Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Framework for Broadband Internet Service **GN Docket No. 10-127**
FCC Docket No. 10-114

Reply Comments of the Undersigned Members of the INTERNET FREEDOM COALITION

Introduction

The Commission is being asked by Free Press and other organizations to pursue a radical course of action – reclassifying information services as telecommunications services in order to regulate the Internet for the first time. We write to urge the Commission to keep the Internet free of new government regulation and taxation and to refrain from rushing into such a potentially disastrous course of action.

Analysts are only beginning to grasp the extent of the disruptive and destructive consequences of regulating the Internet under Title II of the Communications Act, and the Commission is in no position to predict the outcome, much less assure Americans it will be positive. Americans have heard political leaders admit that we will not know the full extent or nature of massive health care and financial services regulations until after the underlying legislation has been passed. Now, Americans are facing the imposition of an even lesser-understood regulatory regime over the Internet without the benefit of any legislative process whatsoever.

The Commission is being urged to employ Title II regulations solely for the purpose of asserting new and formidable government power over the Internet. Free Press writes:

> "In response to the dilemma created by Comcast, the FCC can and should classify broadband Internet connectivity as a telecommunications service under Title II of the Communications Act." (p. 3)

It is highly doubtful that the Commission legally "can" follow this course of action, and a certainty that it "should" not do so.

Many legal scholars doubt that the Commission's unilateral assertion of Title II authority over the Internet will survive judicial scrutiny, in that Congress, the Commission, and the Courts have all agreed that the Internet is properly an information service, not a telecommunications service. Since the Commission seeks such a significant reversal of settled policy solely to sidestep the Court's decision in *Comcast vs. FCC* and manufacture a new authority to regulate the Internet,

the Commission's decision to reclassify information services as telecommunications services is likely be found arbitrary and capricious by the Courts.

Reclassifying Information Services as Telecommunications Services Is a Radical Increase of Federal Regulatory Authority Over the Internet that Will Harm Both Consumers and Producers.

Despite rhetorical attempts to dress up Title II regulation of the Internet as a moderate "Third Way," reclassification represents a substantial increase of Federal regulatory authority over the Internet. Far from anything resembling a fact-based reconsideration of the role of information services, advocates of reclassification have made it abundantly clear that reclassification is merely the means to an end. Their ultimate goal, of course, is to establish the Commission's regulatory authority over the Internet.

Free Press makes this plain when it argues:

> "After *Comcast* [*vs. FCC*], the Commission's authority to make rules for broadband has been severely curtailed." (p. 3)

Free Press's, and the Commission's own conceit of "forbearance" from using the full extent of powers granted under Title II presents the most compelling evidence that the potential reach of a Title II regulatory regime into the pricing and management of Internet services is nearly limitless.

Free Press offers just the beginning of petitions to the Commission as to where it should *not* forbear – that is, where the Commission should use this massive new authority:

> "Broadly speaking, Title II of the Communications Act lays out several key obligations that Congress has deemed critical for two-way communications networks: nondiscrimination, affordable access, interconnection, competition, and consumer protection. In moving to a Title-II framework, the Commission must not forbear the sections of the Act that promote these basic objectives. Thus, at a minimum, the Commission must apply section 201, 202, 208, 222, 251(a), 255, and 256 of the Act to all broadband service providers. To facilitate interconnection and competition, it should also retain section 214's oversight over service discontinuances and preserve its ability to apply the unbundling provisions of section 251(b) and (c)." (p. 3)

Free Press asks the Commission to go so far as to force broadband providers to "unbundle" their services for resale.

> "Although applicable only to local exchange carriers, sections 251(b) and 251(c) provide the most direct sources of competition policy authority to the Commission: the authority to require nondiscriminatory access to unbundled network elements and competitive reselling." (p. 73)

This would necessarily lead to the Commission setting regulated, below-market wholesale prices for broadband, thereby placing the Commission firmly into the business of regulating Internet pricing.

Regulating prices is not, by any stretch of the imagination, a "light touch," or "Third Way." It is a full-on regulatory takeover of an industry.

