BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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

REPLY COMMENTS OF THE BENTON FOUNDATION

August 12, 2010

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INTRODUCTION

The Benton Foundation respectfully submits these reply comments in response to the Federal Communications Commission's ("Commission") *Notice of Inquiry*[1] in the above-captioned docket. The Benton Foundation works to ensure that media and telecommunications serve the public interest and enhance our democracy. Benton pursues this mission by seeking policy solutions that support the values of access, diversity and equity, and by demonstrating the value of media and telecommunications for improving the quality of life for all. Benton is also a member of the Commission's Consumer Advisory Committee and through which Benton is a member of the broadband subcommittee. Benton has long advocated for the ubiquitous telecommunications access for all citizens.

The *Notice of Inquiry* seeks comment on the Third Way, a new legal framework for broadband that strikes a compromise between Title I ancillary authority and full Title II authority under the Communications Act. The proceeding directly addresses the recent court decision in *Comcast v. FCC* that called into question the Commission's legal rationale and ability to enforce a significant number of its Internet-related rules. As a consequence of the far-reaching *Comcast* decision, the Commission's ability to implement the National Broadband Plan and Universal Service reform now hangs in the balance.

As other comments in the docket have noted, it is imperative that the Commission act quickly to clarify its authority over broadband connectivity. To this end, Benton believes the Third Way is an appropriate response to overcome a legal setback in *Comcast v. FCC*[2] and establish a solid legal foundation for the effective protection of broadband consumers and the timely implementation of the National Broadband Plan.

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[1] In the Matter of Framework for Broadband Internet Service, GN Docket No. 10-127, *Notice of Inquiry*, FCC 10-114 (rel. June 17, 2010) ("*Notice of Inquiry*").
[2] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) ("*Comcast*").

BACKGROUND

The Third Way approach is rooted in the Commission's *Computer Inquiries*, which distinguished between Internet service, applications, and content for the purposes of drafting regulatory policy. Beginning in 1971 with the First Computer Inquiry, the Commission drew a line between data transmission services, the provision of which would be regulated under common carrier rules, and data processing services, offered by smaller providers.[3]

In the Second Computer Inquiry of 1980, the Commission refined this distinction by creating two categories of services provided by Internet service providers—basic and enhanced.[4] Basic services refer to the fundamental transport services, the sending and receiving of data, which is analogous to the voice service provided by telephone companies. In contrast, enhanced services are the higher-level data processing services, which today would include access to e-mail, web hosting, newsgroups, and a home page portal made available by Internet providers.

The Telecommunications Act of 1996 drew analogous distinctions between telecommunications services (i.e., basic services) and information services (i.e., enhanced services) provided by Internet access providers, and this remains the law today. Under the Communications Act, an "information service" is defined as,

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[5]

The alternative classification, "telecommunications service," is defined as "the offering of a telecommunications for a fee directly to the public, or to such classes of users as to be effectively

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[3] *Notice of Inquiry*, at 5 (citing *Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm. Servs.*, Docket No. 16979, Notice of Inquiry, 7 F.C.C. 2d 11 (1966)).
[4] *Amendment of Section 64.792 of the Comm'n's Rules & Regulations* ("*Second Computer Inquiry*"), 77 F.C.C.2d 384, ¶¶ 93, 97-98 (1980) (final decision).
[5] 47 U.S.C. § 153(20).

available directly to the public, regardless of the facilities used,"[6] where "telecommunications" is "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."[7] In practice, telecommunications services are subject to the provisions of Title II, while the Commission may exercise only Title I ancillary authority over information services.

The development of Digital Subscriber Line (DSL) access exemplified the information-telecommunications dichotomy. Telephone companies were regulated as common carriers under Title II for providing the data transmission service, while the Internet service providers (ISPs) used the telephone lines to provide broadband Internet access as an information service separate from basic transmission. Cable modem service, for which the telecommunications service and the information service are offered together by a single provider, seemingly required a different solution.

