THE TRUTH ABOUT THE THIRD WAY:

Separating Fact from Fiction in the FCC Reclassification Debate

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Executive Summary

Earlier this year, the U.S. Court of Appeals for the D.C. Circuit issued a decision in the *Comcast v. FCC* case that has far-reaching consequences for the future of U.S. broadband policy. The D.C. Circuit held that even though Comcast had intentionally and secretly blocked access to lawful content on the Internet, the Federal Communications Commission lacked the authority to stop such harmful practices.

The ruling rested on decisions made by the FCC, in 2002 and 2005, to classify broadband Internet access as an "information service" under the Communications Act, which moved it outside of the realm of the law meant to apply to all two-way communications networks. At the time, the FCC believed it had retained limited oversight powers under the theory known as ancillary authority. But the ruling in the *Comcast* case rejected the agency's reasoning.

The court decision has far-reaching consequences that go well beyond content blocking. Most notably, the FCC's National Broadband Plan is now in serious jeopardy. The Commission is now unable to enact policies that would bring broadband into the homes of rural, low-income and disabled Americans; it lacks the authority to require broadband providers to be more transparent in their billing practices and advertisements; and the agency is completely unable to stop Internet service providers from blocking or degrading legal websites.

In the wake of the recent court decision, FCC Chairman Julius Genachowski has no hope of building a sound National Broadband Plan on a failed legal experiment conducted by his predecessors. Thus, Genachowski recently announced that he would seek to re-establish the FCC's broadband oversight authority by reversing the shortsighted classification decisions made by the previous commissions. Genachowski's plan, known as the "Third Way," would reclassify broadband transmission as a "telecommunications service" under the Communications Act, and forbear from applying most portions of the law except for those needed to ensure universal access and preserve the open Internet. The proposal is due to be unveiled at the June 17 FCC open meeting.

Incumbent telephone and cable companies have reacted to this announcement with overheated pronouncements suggesting that the FCC's proposal amounts to a "government takeover of the Internet." This is simply empty rhetoric. While we welcome a lively debate about the best way for the FCC to move forward with implementing the National Broadband Plan, that debate should be informed by the history of communications law and policy in this country and accurate facts about both the FCC's proposal and the technological and market realities of today's broadband world. It should not be based on deliberate misdirection and obfuscation. We offer this issue brief to shed light on some of the more obvious misconceptions circulating about the FCC's proposal.

Fiction #1: *The FCC's Third Way proposal for making broadband policy is a distraction from implementing the National Broadband Plan and bringing broadband access to all Americans.*

Fact: The essence of the FCC's proposal — re-establishing the FCC's authority over broadband networks — is a necessary first step in achieving the goals of the National Broadband Plan.

If the FCC pushes forward without shoring up its legal authority, it faces the risk that its policies will be ultimately reversed in the courts. These policies affect such varied topics as accelerating broadband access and adoption in rural America; connecting low-income Americans, Native American communities, and Americans with disabilities; supporting robust use of broadband by small businesses to drive productivity, growth and ongoing innovation; lowering barriers that hinder broadband deployment; strengthening public safety communications and cybersecurity; and increasing consumer protection, including transparency, disclosure; and consumer privacy.

Failing to re-establish the FCC's authority would be devastating to the Commission and anyone else who believes in bringing broadband to all Americans, preserving an open Internet free from discrimination, and maintaining our competitiveness in the global economy. Far from being a distraction, the FCC's "Third Way" is a pillar on which the ultimate success of the plan must rest.

Fiction #2: *The FCC's proposed policy will jeopardize broadband adoption in low-income communities.*

Fact: The FCC cannot adopt key policies to promote broadband adoption in low-income communities without revisiting its framework for making broadband policy.

Currently, the FCC subsidizes access to telephone service for low-income families through its Lifeline and Linkup programs under the Universal Service Fund. As access to broadband becomes as essential for American families as access to water, power and phone service, the FCC has proposed extending the Lifeline and Linkup programs to support broadband service. But unless the FCC classifies broadband as a telecommunications service under the Communications Act (as it has proposed to do), it may lack authority expand the Lifeline and Linkup programs to subsidize high-speed Internet services for low-income consumers.

Fiction #3: *Placing broadband services back under the Commission's explicit authority will stifle investment in broadband networks.*

Fact: The FCC's proposed policy merely preserves the status quo prior to the recent uncertainty created by the federal appeals court ruling. As a result, it should have little to no effect on company investment decisions.

Many industry representatives and investment analysts have dismissed the notion that the FCC's Third Way will deter investment. Furthermore, history contradicts the claim that applying some of the rules contained in Title II of the Communications Act to broadband service providers (as the Commission has proposed) will adversely affect investment in the networks. Telecommunications industry investments soared during the period when carriers were subject to the full panoply of rules contained in Title II. Investments only began decreasing once the FCC began dismantling many of the pro-competition rules stemming from this part of the Communications Act.

Fiction #4: *Placing broadband services back under the FCC's explicit authority will lead to job losses in the telecom sector.*

Fact: The telecommunications sector accelerated its job-shedding following industry consolidation and FCC deregulation, a trend that continues unabated even as company revenues reach historic highs.

The notion that the FCC's move to re-establish its authority over broadband networks will harm employment is also nothing more than unsupported rhetoric. The simple reality is this sector accelerated its job-shedding following industry consolidation and FCC deregulation. And this trend continued even as overall revenues in the sector continued to expand. Unfortunately, the underlying market economics and company statements suggest this trend will continue regardless of how the FCC acts on the regulatory authority question.

Fiction #5: *The FCC's approach will cause regulatory uncertainty and instability.*

Fact: Recognizing that broadband Internet access contains a telecommunications service is the best way to eliminate existing regulatory uncertainty and instability.

The FCC's proposal will establish clear boundaries for the scope of FCC authority, based on the legislation passed by Congress that first empowered the FCC to oversee two-way communications services. It is likely to withstand judicial review. Moving forward with broadband policy without taking this step could cause serious problems for consumers, the Commission, and companies in the Internet ecosystem. It would leave FCC policies vulnerable to piecemeal litigation, prolonging uncertainty for many years to come.

Fiction #6: *Only Congress can act to give the FCC authority over broadband networks.*

Fact: The Communications Act gives the FCC the regulatory flexibility to determine how it can best protect consumers.

In 2005, a landmark Supreme Court case recognized that the FCC had the flexibility to designate broadband Internet access service as either a combination of telecommunications and information services under the Communications Act or as a unitary information service. This FCC proposes to adopt the former approach, which will, in turn, give it the ability to establish basic rules of the road for broadband. Because the Supreme Court has already held that the responsibility for making this determination resides with the FCC, the Commission can go forward with this proceeding without further guidance from Congress. Congress can and eventually may pass legislation to clarify the FCC's authority over broadband networks. But in the meantime, the FCC can and should exercise authority over broadband to protect consumers and further its crucial efforts to bring broadband to all Americans.

Fiction # 7: *The FCC's Third Way proposal is an unprecedented power-grab which departs from Congress's intent to leave the Internet unregulated.*

Fact: The FCC's proposal will bring the Commission's approach to broadband networks in harmony with longstanding principles in communications policy.

The law always has recognized a distinction between communications infrastructure (like broadband networks) and the content that travels over that infrastructure (such as websites on the Internet). In fact, it was the Powell FCC's decision to abandon oversight over broadband networks that represented a radical and irresponsible shift — by treating basic connectivity services just like content, the Powell FCC undermined the Commission ability to make pro-competitive, pro-consumer policies in the broadband space. This FCC's proposal would return to the first principles of communications policy that fostered innovation, competition and investment in the first place.

Fiction #8: *The FCC's proposal would amount to a "government takeover of the Internet."*

Fact: The FCC's proposal would draw a line between basic two-way communications — which have always been regulated by the FCC — and Internet applications and websites, which would remain unregulated by the FCC.

