Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition; Petition of the National Telecommunications Cooperative Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution	)	GN Docket No. 12-353

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I. Introduction and Summary

While Germany has declared Internet Access an "essential" service, we here in America are considering actions that could completely remove any regulatory oversight of our nation's most critical telecommunications infrastructure.[1] Though AT&T takes great pains to portray its request for a new all-IP transition proceeding as a minor step to facilitate more efficient network investments, the ugly truth is AT&T is trying to push the Commission into a state of veritable regulatory limbo, by removing the last vestige of any federal or state authority to protect consumers in an increasingly consolidated communications market. Because AT&T has previously convinced the Commission that the mere use of IP places a service outside of the laws governing two-way communications networks, the otherwise unremarkable progression of telecom technology from circuit to packet switching could now, under the Commission's current framework, result in a state of total deregulation.

Congress granted the Commission the flexibility to review the appropriateness of its telecommunications regulations, and remove any obligation it finds no longer necessary to ensure reasonable charges and practices. So it is perfectly appropriate for any incumbent carrier to assert its rights under Section 10 of the Act to seek forbearance from specific regulations, as has been done for the specific regulations AT&T names in its petition. But asking the Commission to exploit an FCC-created loophole in order to completely end all regulatory oversight and consumer protection is plainly not in the public interest nor consistent with the law. And this is exactly what AT&T proposes the Commission do.

[1] "German court rules Internet 'essential,'" *Reuters*, Jan. 24, 2013.

AT&T's request continues its practice of purposely confusing content with transmission, IP with the Internet, fiber with information service, telephony with telecommunications, and monopolies with common carriers. This confusion serves AT&T's purposes, but not the public's. As we discuss below, there are numerous reasons Congress embraced the principles behind Section 201, 202 and 208 of the Act for numerous communications markets beyond circuit switched telephony. The transmission infrastructure that connects us to each other is *critical* infrastructure for the well-being of all Americans. While there may not always be a need for the same exact rules that were once required to protect the public interest, policymakers must recognize that telecommunications regulations and the law they are based upon exist to ensure interconnection, promote universal service and protect consumer rights. Free Press welcomes a dialogue about the transition to a 21st century network and the appropriate regulatory regime for that shared goal, the same discussion currently occurring in many other countries. But let's not blindly proceed to flip a switch and end all oversight governing this critical infrastructure, an action that we as a nation are alone in contemplating.

This country once had a successful policy regime that had a reasonable and well-understood demarcation between content and carriage and that ensured innovation could happen without discrimination; but now we have an existential mess brought on by the Commission's unwillingness to adhere to the plain intent of the law and decades of legal precedent. Continuing down this path without first restoring a rational base of authority can only produce the outcome AT&T desires most: The complete removal of Title II and its common carriage consumer protections.

For the typical consumer, the grant of AT&T's wishes would mean no protections from price gouging, no accountability for service outages, no consumer protections from cramming and slamming, and no reliable access to emergency services. For millions of consumers and businesses, it would mean no access at all, as AT&T would be free to stop providing service. And because there would no longer be any obligation for interconnection, Americans should expect to see rolling localized Internet blackouts as intercarrier disputes pop up, which will be "resolved" by higher prices paid to dominant carriers like AT&T.

The Commission must confront lingering and politically difficult questions concerning its authority over next-generation networks. If it doesn't, American consumers will face the parade of horribles described above, and innovation will suffer for generations. We strongly urge the Commission, if it is inclined to grant AT&T's request for a new proceeding, to a open a *global* proceeding that first addresses all of the issues surrounding the transition to next generation networks that the Commission has long neglected. Specifically, this will require that the Commission re-examine these lingering questions about appropriate regulatory classifications of ILECs' services, and it will require that the Commission square today's market realities with the bad predictions made in the 2005 *Wireline Broadband Order*.

II. Discussion

A. The Commission Must Address Lingering Questions About Regulatory Authority and The Fate of the Public Telecommunications Network to Ensure An Efficient Transition to Next Generation Networks As Envisioned in the Communications Act

1. The Specific Telephony Deregulations Sought by Petitioners are the Subject of Pending Forbearance Proceedings. A New Proceeding is Only Appropriate if it Addresses the Problems Created by Prior Commission Regulatory Classification Decisions

In their petitions, AT&T Inc. and The National Telecommunications Cooperative Association (NTCA) ask the Commission to launch a proceeding concerning a transition from Time Division Multiplexing (TDM) to Internet Protocol (IP) multiplexing in networks operated by Incumbent Local Exchange Carriers (ILECs). However, what AT&T in particular fails to note is the logical conclusion to the *specifics* of its request: the complete removal of any regulatory authority over our nation's critical telecommunications infrastructure. AT&T purposefully ignores these consequences because such outcomes are plainly inconsistent with the longstanding – and still vital and entirely valid – goals of the Communications Act. Effectuation of AT&T's plan would cause immense harm to consumers, competition and innovation.[2]

Instead of confronting these uncomfortable consequences, petitioners focus on a variety of existing regulatory obligations imposed on ILECs, arguing against their relevance in the broadband era. However, almost all of these specific obligations are the subject of pending Commission proceedings, including several Section 10 forbearance

