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The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: GN Docket No. 13-5, *Technology Transitions*
GN Docket No. 10-127, *Framework for Broadband Internet Service*
GN Docket 09-191, *Preserving the Open Internet*

Dear Chairman Wheeler,

When the Founders enshrined our free speech rights in the Constitution, Americans exercised these rights by using their voices to speak to those within earshot. But an equally if not more important conduit for free expression was the printed word, a form of speech that could reach a far larger audience than a single Patriot standing upon a soapbox in the town square.

The printed word was an indispensible component to our ability to self-govern. And the printed word was carried to all parts of the colonies and, later, the Union, by a common carrier network: the postal service. The people's ability and freedom to use this common carrier network to *communicate* was vital to ending the "tyranny of place" that had restrained the widespread availability of information to the masses.[1]

The public's right to *access* "the truth" was a critical part of the Enlightenment understanding of the public sphere.[2] And because "speech concerning public affairs is more than self-expression; it is the essence of self-government,"[3] *promoting* the public's ability to access this network was an early American policy priority.[4] This notion of promoting and protecting our ability to exercise our free speech rights appears throughout our nation's history, and is notably enshrined in our communications laws in a manner that preserves this principle even as communications technologies and markets evolve.

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[1] Tom Wheeler, "Net Effects: The Past, Present, and Future Impact of Our Networks," at 5-7 (Nov. 26, 2013).

[2] Culver Smith, *The Press, Politics, and Patronage: The American Government's Use of Newspapers. 1789-1875*, Athens: University of Georgia Press (1977).

[3] *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

[4] The Postal network was so vital to our embryonic democracy that Ben Franklin himself served as the first Postmaster General under the Continental Congress, and the Postal Service Act was one of the first pieces of legislation adopted by the new federal government. *See* Richard R. John, *Spreading the News*, Cambridge: Harvard University Press (1995).

We as a nation believe that every American should have access to adequate communications facilities at reasonable charges.[5] We believe that every American should have access to facilities that allow them to transmit the information of their choosing between points of their choosing without unjust discrimination.[6] We understand that the role of our nation's communications policymakers and regulators should be to promote competition so that Americans are able to pay the lowest price for the highest quality telecommunications services.[7]

These high level concepts should sound familiar. They collectively form the core of the Communications Act, as amended by the Telecommunications Act of 1996.

Congress enshrined and reaffirmed the common law doctrine of common carriage in the Communications Act precisely because the ability *to exercise our right* to speak freely is so important and indispensible.

The law recognizes that the *ability* to have our speech *carried* free from undue discrimination is essential to our *right* to speak freely.

This ability is defined by the Communications Act as the capability for members of the public to transmit the "information of the user's choosing," between "points specified by the user . . . without change in the form or content of the information as sent and received."[8]

In other words, our ability to throw off the tyranny of place and exercise our right to speak freely is a capability promoted and ultimately *protected* by the law's definition of a telecommunications service.

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[5] 47 U.S.C. § 151 ("For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.").

[6] *See id.* § 153 ("The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received ... The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."); *see also id.* § 254(b) ("Access to advanced telecommunications and information services should be provided in all regions of the Nation."); *id.* § 160 ("The Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines 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*." (emphasis added)).

[7] P.L. 104-104 ("An Act To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.").

[8] 47 U.S.C. § 153.

But because of prior FCC actions, and not the law itself, the legal protection to communicate via wire and radio free from undue discrimination only exists for some. These indispensible legal protections are confined by FCC policy to certain *portions* of networks that facilitate a specific type of phone call or dial-up Internet access — all modes of communication that pre-date 1996.

This legal protection to communicate free from undue discrimination no longer exists for broadband, the mode of telecommunications the nation uses more than any other. Despite the promises of the 1996 Act, and the reality that Americans born since its enactment prefer to speak using the language of data, there is no mass-market broadband telecommunications services market in America.

This outcome is plainly nonsensical. How can there be no broadband telecom services market? Surely, making the telecom services market disappear as bandwidth capabilities increased was the exact opposite of Congress' intent in amending the Communications Act in 1996.

This is not simply a matter of semantics. Indeed, the Commission's original eagerness to engage in semantics is precisely why Americans no longer have legal protections for their right to speak freely to each other and the masses.

Until such time that Congress choses to take away this legal protection for our ability to communicate free from undue discrimination, it remains absolute.