None of the parties in the debate before the FCC have suggested that the FCC impose any kind of content regulation on the Internet. Nor has anyone suggested that the government take over the physical infrastructure that forms the Internet. Rather, the FCC is proposing to apply some basic, light-touch rules of the road to the owners of broadband networks.

These rules will attempt to *encourage* private investment, promote competition, and foster innovation, economic growth, and job creation. Further, restoring its regulatory framework back in harmony with the law will insure the FCC has basic consumer protection authority.

Fiction #9: *The Third Way would apply 1930s-era rules designed for monopoly telephone networks to modern broadband networks.*

Fact: The rules under the Communications Act were designed for all two-way communications networks, and the FCC is looking to apply a small portion of the rules to broadband providers.

This myth aggregates two distinct misconceptions: the notion that the rules in question were written in 1934 for telephone companies and the notion that all of the rules in Title II of the Communications Act would apply to broadband service providers. The truth is the rules were designed for all two-way communications networks, including modern packet-switched, Internet-Protocol-based networks, and the FCC has proposed applying only a small fraction of the rules contained in Title II to broadband service providers. Indeed, the high capacity broadband lines sold to large businesses in the so-called "enterprise" broadband market is currently regulated in identical fashion to the "Third Way" framework the FCC proposed for residential broadband.

Fiction #10: *In 1998, the Clinton-era FCC initiated a hands-off regulatory approach to broadband service providers, and subsequent commissions merely adopted the Clinton-era approach.*

Fact: The Clinton FCC promoted competition by treating facilities-based providers like phone and cable companies with more regulatory scrutiny, forcing DSL providers to share their lines with competitors and reasonable, wholesale rates.

In 1998, the Clinton FCC affirmed long-standing FCC policy that refrained from regulating dial-up Internet service providers that did not own telecommunications facilities. However, the Clinton FCC chose to treat facilities-based providers (such as the large telephone and cable companies that dominate today's market for Internet access) with more regulatory scrutiny. In fact, the Clinton FCC enacted open access policies that required DSL providers share their lines with competitors at reasonable wholesale rates. (The current Commission has stated it does not intend to pursue such line-sharing policies.)

In 2002, under Republican Chairman Michael Powell, the FCC decided to classify cable modem service as an information service under the Communications Act. This choice had the effect of limiting the FCC's ability to make broadband policy to those that could be adopted under what's called ancillary authority. (Ancillary authority is a limited grant of authority to make rules with respect to broadband so long as the rules can be justified based on their effect on other services regulated under the Communications Act.) The Commission's current predicament — in which its ancillary authority, and, as a result, its ability to make sound broadband policy, was significantly curtailed by a recent federal court case — can be traced directly back to Powell's 2002 decision, not to the choices made under the Clinton administration.

The Truth About The Third Way[1]

In early May, Federal Communications Commission Chairman Julius Genachowski announced his intention to revisit the Commission's regulatory framework for broadband services. By doing so, he seeks to put policies that "advance our global competitiveness and preserve the Internet as a powerful platform for innovation, free speech, and job creation" on a solid legal foundation. Currently, many broadband Internet access service providers bundle a basic connectivity service (that transmits Internet content of a user's choosing to and from a user's computer) with additional applications or features, such as e-mail, webhosting, data storage, and the access provider's chosen content.

In its "Third Way" proposal, the Commission suggests imposing a limited number of basic rules of the road on the connectivity service. To do so, it has initiated an administrative proceeding to call the connectivity service a "telecommunications service" under the Communications Act of 1934. A telecommunications service is defined as a service offering that "transmi[ts], between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[2] Until now, the entire bundle of services has been classified as an "information service" under the Act. An information service is defined as an "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[3]

We believe that the FCC's action represents a measured response to a recent court case that significantly limits the Commission's authority to make broadband policy so long as it continues to retain the "information service" designation for broadband. In particular, the proposal reverses the Bush-era FCC's radical departure from traditional communications law and policy principles, which recognize that communications networks function as basic infrastructure for commerce, speech, and innovation, and as a result, the FCC should be able to adopt baseline rules of the road for that infrastructure. (Because the Bush-era FCC reversed an earlier approach to the classification issue, the current FCC's approach is sometimes called "reclassification.")

But in order to have productive discussions about this issue, we must first separate fact from fiction.

Fiction #1: *The FCC's 'Third Way" proposal serves as a distraction from what should be the Commission's main priority: implementing the National Broadband Plan and bringing broadband access to all Americans.*

Fact: If the FCC does not re-establish its authority over broadband networks, it may not be able to implement many key aspects of the National Broadband Plan. Without this authority, our ability to achieve America's key broadband goals may be placed at risk.

Incumbent telephone and cable companies, which provide broadband Internet access service, and their allies have repeatedly argued that the FCC's classification proceeding serves as a distraction — they suggest that the FCC ought to be focused on implementing the National Broadband Plan rather than worrying about the legal niceties of its ability to adopt broadband policy.

But this argument deliberately obscures the importance of the classification proceeding: Without it, the FCC might not be able to adopt many of the very proposals contained in the plan.

In April, a federal court of appeals held that the FCC's ability to make broadband policy under the Commission's current framework for broadband — which classifies broadband Internet access as an "information service" — is limited. Under the current framework, the FCC may only make rules with respect to

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[1] The author wishes to thank M. Chris Riley, Policy Counsel, Free Press, and S. Derek Turner, Research Director, Free Press, for their substantive contributions to this report.

[2] 47 U.S.C. § 153(43).

[3] 47 U.S.C. § 153(20).

broadband Internet access under what's called "ancillary authority." And the court interpreted the scope of the Commission's ancillary authority extremely narrowly. It held that the Commission may make broadband policy only to further other goals in the Communications Act that relate to telecommunications, broadcasting, or cable. That is, every rule for broadband must be justified based on its effects on those other services. By reclassifying the basic transmission service as a telecommunications service, the Commission will be able to directly apply some of the rules that currently apply to telecommunications service providers to broadband transmission providers.

If the Commission doesn't shift away from the current ancillary authority frame, it may not be able to implement "recommendations [in the National Broadband Plan] aimed at accelerating broadband access and adoption in rural America; connecting low-income Americans, Native American communities, and Americans with disabilities; supporting robust use of broadband by small businesses to drive productivity, growth and ongoing innovation; lowering barriers that hinder broadband deployment; strengthening public safety communications; cybersecurity; consumer protection, including transparency and disclosure; and consumer privacy."[4]

Let's take two examples from this list: strategies that focus on encouraging deployment and competition. In the National Broadband Plan, the FCC proposes to use monies in its Universal Service Fund to support broadband deployment in rural areas. Under the current regulatory framework, this proposal will be vulnerable to a strong legal challenge. The section of the Communications Act that discusses this fund states explicitly that the fund may be used to support the deployment of "telecommunications services."[5]

Since broadband Internet access is currently classified as an information service, not a telecommunications service, the FCC cannot use universal service funds to support buildout in rural areas. Before the *Comcast* case, the Commission might have argued that adding broadband to the list of supported services obliquely helped to achieve other goals discussed in the Act, such as universal access to telecommunications services, but after *Comcast*, this argument seems risky and unlikely to succeed. Because the fund as currently structured clearly addresses the issue of supporting telephone service in rural and high-cost areas, it is difficult to see how adding broadband Internet access to the list of supported services might further advance that goal — absent acknowledgment that broadband-based communications services are a successor to and functional equivalent for predecessor telecommunications services like the telephone, using 21st-century infrastructure rather than legacy networks to offer data transmission.