[2] Though NTCA's and AT&T's basic asks in their respective petitions are identical (a proceeding on transitioning the PSTN from TDM to IP multiplexing), NTCA does not seek the complete eradication of Title II and common carriage, and its petition rightly expresses concern that this transition not leave consumers unprotected in a market with no regulatory oversight. However, as discussed at length below, this is the unavoidable outcome of the path both petitions set forth, as both are built upon the Commission's flawed classification precedents. NTCA may assume that the Commission will simply allow rural carriers to self-identify as all-IP telecommunications service carriers, as they currently are permitted to do under the polices adopted in the 2005 *Wireline Broadband Order*. While this might be the case, rural LECs, Wireless Internet Service Providers (WISPs) and other providers whose businesses rely on interconnection with the large incumbent LECs will likely lose any interconnection rights in AT&T's desired "wild west" all-IP market. NTCA emphasizes the need for the Commission to protect these rights by suggesting that all interconnection (including IP-interconnection) should fall under Section 251 and 252 of the Act, but AT&T's semantic trap would preclude NTCA's desired outcome.

petitions.[3] Indeed, one only need look at the lengthy title page of a recent AT&T *ex parte* in the instant proceeding to see that the Commission is already considering the specific regulations AT&T and NTCA highlight in their IP transition petitions.[4]

[3] *See e.g. Petition of USTelecom for Forbearance Under 47 U.S.C. §160(c) From Enforcement of Certain Legacy Telecommunications Requirements*, WC Docket No. 12-61.

[4] This letter listed 17 open proceedings, but there are even more pending proceedings that also address these very same issues (*e.g.*, Petition of USTelecom for Declaratory Ruling that Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services, WC Docket No. 13-3). *See* Letter from Frank S. Simone, AT&T Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, RE: *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket No. 12-353; *Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future,* GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Petition of USTelecom for Forbearance Under 47 U.S.C. §160(c) From Enforcement of Certain Legacy Telecommunications Requirements*, WC Docket No. 12-61; *Petition of CenturyLink for Forbearance Pursuant to 47 U.S. C. § 160(c) from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, WC Docket No. 12-60; *Petition of tw telecom inc. et al. to Establish Regulatory Parity in the Provision of Non-TDM-Based Broadband Transmission Services*, WC Docket No. 11-188; *Petition for Declaratory Ruling That tw telecom inc. Has the Right to Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act, as Amended, for the Transmission and Routing of tw telecom's Facilities-Based VoIP Services and IP-in-the-Middle Voice Services*, WC Docket No. 11-119; *Business Broadband Marketplace*, WC Docket No. 10-188; *Framework for Broadband Internet Service*, GN Docket No. 10-127; *Cbeyond, Inc. Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act*, WC Docket No. 09-223; *Petition for Expedited Rulemaking to Adopt Rules Pertaining to the Provision by Regional Bell Operating Companies of Certain Network Elements Pursuant to 47 U. S. C. § 271(c)(2)(B) of the Act*, WC Docket No. 09-222; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 09-137: *Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers*, RM- 11 358; *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *IP-Enabled Services*, WC Docket No. 04-36; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-23 (filed January 15, 2012).

Thus the need for the proceeding that both petitioners request is highly questionable, especially given the unfortunate reality that the potential for regulatory capture is heightened in this highly technical proceeding – one that AT&T has purposefully attempted to narrow in its characterization of its request, but that nonetheless has inversely broad implications. Congress explicitly directed the Commission to deal with these very questions through the forbearance process, either through responses to petitions or on its own motion.[5] In assigning the Commission that duty, Congress envisioned a fact-based evaluative process focused on specific carriers in specific markets.[6] But AT&T would rather have the Commission pursue a definitional deregulatory approach – one in which the progression of technology from circuit switching to packet switching combines dangerously with political pressure and outcome-driven regulatory cant to completely remove all Title II obligations and protections.

Indeed, as proposed, AT&T's request is the first in a series of falling dominos that would lead to a state of complete "non-regulation,"[7] where by decree there would no

[5] 47 U.S.C. § 160(c).

[6] While there has been an increase in forbearance petitions of general applicability across all markets and carriers, we strongly believe the public interest is best served when the Commission considers Section 10 forbearance in specific cases for specific carriers in specific markets, with the Commission's general rulemaking procedures most appropriate for questions about the continued necessity of generally applicable rules.

[7] In his dissent in *Brand X*, Justice Scalia said of the Commission's definitional deregulatory approach in the *Cable Modem Declaratory Ruling*, "[t]he Federal Communications Commission has once again attempted to concoct 'a whole new regime of regulation (or of free-market competition) under the guise of statutory construction.' Actually, in these cases, it might be more accurate to say the Commission has attempted to establish a whole new regime of non-regulation, which will make for more or less free-market competition, depending upon whose experts are believed. The important fact, however, is that the Commission has chosen to achieve this through an implausible reading of the statute, and has thus exceeded the authority given it by Congress. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting) (*Brand X*) (internal citations omitted).

longer be anyone providing telecommunications services in America. This is a very real possibility despite the fact that Congress never intended to give the Commission the power to completely eradicate Title II and the corresponding principle of common carriage.[8] But this would be the consequence of granting AT&T's request if any grant were ultimately built upon the foundation of the *Wireline Broadband Order*.[9] Because AT&T previously has convinced the Commission that "IP" equates to "information service," the otherwise unremarkable progression of the TDM-based Public Switched Telephone Network (PSTN) to an IP-based Public Packet-Switched Telecommunications

[8] In fact, because Congress was not convinced that competition alone would be enough to preserve the open nature of communications platforms, it put a structure in place that would *always* require carriers to abide by the principle of nondiscrimination. In section 10(a) of the Act, Congress gave the Commission the authority to forbear from applying regulations to telecom carriers if a determination is made that "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory, [and] enforcement of such regulation or provision is not necessary for the protection of consumers." Thus, Congress allowed the discontinuance of regulations only so long as they were not needed to ensure a specific desired outcome – just, reasonable and non-discriminatory treatment. But the outcome itself remained paramount. This is wholly consistent with Section 332(c)(1)(A) of the Act, which gives the Commission the authority to apply Title II regulations to commercial mobile service (CMRS) carriers selectively, but specifically forbids the Commission from removing CMRS providers' obligation to adhere to Sections 201, 202 and 208 of the Act.