The obligation to protect our ability to exercise our free speech rights cannot be left to the self-designations and promises of private entities. And the Commission's authority to protect that right derives from the immutable text of the law, not the opinions of bureaucrats about the meanings of phrases like "reasonable and timely."

Most importantly, our ability to exercise our free speech rights should be protected and promoted even after the universal deployment of any particular telecommunications medium.

Below we offer an expansion on these ideas through the lens of recent policy history. We highlight some of the misconceptions concerning communications common carriage. We discuss how the FCC can achieve Congress' bipartisan vision of an open, competitive, and largely deregulated telecommunications marketplace. We also suggest a workable system of case-by-case enforcement through policies designed to create a market structure that acts as a regulator, buttressed by the FCC's clear oversight authority over broadband telecommunications services.

INTRODUCTION

In the discussions surrounding the issue of the appropriate regulatory classification of mass market broadband communications, too many have lost the thread of history, and have developed an inaccurate understanding of the framework for innovation and competition that Congress established for our nation's two-way communications networks.

Our nation's laws are made in a deliberate fashion, in a manner that incorporates our shared understanding of history and our hopes for the future. Our federal lawmaking process for the most part produces laws that are flexible and withstand the test of time. This is the case because of the deliberative wisdom of the Congressional process, which often bases our laws on bedrock principles — principles that transport the law through changing times.

Our Communications Act is guided by the principles of non-discrimination, universal access, interconnection, competition, public safety and reasoned deregulation.

These principles, through the framework of the Telecommunications Act of 1996, were intended to foster the development of a robust, advanced and competitive two-way telecommunications *services* market, which would in turn facilitate competition in the information services and video markets that use telecommunications to reach end users.

Contrary to Washington's prevailing conventional wisdom, the Communications Act is not at all outdated. Congress in fact overhauled the law in 1996 with an eye towards competition and technological convergence. In particular, Title II is most certainly *not* a framework for monopolies offering telephone service, but a framework for competition in two-way communications networks—a framework that *specifically* includes advanced broadband networks.

Furthermore, the notion that the non-discrimination, universal access, interconnection, competition, public safety and reasoned deregulation *principles* that form the heart of Title II are somehow outdated ignores the plain fact that many of our law's basic principles are hundreds of years old. From the ideas embodied in the Constitution to the ideas embodied in common law, basic principles often withstand the test of time. In enacting the 1996 Act, Congress certainly understood that non-discrimination and interconnection unfettered by market power are the keys to a robust two-way communications infrastructure, regardless of changes in technologies.

If one simply takes the time to understand the history, it becomes clear that the law we have in place is still quite useful. It's just not being used.

MISCONCEPTIONS ABOUT THE COMMUNICATIONS ACT AND ITS EMBRACE OF COMMON CARRIAGE

A discussion of the appropriate regulatory approach to broadband telecommunications must start with a common understanding of the law and its history. Unfortunately, many involved in this discussion, either out of self-interest or out of ignorance, seem to hold a few fundamental misconceptions of the law, its history and purpose.

For example, this discussion is often plagued with the incorrect conclusion that Title II and common carriage were designed solely to govern the Ma Bell monopoly. The truth is that the number of regulations applied to a telecommunications service are indeed proportional to whether or not a market is a monopoly, but common carriage is not confined to utilities or to monopolies. Indeed, as we discuss below, there are many communications services offered in non-monopoly markets that are nonetheless treated as common carrier services under the law—and they are vibrant markets characterized by high levels of investment and innovation.

There is also an incorrect view of the 1996 Act as a blueprint for total deregulation. This view ignores the purpose and bounds of forbearance. The entirety of Section 10 indicates that forbearance can only be granted if the regulations are not needed to ensure the outcomes required by Section 201 and 202. In other words, not only should the rates be reasonable, but the charges and practices after forbearance must remain "just and reasonable and [ ] not unjustly or unreasonably discriminatory."

It is critical that neither the importance of a non-discriminatory *outcome* nor the Commission's continued ability to ensure that outcome get lost in this discussion.

The 1996 Act's drafters knew quite well about the Internet, and about the role that policies governing telecom services played and would continue to play in promoting its advancement.

The Commission first dealt with this very issue in *Computer I*, and later settled on a firm demarcation between "basic" and "enhanced" services in *Computer II*, a distinction that Congress codified with its adoption of the definitions of "telecommunications services" and "information services." Further, the Open Network Architecture ("ONA") policies contained in *Computer III* served as the basis for Section 251's unbundling framework. The indisputable reality is that the Commission developed a wildly successful policy framework from which Congress took its cues.