The National Broadband Plan also makes a number of competition-related recommendations. For example, the plan recognizes that accurate and consumer-friendly disclosure requirements "help foster a competitive marketplace," and recommends that the Commission issue a Notice of Proposed Rulemaking to determine appropriate disclosure obligations for broadband service providers.[6] In the future, the Commission may require providers to disclose maximum and average upload/download speeds, uptime, delay, and jitter, as well as a list of standard applications that can be used with a particular service offering.[7] The Plan also suggests that consumers are entitled to "clear, understandable, and reasonably precise estimates of the likely price of different broadband service offers and plans before they sign-up [for service], as well as all applicable fees and taxes."[8] But under the current regulatory framework the Commission has no clear authority to require pro-consumer disclosure requirements for information services; instead, it has historically justified its disclosure and pricing-related inquiries based on its authority to deter carriers from unjust and unreasonable practices

[4] Posting of Austin Schlick to Blogband: the Official Blog of the National Broadband Plan, http://blog.broadband.gov/ (Apr. 7, 2010).

[5] 47 U.S.C. § 254(c).

[6] Federal Communications Commission, *Connecting America: the National Broadband Plan*, at 46 (2010) (*National Broadband Plan*).

[7] *Id.*

[8] *Id.*

under section 201(b) of the Communications Act. Here again, section 201 imposes obligations on telecommunications carriers, not on information service providers, and after *Comcast*, it seems, at a minimum, unclear as to whether that authority will provide a sufficient basis for the Commission to act to provide much needed information to consumers so that they may make the most educated choices among the limited number of service providers from which they have to choose.

These are just two examples, but as explained by the FCC's General Counsel, many varied proposals in the National Broadband Plan are vulnerable to litigation risk. And the failure to implement any of them jeopardizes our ability to achieve America's broadband goals. Without restoring the legal foundation for its authority over broadband networks, the Commission will be unable to promote innovation, competition, and creativity in the broadband space.

Fiction #2: *The FCC's proposed Third Way authority policy will jeopardize broadband adoption in low-income communities.*

Fact: Unless the FCC classifies broadband as a telecommunications service, it will have no authority to expand the Lifeline/Linkup program to subsidize high-speed Internet services for low-income consumers.

There is no doubt that the current Lifeline and Linkup low-income subsidy programs are vital to near-universal subscription to telephone services.[9] One of the key recommendations in the FCC's National Broadband Plan is for the agency to expand these successful low-income subsidy programs to include support for high-speed Internet service. The National Broadband Plan found that the chief cause of the current low-income digital divide is price — the high monthly price of broadband service and the high up-front price of computer equipment. The Plan recommends closing this digital divide by lowering adoption barriers through initial-device and monthly-service-plan subsidies.

However, unless the FCC moves to reclassify broadband transmission as a telecommunications service, it will have no authority to implement this critical component of the National Broadband Plan. Recently, certain lawmakers[10] and policy advocates[11] who have in the past called for the FCC to expand the Lifeline program have now condemned and questioned the Commission for its plans to re-establish legal authority over

[9] Beginning in 1985, the FCC established the low-income subsidy program in order to facilitate universal adoption of telephone services. The FCC's low-income subsidy program consists of two major components: Lifeline and Linkup. Under the Lifeline program, telecommunications carriers are required to offer qualifying consumers discounted basic telephone service, and the program offsets these discounts via direct payments to carriers. The Linkup program reduces the cost of initiating new telephone service by providing subsidies for installation costs. Since the program was first established, telephone penetration rates among low-income households have grown from 80 percent to 90.4 percent.

[10] Many of the 74 Democrats that signed a recent letter to the FCC opposing reclassification are also strong supporters of the Commission's efforts to close the digital divide through implementation of the National Broadband Plan. The letter, however, states that the Commission's efforts to ensure it has proper authority "will likely serve as a distraction from what should be our Nation's foremost communications priority: bringing broadband to every corner of America, getting every American online…" *See* Letter from Rep. Gene Green et al. to FCC Chairman Julius Genachowski (May 24, 2010). Rep. G.K. Butterfield (D-N.C.) recently delivered a statement encouraging the FCC to focus on low-income broadband adoption, but in the same statement, slammed the FCC's efforts on reclassification because of his belief that the policy "risks adding more barriers to adoption by discouraging innovation."

[11] The Rainbow PUSH Coalition recently sent a letter to key members of Congress stating that it "shares" the FCC's "stated goal…[of] connecting low-income Americans," but that it was "puzzled" by the Third Way proposal, expressing concern "that the Commission has yet to conduct a fact driven analysis of the possible impact that its proposed Internet regulations could have on deployment and adoption rates." Letter from Rev. Jesse L. Jackson, Sr., founder and president, Rainbow PUSH Coalition, to Hon. John D. Rockefeller, Chairman, Senate Committee on Energy and Commerce, et al. (May 26, 2010). The letter then goes on to say that "at a time when too many low-income and minority individuals are still lacking a home broadband connection, we urge the Commission to focus on the goals of implementing the National Broadband Plan." *Id.* What's puzzling however is the irreconcilable nature of these policy positions. The unavoidable consequence of the *Comcast* opinion is that the FCC simply cannot pursue implementation of the National Broadband Plan, including policies aimed at closing the digital divide, without legal authority over broadband networks. We respectfully suggest that those advocates who wish to see the Commission implement the Plan but who have concerns about specific regulations should be encouraging an effort to restore the FCC's authority over broadband, and then lobbying the FCC on the specific policies that may or may not follow that re-establishment of authority.

broadband. These opponents of the FCC's reclassification proceeding must realize that their opposition will negatively affect the broadband adoption policies they claim to support.

Unlike the current universal service subsidy program for rural telephone networks, the low-income subsidy program is not explicitly authorized in the Communications Act. The FCC used its "ancillary authority" powers granted in Title I of the Act to create the program.[12] Specifically, in order to carry out its duty "to make available … to all people of the United States … adequate facilities at reasonable charges,"[13] the Commission used its general authority under section 4(i)[14] to require eligible telecommunications carriers[15] to offer common carrier communications services[16] to low-income consumers at reasonable discounted prices[17] prescribed by the Commission.[18] The FCC created the Lifeline and Linkup subsidy programs to provide common carriers with subsidies to offset the costs of these discounts.[19]

But because the D.C. Circuit's decision in the *Comcast* case dismantled the FCC's authority to oversee broadband networks, the Commission now has no path to extend low-income subsidies to broadband, so long as these services remain under the Bush-era FCC classification as "information services." Though the current low-income subsidy program was established using ancillary authority, that authority was directly tied to specific sections of Title II covering common carrier telecommunications services. If broadband networks remain outside of any specific statutorily mandated FCC responsibility — as they currently are — then the Commission has no legal authority to expand the low-income subsidy program to include these vital services.

Indeed, one of the key factors motivating the FCC's efforts to reverse the Bush-era classification decisions is the unfortunate and unavoidable reality that these past actions have now left the Commission with no authority to pursue this most critical recommendation from the National Broadband Plan. Therefore, it is simply disingenuous for certain advocates and policymakers to demand that the FCC create a program to realize the goal of universal adoption while simultaneously trying to prevent the Commission from ensuring it has the authority to oversee policies that will close the digital divide. However unintentionally, those who oppose reclassification threaten to permanently cement the digital divide.

[12] Though Congress declined to explicitly codify the low-income subsidy program in the Act, section 254(j) did state that nothing in the law "shall affect the collection, distribution, or administration of the Lifeline Assistance Program…"

[13] 47 U.S.C. § 154.

[14] *Id.* § 154(i). This is the section of the Act from which the FCC derives its ancillary authority powers. The section states, "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." However, courts have held that this clause does not grant the FCC unlimited authority, finding that the Commission may exercise its ancillary jurisdiction when "the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." *See American Library Ass'n. v. FCC*, 406 F.3d 689 (2005).

[15] 47 U.S.C. § 214.

[16] 47 U.S.C. § 153(10). The Act defines the term common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy…" This generally means any person or company who indiscriminately "holds itself out" to provide service to the general public.

[17] 47 U.S.C. § 201(b).

[18] 47 U.S.C. § 205. "[If] the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed… and to make an order that the carrier or carriers… shall not thereafter publish, demand, or collect any charge other than the charge so prescribed..."