[9] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*).

Network (PPSTN)[10] could cause Title II and the critical common carriage principles that undergird it to magically disappear.

If the Commission is going to open this proceeding and potentially let this first domino fall, then it is necessary and appropriate for the Commission to address *all* of the tough questions, not just the issues AT&T wants addressed. The Commission cannot fall into AT&T's trap. It must consider and remedy the consequences of its past decisions *before* contemplating AT&T's wishes.

For these reasons, Free Press supports the "launch" of such a proceeding if and only if it is a *global* proceeding that addresses all of the issues that the Commission has long neglected surrounding the transition to next generation networks – issues that the Commission's own past regulatory missteps have created. Specifically, this will require that the Commission re-examine lingering questions about appropriate regulatory classifications of the ILECs' services,[11] and it will require that the Commission square today's market realities with the predictions made in the 2005 *Wireline Broadband Order*. Indeed, as NTCA notes in its petition, the Commission's predictive judgment model has a very poor track record.[12] Nowhere is this failure more apparent than in the

[10] NTCA describes this as a Public Routed Communications Network (PRCN). *See NTCA Petition* ¶ 2.

[11] *See, e.g.*, *Framework for Broadband Internet Service*, GN Docket No. 10-127. It would be prudent, should the Commission grant AT&T's request for a new proceeding, to co-docket that new proceeding with No. 10-127; or at a minimum, the questions raised therein should be raised again.

[12] *See NTCA Petition*, n.14. ("Indeed, a notable example of the potential shortcomings of relying largely upon predictive judgments and promises about competition can be found in the experience with respect to price-cap regulated special access services . . . Regardless of one''s perspective on the merits of this ongoing special access examination, any framework that requires thirteen-plus years to determine whether competition has worked as an effective substitute for regulation – and then finds at least some evidence it

Wireline Broadband Order.[13] The Commission must account for these errors in predictive judgment before it compounds its mistakes.

2. A Narrow Proceeding on AT&T's Terms Could Result in the Total Removal of All Regulatory Authority Over America's Telecommunications Networks

Despite making the same basic request, the NTCA and AT&T petitions have vastly different tones, highlighting the hazardous path before the Commission. We *should* have a discussion about how the Commission can best modernize its regulations implementing the Communications Act to better reflect today's technology. We should have a dialogue about repealing regulations that promote technological inefficiency and unnecessarily raise costs for carriers and consumers alike. But this is not the proceeding AT&T seeks here. Under AT&T's chosen framework, we're instead talking about taking the next step towards a completely unregulated communications market. AT&T asks not

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may not have done so – puts consumers, competition itself, and universal service all at risk.").

[13] For example, in the *Wireline Broadband Order* the Commission dismissed the notion that eliminating *Computer Inquiry* unbundling would have a negative impact on the third-party ISP market, or on third-platform competition. Just as it was when it eliminated line sharing in 2003, the Commission was certain that the competitive marketplace would thrive absent regulatory intervention. In particular, the Commission assumed that even without regulation, substantial incentives existed for incumbents to offer competitive ISPs wholesale access on reasonable terms. The Commission stated its belief that "carriers have a business interest in maximizing the traffic on their networks, as this enables them to spread fixed costs over a greater number of revenue-generating customers." *Wireline Broadband Order* ¶ 64. But this belief was spectacularly off-base. There is no longer a wholesale market for home broadband service, only a LEC-cable duopoly *at best*. The Commission also predicted in this and prior orders that third-party ISPs would build their own facilities, and competitive alternatives like wireless and Broadband Over Powerline (BPL) would emerge to compete with the LEC and cable incumbents. This prediction also proved to be wholly incorrect. There is now no disputing the folly in the Commission's prior statement that its decision to end wholesale access "does not mean that we sacrifice competitive ISP choice for greater deployment of broadband facilities." *Wireline Broadband Order* ¶ 79. It is now time for the Commission to revisit these past predictions in an open, honest, and data-driven manner.

merely for the permission to conduct neutral experiments on how best to modernize interconnection so it can replace its TDM switches with softswitches. It proposes total deregulation, the voiding of Title II and the end of common carriage in communications. This means, among other things, *no* interconnection obligations, *no* universal service obligations, *no* consumer safeguards in the event of natural disasters, and *no* restraint on AT&T's desire to use its significant market power to gouge consumers and competitors.

This characterization may *sound* hyperbolic. But it is the unavoidable outcome of the current non-regulatory regime that AT&T convinced the Commission to adopt for our nation's broadband communications infrastructure – and that AT&T seeks to advance here. AT&T and its kin have convinced the Commission that the use of "IP" by any entity to offer public communications services renders that service an inextricably intertwined information service, with the transmission functions lying outside the bounds of Title II.

