

April 30, 2010

Julius Genachowski, Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52; *A National Broadband Plan for Our Future*, GN Docket No. 09-51

Dear Chairman Genachowski:

In recent weeks, you have been subject to a great deal of pressure from the carriers you regulate. You are being urged not to consider regulating them.

We are writing to support the proposition that the Federal Communications Commission has the legal authority to classify the transmission portion of high-speed Internet access -- but not "the Internet" -- as a telecommunications service.

From Computer I onward, the Commission has been concerned about the ability of communications carriers to undermine competitive new computing industries.¹ In Computer II, the Commission allowed the carriers into the business of providing "enhanced" services (*e.g.*, data processing), but only if they sold their basic transport services separately and without discrimination.² The Commission worked to define a basic service that carriers would have to resell on a non-discriminatory basis, and relied on the existence of that resale regime to justify non-regulation of everything else. Basic service was subject to Title II of the Communications Act.³ A basic, regulated communications service was kept in place in order to protect data processing services, and these same distinctions were carried through the AT&T divestiture and into the 1996 Act.

When access to the commercial Internet was first made available, the providers of this access were separate entities - ISPs. The underlying providers of

¹ *See Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm'n Servs. & Facilities*, 28 F.C.C.2d 291, ¶ 15 (1970) (adopting a policy requiring communications carriers to "furnish data processing services only through separate corporate entities").

² *Amendment of Section 64.702 of the Comm'n's Rules & Regulations* (Second Computer Inquiry), 77 F.C.C.2d 384 (1980) (final decision).

³ *Id.* ¶ 7 (regulating the offering of basic transmission services as communications services under Title II).

transmission service were regulated as common carriers. The Commission chose not to regulate ISPs *because* it assumed that the gatekeeper providers of transmission -- the carriers -- would be separate entities providing basic, regulated services. Protection of Internet content and applications from discrimination by ISPs was provided by an enormously competitive ISP marketplace. What was at issue in those early decisions was the regulatory treatment of competitive ISPs that were not bundled with the underlying last-mile telecommunications network.

When telephone companies started providing high-speed DSL access to the Internet over their own copper lines (using electronics to enhance the speed of communications), they were treated like common carriers and required to unbundle this high-speed basic service for sale to competitors who wanted to resell it.⁴ The Commission did not have to consider the small amount of end-user Internet transmission at the time by non-common carriers, because the thousands of ISPs always had a non-discriminatory connection available to them.

Thus, it is accurate to say that before 2002 Internet access was protected from discrimination. There was a requirement imposed on telephone companies to make a wholesale, basic transmission facility available to everyone.

When cable modem service was introduced, and the cable companies argued against application of the wholesale telephone DSL rules to them, claiming that cable modem service combined both transmission and Internet access, the courts strongly disagreed. In *AT&T Co. v. City of Portland*, the Ninth Circuit ruled that cable modem providers were indeed “telecommunications service [providers]” under the 1996 Telecommunications Act.⁵

⁴ As the FCC said in 1998:

An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g., the xDSL enabled transmission path), and the second service is an information service, in this case Internet access.

Deployment of Wireline Serv. Offering Advanced Telecomm. Capability, 13 F.C.C.R. 24,011, ¶ 36 (1998) (memorandum opinion and order).

⁵ *AT&T Co. v. City of Portland*, 216 F.3d 871, 876-80 (9th Cir. 2000) (“[T]he transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act.”). *See also MediaOne Group, Inc. v. County of Henrico*, 57 F.3d 356, 363-65 (4th Cir. 2001) (“[A]lthough MediaOne maintains a ‘cable system,’ its facilities can be properly classified as telecommunications facilities when they provide a transmission path to the Internet.”).

Not until after the Ninth Circuit had spoken did the FCC take its sharp deregulatory turn in the 2002 Cable Modem Order.⁶ It removed the non-discriminatory access requirement, principally because it concluded that high-speed Internet access via cable modem intrinsically combined transmission with information services.