[19] See *MTS and WATS Market Structure: Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board,* Decision and Order, 50 Fed. Reg. 939 (Jan. 8, 1985) (*1985 Lifeline Order*).

Fiction #3: *Placing broadband services back under the Commission's explicit authority will stifle investment in broadband networks.*

Fact: The FCC's proposed Third Way authority policy would merely preserve the status quo prior to the recent uncertainty created by the D.C. Circuit's recent opinion. Many company representatives and investment analysts have dismissed the notion that the Third Way will deter investment. Furthermore, telecom industry investment soared during the period when carriers were subject to full Title-II authority, only decreasing once the FCC began dismantling many of the pro-competition rules stemming from this part of the Communications Act.

The broadband network service sector is one of the most capital-intensive sectors in our economy. Building networks requires substantial up-front investments, and decisions regarding these investments are driven primarily by a complex array of factors that depends on the specifics of a given market. To paint the impact of regulations or regulatory authority on investment decisions as automatically negative is wildly oversimplistic and inaccurate. The historical investment record plainly illustrates that in the telecom sector, regulations are in no way an automatic deterrent to investment, and that in many cases they provide investment incentives in an otherwise poorly competitive market.

The FCC's proposed Third Way policy merely ensures that the Commission has the legal authority that investors and markets already presumed it had prior to the *Comcast v. FCC* decision. Nothing about reversing the Bush-era FCC classification decisions changes the underlying fundamentals in the broadband market: This is a growing market with declining cost structures. The overall high-speed Internet access market is expanding, with the wireless data sector poised for substantial future growth. If a market is expected to grow, businesses have a strong incentive to invest in capacity to meet increased demand, in order to increase revenues. Similarly, in the Internet service provider (ISP) sector, overall capital equipment costs and operating costs continue to decline. If the cost to serve a customer declines, the potential return on investment increases, giving a firm the incentive to increase investment.

Indeed, while their lobbyists are stirring up investment scares on Capitol Hill, many of the carriers themselves are telling investors a different story. Take for example recent comments from Landell Hobbs, Time Warner Cable's Chief Operating Officer, which were made at an investor conference. Hobbs noted that the Third Way "is a light regulatory touch… . [The FCC's] focus is really to put them in a position where they can execute around their national broadband plan, not to rate regulate or crush investment in our sector. That's not at all what we believe. So, I want you to take away as, yes, we will continue to invest…"[20] This reactionmirrors those of many Wall Street investment analysts, who have greeted the Third Way proposal with a shrug. Responding to the apparent overreaction to the Third Way announcement seen in cable stocks, Merrill Lynch released an investor note stating, "the FCC's 'Third Way' reclassification largely keeps the status quo intact… we see no transformative change in our Cable thesis, creating a buying opportunity on market fear over the specter of regulation… [A]ny Third Way regulation will have no impact on Cable growth."[21]

The rhetoric about the Third Way discouraging investment is just a general reflection of the common but misguided belief that any and all regulation discourages investment. According to this theory, regulation will perpetuate uncertainty and will reduce potential return on investment, thereby reducing the incentive to invest. But all regulation is not created equal. Some regulation is heavy-handed, designed to control retail prices in a monopoly market, while other regulation can be much lighter, providing basic rules of the road that ensure healthier competition in an otherwise concentrated market. The FCC pursues its Third Way authority proposal merely to ensure it can adopt policies such as expanding the Universal Service Fund to broadband and

[20] *See* JP Morgan Global Technology, Media and Telecom Conference: Time Warner Cable, Inc. Management Discussion (May 19, 2010).

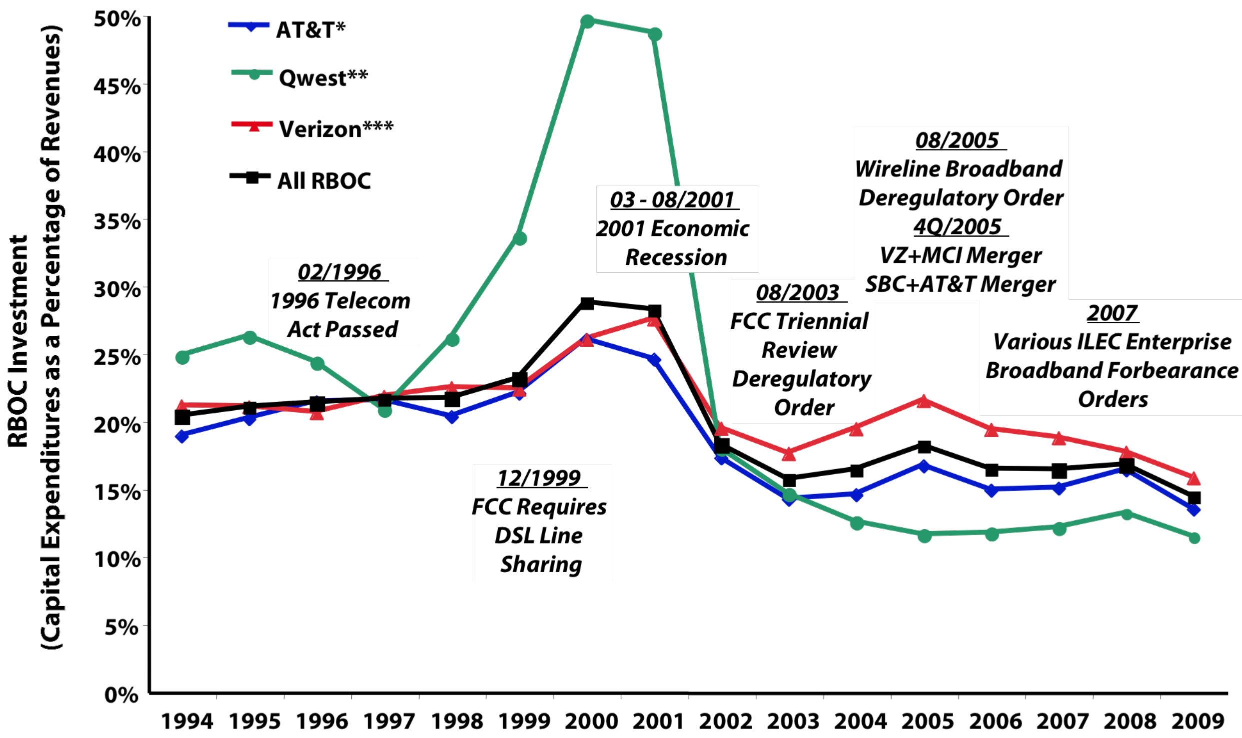
[21] *See* Jessica Reif Cohen, "FCC Decision Centered on Net Neutrality; Not Overreaching," BofA Merrill Lynch Research (May 6, 2010).

requiring better consumer disclosure of service quality and pricing. These objectives are the lightest of regulatory touches.

Evidence from the past 13 years from the telecom sector suggests that the Title II regime did not in any way deter investment. In fact, during this period, which saw the imposition of substantial regulation followed by equally substantial deregulation, we see that regulation might have actually encouraged investment —and that deregulation and consolidation might have decreased investment.

In 1994, two years before the 1996 Telecommunications Act was passed, the combined gross capital investment of the Regional Bell Operating Companies (RBOCs) was 20 percent of revenues. Immediately following the passage of the 1996 Act, RBOC investment as a percentage of revenues grew, despite substantial regulations at the wholesale and retail levels. By 2001, RBOC investment as a percentage of revenues reached 28 percent (see Figure 1). Investment continued to rise throughout the year 2000, despite the bursting of the dot-com bubble in March of that year. In 2001, despite a six-month recession, RBOC investment held steady. It wasn't until 2002, when the FCC began dismantling the 1996 Act's regulations that relative investment declined sharply, to a low of 15.7 percent in 2003. Investment rose slightly in 2004 and 2005, but then declined and held flat following the FCC's subsequent complete deregulation of residential broadband and its approval of a series of massive mergers (see Figure 1).