With its series of classification rulings, the Commission decided in effect to only apply Title II to the PSTN, a business model built on a transmission network utilizing TDM switching and SS7-based signaling. These ill-founded decisions mean that if an ILEC like AT&T moves from TDM to IP switching, as it long ago moved from Strowager switches to crossbars, somehow that ILEC is no longer offering telecommunications services. In other words, because of the Commission's flawed logic in the *Wireline Broadband Order*, we're one step away from a world where not one single home in America has access to a telecommunications service provider.[14]AT&T is

[14] For the residential market, the Commission's 2005 *Order* brought us most of the way to this reality, leaving the TDM PSTN business model as the only remaining wired telecommunications service available to consumers. That the entire point of the 1996 Act

simply trying to get the Commission to do what AT&T could not get Congress to do: declare that the amendments to the Communications Act that Congress enacted in 1996 applying to *nothing*, ending all of the company's common carrier public interest obligations, while preserving all of the public interest benefits that AT&T enjoys as a common carrier.

3. The Flawed Premises and Harmful Consequences of AT&T's Plan for America's Public Telecommunications Network

AT&T attempts to sell its vision for a world without telecom services by describing Title II's obligations and consumer protections as "monopoly-era regulations." But it is a complete myth to pretend that the common carrier provisions of the Act were only intended to apply to the former Bell Operating Companies' (BOCs) provision of local telephony services. While *some* portions of Title II are explicitly concerned with market power (which, by the way, AT&T continues to possess in most of its markets), common carriage obligations are *not* in the Act simply to deal with market power issues. Consumer protection and universal service are critical national purposes that Congress gave the Commission the tools to ensure, through Title II.

For example, millions of citizens in the Northeast are still dealing with the damage from Hurricane Sandy, a powerful storm that exposed numerous weaknesses in our nation's communications infrastructure.[15] Americans need reliable telecommunications access before, during and after natural disasters; and access to emergency services via 911 will always be critical, even after that 3-digit phone number

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was to bring consumers a highly competitive market for *advanced* telecommunications services, not merely voice services, was somehow lost on the Commission.

[15] *See "*Impact of the June 2012 Derecho on Communications Networks and Services, Report and Recommendations," Public Safety and Homeland Security Bureau, Federal Communications Commission (Jan. 2013).

itself becomes a historical footnote. The authority to ensure the availability of these critical services and the ability to demand accountability in their provisioning is a key function of Title II, and has nothing to do with market power. The issue is not some need to maintain the TDM switches in order to maintain critical public safety services; the issue is that under AT&T's interpretation, once these circuit switches are replaced with packet switches, the regulatory authority governing these essential telecommunication services disappears – all as a consequence of the Commission's prior decisions to deregulate pursuant to definitional interpretations instead of Section 10 forbearance. AT&T's recent, lengthy multi-state outage of its U-Verse service, and the lack of the traditional accountability measure governing it (*e.g.*, outage reporting, service quality obligations) serve to highlight the brave new world AT&T wants Americans to inhabit.[16] This is of course oversight that AT&T wants stripped not only from federal regulators, but also from the state regulators who are closer and more responsive to the customers of these networks.[17]

That the Act is concerned with much more than market power is seen in its treatment of interconnection. Section 251 separately discusses the duties of telecommunications carriers,[18] all local exchange carriers,[19] and *incumbent* local

[16] *See, e.g.*, Ray Le Maistre, "AT&T Faces Backlash Over U-verse Outage," *Light Reading*, Jan. 22, 2013.

[17] AT&T's request for the Commission to designate "all IP services as inherently interstate services" is a prime example of AT&T's purposeful confusion regarding IP-enabled services that traverse the public Internet with IP-enabled services that do not. AT&T's managed VoIP services, like Cable's, are closed path, point-to-point communications that may originate and terminate an intrastate call without crossing state lines.

[18] 47 U.S.C. § 251(a).

[19] *Id.* § 251(b).

exchange carriers,[20] the latter category's obligations not predicated on any finding of market power or dominant status.[21] Indeed, the Commission continues to struggle with the issue of intercarrier compensation in the context of reforming the USF system.[22] This struggle exists because of the presence of terminating access monopolies, and it is not in any way solved by the presence of multiple competitive service providers. Even carriers without market power are prone to abusing their position as terminating access monopolies, as the FCC has previously found.[23]

Removing *all* regulatory oversight of interconnection would create the "Wild West" that NTCA warns of in its petition.[24] This would have harmful indirect effects on consumers, resulting in service disruptions and higher prices. But AT&T's preferred non-regulatory end-state would also directly harm consumers, even in the voice "market" that AT&T claims is competitive.[25] Take California, for example, a state that granted AT&T's deregulatory wishes based on the company's claims of competition: rates tripled nearly

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[20] *Id.* § 251(c).

[21] *Id.* § 251(h). This section grants the Commission the discretion to designate "comparable carriers" as incumbents, but does not specify any authority to remove that classification from existing ILECs.

[22] *See* In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board, *Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17663 (2011).

[23] *See, e.g.*, In the Matter of Access Charge Reform, CC Docket No. 96-262, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, 14348-49¶¶ 254-57 (1999).

[24] *NTCA Petition* ¶ 8.