As broadband Internet access provided by cable modem grew rapidly in adoption circa 2000, pressures mounted on the Commission to establish its approach toward overseeing the new communications medium. The Ninth Circuit's 2000 decision in *AT&T v. City of Portland* pressed the issue by holding that cable modem providers offered both telecommunications and information services, an approach consistent with the historical *Computer Inquiries*.[8]

However, the Commission reacted to the Ninth Circuit decision by defining cable modem service as an information service in its 2002 *Cable Modem Order*.[9] The Commission, though acknowledging the existence of a transmission component to cable modem service, decided that

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[6] *Id.* § 153(46).
[7] *Id.* § 153(43).
[8] *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).
[9] *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, ¶ 7 (2002) ("*Cable Modem Order*").

it was functionally integrated with the more prominent information service.[10] As NASUCA wrote, "The Commission completely ignored the fact that the Internet, in 2002, had grown exponentially for over ten years **based on a common carrier regime**. The *Cable Modem Order* was a break with the then-existing *status quo*…"[11]

This move was significant because it deregulated cable modem providers, leaving the Commission with only Title I ancillary jurisdiction over broadband provided by cable. In a post-*Comcast* world, this means the Commission does not have direct authority over broadband, and every action it takes toward broadband must be tied to an express statutory mandate, the existence of which is not always clear.

The Commission's recent Third Way proposal would bring the telecommunications service component of broadband back under Title II, as it had been classified prior to the 2002 *Cable Modem Order*. The computing functionality, analogous to enhanced Internet services, would continue to be classified as a largely unregulated information service under Title I. If the definition of the transmission component were to resemble that of "basic service" from the 1980 Second Computer Inquiry and "Internet connectivity" from the 2002 *Cable Modem Order*, then the transmission component of broadband would include the services directly related to data transmission, including domain name service (DNS) resolution, Internet Protocol (IP) assignment, network management practices, among other functions. As a result, nondiscrimination and consumer protection principles would be tied to the transmission component.

[10] *Cable Modem Order* ¶ 38.
[11] Comments of the National Association of State Utility Consumer Advocates (filed Jul. 15, 2010) ("*NASUCA comments*"), at 14.

Furthermore, because the Third Way calls for the application of just six provisions from Title II and applies only to broadband connectivity, the approach would simply restore the Commission's most basic oversight role over the vital communications medium.

DISCUSSION

I. Title I ancillary authority is no longer an appropriate or effective regulatory solution for broadband Internet service.

The *Notice of Inquiry* is an important step forward in the Commission's effort to refine its approach to broadband Internet access. The recent D.C. Circuit decision in *Comcast v. FCC* cast doubt on the Commission's legal authority to prevent broadband providers from blocking certain types of Internet traffic. In light of *Comcast*, it seems that the Commission's 2002 decision to reclassify broadband as an integrated information service over which it could only exercise ancillary authority left the Commission without the ability to enforce nondiscrimination principles. As a result, key policies of the National Broadband Plan hang in the balance.

If the Commission continues to rely on its ancillary jurisdiction over broadband, it will likely face multiple legal battles as it proceeds in implementing the National Broadband Plan. As Media Access Project notes in its comments, continuing to rely on Title I opens the Commission to legal challenges that will delay indefinitely the deployment of affordable broadband service and other goals of the National Broadband Plan.[12]

A. Broadband consumers do not view their Internet access service as a wholly integrated information service.

In 2002, the Commission classified broadband Internet access service as a Title I information service, based on a finding that the two components of broadband—the basic transmission of data and the enhanced information services such as e-mail—exist as a

[12] *See* Comments of Media Access Project, et al. (filed Jul. 15, 2010) ("*Media Access Project comments*").

functionally-integrated information service. However, through reclassification, the Commission relinquished its direct authority over broadband, opting instead to maintain only limited, ancillary authority through the so-called "necessary and proper clause" of Title I.

The Third Way calls for a reclassification of broadband Internet access service that would differentiate between the basic telecommunications service and the information services it delivers. By requiring the Commission to forbear or refrain from enforcing all but six sections of Title II, the proposal is narrowly tailored to ensure protection for broadband consumers and encourage broadband investment.

