC Should Not Let the Uncertain Possibility of Congressional Action Delay Its Effort To Develop a Stable Approach to Broadband.	6
IV.	Title II Classification.....	7
A.	The Facts of Today’s Broadband Marketplace Support Title II Classification.....	7
B.	Possible Definition of Title II “Internet Connectivity Service”.....	13
C.	The Commission Should Not Tie Its Approach Too Closely to a “Layers” Analysis.....	14
V.	Forbearance and the “Third Way”	15
A.	Durability of Forbearance.....	15
B.	Privacy Considerations and Section 222	16
C.	CALEA Considerations	17
D.	Wireless Internet Access Services Should Not Be Exempt.	18
E.	Applicability to Non-Facilities-Based Providers.....	19
F.	Impact on Managed or Specialized Services	20
G.	Role of Third-Party Groups or Standards Bodies.....	20

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

COMMENTS OF THE CENTER FOR DEMOCRACY & TECHNOLOGY

The Center for Democracy & Technology (“CDT”) respectfully submits these comments in response to the above captioned proceeding regarding the classification of broadband Internet access service.¹ CDT is a nonprofit, public interest organization dedicated to preserving and promoting openness, innovation, and freedom on the decentralized Internet.

I. Introduction and Summary

CDT supports the Commission’s suggested “third way” approach of classifying the connectivity function of Internet access service as a “telecommunications service” while simultaneously forbearing from all but a core set of statutory provisions under Title II of the Communications Act.

For legal as well as policy reasons, the Commission should expressly limit its action to this connectivity function, as proposed in the NOI. Indeed, the Commission should go one step further and expressly disclaim legal authority over Internet content and applications. Articulating a sound and legally stable conception of its own jurisdiction would minimize the risk of future legal misadventures.

By contrast, relying on ancillary authority would leave the Commission with a highly unstable legal foundation that would take many years to sort out. CDT and other commenters can do no more than speculate at this point about how courts might rule in individual cases. CDT does not believe it is tenable for the federal communications regulator to lack any clear and stable conception of the scope of its jurisdiction over the service people use to access the core communications network of the 21st century.

Meanwhile, the facts of today’s marketplace strongly support classifying Internet connectivity as a telecommunications service. Consumers purchase Internet access service for the ability it offers to connect to the Internet, which in turn gives them a gateway to independent content and services of all kinds. There is thus no need for Internet users to rely on their access provider for information service functions such as email, newsgroups, web page hosting, or content aggregation. Other functions that an access provider may perform are best viewed as “adjunct-to-basic” services that merely support the efficient operation of the connectivity function.

¹ Framework for Broadband Internet Service, GN Docket No. 10-127, Notice of Inquiry (Released June 17, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-114A1.pdf (NOI).

Below, CDT suggests a definition of Internet connectivity service. Neither wireless providers nor non-facilities-based providers should be exempt from this definition and hence from the Commission's Title II jurisdiction, though they may warrant special accommodation as the Commission exercises that authority. With respect to privacy considerations, CDT suggests that the Commission should not forbear from applying Section 222 to providers of Internet access service.

II. Scope of FCC Regulatory Authority

A. The Commission Should Stay Narrowly Focused and Expressly Disclaim Authority Over Internet Content and Applications.

The NOI is careful to state that the Commission does “not suggest regulating Internet applications, much less the content of communications.”² This limitation is appropriate and indeed crucial. The point of this proceeding is to address whether and how the Commission may exercise authority over services that provide Americans with “on ramps” to the Internet. Asserting authority over the almost limitless range of applications and content that subscribers may access via those on ramps would be a very different matter. The Commission is right to keep its eye on the ball and insist on a narrow focus.

The Commission should, however, go one step further. It should expressly state that the Commission's decision to limit its consideration of Title II classification to “Internet connectivity service” only³ is not based merely on the Commission's current policy judgment given marketplace circumstances today. Nor is it based merely on a desire to tackle one issue at a time, and leave questions about content and applications to future proceedings. Rather, the Commission should make clear that it understands any assertion of Title II authority over applications or content to be *beyond the Commission's legal authority*. In short, the Commission's exclusion of applications and content is not a discretionary policy choice; it is compelled by law.

There are a number of reasons to make clear that the Commission's approach on this point is a question of legal authority. From a political and public messaging perspective, it offers the best defense against the all-too-common rhetorical charge that the Commission aims to “regulate the Internet.” In the absence of language expressly acknowledging legal limitations, opponents of the Commission's action will continue to argue that this may be just the first step in an FCC effort to increase the agency's prominence by extending its reach over more and more Internet activity. The Commission can best demonstrate that it harbors no such intent by specifically disclaiming any legal authority over the myriad applications and content provided over the Internet by entities that are not providers of Internet connectivity service.

From a policy perspective, too, the Commission needs to clearly fence off applications and content. Without clear legal limits, there remains a possibility that an assertion of jurisdiction today could be used as precedent by a future Commission, pursuing any number of potential concerns, to attempt to regulate various conduct and communications traversing the Internet.

² NOI ¶ 10.

³ NOI ¶ 2; *see also* n.1.

Such a result would be directly contrary to the Commission's policy objectives. As the Commission noted in the Open Internet NPRM, the goal of U.S. policy in this area is "to promote an Internet that is both open and unregulated."⁴ Section 230 of the Communications Act likewise declares the policy aim of preserving the current competitive market for online services "unfettered by Federal or State regulation."⁵ In short, good policy dictates that the Commission should do everything it can in this proceeding to ensure that any action it takes here cannot be misused to help justify broad Internet regulation in the future. That means asserting clear *limits* to the Commission's reach. To safeguard an open and vibrant Internet, the Commission should strive to articulate a conception of its jurisdiction that, far from laying the groundwork for broader Internet regulation in the future, actually serves as a bulwark against it.

Above all, disclaiming authority over applications and content makes sense from a legal perspective. The Commission's subject matter jurisdiction centers on the actual transmission of communications by wire or radio.⁶ Courts have held that the agency lacks jurisdiction over activities that are not closely connected to the actual transmission of communications. The Commission lacks authority, for example, to get involved in skyscraper construction disputes even though skyscrapers may cause interference with broadcast services; the Commission's responsibility to minimize interference is limited to interference caused by transmission activities.⁷ The Commission similarly lacks authority to regulate *non-transmission-related* functions of consumer electronics:

The Commission's general jurisdictional grant under Title I plainly encompasses the regulation of apparatus that can receive television broadcast content, but only while those apparatus are engaged in the process of receiving a television broadcast. Title I does not authorize the Commission to regulate receiver apparatus after a transmission is complete.⁸

By the same logic, any data processing performed at an Internet endpoint before or after a transmission of a communication would be outside the scope of Commission authority. The actions of websites and other services accessed via the Internet (search engines, social networks, cloud computing services, etc.) are thus outside the Commission's subject matter jurisdiction.

In addition, Commission regulation of Internet applications or content would raise serious constitutional issues. In *Reno v. ACLU*, the Supreme Court held that communications over the Internet warrant the full protection of the First Amendment.⁹ Courts have repeatedly struck down as unconstitutional a range of government regulations of Internet content.¹⁰ As courts have

⁴ *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 F.C.C.R. 13064 ¶ 47 (2009) (*Open Internet NPRM*).

⁵ 47 U.S.C. §230(b)(2).

⁶ See 47 U.S.C. §151 (creating the Commission "[f]or the purpose of regulating interstate . . . commerce in communication by wire and radio"). See also 47 U.S.C. § 152(a) (Communications Act applies to "communication by wire or radio").

⁷ See *Ill. Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1401 (7th Cir. 1972).