Figure 1: RBOC Capital Investment as a Percentage of Revenues 1994-2009



*Source: Company annual reports. * Data for AT&T incorporates all the data from the company's predecessor ILEC RBOCs (Southwestern Bell, SBC, PacTel, SNET, BellSouth and Ameritech, as well as their wireless subsidiaries, which from 2000-2006 were subsumed under the Cingular/AT&T Mobility banner). Data prior to 2006 does not include AT&T Corp (ATTC) information, as this company was a CLEC prior to the merger with SBC. ** Data for Qwest prior to 2000 is for US West, but excludes prior information for Qwest, which operated as a CLEC prior to the 2000 takeover of US West. *** Data for Verizon incorporates all the data from the company's predecessor ILEC RBOCs (Bell Atlantic, NYNEX and GTE, as well as Verizon Wireless). Data prior to 2006 does not include MCI/WorldCom information, as this company was a CLEC prior to the merger with Verizon.*

In short, these data suggest that ISP investment decisions are not driven simply by regulation or the lack thereof. In fact, it appears that regulation, especially if designed to promote competition, can stimulate investment. Under the full weight of Title II, telecom companies invested substantially because the market for investment was ripe and newly introduced regulatory-mandated competition further stimulated investment and innovation. There is simply no evidence to suggest that the Third Way proposal to preserve the pre-*Comcast* status quo will negatively impact network investment in any manner whatsoever. To suggest otherwise is merely an exercise in fact-free fear mongering for the sole benefit of the incumbents.

Fiction #4: *Placing broadband services back under the Commission's explicit authority will lead to job losses in the telecom sector.*

Fact: Like the investment argument, the notion that reclassification will harm telecommunications sector employment is nothing more than unsupported rhetoric. The simple reality is that this sector accelerated its job-shedding following industry consolidation and FCC deregulation. The underlying market economics and company statements suggest this trend will continue regardless of how the FCC acts on the regulatory authority question.

Some opponents of the FCC's proposed Third Way authority policy charge that this light-touch regulatory regime will somehow result in ISPs reducing their work force.[22] These opponents argue that the FCC's re-establishment of its regulatory authority over broadband will reduce ISP investment, causing providers to hire less and fire more. This assertion is clearly unsupported by the facts, and actually contradicts what unfortunately has become the ISP industry's default behavior —as revenues rise, jobs are cut.

As we illustrated above, the Title II-hurts-investment argument is nothing but a baseless scare tactic, completely unsupported by the historical record and ignorant of basic truths about the nature of investment decisions in the broadband market. Thus, the Title II-hurts-jobs argument is equally baseless.

Proponents of this anti-authority rhetoric claim that the classification shift will lead to policies like Net Neutrality, which they allege will prevent ISPs from creating new discrimination-based revenue streams. They claim that if ISPs are allowed to earn revenues from discriminatory practices, they will hire and invest more in their networks. We have previously discussed in detail why this theory is absurd, noting that the entire discrimination business model is predicated on congestion in scarcity, which creates incentives for ISPs to invest less in their networks.[23] But we need not rely on theory to see what the likely outcome of higher revenues will be on telecommunications sector investment or employment. As we discussed above, ISP industry revenues have been consistently increasing, yet investment is flat or declining. The same is true for employment, in an even more dramatic fashion.

As we see in Figure 2, during the era of competition and full Title II regulation (1996-2002), the revenues of the RBOCs rose along with employment levels. As the tech bubble burst and the 2001 economic recession set in (alongside the new era of deregulation and consolidation), revenues declined from a high of near $260 billion in 2001 to a low of $223 billion in 2004. Beyond this point, telecommunications revenues rebounded sharply, rising to $243 billion for 2009, or where they were prior to the bubble-years of 2000-2001. But while revenues have risen, employment levels have continued to fall precipitously. AT&T, Qwest and Verizon collectively employ less than 550,000 full-time workers, and that figure is expected to drop even further in 2010. Revenues are up about 10 percent from the bottom, while jobs are down 14 percent since revenues began to recover. From 1996 through 2009, revenues for the industry were up 32 percent while jobs dropped by 25 percent. In short, the pro-competition era created jobs, and the pro-consolidation era destroyed them.

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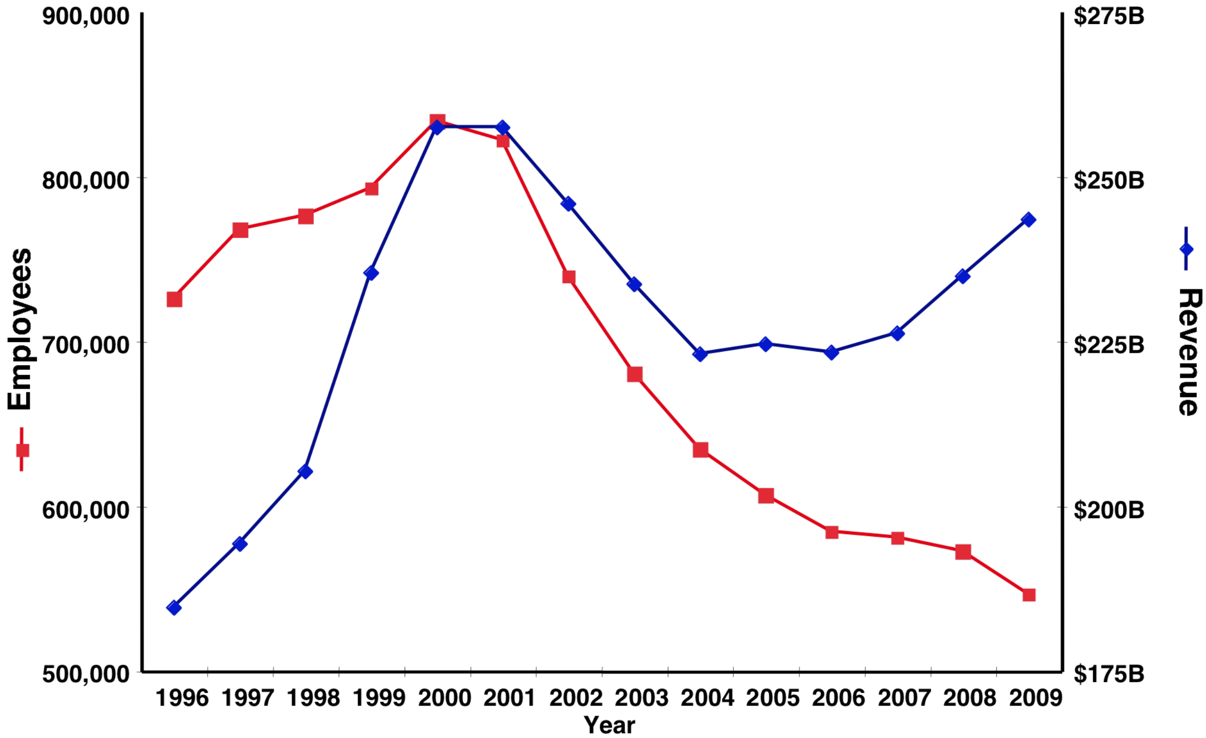
[22] *See* e.g. Letter from Rep. Gene Green et. al., to FCC Chairman Genachowski, stating, "[w]e urge you not to move forward with a proposal that undermines critically important investment in broadband and the jobs that come with it."

[23] *See, e.g.*, Comments of Free Press, *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, at 12-34, January 14, 2009.

Thus, there is no reason, either theoretical or practical, to assume any connection between ISP hiring practices and the presence of firm FCC oversight authority under Title II of the Communications Act. The historical data shows that employment *and* revenues in the telecom sector were highest when the industry was subject to the full weight of Title II regulations. These companies have shown that their top priorities are reducing capital expenditures, increasing revenues, and getting rid of jobs at every turn. The re-establishment of authority by the Commission to promote universal service and preserve the open Internet will not in any way impact the incumbents' plans to further shrink their work force.