[25] AT&T describes a "voice" market that includes everything from over-the-top VoIP to LEC-provisioned PBX services. While it is the case they these are all two-way voice services, the question of whether or not they exist in the same market is an empirical one, and the experience in states in which ILECs were granted substantial regulatory rate relief suggests that the market boundaries are not as broad as AT&T argues.

overnight.[26] Further, the world AT&T wants consumers to live in is one in which the FCC is powerless to deal with cramming, slamming, or even underhanded practices such as Verizon's billing its customers for unintended data sessions.[27]

There are numerous other consumer consequences from AT&T's plan to make Title II disappear. The Commission's Open Internet Rules are based in part on ancillary authority to telecommunications regulations. But if there are no longer telecommunications services subject to Title II, a major rationale for these Open Internet rules vanishes.[28] There is also inherent danger in handing all oversight duties for our nation's entire communications system to the companies whose converged business model forces broadband users to subsidize the annual video programming price hikes dictated by local broadcasters and sports franchises.[29]

In short, what AT&T wants would be good for AT&T's shareholders, but an unmitigated disaster for Americans. This is why, as we discuss below, no other country in the world is taking this path for network modernization, including countries that have already completed or will soon complete the transition to all-IP networks. No amount of deregulation is going to make it economical for a firm other than the existing ILEC or incumbent cable provider to enter the market and build a next generation

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[26] *See* James Temple, "AT&T rates skyrocket since deregulation," *San Francisco Chronicle,* Jan. 18, 2013.

[27] *See* In the Matter of Verizon Wireless Data Usage Charges, *Consent Decree*, 25 FCC Rcd 15105 (2010).

[28] In the *Open Internet Order*, the Commission argued that since VoIP services can discipline the market for services subject to Section 201, the Open Internet Rules are ancillary to Title II. *See* In the Matter of Preserving the Open Internet, Broadband Industry Practices, GN Docket No 09-191, *Report and Order*, 25 FCC Rcd 17905, 17972 (2010).

[29] *See* Brian Stelter, "Rising TV Fees Mean All Viewers Pay to Keep Sports Fans Happy," *New York Times*, Jan. 25, 2013.

telecommunications network to the homes of many Americans. Incumbent LECs built their businesses on the backs of the public trust under protected monopoly status, and the public deserves a return on its 100-plus year investment in this monopoly. So before the Commission continues down the flawed path that SBC/AT&T urged it to follow in the *Wireline Broadband Order*, it should recognize that there are alternative paths – ones articulated in the Act and practiced in many countries that have better broadband markets. This path can be largely deregulatory, but it must preserve the basic level of competition and consumer protections contained in the Communications Act.

4. Broadband Public Telecommunication Service Networks Are a Critical Good, One the Act is Focused on Preserving and Promoting

A Public Telecommunications Network is a critical component to the nation's well being, both socially and economically. This is the case even more so for advanced broadband networks than for narrowband voice networks. Just as we need reliable and non-discriminatory access to roads, electrical grids and transport systems to conduct commerce, so to do we need the same kind of access to two-way communications networks. This is the fundamental premise of common carriage, which the Communications Act is built to preserve.[30]

We would not have today's Internet if it were not for the non-discrimination obligations imposed on telecommunications carriers beginning in the 1960s.[31] But instead of recognizing the importance of common carriage principles for all two-way public networks, as Congress did in the Communications Act and the 1996 Act, the Commission established a regulatory construct that ignores the law, legal precedent and the undeniable

[30] *See, e.g.*, "From Ships to Bits," *The Economist*, May 13, 2010.

[31] *See* S. Derek Turner, "Dismantling Digital Deregulation: Toward a National Broadband Strategy," Free Press (2009), pp. 30-31.

lessons of history. America needs a public telecommunications network to serve as a platform for future innovations. It would be folly to assume IP is the end-all-be-all in networking, or to assume that the dominant incumbents have the right incentives to innovate beyond IP, or that they have the right to be the only innovators. The Communications Act is built on the premise that telecommunications services are a critical input to free speech and commerce, and nothing in the law indicates that Congress gave the Commission and the facilities owners the power to simply wave a magic classification wand and make it all disappear.

But that this is even a possibility proves that the Commission erred greatly in its prior decisions concerning the classification of the transmission component of broadband Internet access services. Now AT&T seeks to exploit this Commission-created loophole, and continues to purposefully conflate the use of IP-based transmission with the Internet itself.

The Communications Act (along with the fundamental definitions in it) does not care about multiplexing technologies (TDM vs. IP). It does not care about the particular transmission medium (cooper vs. fiber vs. coaxial vs. radio waves). And for the purposes of common carriage, the statute certainly doesn't care about content (voice calls vs. data packets). The statute only cares about functions. In this case, the law focuses on preserving a basic level of non-discrimination and consumer protection in those services "offered for a fee directly to the public" that transmit "the information of the user's choosing, without change in the form or content of the information as sent and received," transmission that occurs "between or among points specified by the user."[32] If however, a

[32] 47 U.S.C. § 153(50); *id.* 153(53).

service offers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information" *via this transmission*, then the statute leaves it (largely) alone, so long as the capability in question is not "for the management, control, or operation . . . or management" of the transmission service offered to the public.[33]

It is easy to get lost in the semantic wilderness, but only if one ignores the map left behind by the courts and Congress. The 1996 Amendments to the Communications Act followed both the successful regulatory approach of the *Computer Inquiries* and the court precedents defining common carriage in communications markets. Looking at these first principles, it is hard to fathom how the Commission lost the plot. What makes someone a common carrier under common law, and why is this concept important? As the United States Court of Appeals District of Columbia Circuit stated in the *NARUC I* case,

> [T]he critical point is the quasi-public character of the activity involved... What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier 'undertakes to carry for all people indifferently...' [...] This requirement, that to be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve, is supported by common sense as well as case law. The original rationale for imposing a stricter duty of care on common carriers was that they had implicitly accepted a sort of public trust by availing themselves of the business of the public at large. The common carrier concept appears to have developed as a sort of quid pro quo whereby a carrier was made to bear a special burden of care, in exchange for the privilege of soliciting the public's business.[34]

The same court subsequently stated,

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[33] *Id.* § 153(24).