⁸ *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

⁹ *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

¹⁰ See, e.g., *Reno*, 521 U.S.; *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 86 (2d Cir. 2003); *Cyberspace Commc'ns, Inc. v. Engler*, No. 99-2064, slip. op. (6th Cir. Nov. 15, 2000), *aff'g* 55 F. Supp. 2d 737 (E.D. Mich. 1999); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999).

found, in the Internet context the *users* have great ability to control their Internet experience, and thus direct government regulation of Internet content and applications cannot survive constitutional scrutiny.¹¹

On the Internet, all of the data contained in communications between two endpoints is protected speech, and hence generally cannot be regulated. An analogy between a phone call and a website visit may help illustrate the point. Although the Commission can regulate the underlying transmission lines that allow a user to telephone a movie theater to ask for show times, the agency is precluded from regulating conversations that take place between the user and the theater. The user instructs her device (a telephone) to interact with the regulated telephone network to connect a call to the theater, but what is exchanged over that connection is protected speech. Similarly, when an Internet user instructs her device (a computer) to interact with her Internet access provider and the Internet to connect with a movie theater's website (or a search engine, social network, video site, etc.), the interaction between the user and the other endpoint on the Internet is constitutionally protected.

Most recently, the D.C. Circuit issued its decision in *Comcast v. FCC*.¹² While the full legal ramifications of that case may be open to debate, it clearly reinforces the proposition that the Commission's jurisdiction is subject to significant limitations. In light of that, and of the limitations discussed above, the wisest legal approach for the Commission is not to push the envelope and test the boundaries. It should not refuse to acknowledge the legal constraints or proceed as if any and all such constraints are obstacles that the agency should try to fight to the bitter end in court. Such an approach would carry serious ongoing risks of having Commission actions vacated or drawn into unpredictable, multi-round legal battles. The Commission would be better served at this point by adopting a theory of its own jurisdiction that expressly acknowledges limits and that centers on the core of its authority: the function of actually transmitting communications by wire or radio.

In short, there are good legal reasons for the Commission to stick to those areas where the agency's legal authority is on strongest ground; to fence off areas that would raise constitutional issues or otherwise face legal jeopardy; and to expressly articulate a conception of its jurisdiction that minimizes the risk of future legal misadventures.

Finally, in addition to expressly disclaiming legal authority over Internet applications and content, the Commission should affirm the intention expressed in the NOI to refrain from addressing topics such as backbone, content delivery networks, or VoIP services in this proceeding.¹³ CDT believes the Commission is right to focus narrowly on "Internet connectivity service" – because that is the service that, increasingly, is the gateway to 21st-century communications capability of all kinds. It also is the service that is at the core of the National Broadband Plan and of jurisdictional questions arising out of the *Comcast* decision. In Part IV. B. below, CDT offers a suggestion for defining "Internet connectivity service" or "Internet access service" in a way that

¹¹ The *Pacifica* case, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), does not alter the conclusion that regulating Internet content would be outside the scope of the Commission's authority. That decision turned on particular characteristics of the broadcast medium as it existed in the 1970s, and is wholly inapplicable to the context of the 21st-century Internet. The *Pacifica* Court itself "emphasize[d] the narrowness of [its] holding," *id.* at 750, and there are many key differences between the radio station at issue in *Pacifica* and the Internet websites and online services of today. CDT reviewed these differences at n.32 of its January 14, 2010 comments in the Open Internet proceeding (available at http://www.cdt.org/files/pdfs/2010_CDT_openness_comments.pdf).

¹² *Comcast Corp. v. FCC*, No. 08-1291, 2010 U.S. App. LEXIS 7039 (D.C. Cir. Apr. 6, 2010).

¹³ See NOI ¶¶ 10, 107.

will appropriately focus and limit the scope of the Commission action in this proceeding. With a focused definition, the Commission should be able to address the issues that are the intended targets of this proceeding, without affecting the regulatory status of other services.

III. Reliance on Ancillary Authority

A. Relying on Ancillary Authority Would Leave the FCC with a Highly Unstable Legal Foundation That Would Take Many Years To Sort Out.

The Commission “seek[s] comment on whether . . . ancillary authority continues to provide adequate legal foundation” for “effective performance of its core responsibilities.”¹⁴ It then inquires about the viability of a variety of specific legal theories for asserting ancillary jurisdiction over particular issues, including theories that the *Comcast* court did not address for safeguarding against harmful practices by Internet access service providers.¹⁵

Commenters in this proceeding can all offer their best judgments about the legal strength of different possible justifications for ancillary jurisdiction. But at this point, the most honest answer to the Commission’s questions on this topic is simple: Nobody really knows. It would take many individual court cases to get a clearer picture of the scope of the Commission’s ancillary jurisdiction, and parties to this proceeding can no more than guess how those cases may play out. Only one thing is certain: Virtually any assertion of ancillary jurisdiction is likely to face challenge in court, and it would be the courts that would (gradually) make the decisions. For all the Commission’s effort to seek input on different legal rationales in this proceeding, it will not get an answer it can rely on here.

CDT believes it is not tenable for the federal communications regulator to lack any clear and stable conception of the scope of its authority over the services people use to access the Internet. The Internet is rapidly becoming the core communications network for the 21st century. As the National Broadband Plan observes, we are in the midst of a “transition from a circuit-switched network” to a world in which the broadband Internet serves as “a platform over which multiple IP-based services – including voice, data, and video – converge.”¹⁶ It is hard to see how the Commission can pursue its mission of promoting “rapid, efficient, Nation-wide, and world-wide wire and radio communication service”¹⁷ amidst broad uncertainty regarding its authority over the principal element of the emerging communications landscape.

Moreover, at least some of the theories for ancillary jurisdiction suggest that navigating this new landscape under current regulatory classifications would require significant legal gymnastics. For example, the NOI points out that NCTA has offered a theory that requires re-interpreting a statutory reference to “elementary and secondary school classrooms” to include residences, on the ground that residential broadband connections have significant educational uses.¹⁸ Another theory would justify ancillary jurisdiction on the ground that Internet services “may affect”

¹⁴ NOI ¶¶ 30.

¹⁵ See NOI ¶¶ 44-47.

¹⁶ FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN at 59 (March 16, 2010) (NATIONAL BROADBAND PLAN).

¹⁷ 47 U.S.C. § 151.

¹⁸ NOI ¶¶ 35.

regulated communications offerings¹⁹ – a theory that would appear to have no discernable limits, since all sorts of services “may affect” regulated services in an age convergence. At a minimum, neither the Commission, industry, nor consumers could have any confidence in the legal durability of actions relying on such theories. Everything would be entirely provisional, pending eventual case-by-case court review.

In its discussion of the Commission’s possible authority to address harmful practices by Internet access service providers, the NOI asks in particular about whether the Commission would have authority to address “a failure to disclose practices to consumers” – in other words, the issue of transparency.²⁰ From a policy perspective, measures aimed at transparency may be less controversial than other types of regulatory measures. But from a legal perspective, CDT does not see how regulation aimed at transparency would be fundamentally different from any other kind of regulation. If the Commission’s authority over broadband Internet access services rests on a suspect foundation, then transparency-focused regulation of such services will be suspect as well. In short, the current legal uncertainty does not really depend on how controversial particular proposed regulations may be. Transparency may seem like relatively “low-hanging fruit” in the open Internet debate, but it will require just as difficult a legal reach, unless the Commission acts in this proceeding to establish a firm general base of authority.

B. The FCC Should Not Let the Uncertain Possibility of Congressional Action Delay Its Effort To Develop a Stable Approach to Broadband.

The NOI mentions that “[c]ommenters may wish to address how the Commission should proceed on these issues in light of Congressional developments.”²¹

Key congressional leaders have indicated that they will begin a process to consider updating the Communications Act, but that process is only just starting, and telecommunications law is not an area in which Congress tends to move quickly. Congressional interest in a legislative approach, therefore, should not be allowed to derail the Commission’s effort to ensure a sensible framework for implementing the Act as currently written. After all, the Commission remains charged with implementing the existing Act for however long it remains on the books. The agency cannot simply go dormant and abdicate its role for what could be multiple years in anticipation of a legislative update that is currently little more than a glint in a committee chairman’s eye. Moving forward with the agency’s existing responsibilities means developing a sound and stable legal footing for agency action under the existing statute.