In the past, the link between the user's home and an ISP (separate from the telephone company) had been a regular telephone call. That link was clearly telecommunications, and clearly burdened with a non-discrimination obligation. But the FCC reasoned in 2002 that when the user requested high-speed online access using a cable modem, that last-mile link was inextricably intertwined with the Internet access link. The two were experienced by the user as a single event of connection. If the cable company had offered "last-mile" connectivity (between, again, a user's home and an Internet connection point) separately, then that service as a separate product would have been categorized as "telecommunications." But the combination of last-mile and Internet connection was seen by the Commission as an information service, an "integrated" offering, because the definition of "telecommunications service" requires the service be "offer[ed] . . . for a fee directly to the public," and the pure transmission component was not offered separately.

The Commission reasoned that DSL had been treated differently for categorization purposes because telephone companies had always offered transmission services separately -- because they were required to. The Commission also took the view -- as it had in the 1998 Stevens Report -- that Internet access should be considered an "information service" because it involved functions beyond mere transport, and those functions trumped the telecommunications component of Internet access.⁷

To simplify the complicated reasoning in the 2002 Cable Modem order: the FCC declared that because telephone companies had been required to offer pure transmission historically, they were in fact telecommunications providers even when what they were selling was DSL access to the Internet. But because cable operators had never been subject to the pure transmission requirement, they could avoid regulation by continuing to refuse to provide pure transmission services -- effectively deregulating themselves through vertical integration. At the same time, the FCC recognized that the Ninth Circuit's decision meant that the Commission might have to forebear from Title II enforcement in the region covered by the Ninth

⁶ *Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798 (2002) (Cable Modem Order), *aff'd sub. nom. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

⁷ Federal-State Joint Bd. on Universal Serv., , Report to Cong. 13 F.C.C.R. 11,501, ¶¶ 73-79, at 11,536-39 (1998) ("Stevens Report").

Circuit because cable modem service might be considered a telecommunications service there.⁸

The Ninth Circuit, in turn, followed its own precedent and reversed the FCC's Cable Modem Order in 2003.⁹ In the 2005 *Brand X* decision, the Supreme Court elected to defer to the FCC's 2002 interpretation of the Telecommunications Act and its decision as to the regulatory status of cable modem service under the Act.¹⁰ The Court acknowledged the Ninth Circuit's previous holdings, but found that they did not foreclose the FCC from making a new regulatory classification decision that the Court would not disturb. Justice Scalia's dissent was scathing: "This is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions;" and the Commission chose to achieve its objectives "through an implausible reading of the statute, and has thus exceeded the authority given it by Congress."¹¹

During this same period, the Commission eliminated regulations requiring incumbent phone companies to share their DSL high-speed Internet access connections with competitors.¹² Then-Chairman Powell vehemently objected, saying that "line sharing is the Commission's most successful broadband policy and it has

⁸ Cable Modem Order, *supra* note 6, ¶ 95 ("To the extent that cable modem service may be subject to telecommunications service classification [by *City of Portland*], we seek comment on whether we should forbear from applying each provision of Title II or common carrier regulation. . . . Given that cable modem service will be treated as an information service in most of the country, we tentatively conclude that the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent cable modem service is classified as a telecommunications service.")

⁹ *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1127 (9th Cir. 2003), *rev'd sub. nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). Judge Thomas's concurrence in the 2003 Ninth Circuit opinion characterizes the Ninth Circuit's view in *City of Portland* as "Congress meant what it said in defining 'telecommunications'": "We did not discern any ambiguity in the statutory meaning for the agency to interpret; thus, *Chevron* deference would have been inappropriate even if the agency had interpreted the statute prior to *City of Portland*."

¹⁰ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) ("Brand X").

¹¹ *Brand X*, 545 U.S. at 1013 (2005) (Scalia, J., dissenting).