There is a widely held belief that classifying a communications service as a telecommunications service brings substantial regulation. As the Commission knows better than most, there are dozens of such services that comprise tens of billions of dollars in economic activity. These are treated as common carriage services under Title II, yet are subject to very little regulation.

Finally, we must rid this discussion of the notion that the legal framework Congress adopted in 1996 is a siloed approach that is in any way concerned with modes of technology. Congress purposefully wrote the Act to be technology neutral, a fact made clear by its definitions. Title II is about two-way communications services; Title III deals with spectrum, regardless of the technologies and services that utilize it. And the 1996 changes to Title VI's treatment of cable services were largely deregulatory and technology neutral. These are not silos, and they are not obligations based on the mode of technology.

In sum, Congress was clear: the physical networks of the 21st century would provide telecommunications services. Congress gave the Commission wide latitude in applying Title II to those networks — networks that clearly provide common carriage in the eyes of the law. Congress' overarching goal was to ensure a world of big open telecom services that could connect Americans to the Internet, or to whatever information service. That goal requires telecom services that function to deliver whatever applications our innovators think of next.

A BRIEF HISTORY OF THE 1996 TELECOM ACT AND ITS CENTRAL PURPOSE: SERVICES COMPETITION DELIVERED VIA BIG, OPEN AND COMPETITIVE TELECOMMUNICATIONS SERVICES

In the years following the breakup of Ma Bell, there was a marked shift in how many members of Congress on both sides of the aisle approached the issue of communications regulation. Deregulation was the theme of the day, even if this overarching slogan obscured the complexity of the policy choices Congress considered. While a few members may have felt that government should play no role in the telecommunications and cable markets, the overwhelming majority of both Republicans and Democrats embraced the emerging "competition-then-deregulation" philosophy.

The driving forces behind this shift were the dawn of the broadband telecommunications era in the mid-1990s and the big promises that cable, telco and other executives were making about the future of competition. The Regional Bell Operating Companies ("RBOCs") wanted desperately to get out from under the policies of the court-ordered Modified Final Judgment ("MFJ") in the AT&T breakup, which kept them from entering the long-distance, video and information-services markets. The

competitive telecoms, led by AT&T Corp. and MCI, wanted equal access to the RBOCs' local networks to offer local calling and data services. And the cable industry wanted multichannel service rate deregulation and approval to enter the local telecom market.

All these factions told Congress that *open* telecommunications networks would solve any market-power problems in the services offered *over* those networks. If every home and business in America were offered reasonably priced, fast and open advanced telecommunications *services*, there would no longer be any concern about competition in the local toll, long-distance, information-service and multichannel-video markets. The thinking was that so long as the underlying telecommunications service was a neutral distribution platform, and new entrants could get into the business of offering these other services over that platform, there would be no concern about the Bells entering the long-distance markets—and no need to regulate cable rates.

The plan's linchpin was cable's promise to become a telecommunications service provider, not merely as an alternative for narrowband voice service, but an open and nondiscriminatory broadband telecommunications service capable of delivering high-quality voice, video and data communications.[9]

Again, for most members of Congress, the entire point of the 1996 Act was the creation of robust and open telecommunications platforms that could deliver competitive voice, video and data services. The theory Congress operated on in 1996 was that more distribution mediums (be they copper, coaxial cable, fiber, terrestrial wireless or satellite) produces competition in the markets for the services delivered over those distribution mediums.

But despite all their promises, the Bells did not enter the video markets for another decade (having completely ignored the law's Open Video System provisions that would have enabled entry bypassing the franchise process). The cable industry also broke its promise to become the competing nondiscriminatory broadband platform. Cable instead pressured the FCC to create a loophole in the regulatory structure by defining cable's two-way telecommunications platform as an information service and not a telecommunications service. The Commission did this—even though Congress clearly stated that "*telecommunications services [include] the transport of information or cable services*"[10] when it adopted the 1996 Telecom Act.