Thus, the Commission is right to offer to serve as a resource to legislators in any update effort, while at the same time moving ahead with this proceeding based on “the legal and factual circumstances that exist today.”²²

¹⁹ NOI ¶ 47.

²⁰ NOI ¶ 50.

²¹ NOI ¶ 5 n.17.

²² NOI ¶ 9.

IV. Title II Classification

A. The Facts of Today's Broadband Marketplace Support Title II Classification.

The Commission asks whether the “facts of today’s broadband marketplace support a conclusion that providers now offer Internet connectivity as a separate telecommunications service.”²³ The answer to this question is a clear “yes.”

The service that Internet connectivity providers offer to the public is widely understood, by both the providers and their customers, as the ability to connect to anywhere on the Internet – to any of the millions of Internet endpoints – for whatever purposes the user may choose. It provides a classic example, in other words, of “transmission, between or among points specified by the user, of information of the user’s choosing.”²⁴

This ability to transmit information to and from anywhere on the Internet is incontrovertibly the dominant function of Internet access service as it exists today. This is reflected in the marketing of the service providers themselves, which overwhelmingly focuses on connection speed and often describes the inclusion of additional functions as mere “extras.”²⁵ It also is reflected in press accounts commenting on the broadband market and in surveys and reviews meant to assist consumers in choosing among providers – all of which again focus on speed as the leading factor other than price, and which generally do not even mention content or other non-transmission functions as factors in evaluating Internet access services.²⁶ Gone are the days when Internet access service providers sought to differentiate themselves by offering “walled gardens” of proprietary content and users looked to their access provider to serve as a kind of curator of the chaos of the Internet.²⁷

It may be true, as the Commission found starting in 2002, that service providers often choose to offer this telecommunications function together with other, non-telecommunications services. But providers’ decisions to package certain services together cannot, by themselves, change the way those services are classified. Otherwise, carriers would have an easy path to evade

²³ NOI ¶ 53.

²⁴ 47 U.S.C. § 153(43).

²⁵ See *High Speed Internet*, COMCAST (2010), <http://www.comcast.com/Corporate/Learn/HighSpeedInternet/highspeedinternet.html?lid=2LearnHSI&pos=Nav> (boasting that its connection is “way faster than DSL” and provides “blazing fast downloads and uploads”); *FiOS Internet*, VERIZON (2010), <http://www22.verizon.com/Residential/FiOSInternet/Overview.htm> (asserting that its FiOS service is “[t]he fastest Internet in the U.S. based on speed tests”).

²⁶ See, e.g., *Save a Bundle*, CONSUMERREPORTS, Feb. 2010, at 22-27; *2009 Internet Service Provider Residential Customer Satisfaction Study*, JDPower.COM (2009), <http://www.jdpower.com/telecom/ratings/high-speed-internet-service-provider-ratings/east>; Peter Wayner, *How Fast is Your Web Connection?*, NYTIMES.COM, Jan. 20, 2010, http://www.nytimes.com/2010/01/21/technology/personaltech/21basics.html?_r=1; Ben Gottesman, *Internet Speed Test: The Fastest ISPs in the U.S. 2010*, PCMAG.COM, June 23, 2010, <http://www.pcmag.com/article2/0,2817,2365347,00.asp>; *ISPs: What to Look For*, CONSUMERSEARCH, June 2010, <http://www.consumersearch.com/isp/important-features>.

²⁷ See, e.g., Steven Johnson, *Rethinking a Gospel of the Web*, NYTIMES.COM, April 9, 2010, http://www.nytimes.com/2010/04/11/technology/internet/11every.html?_r=1 (noting that “the jungle of the World Wide Web” triumphed over “the walled gardens of CompuServe, AOL and MSN,” and that “[o]pen platforms promote innovation and diversity more effectively than proprietary ones”); Catherine Yang, *AOL: You’ve Got Content for Free*, BLOOMBERG BUSINESSWEEK, June 7, 2005, http://www.businessweek.com/technology/content/jun2005/tc2005067_0871_tc024.htm (quoting AOL CEO, Johnathan F. Miller: “There’s no return to the walled garden whatsoever”).

Title II treatment whenever they wish – all they would have to do is package their Title II services with some insignificant service that is not a Title II service. Even ordinary telephone service could have escaped Title II treatment on such a theory. Needless to say, the Communications Act does not contemplate, much less dictate, such a result. The NOI recognizes as much when it observes that packaging local telephone service with voicemail was never held to change the classification of telephone service; rather, the two services “retain distinct identities as separate offerings for classification purposes.”²⁸

The question of whether Internet connectivity is offered as a distinct service, therefore, does not turn merely on whether it is sold together with other functions. It turns, ultimately, on whether the various functions are so “integrated” that it that it makes more sense to think of the entire package, as a “single, . . . comprehensive service offering” of which telecommunications is just one component – as the Commission ruled in 2002.²⁹

Today, there is no basis for concluding that Internet connectivity service is integrated with non-telecommunications functions. Rather, the additional functions are either relatively minor “add-on” services that many users ignore entirely, or are largely technical processes aimed at making the telecommunications function work smoothly.

First, at a general level, the well-documented rise of “cloud computing” means that a transmission link to the Internet serves as a gateway to services of all kinds.³⁰ For virtually any kind of information service function one might want, there are a variety of cloud-based providers, completely independent of a user’s Internet connectivity provider. There is thus only one indispensable function a consumer looks to the connectivity provider for: the connection link that in turn enables access to the essentially unlimited range of Internet-based services.

More specifically, each of the information service functions cited in the *Cable Modem Order* as integrated with connectivity – email, newsgroups, personal web page hosting, obtaining and aggregating content, and provision of a “home page”³¹ – are today widely available and widely obtained from independent, third-party sources. None are an integral part of a user’s Internet connectivity subscription.

- **Email.** While Internet access providers continue to offer email accounts to their subscribers, there are many free email services also available on the Internet.³² These services provide a popular alternative to access provider–based email. Based on recent estimates, the top four web-based email providers (Yahoo!, Hotmail, and

²⁸ NOI ¶¶ 26 n.158.

²⁹ *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798 ¶38 (2002) (*Cable Modem Order*).

³⁰ See, e.g., Cecilia Kang, *Ballmer Says Microsoft Intends to Become Industry Leader in Cloud Computing*, THE WASHINGTON POST, July 13, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/12/AR2010071205166.html>; Walter S. Mossberg, *Learning About Everything Under the 'Cloud'*, THE WALL STREET JOURNAL, May 6, 2010, <http://online.wsj.com/article/SB10001424052748703961104575226194192477512.html>; Jon Stokes, “The Cloud: a short introduction,” *Ars Technica*, <http://arstechnica.com/business/news/2009/11/the-cloud-a-short-introduction.ars> (last visited July 14, 2010).

³¹ *Cable Modem Order* ¶¶ 18, 38.

³² See http://en.wikipedia.org/wiki/Comparison_of_webmail_providers for a partial list.

Gmail) collectively received more than 190 million unique visitors in July 2009.³³ Between January and July 2009, Gmail's unique visitors alone grew by 25 percent.³⁴ As of July 2010, a ranking of the top 20 websites by unique visitors included Yahoo! Mail at #4; Windows Live Mail at #8; and Gmail at #11.³⁵ Popular Internet access providers' sites, such as Comcast and Time-Warner's Roadrunner, do not appear on the list. It is difficult to say with complete certainty how widespread access-provider email usage is relative to email from other providers, since usage estimates may not include email usage that takes place through email clients instead of through web-based mail. However, these results clearly show that even if some users still use access provider-based email, many prefer other alternatives, and email is not a critical function for an access service to provide.