The move toward a two-pronged approach to broadband reflects a shift in the way consumers use and understand broadband Internet access. In the past, consumers often subscribed to an Internet provider to take advantage of its e-mail, newsgroup, and web hosting services considered integral to Internet connectivity. Today, consumers are more likely to subscribe to a broadband provider for basic Internet access and to rely on independent web services for free e-mail accounts and web and blog hosting. "In 2010, it is plainly obvious that the various supposedly integrated service offerings of broadband providers (such as e-mail, data storage, caching and DNS) are all functionally separate from the offer of data transmission – that is, successful data transmission does not depend on the network operator providing any of these services."[13] As evidence, Public Knowledge offered in its comments a sampling of the online advertisements from leading broadband Internet providers, which clearly show that fast, high-capacity data transmission is the main selling point and any additional services are secondary to broadband access.[14]

[13] Comments of Free Press (filed Jul. 15, 2010) ("*Free Press comments*"), at 53.
[14] *See* Comments of Public Knowledge (filed Jul. 15, 2010) ("*Public Knowledge comments*"), Appendix A.

It no longer makes sense to assume that consumers view broadband connectivity and the additional services delivered by the provider as functionally integrated and inseparable.[15] As Media Access Project illustrates, "Just as the Commission is not required to define an entire 'triple-play' bundle (combining voice, video, and data offerings) as one type of service within the regulatory framework of the Act, it does not need to define broadband Internet connectivity as an 'information service' simply because providers may choose also to offer e-mail and news gathering services."[16]

B. *Comcast v. FCC* has undermined the Commission's ability to rely on Title I.

Since 2002, the Commission has exercised ancillary authority over broadband through section 4(i), a provision of the Communications Act which states, "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its function."[17] However, the *Comcast* decision undermined the Commission's ability to rely on this authority to enforce basic consumer protection principles and other policies related to broadband.

In 2008, the Commission found Comcast had violated the nondiscrimination policies of the Communication Act by secretly degrading and even blocking some of its customers' lawful Internet traffic. In *Comcast*, the Commission claimed that its ancillary authority, tied to its broad policy goals defined in the Communications Act and specific Internet policy goals included in an update of the law, was sufficient to enforce nondiscrimination rules against Comcast. Yet the D.C. Circuit held this past April in *Comcast v. FCC* that the Commission relied on the wrong legal authority to enforce nondiscrimination rules.

[15] *See Media Access Project comments*, at 16.
[16] *Media Access Project comments*, at 18.
[17] 47 U.S.C. § 154(i).

The *Comcast* court held that the cited provisions were mere "statements of policy," rather than direct statutory mandates.[18] According to the opinion, policy statements may "illuminate" the scope of a statutory delegation of authority in a specific context, but "it is Titles II, III, and VI that do the delegating."[19] The Commission's ancillary authority to enforce the policy goals cited in *Comcast* would have had to have been tied to an express delegation of regulatory authority under Title II which covers common carriers like traditional telephone service providers.

The D.C. Circuit found in April that this ancillary jurisdiction must be tied to a direct statutory mandate, which did not exist for the nondiscrimination rules the Commission had attempted to enforce against Comcast. By ruling that the statute did not mandate the Commission to enforce these policies under its Title I ancillary authority, the decision undermined the Commission's ability to enforce nondiscrimination rules and other National Broadband Plan policies. After the *Comcast* decision, the Commission's ability to promote the goals of the National Broadband Plan is uncertain.

II. Title II reclassification of broadband connectivity will support implementation of the National Broadband Plan.

Third Way reclassification of broadband Internet access service is necessary to implement the policies of the National Broadband Plan efficiently and with legal certainty.[20] Without reclassification, Congress' plan to expand broadband connectivity to underserved communities, to increase broadband speeds across the country, and to protect consumers from unjust and unreasonable practices may be delayed or halted.

[18] *Comcast Corp. v. FCC*, 600 F.3d 642, 664 (D.C. Cir. 2010).
[19] *Id.*
[20] *See Free Press comments*, at 21.