¹² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338), *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (CC Docket No.96-98), and *Deployment of Wireline Services Offering Advanced Telecommunications Capability* (CC Docket No. 98-147), Aug. 21, 2003.

generated clear and measurable benefits for consumers. It has unquestionably given birth to important broadband suppliers. This additional facilities-based competition has directly contributed to lower prices for new broadband services. . . . Companies such as Covad presented specific, credible arguments that competitors are impaired without line sharing.”¹³

This history highlights two important points. *First*, from 2000 (when the Ninth Circuit decided *City of Portland*) to 2005 (when the Supreme Court decided *Brand X*), retail cable modem service (and, under the Ninth Circuit's reasoning, all other retail high-speed Internet access service) was arguably legally classified as a telecommunications service -- unambiguously so between the 2003 Ninth Circuit opinion and the 2005 Supreme Court decision. *Second*, this history underscores the ambiguity of the statute and the permissibility of either classification. The Supreme Court reversed the Ninth Circuit not because its construction was unreasonable but because it believed that *Chevron* and its progeny require deference to an agency interpretation of a statute despite prior judicial rulings interpreting the same statute in a different way.

Now, in 2010, the fundamentals of the telecommunications marketplace have been completely upended. The gatekeeper providers of transmission -- the carriers -- are no longer separate entities providing basic, regulated services. We no longer have a robust marketplace of independent ISPs. Other than land-line phones (which Americans are abandoning) there is no basic transport of communications available to everyone. The requirement to provide non-discriminatory access to the carriers' general-purpose communications networks has been eliminated.

The Commission took its deregulatory steps in 2002-2005 based on three assumptions. *First*, it assumed that inter-platform competition between cable and telephone-based providers of high-speed Internet access would restrain gatekeeper control by either group of actors. This assumption may not have been correct, and is even more contestable today. *Second*, it assumed that high-speed Internet access services were perceived by consumers as integrating transport and other services, such as web hosting, email, and DNS services. This assumption may also not have been correct, and is also even more contestable today. *Third*, it assumed that it retained broad power to regulate high-speed Internet access under Title I “ancillary jurisdiction.” It is this assumption that the DC Circuit's recent *Comcast* opinion has sharply undermined.

Now the Commission faces a choice. It can abandon the idea of supporting high-speed Internet access with USF and requiring providers of high-speed Internet access to disclose detailed information about their costs and speeds. It can move ahead under Title I, attempting to tie its steps more closely to other portions of the Communications Act and facing a battle over every proceeding it launches.

¹³ *Id.*, Separate Statement of Chairman Michael K. Powell, approving in part and dissenting in part.

According to your General Counsel, moving ahead under Title I may undermine the FCC's ability to follow through on its recent "recommendations aimed at accelerating broadband access and adoption in rural America; connecting low-income Americans, Native American communities, and Americans with disabilities; supporting robust use of broadband by small businesses to drive productivity, growth and ongoing innovation; lowering barriers that hinder broadband deployment; strengthening public safety communications; cybersecurity; consumer protection, including transparency and disclosure; and consumer privacy."¹⁴

As part of the 1998 Stevens Report, the Commission described the tradeoffs to which ISPs would be subject if their services were classified under Title I:

Under our framework, Internet service providers are not treated as carriers for purposes of interstate access charges, interconnection rights under section 251, and universal service contribution requirements. This treatment admittedly provides some benefits to such companies, but it also imposes limitations. Internet service providers are not entitled under section 251 to purchase unbundled network elements or discounted wholesale services from incumbent LECs, they are not entitled to federal universal service support for serving high-cost and rural areas, and they are not entitled to reciprocal compensation for terminating local telecommunications traffic.¹⁵

If the arguments urged by the carriers are correct, and if high-speed Internet access providers fall within the class of "ISPs" referred to in the Stevens Report, then the Commission has already concluded that it lacks authority under Title I to provide them with USF funds. Nor would these "ISPs" be permitted to demand special access under Section 251. To the extent these "ISPs" rely on special access and special access rates, other carriers could refuse to provide them access. Similarly, despite the *Madison River* settlement¹⁶ (which was, after all, a settlement and not a vote of the full Commission or a rule binding on other parties), ISPs may refuse interconnection and need not pay reciprocal compensation. Finally, there would be no jurisdictional grounds on which the Commission could preempt state authority over high-speed Internet access service providers.