- **Newsgroups.** Though still widely used, newsgroups have become far less integral to – and far less integrated with – Internet access in the years since the *Cable Modem Order*. They predate and to some extent have been superseded by today's dominant web-based news and discussion forums such as blogs, social networks, and individual websites. Traditionally, and at the time of the *Cable Modem Order*, access providers would operate a newsgroup server to allow subscribers easy access to the USENET network. Currently, however, much newsgroup activity has migrated to independent entities that do not provide general Internet access, such as Google Groups and Giganews.³⁶ In fact, several of the biggest American Internet access service providers have discontinued direct newsgroup access entirely.³⁷ Given this evolution, there is no basis on which to conclude that newsgroups are so integrated as to preclude classification of Internet access service as a telecommunications service.
- **Personal web page hosting.** In this area, competition is vigorous, and there is no evidence to suggest that this remains a primary factor for people selecting an Internet access service provider. Trends show that Internet users increasingly rely on third party sources such as WordPress³⁸ and Blogger³⁹ to create personal web

³³ Erick Schonfeld, *Gmail Nudges Past AOL Email in the U.S. to Take No. 3 Spot*, TECHCRUNCH, Aug. 14, 2009, <http://techcrunch.com/2009/08/14/gmail-nudges-past-aol-email-in-the-us-to-take-no-3-spot>.

³⁴ *Id.*

³⁵ *Top 20 Sites & Engines*, EXPERIAN HITWISE, tbl.1, (2010), <http://www.hitwise.com/us/datacenter/main/dashboard-10133.html>.

³⁶ See GOOGLE GROUPS (2010), <http://groups.google.com>; GIGANEWS (2010), <http://giganews.com>.

³⁷ See, e.g., Verizon Customer Support, *Verizon Newsgroup Service Has Been Discontinued*, VERIZON (2010), <http://www22.verizon.com/ResidentialHelp/HighSpeed/General+Support/Top+Questions/QuestionsOne/125159.html> (last visited July 13, 2010); *ATT Announces Discontinuation of USENET Newsgroup Services*, NEWSDEMON, June 9, 2009, <http://www.newsdaemon.com/blog/2009/06/09/att-announces-discontinuation-of-usenet-newsgroup-services>; Jared Moya, *Cox to Drop Free Usenet Service June 30th*, ZEROPAID, April 22, 2010, <http://www.zeropaid.com/news/88729/cox-to-drop-free-usenet-service-june-30th>.

³⁸ See *Wordpress.org*, ALEXA (2010), <http://www.alexa.com/siteinfo/wordpress.org> (Follow "Traffic Stats" hyperlink) (last visited July 13, 2010) (demonstrating that Wordpress.org's percentage of global daily page views rose 12.1% during the past three months). See also *ComScore Media Metrix Ranks Top 50 U.S. Web Properties for May 2010*, COMSCORE, tbl.3 June 15, 2010, [http://www.comscore.com/Press_Events/Press_Releases/2010/6/comScore_Media_Metrix_Ranks_Top_50_U.S._Web_Properties_for_May_2010/\(language\)/eng-US](http://www.comscore.com/Press_Events/Press_Releases/2010/6/comScore_Media_Metrix_Ranks_Top_50_U.S._Web_Properties_for_May_2010/(language)/eng-US) (Follow "comScore Media Metrix..." hyperlink) (ranking WordPress as the 27th most visited web property, with 35,770 unique visitors for May 2010).

pages. Furthermore, many users maintain personal profiles on social networking sites like Facebook – currently boasting 125,881,220 users in the U.S.⁴⁰ – in lieu of creating individual web pages. Other third party hosts that either provide web page hosting services or allow users to create their own profile pages include MySpace, LinkedIn, GoDaddy, Yahoo, InMotion, HostMySite, and many more.⁴¹

- **Obtaining and aggregating content.** Users no longer rely on their Internet access providers as a direct source of online content. In the early days of the Internet, access providers (including AOL, CompuServe, and Prodigy) provided a “walled garden” for users by producing or collecting desirable content and presenting it in a single, central location. This model has largely been discarded. Search engines now provide a more convenient and effective way for users to find the content they desire. The main search engines (Google, Yahoo!, and Microsoft’s Bing) receive considerably more traffic than broadband Internet access providers’ in-network pages, indicating users’ preference for search engines as a means of locating content.⁴² Apparently aware of this preference, broadband providers include third-party search engines on their own less-popular content pages.⁴³

Should a user prefer a more curated experience, that user has many available options that are unaffiliated with his or her Internet access provider. Numerous sites, such as Yahoo! and AOL,⁴⁴ offer personalized portal pages that provide equivalent functionality and similar interface to the access provider–offered portal pages. Users can also rely on social news sites like Digg, Reddit, or StumbleUpon for content.⁴⁵ In short, the access provider is simply no longer its users’ primary source or aggregator of content.

- **Home page.** A user’s home page is a setting in the user’s browser, i.e., in software installed on the user’s Internet-accessible device. The Internet access provider does not control it; a user can set his or her home page to any desired page. Many sites compete for the privilege of being a user’s home page, since being set as the home page guarantees repeat visits from that user. Most sites make it easy to set their site as the user’s home page, either by providing instructions on how to change the page

³⁹ See *Top Sites in the United States*, ALEXA (2010), <http://www.alexa.com/topsites/countries/US> (last visited July 13, 2010) (ranking Blogger as the eleventh most popular site in the U.S. based on one month of site traffic).

⁴⁰ *Press Room Statistics*, FACEBOOK (2010), <http://www.facebook.com/press/info.php?statistics>. See also *Id.* (ranking Facebook as the second most popular site in the U.S. based on one month of site traffic).

⁴¹ See *Web Hosting Reviews*, CNET REVIEWS (2010), <http://reviews.cnet.com/web-hosting> (last visited July 14, 2010).

⁴² See, e.g., *ComScore Media Metrix Ranks Top 50 U.S. Web Properties for May 2010*, COMSCORE, tbl.2 June 15, 2010, [http://www.comscore.com/Press_Events/Press_Releases/2010/6/comScore_Media_Metrix_Ranks_Top_50_U.S._Web_Properties_for_May_2010/\(language\)/eng-US; Top 20 Sites & Engines](http://www.comscore.com/Press_Events/Press_Releases/2010/6/comScore_Media_Metrix_Ranks_Top_50_U.S._Web_Properties_for_May_2010/(language)/eng-US; Top 20 Sites & Engines), EXPERIAN HITWISE, tbls.1, 4 (2010), <http://www.hitwise.com/us/datacenter/main/dashboard-10133.html>.

⁴³ See, e.g., COMCAST.NET (2010), <http://www.comcast.net>; ROAD RUNNER (2010), <http://www.rr.com>.

⁴⁴ AOL has largely transitioned from an Internet access provider to an aggregator of content and online services. See AOL. (2010), http://free.aol.com/thenewaol/plan_choice.adp.

⁴⁵ See DIGG (2010), <http://www.digg.com>; REDDIT (2010), <http://www.reddit.com>; STUMBLEUPON (2010), <http://www.stumbleupon.com>.

or by offering a single-click button to automatically change it.⁴⁶ While the Internet access provider may certainly offer a portal site to aggregate content for the user and serve as a home page, doing so does not provide any service not already available to users from multiple other sources. Furthermore, as discussed above, the home pages offered by Internet access providers are of waning utility in the face of current search-first usage patterns.