[34] National Ass'n of Regulatory Utility Comm'rs v. FCC, 525 F.2d 630 (DC Cir. 1976) (*NARUC I*) (internal citations omitted).

> "[a] second prerequisite to common carrier status was mentioned but not discussed in the previous N.A.R.U.C. opinion. It is the requirement formulated by the FCC and with peculiar applicability to the communications field, that the system be such that customers 'transmit intelligence of their own design and choosing.'"[35]

These are the two-prongs of the "NARUC test" for determining whether or not a service should be treated as common carriage, and they were embraced by Congress in the Amendments to the Communications Act.[36] If we for a moment move away from communications to another common carriage market such as physical transport, we can see clearly the lines Congress drew between content and carriage.

A bus line operates on public-rights-of-ways and offers transmission to the public indiscriminately. The bus line transports passengers between points of their choosing. The bus line does not surprise your waiting relatives by replacing you with a stranger, nor does the bus line choose to take you to Toledo when you asked to go to Tampa. This is the same as the functions that telecom service providers offer for our communications.

An information service provider does something completely different than transmit the content we choose between points of our choosing. Netflix decides what movies it will offer for streaming, and it purchases transit services to make these movies available (*i.e.*, information is provided *via* telecommunications). So in the bus analogy, the bus service is to a telecom service as watching a TV show about bus travel is to an information service.

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[35] National Ass'n of Regulatory Utility Comm'rs v. FCC, 533 F.2d 601 (DC Cir. 1976) (*NARUC II*) (internal citations omitted).

[36] In the Act, Congress said that that "any provider" of "telecommunications" to the public directly for a fee, "regardless of the facilities used" is a "telecommunications carrier" subject to Title II, and will be treated as a common carrier in the provision of those telecommunications services. By basing the common carriage definition ultimately on the offering of transmission to the public, Congress codified the tests described in *NARUC I* and *NARUC II*.

This well understood demarcation between content and carriage predated the Act,[37] but in 1996 the lines between content (or "the Internet") and transport were clear, and only became *seemingly* muddier once traditional facilities-based carriers began arguing that vertical integration serves to erase this well-understood line. In 1996, everyone understood a dial-up Internet Service Provider like AOL was content, and not common carriage. In the bus line analogy, a third-party ISP like AOL acts as a reseller, purchasing the use of the bus. While AOL is deciding which roads to take for these particular trips, the bus line itself still remains in business as a common carrier.

This is the plain meaning of the Commission precedents the Act was built upon, as well as the Act itself, and decades of common carriage law. But for some reason the

[37] Indeed, it is the entire purpose of the *Computer II* regime and subsequent decisions like the 1995 *Frame Relay Order*. In this decision, the Commission rejected AT&T's argument that since the frame relay service itself was sold to customers only as an enhanced service, that the service was one singular enhanced service. The Commission also rejected AT&T's interpretation that the "contamination theory" applied to its frame relay service. The contamination theory holds that if an enhanced service provider sells a service that is a combination of computing and basic transmission, the entire service is considered enhanced, and the provider is not obligated to abide by Title II regulations. But as the Commission made clear in the *Frame Relay Order*, the contamination theory is not meant to apply to facilities-based providers: "Application of the contamination theory to a facilities-based carrier such as AT&T would allow circumvention of the Computer II and Computer III basic-enhanced framework. AT&T would be able to avoid Computer II and Computer III unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. This is obviously an undesirable and unintended result." *See* Independent Data Communications Manufacturers Association Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service Is a Basic Service, American Telephone and Telegraph Company Petition for Declaratory Ruling that all Interexchange Carriers be Subject to the Commission's Decision in the ID-CMA Petition, *Memorandum Opinion and Order*, 10 FCC Rcd 13717 (1995) (*Frame Relay Order*), at ¶¶ 41-44, stating further that, "The assertion by AT&T and other commenters that the enhanced protocol conversion capabilities associated with AT&T's InterSpan service bring it within the definition of an enhanced service is beside the point. Under the Commission's Computer II and Computer III decisions, AT&T must unbundle the basic frame relay service, regardless of whether the [service] offering also provides a combined, enhanced protocol conversion and transport service for those customers who require it."

Commission has chosen to ignore all of this, and forge ahead with its unworkable classification system. The reality is the move from TDM to IP is just a change in technology, not a change in function. The entire design of the Internet Protocol itself is to ensure the content of the message remains unchanged, regardless of network topology. This is the end-to-end concept in a nutshell, but AT&T and other incumbents have proven quite successful in misleading the Commission and Congress about the differences between transmission and content. If Congress wanted the outcome that grant of AT&T's request will produce (the complete eradication of telecom services), it would have done things much differently than it did.