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[9] *See* Telecommunications Competition and Deregulation Act of 1995, Report of the Committee on Commerce, Science, and Transportation on S. 652, S. Rpt. 104-23, 104th Congress, First Session, at 13 (1995) ("*Senate Committee Report on S. 652*") ("Decker Anstrom testified that NCTA supports telecommunications legislation because the cable industry is ready to compete, and legislation must include rate regulation relief for cable. *He said that cable will be the competing wire to the telephone industry, and cable's coaxial cable carries 900 times more information than telephone's twisted copper pair*. The problem, he said, is that cable does not have the capital or, in some states, the authority to compete with the local exchange carriers." (emphasis added)).

[10] *See Senate Committee Report on S. 652*. ("As defined under the 1934 Act [as amended by this bill], *'telecommunications services' includes the transport of information or cable services*, but not the offering of those services. This means that information or cable services are not included in the definition of universal service; what is included is that level of telecommunications services that the FCC determines should be provided at an affordable rate to allow all Americans access to information, cable, and advanced telecommunications services that are an increasing part of daily life in modern America. Put another way, the Committee intends the definition of universal service to ensure that the conduit, whether it is a twisted pair wire, coaxial cable, fiber optic cable, wireless, or satellite system, has sufficient capacity and technological capability to enable consumers to use whatever consumer goods that they have purchased, such as a telephone, personal computer, video player, or television, to interconnect to services that are available over the telecommunications network." (emphasis added)).

This history is as important today as it is forgotten. Congress created the correct framework to promote the blossoming of competition in the voice, video, data and information-services markets. But the FCC, abetted by the courts, quickly abandoned this framework.

By tossing aside the congressional roadmap, the Commission led us to what we all live with today: despite the promise of the 1996 Act to foster a competitive advanced telecommunication *services* market, Americans now have *zero* options for broadband telecommunications services. All we have is an at-best duopoly market for wired high-speed Internet information services, a sharp decline from the choice in ISPs that Americans enjoyed in the late 1990s.

The lack of an open telecom service platform completely undermined the blueprint for video competition in particular (not to mention telecom competition), and not surprisingly multichannel service prices continue to skyrocket despite the decline in traditional cable's market share. And the fallout isn't over. The consequences of the FCC's classification decisions have up until now been reserved for broadband telecommunications, but by simply calling their services information services, the remaining common carriers will be able to bring an end to the entire concept of a public telecommunications service network.[11]

Nothing in the law or legislative history even remotely suggests this was the path Congress intended for the FCC to follow, nor the outcome it desired.

However, the law itself remains intact.

If the Internet remains an open and nondiscriminatory platform, like it has always been, then anyone can be an information service provider, broadcaster, publisher or video distributor — not just the incumbents that own the physical infrastructure.

But thanks to the FCC's misguided classification decisions, there is no guarantee *under the law* that the Internet will remain a viable delivery platform for information services, including new video distributors. When the owners of the physical infrastructure can prevent anyone else from being a distributor, that's a problem — *the exact problem* the 1996 Act was designed to solve.

Because of the actions the FCC took in the *Computer Inquiries*, the codification of that policy framework in the 1996 Act, and the FCC's half-willingness to promote openness through policy statements and legally shaky Open Internet rules, we've seen robust innovation and investment in the edge markets that require an open delivery platform. But this investment and innovation will not continue if there is any new uncertainty about the openness of the delivery platform.

The answer to this seemingly complex problem is the one that the FCC and then Congress came to before. We don't need public policy to dictate how the industry should behave; that's the consumers' job. We need public policy to allow innovation to happen. If we keep the pipes open, the content will flow and consumers will win.

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[11] *See* Comments of Free Press, *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 (filed Jan. 28, 2013).

The unfortunate reality is that while we already have these policies and they are the law of the land, the Commission abandoned them. The agency's shortsighted classification decisions robbed Americans of a competitive video market and a competitive Internet access market, and robbed Americans completely of *any* broadband telecommunications service market.

Incumbents have spent a substantial amount of resources spreading misinformation about and ultimately demonizing the principle of common carriage, and by extension, Congress' competitive blueprint from the 1996 Act. This is unfortunate, because Congress' blueprint was right, and members of both parties supported it, as did the cable and telecom incumbents and their would-be competitors.

The 1996 Act was framed as deregulation in exchange for competition. We've already got the law we need, and the Commission must take the steps needed to get the Act back on track.

THE COMMISSION FORGOT ABOUT FORBEARANCE

Given the history discussed above, the current heated debate over broadband's place in Title I or Title II seems odd.

Of course two-way broadband transmission networks belong in Title II, because that's where Congress put them and intended them to stay. But that does not mean Congress intended for a permanent heavy hand of regulation to apply to these advanced networks. Again, Congress recognized that as competition develops, reasoned deregulation is an appropriate response.