As to Title II's negative effect on investment, Free Press comments:

> "Recent 'studies' that purport to demonstrate Title II's harm to investment amount to nothing more than blatant propaganda." (p. 99)

Free Press opens this argument with an *ad hominem* attack:

> "Several recent papers from coin-operated think tanks deliberately confuse and obfuscate the policy debate around Title-II classification." (p. 99)

In fact, the consensus that has developed regarding the economics of government regulation – begun in the 1960s with Nobel Laureate George J. Stigler and advanced over decades – was based on an empirical examination of regulation in a deliberate attempt to break from the mere theoretical assumption that regulation is beneficial.

The consensus position of economists studying regulation ever since has been that regulation often results in industry "capture" of the regulatory process, as larger firms seek to benefit from regulatory proceedings by increasing their market power and preventing the entry of competitors. Decades of study have found that consumers rarely benefit from regulation. The policy implications of this consensus became clearer in practice beginning with President Carter's deregulation of the airline and trucking industries. From the start of the 20th century regulators sought to improve upon market behavior. However, by the late 1970s, academic research and public policy practitioners demonstrated that competitive markets served consumers better than regulated markets. Since that time, economic regulation has waned as competition has been introduced into such industries as airlines, trucking, electricity, telecommunications and railroads. In all cases, competition provided lower prices and quality that equaled—if not improved upon—the existing industry standards. In one study, deregulation was found to provide consumers with benefits of at least $50 billion annually.[1]

Free Press's expressions of contempt for the opinions of free-market economists should not guide the Commission's duty to heed generally accepted economic theory, which overwhelmingly suggests that government regulation may impose significant welfare losses on consumers nor is it even intended to advance competitive market forces that would benefit consumers. Since the 1970s, economists have been reshaping their views of economic regulation.[2] Many previously regulated industries—airlines, trucking, railroads, natural gas, and

[1] Robert Crandall and Jerry Ellig, *Economic Deregulation and Customer Choice: Lessons for the Electric Industry*, Center for Market Processes, Fairfax, Va.: 1996.

[2] Economic regulation refers to price and entry restrictions established by public utility commissions. In this sense, economic regulation is distinct from health and safety regulation, which has become more prominent in recent years.

to some extent telecommunications—have undergone the transformation to competitive markets. The general view among economists has been that economic regulation has served consumers poorly and the potential welfare gains of deregulation can be significant.[3] As the chart below indicates, consumers enjoyed significant price reductions through the elimination of inefficient regulations.

Real Price Reductions in the Years Following Deregulation			
	2 Years	**5 Years**	**10 Years**
Airlines	13% (1977-79)	12% (1977-82)	29% (1977-87)
Railroads	4% (1980-82)	20% (1980-85)	44% (1980-90)
Standard Telephones	14% (1984-86)	33% (1984-89)	65% (1984-94)
Long Distance	5%-16% (1984-86)	23%-41% (1984-89)	40%-47% (1984-94)
Wireless Telephone	17% annually		N.A.
Source: Taken from Jerry Ellig, "Economic Deregulation and Re-regulation: Benefits and Threats," Citizens for a Sound Economy Foundation, Washington, D.C.: March 20, 2001			

Investments are made or avoided based on their potential risks and rewards. To the extent investors worry that future government actions will diminish the value of their investment, their capital will move freely and rapidly into other sectors where risks are better understood. A winning business strategy is less likely to be disrupted by the whims of a distant bureaucracy in Washington, DC.

Free Press argues that Title II regulations will bring "certainty" to Internet investors when it says a Title II:

> "…approach will provide certainty to both kinds of service providers. Like services will be treated alike, and the FCC will eliminate the need to shoehorn regulations imposed on our communications infrastructure into a framework designed for websites and applications. An approach that recognizes the distinct markets, technologies, and purposes of these services should provide greater clarity for all parties." (p. 85)

As for this, and the Commission's own argument that reclassification somehow brings regulatory "certainty" to the marketplace, the only certainty is that Title II opens the Internet to a new and troubling future of government control. Title II is a massively powerful regulatory regime

[3]See Robert Crandall and Jerry Ellig, "Economic Deregulation and Customer Choice: Lessons for the Electricity Industry," Center for Market Processes, George Mason University (1997) and Clifford Winston, "Economic Deregulation: Days of Reckoning for Microeconomists," *Journal of Economic Literature*, vol. XXXI (September 1993), pp.1263-1289, and Jerry Ellig, "Economic Deregulation and Re-regulation: Benefits and Threats," Citizens for a Sound Economy Foundation, Washington, D.C.: March 20, 2001.