Under the Third Way, the information services offered by broadband providers would continue to be subject to minimal ancillary jurisdiction under Title I. However, the proposal calls for reclassification of the basic transmission component of broadband as a Title II telecommunications. Further, the Commission is considering forbearance from most of Title II and only applying six Title II provisions to broadband connectivity: sections 201, 202, 208, 222, 254, and 255. Together, sections 201, 202, and 208 allow the Commission to enforce consumer protection principles, such as truth-in-billing and limits on unjust or unreasonable discrimination. Further, customer information privacy protections are supported under section 222. Section 254 advances all areas of universal service support. Finally, section 255 provides for mandates and guidelines for access by individuals with disabilities. These sections are considered the minimum necessary to support the National Broadband Plan goals. Enabling the Commission to draw directly on a small number of Title II provisions, as proposed in the Third Way, would resolve the uncertainty created by *Comcast* and provide a solid legal foundation for the National Broadband Plan and universal service reform.

In addition to the provisions proposed by the Commission, Media Access Project recommends also applying section 207, which permits individuals affected by violations of Title II to recover damages in court, and 257, which requires the Commission to evaluate barriers to market entry, because forbearance from these sections seems contrary to the goals of forbearance.[21] Further, Media Access Project recommends the application of section 214, which requires Commission approval before a career may acquire another carrier, as well as sections

[21] *See Media Access Project comments*, at 27.

251 and 256, in order to uphold its competition policies.[22] Free Press also calls for sections 214, 251(a), and 256 to be applied on broadband providers.[23]

Bringing the transmission component of broadband Internet access service under Title II would strengthen the Commission's legal authority over broadband connectivity and therefore reduce the likelihood that the legal issues surrounding the implementation of the National Broadband Plan will be thrown into litigation for years to come. For example, section 255 of the Communications Act, which mandates disability accessibility for equipment and services, appears to apply only to "telecommunications service," putting it outside the reach of broadband unless the Commission brings broadband under Title II.[24] Ultimately, Title II reclassification will strengthen the Commission's authority over broadband transmission, making implementation of the National Broadband Plan possible.

These comments focus specifically on broadband deployment to high-cost and rural communities through universal service reform and consumer protection rules as called for by the National Broadband Plan.

A. Reclassification of broadband connectivity as a telecommunications service will clarify the Commission's authority to modernize the Universal Service Fund.

At the heart of the National Broadband Plan is the provision calling for transformation of the Universal Service Fund, currently used to make traditional telephone service more affordable, into a fund that supports the expansion of broadband networks into high-cost rural areas. Specifically, three programs are affected—High Cost, which would be used to support

[22] *Id.*, at 28.
[23] *See Free Press comments*, at 64.
[24] *Id.*, at 38-39.

deployment in high-cost and rural areas, and Lifeline and Link-Up America, which would be used to make broadband more affordable for low-income consumers.[25]

The High Cost Fund falls under section 254 of the Communications Act, but the statute is ambiguous referring to the use of universal service support for, alternately, "telecommunications services" and "telecommunications and information services."[26] Further, the statute reads that only a "telecommunications carrier" is eligible for universal service support.[27] If the Commission declines to adopt the Third Way reclassification of broadband connectivity as a telecommunications service, the combination of the lack of statutory clarity and the Commission's limited legal authority over information services leaves the future of universal service reform uncertain.

Free Press points out that the *Comcast* decision as well as the decision in *Texas Office of Public Utility Counsel v. FCC* specifically reject the use of section 254 as an independent source of regulatory authority.[28] Other proposals, such as expanding the E-rate program or granting subsidies to carriers to offer broadband services, are also likely to be unsuccessful.[29] Similar problems would arise for the Lifeline and Link-up programs. "Extending these programs to broadband would build another layer of ancillariness onto a program already essentially built on ancillary authority," because the language of the applicable statutes only mentions "telecommunications" carriers, and the programs so far have only been applied to telephone services.[30] Ultimately, as Public Knowledge's comments note, "In the wake of the Comcast decision, the Commission cannot repurpose the Universal Service High Cost Fund or

[25] Federal Communications Commission, *Connecting America: the National Broadband Plan* (2010) ("*National Broadband Plan*").
[26] 47 U.S.C. § 254(c)(1).
[27] *Id.* § 254(e).
[28] *See Free Press comments*, at 26; *see also Comcast*, 600 F.3d at 642; *see also Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 440-43 (5th Cir. 1999).
[29] *See Free Press comments*, at 27-29.
[30] *Free Press comments*, at 32.