Section 10 of the Act is the path of reasoned deregulation chosen for our nation's two-way communications networks. The Commission chose a different path that involved sometimes metaphysical definitional interpretations of legal classifications. The Commission felt that it could follow this path to deregulation, while preserving the Commission's ability to uphold the principles of universal service, non-discrimination, interconnection and competition.

But the legal theory on which the FCC based this assumption has now, through the DC Circuit's decisions, been proven unworkable. The FCC's classification errors now inhibit the Commission's activities in areas that Congress clearly placed under the FCC's authority. This outcome, and its unworkability was predicted by Justice Scalia in his dissent in the *Brand X* case:

> The main source of the Commission's regulatory authority over common carriers is Title II, but the Commission has rendered that inapplicable in this instance by concluding that the definition of "telecommunications service" is ambiguous and does not (in its current view) apply to cable modem service. It contemplates, however, altering that (unnecessary) outcome, not by changing the law (*i.e.*, its construction of the Title II definitions), but by reserving the right to change the facts… [by asserting] its undefined and sparingly used "ancillary" powers… Such Mobius-strip reasoning mocks the principle that the statute constrains the agency in any meaningful way.[12]

In other words, the FCC's end-run around Section 10 physically "broke" the law, making it unworkable. As Justice Scalia put it, in pursuing the principle of *reasoned* deregulation in an unreasonable manner (one not remotely contemplated by Congress), "the Commission has attempted to

[12] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

establish a whole new regime of *non*-regulation.... 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."

Some still say that restoring the policy framework Congress adopted (via "reclassification") would be a return to "century-old rules made for railroads and Ma Bell phone monopolies." That is simply incorrect. Reclassification would return the framework that Congress adopted for all two-way communications networks in 1996, a framework that today still applies to many non-monopoly markets, including CLEC services, CMRS services, as well as all of the high-capacity data lines in the very competitive enterprise broadband market.

Reclassification, followed by appropriate Section 10 forbearance, will preserve the 1996 Act's deregulatory approach. It will put the FCC's rules back in harmony with the law, and it is justified by current realities of the marketplace that make the prior classification decisions inappropriate today.

CASE-BY-CASE ENFORCEMENT IS VALID ONLY IF BUILT UPON A CLEAR, PERMANENT AND UNAMBIGUOUS BASIS OF AUTHORITY TO PROTECT DESIRED OUTCOMES THROUGH EXPECTED NORMS OF INDUSTRY BEHAVIOR

There is a reason the Department of Justice broke up AT&T, and that reason was not simply to bring an end to a monopoly. Indeed, the Modified Final Judgment left local monopolies in place.

The Department took the action it did in order to create a *market structure* that would act as a regulatory force to improve consumer welfare. The breakup drew a clear market boundary between the local access network (which was and will always be subjected to the greatest level of natural monopoly barriers) and every other possible market that the local access network can connect to (be it long distance, information services, cable services, or customer premises equipment).

The Department's actions weren't the only path to removing Ma Bell's gatekeeper power over these adjacent markets; the Commission could have tried to regulate incumbents' interactions with these markets. Indeed, in some cases it did, quite successfully (*e.g.*, *Carterfone* for CPE, and *Computer II* for information services). But the inherent eloquence of the Department's action was to let the market structure act as regulator first, then the FCC second.

This approach worked. Washington seems to have forgotten the success of this approach, as it in many cases stood by and watched vertical reintegration dissolve these important market boundaries.

If the Commission wishes to reduce regulation to as minimal a level as possible in a market that will always be highly concentrated, constrained as that market is by the economics and politics of the last mile, then it needs to think deeply about restoring a market structure that can act as the first-pass regulator. This begins with a clear delineation of market boundaries and a commitment to keeping those boundaries intact. In broadband, this means recognizing that local access networks are the gates through which all other markets must cross.

Whatever the wisdom of a purely case-by-case approach to preserving the Network Compact, the Commission must recognize that any such approach must be built upon a clear basis of authority. This approach must be directed at violations of expected norms of behavior. We suggest that the norms

encompassed in the heart of Title II—Sections 201 and 202—provide a clear expectation for industry, and will lessen the likelihood of carriers stepping outside these norms in the first place.