intended to deal with government-granted monopolies, not a competitive industry. And there is by no means "certainty" in regulated rates. In the real world, results have been far from perfect. There is no scientific way to establish a "fair" rate of return. Politics, not economics, tends to guide the determination of the rate of return. As economist Alfred Kahn put it, "The process has inevitably reflected a complex mixture of political and economic considerations. Governmental price fixing is an act of political economy."[4]

The Commission's own plan to "forebear" specific provisions of Title II is entirely dependent upon the disposition and political opinions of future Commissioners. If, by its actions, this Commission proves that a mere three votes can so suddenly and radically reclassify the regulatory status of an entire industry, why would rational investors ever risk tens of billions of dollars on the dubious premise that future Commissioners would not indulge in precisely the same behavior?

The Commission's Misguided and Hurried Attempt to Single Out a Few Networks for Regulation Will Almost Certainly Lead to the Regulation of Other Networks

In an attempt to dampen fears that Title II regulations can be fully understood, and even controlled, at the onset, Free Press claims:

> "Arguments that classifying broadband transmission as a telecommunications service would lead to greater regulation of all information services hold no water." (p. 86)

As the term "cyberspace" is meant to convey, the Internet is a vast "network of networks," with complex systematic applications of hardware and software running throughout. Therefore, the Commission's attempt to single out a few networks or a few components of the Internet for regulation is neither a sound intellectual nor a sound policy endeavor. There are many, many necessary components required to create the experience most Americans have come to expect from "the Internet." Therefore, any of those many components – and any business offering those components – has the potential to degrade that experience profoundly. If the Commission's rationale for regulating broadband providers truly is to ensure that no necessary component of the Internet degrades any users' Internet experience by refusing to treat all traffic or content equally, it follows that the Commission is at the threshold of a massive intrusion into nearly any network offering widely used services over the Internet.

If the Commission Insists Upon Misclassifying Internet Service as a "Telecommunications Service," There is a Significant Danger that the United Nations' International Telecommunications Union Could Claim Its Own Regulatory Authority Over American Networks.

In the rush to exercise sweeping new Federal powers over the Internet, proponents of Title II regulation have dismissed and even derided those calling for a more thorough examination of the

[4] Alfred Kahn, *The Economics of Regulation, Vol. 1*, Cambridge, The MIT Press (1995), p. 42.

implications of such regulations. Such a radical reversal of FCC policy will undoubtedly have unintended consequences, which no amount of good intentions will undo.

In a striking elucidation of what the unintended consequences of reclassifying broadband as a Title II telecommunications service might look like, Commissioner Robert M. McDowell recently wrote:

> "The FCC proposed in June to regulate broadband Internet access services using laws written for monopoly phone companies. Despite a four-decade bipartisan and international consensus to insulate computer-oriented communications from phone regulation, the FCC is headed toward classifying these complex 21st century technologies as 'telecommunications services.' This could inadvertently trigger ITU [International Telecommunications Union] and, ultimately, U.N. jurisdiction over parts of the Internet. Unlike at the U.N. Security Council, the U.S. has no veto power at the ITU and may not be able to stop it.
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> "This scenario is by no means far-fetched. At two meetings of the U.N.'s World Summit on the Information Society in 2003 and 2005, the U.S. found itself in the lonely position of fending off efforts by other governments to exert U.N. or other multilateral control over the Internet. ITU member states have attempted to expand their control over Internet governance, Web address registries and cybersecurity. These nations will likely be encouraged by talk of more U.S. Web regulation and are not likely to be dissuaded by the FCC promising to govern with a 'light touch.'
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> "This chain reaction of international intervention could come just as Secretary of State Hillary Clinton has been promoting Internet freedom as a means of spurring the unhindered flow of information across the globe. Like free trade, free-flowing information promotes freedom itself. Conversely, countries that regulate the Internet more heavily tend to be less free."
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> Wall Street Journal, July 22, 2010, "The U.N. Threat to Internet Freedom"
> http://online.wsj.com/article/SB10001424052748704684604575381571670766774.html

Even if Americans were content to trust the FCC to forbear from the full implications of Title II regulation, would they be content to turn U.S. sovereignty on questions of Internet provision and interconnectivity over to an international body?