Figure 2: Telco Employment vs. Revenues
(Data Includes All ILEC + CLEC Business Segments For AT&T, Verizon & Qwest)



Source: SEC filings; For this chart, all of the prior businesses that comprise AT&T, Qwest and Verizon were included in order to ensure comparability across all periods (i.e., the pre-merger data is pro forma, reflecting all pre-merger CLEC businesses).

Fiction #5: *The Commission's approach will cause regulatory uncertainty and instability.*

Fact: Recognizing that broadband Internet access contains a telecommunications service is the best way to eliminate existing regulatory uncertainty and instability. It will establish clear boundaries for the scope of FCC authority, based on the legislation passed by Congress that empowered the FCC to oversee two-way communications services. Moving forward with broadband policy without taking this step, on the other hand, would create substantial uncertainty and instability for consumers, the Commission, and companies in the Internet ecosystem.

Although many industry executives and analysts have stated that the FCC's proposal will not affect their businesses, others have claimed that it will result in years of lawsuits and defeats for the Commission, and will leave businesses uncertain as to the possibility of FCC regulatory action that could impact them. They argue that businesses might face unexpected burdens or restrictions that would undermine investments made under the assumption of a different regulatory playing field.

Many of these concerns are misplaced because of a faulty understanding of the scope and practical effect of the Commission's proposal, as addressed above. The proposal does not advocate for expansive, unprecedented regulation of broadband networks; rather, it provides the FCC with the authority intended by Congress, to promote broadband policies that would advance essential social and economic goals, including preserving the open Internet and facilitating the universal availability of affordable broadband service. These policies have been discussed and evaluated over the years, and prior to the D.C. Circuit's decision in *Comcast v. FCC*, there was little disagreement over the FCC's authority to promote the policies as a general matter (though there was substantial debate over specific aspects of the policies).

If the FCC adopts the Third Way, it will certainly face court challenges from the industry — as does any serious FCC policy activity. If the likelihood of court challenges to an action justifies not taking that action to begin with, then the FCC should close its doors. The question is whether the court challenges are likely to result in overturning of the FCC's action, leading to some period of uncertainty. Here, expert legal minds, including the general counsel of the FCC, have expressed their confidence that the chairman's proposal is legal and would be upheld on judicial review. Uncertainty and instability should prove minimal – as conceived, the Third Way is a temperate policy with limited immediate or long-term impact, likely to be upheld by reviewing courts.

On the other hand, ignoring the jurisdictional issues raised by the *Comcast* case *would be* likely to generate substantial uncertainty and instability. The D.C. Circuit's decision left highly unclear the scope of the FCC's ancillary authority to promulgate broadband policy. As a result, moving forward to advance the goals of the National Broadband Plan or to preserve the open Internet, without Commission action to re-establish its authority over broadband or congressional intervention, would result in court challenges and likely many defeats — which would propagate and amplify current uncertainties regarding FCC authority. Congressional intervention — when clear and rapid — can provide much clarity; however, we are unlikely to see legislation on this topic in the near term.

Fiction #6: *Only Congress can act to give the FCC authority over broadband networks.*

Fact: The Communications Act as currently written gives the FCC the regulatory flexibility to determine how it can best protect consumers. The courts have recognized this flexibility, and as a result, they are likely to endorse the FCC's efforts during an inevitable legal challenge. Congress can certainly pass legislation to clarify the FCC's authority over broadband networks, but such legislation is not needed for the FCC to move forward.

Those who oppose basic rules of the road for broadband networks have argued that the FCC must wait for Congress to give it explicit authority to adopt broadband policies. While couched in the rhetoric of democracy, these appeals for congressional action are nothing more than a stall tactic.

In 2005, the Supreme Court evaluated the FCC's decision to classify broadband Internet access service as an information service.[24] And in that case, the Court held that the Communications Act did not clearly answer the question of whether broadband Internet access contained a separate telecommunications service component.[25] What that means in the context of this debate is that the Supreme Court has said that it is up to the FCC to decide whether or not broadband Internet access contains a telecommunications service that ought to be subject to various consumer protection provisions of the Communications Act. So the statute as written gives the FCC the flexibility to revisit its earlier determination regarding the nature of broadband Internet access and the framework that the Commission should use in adopting broadband policy. In fact, in the same case, the

[24] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[25] *Id. at 989.*

Supreme Court specifically stated that the FCC *must* revisit these classification decisions as technologies and market conditions evolve.[26]

In order to revisit its earlier decision that broadband Internet access service is a single, fully integrated "information service," the agency must simply demonstrate that it has good reasons for changing its policy.[27] In the context of agency decisionmaking, the Supreme Court has stated plainly that "the forces of change do not always or necessarily point in the direction of deregulation."[28]

In fact, the FCC can cite several good reasons for revisiting its 2002 decision that broadband Internet access service should be classified as an integrated information service.[29] The agency based its earlier orders on two factual premises: First, the FCC suggested that when consumers bought broadband Internet access services, they used the data transmission component of broadband Internet access to "run a variety of applications," including e-mail, webhosting, or newsgroup access, rather than viewing Internet access principally as connectivity to the vast trove of third-party content and applications on the broader Internet.[30] That is, the prior orders were based on the notion that the offering of connectivity did not exist as a separable service with its own distinct market value. Second, the FCC believed that its classification decisions would spur competition in the market for broadband Internet access services.[31] In particular, it predicted that the information services classification would promote competition among different types of broadband platforms (such as DSL, cable, satellite, and wireless), and it predicted that those providers who owned broadband facilities would open up those facilities to buyers on a competitive, wholesale basis who would then resell retail Internet access services to individual consumers.[32]

Neither of these conclusions continues to make sense in light of current market and technological realities. It is now clear that consumers value connectivity as a separate service; indeed, broadband Internet access service providers compete largely on the basis of the speed and price of the transmission they offer, not on the basis of access to any content and applications they may provide in addition to their connectivity service. And the Commission itself has recently recognized that 96 percent of consumers have access to at most two truly high-speed connections.[33] In light of the increasing importance of the connectivity offered by an Internet access provider (as opposed to the limited number of applications a service provider offers on top of that data

[26] *See id.* at 981.

[27] *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)

[28] *Motor Vehicle Mfs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

[29] In 2002, the FCC classified broadband Internet access offered over cable modem service as an information service. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185; *Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) (*Cable Modem Order*). Subsequent orders in 2005 and 2007 classified wireline (DSL) and wireless broadband Internet access as information services, but these orders did not rely on new facts in making those determinations. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33; *Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10; *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242; *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (2005) (*Wireline Broadband Order*), *aff'd sub. nom Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd. 5901 (2007) (*Wireless Broadband Order*). Thus, the Commission has not revisited factual bases for concluding that broadband Internet access is an information service since 2002.

[30] *Cable Modem Order* at ¶ 36.

[31] *See, e.g.*, *Wireline Broadband Order* at ¶¶ 3, 56, 58; *Wireless Broadband Order* at ¶ 4.

[32] *Id.*; *see also Wireline Broadband Order* at ¶ 19.

[33] *National Broadband Plan* at 37. The Commission acknowledges that none of the alternatives to cable and DSL services are truly viable competitors for high-speed connections. *Id.* at 37, 40-41. They are, in large part, too expensive or too slow or both. *Id.* And the National Broadband Plan suggests, even more troublingly, that in many parts of the country, we may be heading toward a cable monopoly on the fastest speeds. *Id.* at 42.

transmission), the Commission could easily find that broadband Internet access contains a separate telecommunications service. The definition of a telecommunications service is a service that transmits data "between or among points specified by the user, of information of the user's choosing." In today's broadband world, it is difficult to argue that broadband Internet access service providers do not offer this capability.