Indeed, by granting rural LECs the ability to declare the transmission component of their DSL services to be common carriage, despite the fact that these services are functionally identical to the DSL services offered by the large ILECs, the Commission demonstrates the lie that vertical integration renders content and carriage inextricably intertwined.[38] The courts had previously looked down on this kind of outcome-driven regulatory rationale,[39] but now appear ready to give the FCC free rein to pick and choose which parts of the Act to enforce and which to ignore.[40]

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[38] *Wireline Broadband Order* ¶ 90.

[39] In *NARUC I*, the court stated, "[f]urther, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so."

[40] In the recent ruling on the Commission's *Data Roaming Order*, the D.C. Circuit stated, "Verizon insists that the Commission's interpretation of 'common carrier' warrants no deference because the Act merely codified a concept of common carriage that was well established at common law. But to the extent we suggested as much in *NARUC I*, a decision predating *Chevron*, that suggestion was dicta. Instead, we are bound

If AT&T replaced all of its circuit switches with IP switches, and told no one about it, end users wouldn't have any clue that something had changed (aside from the inevitable negative service impacts that would arise due to the lack of Commission-mandated IP interconnection rules). It also wouldn't make any difference under the statute. The differences in the real world that would arise after the move to an all-IP network stem solely from the Commission's precedents and its indecisiveness on mandating IP interconnection. The law cares about functions and services, not the technology used to provide those functions and services.

B. The Commission Should Study and Learn From The Experiences of Our Global Peers in Managing the Transition to Next Generation Networks, Particularly on the Importance of Non-Discriminatory IP-Interconnection Obligations

As the Commission contemplates how to best ensure consumer protection and promote competition in the transition to next generation services, it would be wise to study the successful experiences of several of our international peers. It is clear from surveying the transitions underway overseas that the authority issues the FCC faces are truly an America-only problem. It simply would never occur to regulators in Europe that the replacement of TDM switches with IP softswitches should result in the complete removal of common carriage obligations.

Apologists for the Commission's current definitional dilemma often point to the near-universal deployment of coaxial cable facilities along side LEC facilities as *the* unique American circumstance that gives rise to the uncertainties about the proper

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by our express determination in U.S. Telecom Association v. FCC, 295 F.3d 1326 (D.C. Cir. 2002), that the Commission's interpretation and application of the term 'common carrier' warrants Chevron deference." *See Cellco Partnership v. FCC*, No. 11-1135, slip op. at 17 (D.C. Cir. Dec. 4, 2012).

regulatory regime. But America is not the only country with appreciable cable deployment. OECD data from 2008 indicates that 18 of the group's 30 member nations have greater than 40 percent cable modem availability.[41] Over half of the homes in the United Kingdom are passed by cable facilities, while cable deployment tops 92 percent in the Netherlands. And both of these countries are navigating the transition to next generation networks while maintaining policy regimes that preserve open access and promote competition.

Despite having ubiquitous cable modem availability, the Dutch regulatory bodies required KPN (the ILEC) to offer wholesale access even when it goes all-IP, because the company has significant market power in the wholesale market.[42] In other words, Dutch regulators recognized that the history matters, and that having a wholesale next generation telecom services market is critical to the country's well being. The Dutch authorities never would contemplate the path AT&T wants the FCC to follow. Allowing KPN to disappear both the PSTN and the wholesale market by the wave of a wand was never a possibility in the Netherlands.

A similar approach to the all-IP transition is seen in the United Kingdom. Though BT's (the U.K. ILEC) "21CN" next generation plans were scaled back following the country's recent recessions, the company and the regulator (Ofcom) have an agreed-upon understanding as to the need for the transition to preserve competition and consumer rights. Ofcom has stated that "the deployment of BT's 21st Century Network also creates the opportunity to build a solid platform for competition by designing in equivalence

[41] *See* "Cable modem coverage (up to 2008)," OECD, July 18, 2012.

[42] *See* "Developments of Next Generation Networks (NGN): country case studies," International Telecommunications Union (2009).

from the outset. Therefore, a key priority for Ofcom has been to ensure that the deployment of BT's NGN does not foreclose competition, either through disrupting existing competitive businesses or through preventing equality of access being provided in the future."[43]

Europe in particular provides an interesting contrast on the matter of IP interconnection. In the U.K., the TDM to IP interconnection conversion problem is viewed from a completely different perspective. Here in the U.S., AT&T argues that CLECs want to force AT&T to maintain TDM so they can interconnect. In the U.K., Ofcom recognizes that the CLECs would *rather* interconnect in IP, but that BT's refusal to offer IP interconnection is the barrier. If the FCC would clarify that CLECs have IP interconnection rights, that would accelerate IP transition.[44] This makes it clear that if there is any barrier to the IP-transition, it's the uncertainty surrounding the interconnecting carriers' ability to avoid being gouged by the incumbents should they prefer to replace TDM with IP.[45]

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[43] *See* Regulation of VoIP Services, Statement and further consultation, Ofcom, February 22, 2006, at ¶ 3.37.

[44] *NTCA Petition* ¶ 13 ("Today, there is significant uncertainty (although there perhaps should not be) surrounding the rights and obligations that govern IP interconnection and the exchange of traffic through such interconnects. As noted earlier in this Petition, if the perception of heavy-handed regulation is a deterrent to investment, regulatory uncertainty is far worse in driving dollars away from markets. Lingering uncertainty surrounding IP interconnection for the exchange of traffic that is otherwise subject to sections 251 and 252 of the Act in all respects hinders the deployment of IP-enabled networks - in fact, it would seem to create perverse technology choice incentives by <u>*encouraging*</u> retention of TDM-based networks (at least at the points where they interconnect with other networks) simply for the purpose of ensuring a clearer set of 'ground rules' around interconnection and intercarrier compensation.") (emphasis in original).