Other functions cited previously by the Commission facilitate the smooth and effective functioning of Internet connectivity service and are essentially invisible or of little direct interest to the typical consumer. These functions do not change the nature of the connectivity service, and are thus comparable to “adjunct-to-basic” services, first identified and treated as telecommunications services by the Commission in 1985.⁴⁷ In accordance with the Commission’s finding that adjunct-to-basic services are covered by the management exceptions to the definition of information services,⁴⁸ many of these functions fit comfortably within that exception, because their entire purpose is to ensure the efficient operation of the telecommunications function.

- **DNS.** The *Cable Modem Order* cited domain name resolution through a domain name system (DNS) as an “application” that is integrated with Internet connectivity service.⁴⁹ But the DNS lookup service provided by broadband Internet access providers simply translates text URLs (such as <http://www.cdt.org>) requested by users into numeric IP addresses (such as 72.32.6.120). This is a basic routing function that establishes connections between users and the Internet endpoints of their choosing.⁵⁰ As such, it satisfies the Commission’s historical test for adjunct-to-basic services: DNS (1) is intended to facilitate the use of Internet connectivity, and (2) does not alter the fundamental character of that service.⁵¹ Moreover, it is directly analogous to computer-provided directory assistance in the telephone context, which the Commission considered adjunct-to-basic and thus treated as a basic

⁴⁶ See, e.g., *Search History and Settings: Set Google as My Homepage*, GOOGLE (2010), <http://www.google.com/support/websearch/bin/answer.py?hl=en&answer=463>; *Keep Everything You Love All in One Place*, YAHOO! (2010) <http://www.yahoo.com/bin/set>; *How Do I Make Yahoo! My Homepage?*, YAHOO! (2010), <http://help.yahoo.com/l/us/yahoo/my/basics/basics-08.html>; *Make AOL.com Your Home Page*, AOL. (2010), <http://www.aol.com/mk splash.adp>; *Make MSN Your Homepage*, MSN (2010), <http://www.myhomemsn.com>; *Make This My Homepage*, ANIMALPLANET (2010), <http://animal.discovery.com/utilities/about/makethismy.html>.

⁴⁷ In its opinion and order *In the Matter of North American Telecommunications Association*, the Commission identified as “adjunct-to-basic” services that “does not alter the fundamental character of telephone service,” and for regulatory purposes treated such a services as basic services. 58 Rad. Reg. 2d 402 ¶27. See also *Second Computer Inquiry*, Final Decision, 77 F.C.C. 2d 384 ¶ 98 (1980) (*modified, in part, by In re Section 64.702 (Second Computer Inquiry)*, 79 F.C.C. 2d 953 (1980); *Re Second Computer Inquiry*, 39 P.U.R. 4th 319 (1980)).

⁴⁸ *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272*, 11 F.C.C.R. 21905 ¶ 107 (1996) (“[W]e conclude that “adjunct-to-basic” services are also covered by the “telecommunications management exception” to the statutory definition of information services, and therefore *are treated as telecommunications services under the 1996 Act.*”) (*modified in part by In re Implementation of the Non-Accounting Safeguards*, 12 F.C.C. Rcd. 2297 (1997), available at http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1996/fcc96489.txt; *reversed in non-relevant part by In re Implementation of the Telecomm. Act of 1996*, 13 F.C.C.R. 8061)

⁴⁹ *Cable Modem Order* ¶¶ 37-38.

⁵⁰ Such a conclusion was a key factor in Justice Scalia’s apt dissent in the *Brand X* case: “DNS, in particular, is scarcely more than routing information, which is expressly excluded from the definition of ‘information service.’” *Nat’l Cable & Telecomm. Ass’n v. Brand X*, 545 U.S. 967, 1012-13 (2005).

⁵¹ See *In re Establishment of a Funding Mechanism for Interstate Operator Services for the Deaf*, 11 F.C.C.R. 6808 ¶ 16 (1996).

(telecommunications) service.⁵²

In any event, DNS service, much like e-mail, web-hosting, and the other services discussed above, is available from third-party sources. As the NOI points out, Internet users are free to use the DNS provider of their choice.⁵³ And switching does not require altering any aspect of the Internet access service itself; users need only quickly update a single setting in their operating system's Internet preferences to point DNS requests to another server.⁵⁴

- **Caching.**⁵⁵ Caching, too, meets the criteria for an adjunct-to-basic service that should not turn an otherwise telecommunications service into an information service. The type of caching cited involves simply re-routing traffic to alternate copies of websites stored closer to the subscriber.⁵⁶ This service is aimed at reducing network congestion and improving the perceived speed of users' connections, not at altering the information or providing access to information other than that requested by subscribers. It is simply a technical tool to speed network performance.
- **Network security, network monitoring, capacity management, and troubleshooting.**⁵⁷ These services are likewise aimed at maintaining a functional connectivity service, not at altering the nature of that service. Like caching, these activities are intended to preserve a fast, uncongested, working network, in large part regardless of the connections consumers establish over the network. Moreover, these security and management services are most often largely invisible to consumers, in the sense that most consumers are unaware of how they relate to their connection; rather, these activities are simply part and parcel of running a network. To the extent that security services are aimed at securing subscribers' computers and not the network itself, they are typically offered as optional services amid a sea of third-party anti-virus and anti-malware competitors.

In sum, the services cited in the *Cable Modem Order* are all either wholly separable and available from third parties; so directed at routing and other critical network functionality as to be considered analogous to adjunct-to-basic services; or, in the case of DNS lookup, both. Routing, security, and other management functions easily fall within the management exception to the definition of information services. For the functions that do not fall within that exception, the fact that unaffiliated options are readily and easily available conclusively demonstrates that such services are not fundamentally integral to the connectivity service. The proportion of users choosing unaffiliated providers might be indicative of how separable a particular service (like e-mail) is, but it should not be dispositive. Regardless of what choice is made, users still have a

⁵² *In re Implementation of the Telecomm. Act of 1996*, 13 F.C.C.R. 8061 ¶ 73 (1998) (vacated on other grounds by *U.S. West, Inc. v. Fed. Commc'ns Comm'n*, 17 Communications Reg. 87 (10th Cir. 1999); reconsidered and granted in part by *In re Lenfest New Castle County Regarding Cable Programming Service Tier Rates*, 14 F.C.C.R. 14 (1998)).

⁵³ NOI ¶ 58.

⁵⁴ See, e.g., *Configuring your network settings to use Google Public DNS*, GOOGLE (2010), <http://code.google.com/speed/public-dns/docs/using.html>.

⁵⁵ *Cable Modem Order* ¶ 17.

⁵⁶ *Id.* at 13 n.76.

⁵⁷ *Id.* ¶ 17.

choice. But connecting to *all* applications requires an underlying telecommunications service, and the Commission should designate Internet connectivity as such.

B. Possible Definition of Title II “Internet Connectivity Service”

The NOI “ask[s] commenters to propose approaches to defining the telecommunications service offered as part of wired broadband Internet service.”⁵⁸

CDT believes that one viable approach would be to use a high-level definition of “Internet connectivity service” that tracks the Commission’s suggested definitions of “Internet connectivity” in the NOI.⁵⁹ The downside of a high-level definition, however, is its lack of precision. For example, would it be limited to “last mile” providers, or not? What entities could be deemed to “enable” users to transmit data to and from the Internet, given that multiple entities may be involved, at some level, in each instance of transmission?

It may be useful, therefore, to include more specific language. The idea would be to cabin the definition of “Internet connectivity service” or “Internet access service” to entities that provide last-mile connections to retail subscribers. CDT would suggest the following definition:

a retail service that enables a customer to send and receive Internet Protocol communications to and from Internet endpoints of the customer’s choosing by—

a. assigning an Internet Protocol address to a device owned or controlled by the customer; and

b. providing the customer with the means for Internet Protocol communications to be transmitted physically, by wire or radio, between the customer’s device and one or more interconnection or peering points that enable further routing, directly or indirectly, to the Internet.