This parade of limitations raises the question of whether the Stevens Report characterization actually applies to these vertically-integrated actors. The Report strongly suggests otherwise:

¹⁴ Posting of Austin Schlick to Blogband: the Official Blog of the National Broadband Plan, <http://blog.broadband.gov/> (Apr. 7, 2010).

¹⁵ Stevens Report, *supra* note 7.

¹⁶ See *Madison River Communications, LLC and Affiliated Companies*, File No. EB-05-IH-0110, Order, 20 F.C.C.R. 4295 (2005).

In those cases where an Internet service provider owns transmission facilities, and engages in data transport over those facilities in order to provide an information service, we do not currently require it to contribute to universal service mechanisms. *We believe it is appropriate to reexamine that result, as one could argue in such a case that the Internet service provider is furnishing raw transmission capacity to itself.* We recognize, however, that there are significant operational difficulties associated with determining the amount of such an Internet service provider's revenues to be assessed for universal service purposes and with enforcing such requirements. We intend to consider these issues in an upcoming proceeding.¹⁷

This characterization is very different from the description of cable modem service in the 2002 Cable Modem Order. In that Order, the salient characteristic of cable modem services (and the "intermodal competition" that they would offer) was the integration of transmission and facility.¹⁸

In other words, in the 1998 Stevens Report the Commission remained undecided about how to characterize facilities-based providers offering high-speed Internet access via their own transmission facilities, but appeared to be leaning towards classifying such providers as offering telecommunications to themselves. If, nonetheless, the Commission now accepts the Stevens Report as binding, it must accept its other findings as binding as well, and conclude that it lacks authority to provide high speed Internet access providers with USF funds or protect their right to interconnection.

Alternatively, the Commission can reclassify the basic transport portion of high-speed Internet access as a Title II service and appropriately regulate the basic transmissions service on which this country's economy increasingly depends. There will be a single battle, but it is one that the Commission should win if it develops an adequate factual record about consumers' changed perception of Internet access services. Eight years ago, the Commission was speculating about what high-speed Internet access would become. Now that we know how the market has developed, the Commission is not legally bound to ignore the facts.

Reclassification of the transmission portion of high-speed Internet access as a Title II service would not implicate "the Internet" - the content and applications that run on these basic transport services. The carriers' assertions that the Commission would be regulating "the Internet" are deliberately misleading. The

¹⁷ Stevens Report, *supra* note 7.

¹⁸ See Cable Modem Order, *supra* note 6, ¶¶ 38-44 ("As currently provisioned, cable modem service is a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering.").

Commission could simply state that transport services should be subject to non-discrimination and interconnection requirements - as basic communications transport networks have been for a hundred years. Many regulators in other countries have taken this step without difficulty for high-speed Internet access, and the Commission itself successfully engaged in such an exercise in the Computer Inquiries.¹⁹ Indeed, the Computer Inquiries - begun during the Nixon administration - were arguably some of the Commission's greatest successes.

Nor would reclassification require tariffing of these services. The Commission has already several times refrained from requiring such tariffing: High-speed Internet access provided by rural phone companies, middle-mile access, and enterprise access is currently subject to Title II of the Act and its nondiscriminatory safeguards—subject to forbearance from certain economic regulation. By adopting a framework modeled on the Commission's basic/enhanced distinction from Computer II, and establishing a forbearance mandate, Congress in 1996 clearly envisioned that the Commission would have the freedom to proceed in this manner.

Sincerely,

/s/

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¹⁹ Robert Cannon, *The Legacy of the FCC's Computer Inquiries*, 55 FCLJ 167 (2003).