Furthermore, we hope the Commission recognizes that the principles and outcomes for our communications markets transcend the temporality of a Section 706 finding and even the goal of universal deployment. Narrowband telecommunications networks reached a state of full deployment long before Congress amended the Act in 1996, but the law extended Title II's protections and goals to those and other telecommunications services regardless of the state of deployment or competition.

The Commission's repeated legal entanglements on this issue, the never-ending stream of metaphysical definitional questions it faces, and the uncertainty all of this creates are merely symptoms of the illness caused by the original improper classifications and diversion from Congress' blueprint. The Commission must revisit its prior assumptions for those classifications, as almost all of them were wildly incorrect.[13] Returning these classifications in harmony with the law will provide certainty to all, and is the only sensible path for the Commission to follow.

We recognize the appeal of putting fresh chalk on the cue for another triple cushion shot, this time using the latest reading of Section 706. This is the wrong approach legally and principally, but under current conditions, it is an easier path politically.

But while politics are important to politicians, they should not even be a small concern to regulators. Regulators must from time to time demonstrate their congressionally mandated independence from politics by showing *political courage*.

CONCLUSION

The history of the Communications Act and its amendments makes clear that nothing about a service's classification depends on how the provider chooses to think of it. The Act isn't something designed to let carriers get the privileges of Title II without the obligations, based on self-designation as an information service provider.

The Act was written as laws unlikely to see constant tinkering are always written—as clear as the drafters could be about functions, reflecting the input, debate and promises made to the American people in real time.

These promises—made by industry and by members of Congress, and ultimately enshrined in the law itself—were not promises to forever offer the American people only *narrowband* telecommunications services. No members who voted for the 1996 Act thought they were voting to ensure that the residential telecom services market would disappear completely (as it very well may in the context of the IP Transition, if the Commission fails to restore its authority over broadband).

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[13] For example, the Commission fully believed that even in the absence of any obligation to do so, that incumbent cable and LECs would continue to offer competing ISPs access to their last mile networks. This clearly did not happen. *See, e.g.*, *Appropriate Framework for Broadband Access to the Internet over Wireline*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 46 (2005) ("For the reasons discussed herein, we determine that the competitive pressures and technological changes that have arisen since 1990 have reduced the BOCs' incentive and ability to discriminate against unaffiliated ISPs in their provision of broadband Internet access service to the point that structural separation for BOC broadband Internet access service is no longer necessary.").

The 1996 Act was in fact about the future. In it, Congress embraced the foundational principles of common carriage (and what the FCC had helped enable in *Computer II*) and used these principles to usher in a competitive advanced telecommunications services market.

We are now 18 years removed from this last overhaul. We are now in that future.

A child born in that February when the 1996 Act became law is about to turn 18. That child and her cohort barely use voice "calls." She speaks and *communicates* to her world through data—text and instant messages, social media, Tumblr, and numerous other websites and applications that many members of prior generations have likely never heard of.

The *two-way communications facilities* and underlying technology used to carry these services may have changed, as Congress fully expected they would. But the societal and policy reasons for common carriage obligations have not. The total eradication of common carriage is certainly not the promise Washington made to America, yet that is the reality we now face. Here today, 18 years later, there is no mass-market broadband telecommunications services market. There is only "high speed Internet access" in a highly concentrated market. There are long-term consequences to this loss.

If the Commission fails to restore common carriage to our nation's central communications network, we are ensuring that future generations of Americans will not be able to send the information of their choosing, between points of their choosing, without undue discrimination. That is the very definition of a telecommunications service and the protection afforded by Title II. Nowhere in Communication Act or in the lengthy debates leading up to the 1996 rewrite is it suggested that Americans should not be able to access telecommunication services. That shouldn't be surprising, because it's a plainly absurd proposition.

The Commission must understand that the children of today and tomorrow do not and will not communicate the way prior generations did. They communicate with 0s and 1s. They communicate through words and images on a screen.

Is the Commission seriously willing to tell our children that they should not be able to access a *public network* that lets them communicate free from undue discrimination?

Is the Commission really prepared to tell our children that if they want to act like their parents and grandparents and make a voice call using a landline or wireless phone, they know that call will connect and won't be of inferior quality, and they won't be price gouged for it; but if they instead choose to communicate through their natural medium of data, they get no legal protections against undue discrimination?

The choice for the Commission is binary. It can act to restore American's legal protections to communicate free from undue discrimination, or it can leave this foundational democratic principle to the whims of the market.

Sincerely,

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