This definition, like the Commission’s high-level one, reflects the basic purpose of the service: enabling a user to exchange communications with other Internet-connected entities. But it further specifies two key functions: assigning an I.P. address and providing the “last mile” transmission pathway. Specifying these functions should ensure that the definition clearly excludes applications, Internet backbone, content delivery networks, over-the-top video services, and VoIP – all functions that the Commission has stated its intention to exclude.⁶⁰

An important outstanding question is whether the definition above could be read to include entities like hotels and coffee shops that offer WiFi or other Internet connectivity to their patrons. CDT believes such entities are fundamentally different from companies offering Internet connectivity as a core part of their business. Consistent with the Commission’s approach in the CALEA and Open Internet proceedings, entities offering Internet connections at their own

⁵⁸ NOI ¶ 63.

⁵⁹ NOI ¶ 64 (“We have previously defined ‘Internet connectivity’ to include functions that ‘enable [broadband Internet access service subscribers] to transmit data communications to and from the rest of the Internet’”). *See also id.* at 1 n.1 (“Internet connectivity service allows users to communicate with others who have Internet connections, send and receive content, and run applications online”).

⁶⁰ NOI ¶ 10.

premises for use by patrons and should not be subject to the same regulatory framework as telecommunications carriers.⁶¹

Rather, for classification purposes, the Commission should treat such entities as *aggregators* of Internet communications. In the telephone context, the Commission described “call aggregators” as “entities that have telephones available for use by their customers, patrons, or other transient users. Aggregators include, for example, hotels, hospitals, airports, and universities.”⁶² The Telephone Operator Consumer Services Improvement Act of 1990 defined “aggregator” as “any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services.”⁶³

Following this approach, the Commission could state in its ruling or order that the definition of “Internet connectivity services” or “Internet access services” should not be interpreted to include any entity that serves as an aggregator by making Internet access available to transient users of its premises or a public place using service obtained from a provider of Internet access service. (The reference to “public place” is worth adding to include entities that provide access in locations such as parks.) Alternatively, the Commission could incorporate this concept into an express exemption in the definition of “Internet connectivity service” or “Internet access service:

Such term shall not include the provision, using [Internet connectivity service][Internet access service] obtained from a provider of such services, of Internet access to transient users of particular private or public premises or facilities.

C. The Commission Should Not Tie Its Approach Too Closely to a “Layers” Analysis

The Commission has asked whether the “layers” model of the Internet architecture is relevant and useful for classifying broadband Internet service.⁶⁴ The concept of separating different network functionality into a hierarchy of layers goes back to networking’s earliest days. Over time, the Internet’s layered architecture has been formalized in a number of different ways that range according to the specificity of what is defined at each layer. Often-referenced formalizations include the Open Systems Interconnection (OSI) Reference Model,⁶⁵ which has seven layers (physical, data link, network, transport, session, presentation, and application), and the Internet Engineering Task Force model,⁶⁶ which is condensed into four layers (link, internet, transport, and application).

⁶¹ See *Open Internet NPRM*, ¶ 55 (“We do not intend that our proposals would apply to ‘establishments that acquire broadband Internet access service from a facilities-based provider to enable their patrons or customers to access the Internet from their respective establishments’” (citing the Commission’s approach in its 2005 CALEA order).

⁶² *In re Policies and Rules Concerning Operator Service Providers*, Notice of Proposed Rulemaking, CC Docket No. 90-313, 5 F.C.C.R. 4630, ¶ 2 n.6 (July 17, 1990).

⁶³ 47 U.S.C. § 226(a)(2).

⁶⁴ NOI ¶ 60.

⁶⁵ *International Organization for Standardization, Information technology - Open Systems Interconnection - Basic Reference Model* (June 1996), http://webstore.iec.ch/preview/info_isoiec10731%7Bed1.0%7Den.pdf.

⁶⁶ R. Braden, ed., *Requirements for Internet Hosts -- Communication Layers (RFC 1122)* (1989), <http://tools.ietf.org/html/rfc1122>.

While these layered models have been extremely useful in engineering the design of the Internet, we believe that they can provide only limited guidance regarding the scope of Commission jurisdiction over broadband Internet access services. Using the OSI version of the model, one could imagine the FCC defining “Internet connectivity” or “broadband Internet access service” as the combination of functionalities that exist within the first three layers: physical connection and electrical signaling, physical addressing and routing, and IP-based addressing and routing. But just because a network operator provides some or all of the first three layers’ worth of functionalities does not mean that operator cannot also access the higher layers – and therefore does not extinguish the possibility of higher-layer discrimination. Indeed, the kinds of discrimination that are of most concern in the Open Internet proceeding are those that involve network operators “reaching up” into the application-related layers in order to identify a particular application or service and discriminate against it. This is precisely the behavior that was at issue in the Comcast order⁶⁷ – Comcast, which provides the first three layers of functionality, installed devices that could reach up to the application layer to identify and block BitTorrent and other file-sharing applications.⁶⁸

Thus, if the Commission were to go down the path of classifying services that provide the first three OSI layers’ worth of functionalities as Title II services, it would still need to preserve some jurisdiction over providers of such services when they engage in *higher level* functions. For example, the nondiscrimination provisions in Section 202 likely would need to be applied to discrimination perpetrated above level three by providers of the first three layers. While this approach may be workable, it strikes us as a rather convoluted means of ensuring that network operators do not leverage their position as controllers of the physical medium and/or IP routing to discriminate on the basis of applications or content flowing over their networks. Using a specific definition of “Internet connectivity” as the basis for classification (as discussed in the previous section) is likely to provide more clarity about both what is being classified as a Title II service and the scope of the Commission’s jurisdiction over entities providing that service.

V. Forbearance and the “Third Way”

A. Durability of Forbearance

The Commission asks whether its forbearance decisions are likely to endure, and whether there is any way for the Commission to establish a heightened standard for future “un-forbearance.”⁶⁹

The current Commission of course cannot handcuff future Commissions; if an action is within the Commission’s discretion to take, it would be within the power of a future Commission to reverse, so long as the future Commission articulates legally sufficient reasons. Importantly, however, there is no merit to any argument that the theoretical possibility of a future Commission reversing a forbearance decision would somehow create a more uncertain regulatory environment compared to the *status quo*. Either way, a future Commission that believes that a particular regulatory step is warranted with respect to broadband Internet access service could attempt to act accordingly – and its success would depend on whether it articulates a strong rationale for reversing prior policy. In one case, the policy being reversed

⁶⁷ Memorandum Opinion and Order in the Matter of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13028 (2008).

⁶⁸ This kind of “reaching” is sometimes referred to as a “layering violation.”

⁶⁹ NOI ¶¶ 98.

would be a forbearance decision, and in the other case the policy being reversed would be a classification decision. The legal standard the Commission would need to meet would be the same.

Put another way, a provider of Internet access service that fears (say) the possible future imposition of tariff filing requirements gets no more protection against that result from the current service classification scheme than it would get from a forbearance decision. The theoretical risk of a Commission changing policy course is no greater in one instance than in the other.

The Commission could try, however, to make a future policy reversal more difficult to explain. It could articulate its policy judgment in strong terms; the Commission could indicate, for example, that it views the case for forbearance as clear-cut, rather than a close call. Perhaps more importantly, the Commission could seek to base its judgment on factual premises that are not likely to change in the near term. The Commission may, through the strength of its rationale for forbearance, be able to raise the justification bar that a future Commission would need to clear to reverse course.

B. Privacy Considerations and Section 222

The Commission suggests that it could exclude Section 222 from forbearance, but temporarily refrain from applying it to Internet connectivity service until it has conducted a rulemaking on matters such as how to interpret the definition of “customer proprietary network information” (CPNI) in the Internet connectivity context.⁷⁰ CDT agrees fully with this approach.