Concerns about protecting the global Internet from international regulation were a major consideration of the Commission when it originally addressed the classification issue in 1998, and the Commission wisely chose a hands-off policy while the State Department consistently argued against regulation abroad.

Where telecommunications begin and end on a multiplicity of networks, what courts may eventually rule as to how network components and users are defined, and where future governments may choose to exercise their temporary powers to favor one sector over another are all vast unknowns under a Title II regulatory regime, and the consequences of those unknowns

are significant. Alternatively, allowing the current, well-functioning Internet to continue as it is forecloses those unintended consequences, and harms no one.

There is Absolutely No Reason to Rush into Title II Regulation of the Internet.

The Commission must take heed of the multiplicity of voices urging it to cease and desist from this radical departure from America's clearly stated policy of not impeding development of the Internet with predatory taxes or regulations.

The Federal Courts have spoken in *Comcast vs. FCC*, telling the Commission it has no statutory authority to regulate broadband providers. The Commission has received letters signed by a majority of the Members of the House of Representatives urging it to halt its effort to reclassify broadband as a telecommunications service under Title II of the Communications Act. And, according to a widely published Rasmussen Reports poll released in April, 53 percent of Americans oppose the FCC regulating the Internet, while only 27 percent approve.

> Rasmussen Reports: 53% Oppose FCC Regulation of the Internet" April 9, 2010 http://www.rasmussenreports.com/public_content/business/general_business/april_2010/53_oppose_fcc_regulation_of_the_internet

The Commission should be exceedingly cautious when taking action so clearly opposed by the will of the people and the separate branches of government.

Moreover, rushing into such a precipitous and radical policy reversal is utterly unjustified by any visible market failure or pattern of abuses reported to the Commission. In applying Title II regulations to the Internet, the Commission would be regulating against hypothetical future actions – a sort of "prior restraint" theory of regulation.

Regulating against hypothetical future events by definition renders the Commission unable to clearly gauge the harm any future misbehavior may actually cause, and thereby unable to gauge the merits and wisdom of how and when to restrain it.

Free Press is one of the principal proponents of ignoring the will of Congress and rushing unilaterally into Title II regulations:

> "Various parties have suggested that Congress could step in and restore the Commission's authority over broadband networks. While Congress has begun discussions regarding comprehensive revisions to the Communications Act, the legislative process necessarily operates more slowly than the administrative process. The last time Congress updated the Communications Act, it took at least five years. Because we cannot afford to wait that long to pursue the nation's broadband goals, congressional efforts cannot and should not supplant Commission action." (p. 5)

In hearing such arguments as "because we cannot afford to wait that long," one is compelled to ask Free Press: Who do you mean by "we?" Congress can wait that long. The American people

are in no rush to regulate—they like the unregulated Internet. Precisely who is it that "cannot afford to wait that long?"

Those who argue that the Commission must rush to regulate merely because Congressional policymaking will take more time ignore both the proper role of the legislative branch of government and the proper role of deliberation in a free, democratic society. The Commission must consider the fact that the Congress may have refrained from regulating the Internet because they see no compelling reason to do so.

When Free Press argues that "congressional efforts cannot and should not supplant Commission action," where would this line of argument for unilateral Administrative action ever end? Was this unauthorized presumption of regulatory power not *precisely* what the courts ruled against in *Comcast vs. FCC*?

We are compelled to ask: What, exactly, is the rush? What, exactly, is the harm being done by a broadband market free of Title II regulation, and to whom is that harm being done? And what, exactly, is the harm of allowing Congress to debate these issues before considering what, if anything, ought to be done?

The Commission Should Consider Well the Implications of Radical, Unilateral Action.

As the Commission has been warned repeatedly by both Congress and the Courts, regulating information services is beyond its authority and is a question rightly put to the Congress.

If the Commission ignores these clear warnings and claims for itself a legislative role over such wide swaths of the American economy, it will set us on a road down which either the Commission will be embarrassed once again before the Courts, or face the judgment of Congress, which may well strip the Commission substantially of its powers, or argue so bitterly over the role of the Commission as to render it a radically politicized body for the foreseeable future. The Commission's role as an expert, independent agency acting with bipartisan approval would in all likelihood come to an end. If it continues down this road, such will be its legacy. For if an unelected body assumes for itself the powers normally afforded to democratic institutions, it is perfectly natural and predictable that the democratic institutions will respond by greatly diminishing its powers.

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