Thus, the Communications Act as it is currently written and as it has been interpreted by the Supreme Court gives the Commission ample authority to construct a new framework for broadband policy. Of course, Congress may eventually need to update the Communications Act to clarify the rules that apply to the players in the Internet ecosystem. But the last time that the Communications Act was revised, the process took five years.[34] The FCC cannot simply abdicate its responsibility to bring broadband to all Americans and provide basic consumer protections while waiting for Congress to act, certainly not when the FCC's actions are fundamentally an effort to *restore* Congress's preferred framework as embodied in current law.

Fiction # 7: *The FCC's Third Way proposal is an unprecedented power-grab which departs from Congress's intent to leave the Internet unregulated.*

Fact: The FCC's proposal will bring the Commission's approach to broadband networks in harmony with longstanding principles in communications policy. In fact, it was the Powell FCC's decision to abandon oversight over broadband networks that represented a radical irresponsible shift.

Historically, policymakers have recognized several unique characteristics of two-way communications networks (such as the telephone, telegraph, and now IP-based networks): (1) The networks require significant investment to build them, and as a result, the market to provide access to such networks will likely be heavily concentrated; (2) customers can likely use the services of only one network provider at a time; and (3) the costs associated with switching providers are significant. Thus, the owners of these networks have substantial gatekeeping power. Because the network providers possess this power, the law has historically required them to comply with certain basic rules, including the duty not to discriminate among classes of users on the networks and to interconnect with other network providers that offer the same services.

On the other hand, telecommunications law has not historically regulated the content traveling over the physical networks. The market for those types of services is more competitive; the barriers to entry are lower; and the chance that those service providers can extract monopoly rents or hamstring their competitors is significantly reduced as a result. The law has also recognized that the owners of transport networks might have the ability to manipulate the content traveling along those networks, but that purveyors of content could not adopt anti-competitive practices with respect to the networks.

So, for example, in the early days of widespread access to the Internet, the physical networks (the phone networks) were subject to the provisions of Title II, but Internet content was largely unregulated. This framework was in effect during the rapid growth of dial-up service adoption in the 1990s and early 2000s.

In 1996, Congress passed the Telecommunications Act, which essentially adopted these distinctions. Access to a communications network was deemed a "telecommunications service," and content and applications that use IP-based networks to transmit data were termed "information services." Telecommunications services were subject to the substantive provisions of Title II of the Communications Act, including the duty to open their networks without regard to the types of messages or uses consumers or businesses sought to employ. Information services were subject only to the Commission's "ancillary" or Title I jurisdiction.

The Powell Commission's decision to classify the connectivity associated with cable modem service as part of an integrated information service represented a dramatic departure from this framework. It also laid the groundwork for our current situation —in which the FCC has limited authority to protect consumers using

[34] *See* Telecommunications Act of 1991, H.R. 3515, 102d Cong. (1991).

broadband Internet access. By recognizing that broadband Internet access service contains a separable telecommunications service, this Commission's approach would be faithful to both our history and the language of the Act.

Fiction #8: *The FCC's proposal would amount to a "government takeover of the Internet."*

Fact: The proposal would draw a line between basic two-way communications – which have always been regulated by the FCC – and Internet applications and websites, which would remain unregulated by the FCC.

Industry lobbyists, some reactionary anti-government organizations, and certain television pundits are spinning the FCC's broadband policies as a form of "government takeover of the Internet." Taking the general "regulation is bad" meme to an extreme level, this argument goes one step beyond the theory that regulation could reduce revenues and deter investment. It argues that the regulation at issue is so intrusive into private corporate activity, and so broad in scope, that it would give the government control over all activity on the Internet, including e-mails that people send and websites that are hosted.

This argument contains many serious factual errors. First and foremost is its error of scope. The proposed proceeding would not in any way affect the current legal status of Internet applications, websites, or content. No supporter of restoring the FCC's authority over broadband has ever called for "regulation of the Internet" as that term is commonly understood — in fact, some of the companies that most strongly oppose government involvement with "the Internet," including Internet companies and many public interest organizations, support the FCC's proposal. Rather than involving the government in Internet content and applications, a move to bring broadband transmission back under the FCC's authority would draw a clear line between basic two-way communications services offered by broadband network operators (such as cable modem and DSL connections) and the content, applications, and websites that people use and view on the Internet.[35] The FCC would oversee and have authority over the former, and would leave the latter to Congress, the Federal Trade Commission, and the market.

Second, this argument grossly misstates the effect that the FCC's proposal would have on broadband communications services. The chairman of the FCC has stated that his Third Way proposal would simply restore the status quo — the authority the FCC assumed it retained over broadband services after deregulation, which is now in doubt.[36] No proponents of the FCC's proposal have called for direct rate regulation of broadband services, or for application of the full panoply of telephone-style rules, contrary to the assertions of industry lobbyists. Even if the FCC classifies broadband transmission services as telecommunications services, the role of the FCC will be virtually identical to the role under which these businesses have been operating for years, except that now the FCC's ability to adopt the policies it has proposed will stand on firm legal footing.

But even the full provisions of Title II would not constitute a "government takeover" of broadband networks. Government control of broadband networks would entail government operation of the business at all levels — specification of its network equipment, installation policies, exact pricing policies at all levels, customer relations, and so forth. Congress has never authorized direct government control over broadband networks; the FCC could not exercise such control even if it wanted to.

The FCC's proposed proceeding on its authority over broadband networks is not about a government takeover of any portion of the Internet. It would not even impact the applications, content, and websites that users think of as "the Internet." It would merely provide the FCC with essential authority to implement broadband policies that will help close the digital divide by ensuring universal, affordable access to broadband services.

[35] *See* Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework For Addressing the Comcast Dilemma* (May 6, 2010) (Schlick, *Third Way*).

[36] *See* Julius Genachowski, Chairman, FCC, *The Third Way: A Narrowly Tailored Broadband Framework* (May 6, 2010).

Fiction #9: *The Third Way would apply 1930s-era rules designed for monopoly telephone networks to modern broadband networks.*

Fact: This myth aggregates two distinct misconceptions: the notion that the rules in question were written in 1934 for telephone companies and the notion that all of the rules in Title II of the Communications Act would apply to broadband service providers. Rather, (1) the rules contained in Title II of the Communications Act (the sections of the Act that would govern broadband Internet access providers if the FCC moves ahead with its proposal) were designed for all two-way communications networks, including modern packet-switched, Internet-Protocol-based networks; and (2) the FCC has proposed applying only a small number of the rules contained in Title II to broadband service providers.

Opponents of the FCC's effort to put its broadband policy on stable footing consistently trot out the false claim that the Commission seeks to impose "burdensome obligations" "designed for the monopoly telephone companies of 1934" on broadband service providers. It is difficult to know where to begin in debunking this myth.

First, the rules in Title II apply to "telecommunications services," and the Act defines telecommunications services broadly to include all two-way communication networks, whether information travels over a traditional phone line, a coaxial cable, a fiber-optic cable, an over-the-air radio signal, or any other facility.[37] In fact, Congress specifically added this language in 1996 as part of a comprehensive revision of the Act.[38] So the notion that Congress has not revisited these principles since 1934 is plainly untrue.

Second, when Congress updated the Communications Act in 1996, it evinced a specific awareness that the Internet was a transformative technology. In particular, Congress recognized that with the growth of IP-based networks, many different types of services might be offered by the same company. Indeed, this expectation of convergence is the impetus behind many of the new additions to the Communications Act.[39] Thus, Congress took care to define services based on their function, rather than on the company that might be providing them. And it left no doubt that regardless of who offered the service, the transmission of data unchanged between and among points of a user's choosing constituted a "telecommunications service."