The Commission has rightly recognized the importance of protecting Internet users’ privacy online, highlighting its importance in connection with many of the goals outlined in the National Broadband Plan.⁷¹ The Federal Trade Commission (FTC) has a lead role in addressing privacy questions under its authority to address unfair or deceptive practices. As the NOI indicates, however, common carrier activities are exempt from the FTC’s authority.⁷² Therefore, classifying Internet connectivity services as common carrier activities will have the side effect of curtailing the FTC’s ability to safeguard user privacy in connection with such services. Applying Section 222 is therefore necessary to avoid creating a major loophole with respect to privacy protection. In the absence of FTC authority, Section 222 must apply to ensure that consumers’ privacy is not left wholly unprotected with respect to their use of Internet connectivity service. A rulemaking is warranted to address the definition of CPNI and how exactly Section 222 will apply in the Internet connectivity context.

The Commission also asks how it can avoid significantly compromising the FTC’s authority to address online privacy issues.⁷³ Importantly, the common-carrier exception to FTC authority applies to providers of telecommunications services only “to the extent that [they are] engaged in providing telecommunications service.”⁷⁴ Thus, any non-telecommunications service offered

⁷⁰ NOI ¶¶ 82.

⁷¹ See, e.g., NATIONAL BROADBAND PLAN, Recommendations 4.14 (concerning online profiles and the collection of personal data), 11.11 (concerning the privacy of student data in online educational initiatives), and 12.7 (concerning the privacy of utility data disseminated over the Internet).

⁷² NOI ¶¶ 83.

⁷³ NOI ¶¶ 83.

⁷⁴ See *Broadband Connectivity Competition Policy*, FTC Staff Report, n.159 and accompanying text (2007) (quoting 47 USC § 153(44)), available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

by Internet access service providers, such as e-mail, web-hosting, content aggregation, and others, will remain under FTC oversight. The desire to avoid significantly compromising the FTC's authority over online privacy only underscores the importance of carefully and narrowly defining the telecommunications service so that it excludes higher-level Internet applications and services.

One final privacy question on which the NOI asks for comment concerns Section 631 of the Cable Act.⁷⁵ In CDT's view, it is not necessary to try to reconcile the obligations under Sections 222 and 631 in this proceeding. The focus here should simply be on what obligations should apply to all providers of Internet access service. Section 222 should apply equally to all Internet access providers. Any additional obligations that may apply to some entities under Section 631 are a separate matter outside the scope of this proceeding. To the extent there is disparity in regulatory treatment, that is a direct product of Section 631 and its focus on cable providers; the Commission's action here would not create any additional disparity. Nor is CDT aware of any potential conflict between the obligations under Sections 222 and 631. In the event that some parties see a potential conflict, that is a matter that could be considered in the rulemaking that will interpret Section 222 for the Internet access service context.

In the long run, developing a more unified privacy regime, rather than the current patchwork of agency jurisdictions and statutory provisions, is a project that warrants policy attention. But that is not a question for this proceeding.

C. CALEA Considerations

The Commission seeks comment on the impact, if any, of its "third way" approach on the Communications Assistance for Law Enforcement Act (CALEA), codified in part at 47 U.S.C. 229.⁷⁶ In light of the D.C. Circuit's decision in *Am. Council on Educ. v. FCC*, the Commission would be on strong ground in applying different meanings to the term "telecommunications carrier," which is found (with different definitions) in both in the Communications Act and CALEA.⁷⁷ In that case, the court upheld the Commission's conclusion that the statutes could be interpreted differently. In light of this, the Commission's forbearance of certain Title II provisions as proposed in the NOI would not affect the coverage of CALEA.

On the question of whether the Commission could forbear from the one CALEA provision that appears in the Communications Act, it is important to note that the Commission's proposed reclassification would have no impact whatsoever on this question. The Commission already today has the authority to forbear from Section 229, and a reclassification would not increase that authority, nor would it increase the likelihood that the Commission would exercise that authority. We believe that it would be unlikely that the Commission would find forbearance of that section to be in the public interest except for very small carriers (if then). Ultimately, the proposed reclassification would have no impact on the reach or enforcement of CALEA.

⁷⁵ NOI ¶¶ 82.

⁷⁶ NOI ¶¶ 89.

⁷⁷ 451 F.3d 226 (D.C. Cir. 2006)

D. Wireless Internet Access Services Should Not Be Exempt.

The NOI asks whether the Commission should defer its decision on the proper classification of wireless Internet access services.⁷⁸ It should not. In a converging world where wireless connectivity is expected to make broadband Internet access increasingly ubiquitous, failing to address wireless would leave a gaping hole in any jurisdictional framework meant to facilitate the country's critical broadband policy goals.

As we argued in our comments in the Open Internet proceeding, people are increasingly using mobile Internet access in much the same ways as wired access.⁷⁹ Improving technology and the widespread use of smartphones, netbooks, and devices like the iPad has meant that the mobile Internet experience ever more resembles the wired experience.⁸⁰ A 2010 Pew survey reflects this, showing a marked increase in the percentage of Americans accessing the internet wirelessly; 40 percent of those surveyed use their mobile phone for Internet access, a 25 percent increase over 2009.⁸¹

Policy should reflect this convergence and treat wireless and wired services alike as a jurisdictional matter. This is not to say that technological or structural considerations on which the Commission has requested comment are irrelevant to the regulation of wireless Internet access services.⁸² There may well be certain technical distinctions that will bear on how rules are crafted or interpreted. For example, what constitutes unreasonable discrimination under Section 202 may differ for wireless networks.⁸³ But such considerations are irrelevant to the statutory classification at issue in this proceeding, and are best left to individual rulemakings and adjudications. Both wired and wireless Internet access provide the same underlying telecommunications function – the ability to “communicate with others who have Internet connections, send and receive content, and run applications online.”⁸⁴ The Commission's proposed “third way” framework should apply equally to wireless Internet access.

The notion that wireless services should be treated under the same general framework as their wired counterparts is reflected in Section 332 of the Communications Act. While Section 332 may not apply to wireless broadband service, as the Commission notes,⁸⁵ it can nonetheless serve as a model for how to proceed in the broadband context. Congress chose to apply the core provisions of Title II to Commercial Mobile Radio Services (CMRS) by specifying that a provider of such services “shall . . . be treated as a common carrier” and by barring forbearance from Sections 201, 202, and 208. At the same time, by inviting forbearance from any other provisions that the Commission determines to be unnecessary in the CMRS context, Congress

⁷⁸ NOI ¶ 105

⁷⁹ *CDT Open Internet Comments*, GN Docket No. 09-191, at 51, http://www.cdt.org/files/pdfs/2010_CDT_openness_comments.pdf.

⁸⁰ See Esther Shein, *Broadband Devices Driving Mobile Market Gains*, INFORMATIONWEEK, July 12, 2010, <http://www.informationweek.com/news/smb/mobile/showArticle.jhtml?articleID=225702921>.

⁸¹ *Mobile Access 2010*, PEW INTERNET, July 7, 2010, <http://www.pewinternet.org/Reports/2010/Mobile-Access-2010.aspx>. The most dramatic uptick in mobile access occurred among minority Internet users. See Cecilia Kang, *Going wireless all the way to the Web*, WASHINGTON POST, July 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/09/AR2010070905521.html>.

⁸² NOI ¶ 102.

⁸³ *CDT Open Internet Comments*, GN Docket No. 09-191, at 51.

⁸⁴ NOI ¶ 1 n.1.

⁸⁵ NOI ¶ 104 n.275.

provided flexibility to ensure that the regulatory framework could take account of the differences between CMRS and wireline telephony. Similarly, the Commission should consider wired and wireless broadband under the same broad framework, forbearing where appropriate and tailoring the framework to wireless service in future rulemakings and adjudications.