[45] Again, in the U.K. the arguments are flipped. Ofcom notes that "BT argued that the costs of interworking are not prohibitive since they have not deterred some operators from investing in NGNs, and that the conjecture that such costs inhibit adoption of new

If there are "perverse" interconnection incentives[46] they exist simply because the Commission has failed to faithfully implement the Act through its continued inaction on IP interconnection. The Commission can solve this matter by recognizing that IP is just a multiplexing header that doesn't change the economic principles that undergird interconnection policy.

And to be clear, ILECs don't always operate as ILECs when interconnecting, and they too stand to benefit from a coherent IP interconnection policy under Sections 251 and 252 of the Act. Because *someone* will have outsized leverage in many of these interconnection negotiations, there is substantial potential for consumer harm absent some basic governing framework. While the private carriage backbone interconnection has *mostly* worked well (though even that is starting to change, as is seen in recent disputes between Cogent and Sprint, Level-3 and Comcast, TWC and Netflix, etc.), last mile interconnection is a fundamentally different case due to the presence of terminating access monopolies. However, the point here is not that the Commission needs to adopt prescriptive regulations in all cases; but that companies who are in all respects serving

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technology is therefore flawed. It said that the cost of signal conversion via a media gateway is an insignificant proportion of call costs, and would not deter early movers from investing to reap the cost advantages of the new technology." Also, "In BT's view, where conversion between IP and TDM is required it should be regarded as a market opportunity, not a problem requiring regulatory intervention. Operators who had invested in infrastructure to interconnect with BT's Digital Local Exchanges ('DLEs') could add IP gateways to that infrastructure and offer IP interconnection with BT's legacy network. NGN operators could then decide whether to self-provide the conversion they required or purchase conversion services from other operators." *See* Regulation of VoIP Services, Statement and further consultation, Ofcom, February 22, 2006, at ¶¶ 3.38, 3.40.

[46] *See* Letter from Brian Scarpelli, Manager, Government Affairs, Telecommunications Industry Association to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-353, January 11, 2013. ("PSTN interconnection rights give some carriers a perverse incentive to switch from IP into PSTN protocols, in order to take advantage of their interconnection advantages.").

customers as a common carrier, and who have terminating access monopoly power, need to interconnect efficiently with other carriers in order to preserve consumer welfare. The Commission has to retain oversight here, even if it refrains from initial intervention. But if it instead follows AT&T further down the definitional rabbit hole, the Commission will lose the ability to intervene to protect consumers if necessary.

C. The Commission Already Has a Decade's Worth of Evidence from its Experiment with Definitional Deregulation. It Should Weigh this Evidence Equally With That From Any New Experiments, Which Must Be Independently Designed

While both NTCA and AT&T request a new proceeding on facilitating the transition to all-IP networks, AT&T specifically asks the Commission "to consider conducting, *for select wire centers chosen by incumbent local exchange carriers* . . . that elect to participate, trial runs of the transition to next-generation services, including the retirement of time-division multiplexed . . . facilities and offerings and their replacement with IP-based alternatives."[47] AT&T expresses its belief that "this regulatory experiment will show that conventional public-utility-style regulation is no longer necessary or appropriate in the emerging all-IP ecosystem."[48] AT&T's prejudging aside, the Commission should recognize that what AT&T is actually proposing is *not a valid experiment*; it is AT&T's attempt to establish a rigged demonstration designed to "prove" correct AT&T's beliefs about the need for regulatory oversight. Real experiments involve the investigator, not the subject, setting the parameters and controls.[49] Further, even if the

[47] *AT&T Petition* ¶ 1 (emphasis added).

[48] *Id.* ¶ 6.

[49] There is also inherent methodological danger in drawing far reaching conclusions from experiments with small sample sizes and inadequate control variables (indeed, this is why policymakers' best practices involve reliance on quasi-experimental methods, case

Commission designs these "experiments" and choses the wire centers (as it must if it agrees to this request), the lessons learned must be weighted appropriately and considered along side the voluminous evidence produced from various states' experiences with partial deregulation, as well as the FCC's own decade-long experiment with its definitional deregulation.

Regardless of how the Commission chooses to proceed on these "experiments," it must recognize that the central question is not whether all-IP or TDM networks require specific regulations. The central question is how the Commission can best ensure that the public policy goals of the Communications Act are achieved; and precisely how, not if, the basic common carriage obligations (and benefits) should govern the provision of these essential telecommunications services.

III. Conclusion

The Commission must confront lingering and politically difficult questions concerning its authority over next-generation networks. If it instead grants AT&T's desires under the existing regulatory classifications, it will remove any remaining vestige of regulatory oversight and consumer protections governing our nation's communications markets. This outcome would be wholly inconsistent with the Commission's purpose and ruinous to the public interest.

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studies, economic theory and reasoned judgment). In general, it is bad practice to: rely on evidence from a single study; rely on evidence produced by the subject itself; rely on evidence from an intervention only recently conducted; rely on evidence from an unreplicated experiment; or rely on evidence that has not been tested by researchers who did not already support the underlying policy variable in the first place. *See* Kevin Drum, "Big Surprise: Yet Another Ed Reform Turns Out to be Bogus," *Mother Jones MoJo Blog*, Jan. 28, 2013.

Respectfully submitted,

_____/s/_____
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_____/s/_____
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