Equally important, the notion that the Third Way will entail "burdensome obligations" willfully ignores the concept of forbearance contained in the Communications Act and in the particulars of the FCC's proposal. Under the Communications Act as it was amended in 1996, the FCC can decline to apply any obligation imposed on a telecommunications service provider under Title II if it decides that not imposing that obligation is in the public interest — this power is called forbearance under the law.[40]

In its proposal, the Commission said that the public interest would be best served by applying only six provisions contained in Title II to broadband service providers, and will seek comment on the appropriateness of forbearing from other sections.[41] The important point to note is that while incumbents may grouse about Title II being "burdensome," the simple fact is the FCC has a statutory duty to apply the portions of the law necessary to achieve the public interest goals of the Communications Act. Congress gave the FCC forbearance authority as a flexible mechanism for judging when certain rules are no longer needed "to ensure that the charges, practices, classifications, are just and reasonable and are not unjustly or unreasonably discriminatory… [and that] enforcement of such regulation or provision is not necessary for the protection of consumers."[42] This

[37] See 47 U.S.C. §§ 153(43), 153(46).

[38] Telecommunications Act of 1996, Pub. L. No. 104-104, § 401, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 160).

[39] See, e.g., S. Rep. 104-23, at 2, 3 (1996).

[40] 47 U.S.C. § 160.

[41] Schlick, *Third Way*.

[42] 47 U.S.C. § 160.

is Congress's desired outcome for two-way communications networks, recognizing that these networks offer critical infrastructure services.

As a result, the Commission's proposal contemplates adopting basic rules of the road for broadband networks, each of which is necessary either to bring broadband to all Americans or to ensure minimal protections for consumers who use those networks. It is in no way a return to the regulatory framework that governed the provision of telephone service in 1934.

Fiction #10: *In 1998, the Clinton FCC initiated a "hands-off" regulatory approach to broadband service providers, and subsequent Commissions merely adopted the Clinton-era approach.*

Fact: In 1998, the Clinton FCC affirmed long-standing FCC policy that refrained from regulating dial-up Internet service providers that owned no telecommunications facilities. However, the Clinton FCC chose to treat facilities-based providers with more regulatory scrutiny. In fact, the Clinton FCC enacted open access policies that required DSL providers to share their lines with competitors at reasonable wholesale rates. The now-failed Title I legal authority regime began not with the Clinton FCC, but with the 2002 decision by Republican FCC Chairman Michael Powell to classify cable modem service as an integrated information service.

Incumbents[43] and policymakers[44] opposed to the FCC's move to re-establish its broadband oversight authority have repeatedly stated that the failed information service classification policy actually began with the Clinton FCC under Chairman Bill Kennard, not with the Bush FCC under Republican Chairman Michael Powell. The sole basis for this assertion is a 1998 FCC report to Congress on the topic of universal service (often colloquially called the *Stevens Report*), wherein the FCC, among other things, maintained its longstanding policy of treating non-facilities-based computing services (like dial-up Internet access) as non-regulated and not legally subject to Universal Service Fund contributions.

At the time of the *Stevens Report*, most Internet service providers operated in a dial-up world. Americans connected to the Internet using their own phone service, and the Internet service provider offered the necessary functionality to connect a user's phone line and computer to the packet-switched data network that is the Internet. All the report did was to conclude that such Internet service providers (who did not own telecommunications facilities, but depended on those facilities for their business models) should not be required to contribute to the Universal Service Fund.

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[43] *See e.g.*, Posting of Hank Hultquist to AT&T Policy Blog, http://attpublicpolicy.com/, "The Myth of Broadband 'Reclassification,'" (April 12, 2010). In this blog post, AT&T cites a passage from the Commission's 1998 report on universal service obligations (often called the *Stevens Report*) stating, "it was the Clinton Administration FCC that definitively declined to classify Internet access as a telecommunications service. When it first looked at this issue back in 1998, the FCC (under then-Chairman Bill Kennard) said that 'classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it.'" *Id.* (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11501, ¶ 82 (1998) (*Stevens Report*).) However, a reading of the *Stevens Report* makes it glaringly obvious that this was an FCC statement of policy as it applied to the main type of Internet access providers of the day — non-facilities-based dial-up providers. Indeed, just one paragraph above this citation cherry-picked by AT&T, the Commission stated, "Internet access providers, typically, own no telecommunications facilities. Rather, in order to provide those components of Internet access services that involve information transport, they lease lines, and otherwise acquire telecommunications, from telecommunications providers -- interexchange carriers, incumbent local exchange carriers, competitive local exchange carriers, and others." *Stevens Report* at ¶ 81.

[44] The letter sent to Chairman Genachowski by Rep. Gene Green and 73 other Democratic Party lawmakers states, "the success of the broadband marketplace stems from policies that encourage competition, private investment, and legal certainty. The regulatory framework first adopted in 1998 by the Clinton Administration's FCC has resulted in broadband industry infrastructure investment of approximately $60 billion per year." Again, the framework "first adopted" in 1998 was in reality merely a continuation of Commission policy toward non-facilities-based computing companies first enacted in 1970 with the *Computer I* decision. The Clinton FCC in 1998 affirmed this approach to non-facilities-based dial-up ISPs like Earthlink, but chose to avoid confronting the need to develop a policy for cable modem services, while enacting hands-on open access policies for DSL services.

When the *Stevens Report* speaks of "Internet Access Service," it clearly speaks of the type typical of the era — dial-up access provided by companies like AOL and Earthlink, which owned no last-mile telecommunications facilities. That the FCC would affirm a non-regulatory, "hands-off" approach on this segment of the industry is not surprising, and should in no way be interpreted as a policy judgment that was extended to the broadband services offered by dominant facilities-based providers like phone and cable companies. Indeed, the report explicitly stated, "Internet access providers, typically, own no telecommunications facilities. Rather, in order to provide those components of Internet access services that involve information transport, they lease lines, and otherwise acquire telecommunications, from telecommunications providers…"[45]

The report also specifically declined to apply its conclusions about non-facilities-based dial-up ISPs to cable operators providing Internet services, stating, "[w]e express no view in this Report on the applicability of this analysis to cable operators providing Internet access service. The Act distinguishes between Title II and Title VI facilities, and we have not yet established the regulatory classification of Internet services provided over cable television facilities."[46] In fact, in briefs filed 1999 and 2000, the FCC twice indicated that it had yet to resolve the issue of whether high-speed Internet access offered over cable facilities constituted a cable service, a telecommunications service, or some other type of service.[47]

But the Clinton FCC's approach cannot in any way be characterized as completely hands-off to broadband Internet access service providers. In a series of decisions in 1998 and 1999, the Kennard Commission required incumbent telephone companies to resell their DSL services to competitors at reasonable wholesale rates,[48] and also required these companies to "line-share"[49] their DSL services with competing Internet service providers.[50] Thus the notion that the Clinton FCC began the failed deregulation-by-redefinition experiment actually begun in 2002 is plainly incorrect, and contrary to the Kennard Commission's actual treatment of Internet services offered by telecommunications carriers.

[45] *Stevens Report* at ¶ 81.

[46] *Id.* at ¶ 69 n.140.

[47] Brief for FCC as Amicus Curiae at 9-11, 26, *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) (No. 99-35609); Pet. for Cert. of FCC at 15 n.4, *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (No. 00-843).

[48] This is a policy known as "bitstream access," required by Section 251(c)(4) of the Act. Bitstream access includes wholesale DSL services that hand off the traffic to the competitive carrier at the central office or the nearest local Internet Point of Presence (POP), or that can be a full-resale service where the incumbent also provides backhaul transport.

[49] Line-sharing involves the incumbent "sharing" the last mile wire into a customer's home by unbundling the High-Frequency Portion of the Local Loop (HFPL), which carries the data signal, from the voice portion of the loop. In this arrangement, the competitor receives the traffic directly from its own DSLAM or line splitter collocated in the incumbent's central office, and provides its own transport from that point.

[50] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98- 32, 98-15, 98-78, 98-91, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24012 (1998) (*Advanced Services Order*); *see also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, Third Report and Order, 14 FCC Rcd. 20912 (1999) (*Line Sharing Order*),