Moreover, it is instructive that the core provisions the Commission proposes to apply to Internet access service are the very same provisions (plus Section 254) that Congress mandated be applied to CMRS in Section 332.⁸⁶ Wireless telephony has thrived and expanded under Section 332, and CDT is aware of no credible reason the same should not be true of wireless broadband under the similar “light-touch” framework the Commission proposes here.

E. Applicability to Non-Facilities-Based Providers

The Commission asks what approach it should take towards non-facilities-based Internet service providers.⁸⁷ CDT believes that, for purposes of regulatory classification and Commission jurisdiction, non-facilities-based providers of retail Internet access service should be treated the same way as their facilities-based counterparts.⁸⁸

This makes sense from a policy perspective for a number of reasons. Facilities-based and non-facilities-based providers of Internet connectivity sell the same service to an end user; the end user likely will neither know nor care who holds title to the transmission line used or what wholesale arrangements may be involved in delivering the service. Once a subscriber has signed up to obtain access from a non-facilities-based provider, that provider has the same kind of “termination monopoly” with respect to that subscriber as facilities-based providers have with respect to theirs. Applications developers and content providers, if they hope to maintain the ability to reach all willing Internet users, need access to subscribers to non-facilities-based services as well as facilities-based ones. And consumers need protection against the possibility of provider-level action that affects them but is non-transparent – again, regardless of whether the provider is facilities-based.

After establishing its jurisdiction, however, the Commission may well choose to make special accommodations in certain rules for non-facilities-based providers, or to exempt non-facilities-based providers from some rules entirely. In particular, where a provider’s contract with the wholesaler of transmission facilities is *non-exclusive*, there will be an argument that the provider itself does not control any scarce input. Some types of rules, therefore, might be unnecessary. For example, there would be a good argument that such a non-facilities-based provider offering a specialized, “family-friendly” Internet access service in a transparent manner would not raise discrimination concerns, even though the service might require filtering out certain content.

⁸⁶ See NOI ¶¶ 68.

⁸⁷ NOI ¶¶ 106.

⁸⁸ Paragraph 106 of the NOI uses the term “Internet service providers” instead of Internet *access* service providers. CDT believes this may be an error, since n. 1 explains that the Commission will use the term “broadband Internet service” to refer to a bundle of services, not just connectivity. As discussed above, CDT believes it is essential for the Commission’s “third way” approach to focus narrowly on the provision of Internet *access* service – also referred to in the NOI as “Internet connectivity service.” No other kind of “Internet service” – facilities-based or otherwise – should be subject to classification as a telecommunications service under the Commission’s proposed approach.

F. Impact on Managed or Specialized Services

The Commission seeks comment on whether its action here may affect “managed or specialized services.”⁸⁹ This proceeding focuses specifically on “Internet connectivity” or “Internet access service.” Either term should be mutually exclusive with the term “managed or specialized service,” since the latter term properly signifies a class of *non-Internet* services.

The Commission may wish to clarify this point by stating expressly that it does not intend for its classification decision in this proceeding to apply to managed or specialized services. The Commission has not formally defined “managed or specialized services,” but it could state here, without crafting a full definition at this time, that it generally understands the term to refer to services that offer connectivity to specific content or a specific subset of Internet endpoints and that are neither marketed nor widely used as substitutes for Internet access services.⁹⁰

G. Role of Third-Party Groups or Standards Bodies

Having spent more than a decade participating in technical standards bodies such as the Internet Engineering Task Force (IETF) and the World Wide Web Consortium (W3C), CDT firmly believes in the power that open standards can have in supporting the most efficient and interoperable experience for all Internet users regardless of the network, platform, or location from which they access the Internet. It is thanks to standardized protocols that disparate computer networks can interoperate, enabling communications and applications to traverse the Internet on a seamless basis. Without standards, the Internet could not exist. The use of standardized protocols also provides crucial assurances for applications developers that their applications will function in a similar way all across the Internet.

The Commission has asked for comment on the role that could be played by third party technical groups, such as the IETF or the “technical advisory groups” proposed by Verizon and Google in the Open Internet proceeding.⁹¹ In CDT’s view, standards bodies and other third parties can provide important input into and the FCC decision-making process. In some cases, groups may be able to offer criteria that the Commission could choose to rely on in making decisions. For example, as CDT argued in our Open Internet comments, compliance with standards could be a guiding factor in determining whether a particular practice is reasonable.⁹² Existing standards bodies help explore different technical options and are constantly working to evolve Internet standards to meet current challenges.⁹³ By including standards compliance as one criterion in evaluating network operators’ practices, the Commission would be supporting this work and providing extra incentives for network operators to participate in standardization efforts.

Nonetheless, it is unrealistic to expect standards bodies to pass judgment or to directly assist the Commission in passing judgment on specific, individual regulatory questions or cases. The

⁸⁹ NOI ¶¶ 108.

⁹⁰ CDT offered a more complete proposed definition of “managed or specialized services” in its comments in the Open Internet proceeding. See Reply Comments of the Center for Democracy & Technology, *In the Matter of Preserving an Open Internet*, GN Docket No. 09-191 at 39-40, Apr. 26, 2010, http://www.cdt.org/files/pdfs/CDT_Reply_Comments-Open_Internet.pdf.

⁹¹ NOI ¶¶ 93, 51.

⁹² CDT Comments, GN Docket No. 09-191 at 44.

⁹³ See *id.* for a discussion of the IETF’s work in relation to congestion management techniques.

IETF in particular is an engineering organization dedicated to crafting technical protocols that improve the Internet. While the standards it creates most certainly have policy implications, the IETF's expertise lies not in making policy judgments for regulatory purposes, but in providing tools to help network operators provide service and manage their networks in the most efficient and interoperable fashion. In some rare cases, the IETF has expressed its disapproval of specific non-standard practices,⁹⁴ but such cases are the exception. Furthermore, the IETF has gone to significant lengths to stay out of adjudicating disputes between individual companies, including the kinds of disagreements between network operators and subscribers or applications providers that could come before the FCC. So while the Commission should value the expert input standards bodies can provide, it would be unwise and unfeasible to delegate formal authority to them.

The Broadband Industry Technical Advisory Group (BITAG), recently announced by Silicon Flatirons, Verizon, and Google, could similarly be an important resource for the Commission.⁹⁵ The BITAG seeks to serve as a venue where technical experts can develop consensus about broadband network management practices. CDT is hopeful about the BITAG's ability to inform and improve the debate over key network management issues. The group's structure, membership, and particular functions have yet to be worked out, however, and there are significant challenges, including the possibility of politicization or capture by particular corporate interests. Above all, for the BITAG to have credibility as a group the Commission should look to, Internet stakeholders of all kinds – including those representing users, the public interest, applications providers, and network providers – will need to be allowed to participate. Absent the presence of a diversity of technologists, it will be difficult for the BITAG to credibly reflect the technical interests of the Internet community at large. And like other standards-setting bodies, it does not and cannot offer a substitute or surrogate for the Commission asserting appropriate authority under the Communications Act.

* * *

CDT is pleased to provide the above comments in support of the Commission's "third way" for broadband Internet access service.

Respectfully submitted,

Leslie Harris
David Sohn
John Morris
Alissa Cooper
Andrew McDiarmid
Elizabeth Allen
Matthew McHale

⁹⁴ See, e.g., Internet Architecture Board, *IAB Commentary: Architectural Concerns on the Use of DNS Wildcards* Sept. 19, 2003, <http://www.iab.org/documents/docs/2003-09-20-dns-wildcards.html>; Sally Floyd, *Inappropriate TCP Resets Considered Harmful*, IETF RFC 3360 (2002), <http://www.apps.ietf.org/rfc/rfc3360.html>.

⁹⁵ *Initial Plans for Broadband Internet Technical Advisory Group Announced*, June 9, 2010, <http://www.prnewswire.com/news-releases/initial-plans-for-broadband-internet-technical-advisory-group-announced-95950709.html>; See also NOI ¶ 51.