Lifeline/Link-Up to support broadband."[31] On the other hand, reclassification would grant the Commission the direct authority needed to modernize the Universal Service Fund to support the expansion of broadband Internet access to high-cost, underserved areas across the country.

B. Reclassification will enable the Commission to enforce consumer protection principles like nondiscrimination.

The *Comcast* decision most clearly undermined the Commission's authority to enforce the most basic open Internet policies, which have been an engine for technological innovation and consumer adoption. *Comcast* explicitly challenged the Commission's ability to rely on section 230 of the Communications Act or section 706 of the Telecommunications Act to enforce nondiscrimination.[32] These provisions do not rise to the level of a direct statutory mandate needed to ground the Commission's ancillary authority.

The National Broadband Plan also calls for providers to disclose information about speed and performance of their broadband service.[33] However, the Commission would have to rely on section 201(b) or 258(a) under the Communications Act to enforce such rules, and these provisions apply only to common carriers and telecommunications carriers, respectively.[34] The Commission will likely also have trouble enforcing the consumer privacy protections called for by the National Broadband Plan because they fall under section 222, which also refers to "telecommunications" carriers.[35]

Adopting the Commission's Third Way proposal and bringing broadband Internet connectivity under Title II would strengthen the Commission's authority to enforce nondiscrimination policies and similar provisions related to the National Broadband Plan. Under

[31] *Public Knowledge comments*, at 26.
[32] *See Free Press comments*, at 43.
[33] *National Broadband Plan*, at 44, 54.
[34] *See Free Press comments*, at 35.
[35] *Id.*, at 37.

the Third Way, the Commission will have the authority to enforce nondiscrimination rules and consumer protection policies, such as information privacy rules, truth-in-billing requirements, prohibitions against denials of service, among other provisions. In an analogous case, *CCIA v. FCC*[36], the D.C. Circuit permitted the Commission to exercise its ancillary authority over the enhanced services (analogous to today's information services) provided by AT&T because the Commission had tied its ancillary authority to its jurisdiction over common carriers under Title II.

III. The Commission has the legal authority to reclassify broadband.

The *Comcast* decision did not challenge the Commission's ability to enforce its policy goals using an alternative legal approach.[37] What the D.C. Circuit rejected was the Commission's reliance on its Title I ancillary authority without tying it to a direct statutory mandate over broadband. In previous cases, such as *U.S. v. Southwestern Cable*[38] and *U.S. v. Midwest Video*[39], the Supreme Court held that the Commission could rely on policy statements similar to those referenced in the *Comcast* case when the Commission also has a direct statutory mandate, such as Title III authority over broadcasting.

The Commission retains the authority to reclassify broadband. In *Chevron v. NRDC*[40], the Supreme Court held that in technical, complex areas such as broadband, courts would defer to the Commission's reasonable interpretation of an ambiguous, complex statute such as the Communications Act. The 2005 decision in *NCTA v. Brand X*[41] relied on *Chevron* to find that the

[36] *Computer & Comm'ns Indus. Ass'n v. Federal Commc'ns Comm'n*, 693 F.2d 198 (D.C. Cir. 1982).
[37] *See* Comments of MAG-Net (filed Jul. 15, 2010) ("*MAG-Net comments*"), at 3.
[38] *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).
[39] *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) ("*Midwest Video I*").
[40] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*").
[41] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*, 545 U.S. 967 (2005) ("*Brand X*").

Commission's decision to classify cable Internet access service as an information service was a reasonable interpretation of an ambiguity in the Communications Act.[42]

Justice Antonin Scalia's dissent in *Brand X* is particularly helpful as an analysis of a possible reclassification regime. His opinion argues that a distinction should be drawn between the applications that sit on top of the Internet and the transmission of broadband Internet access, Scalia goes on to write that these two components should be regulated differently because consumers understand and use these services in different ways. This distinction is very similar to the Third Way approach, which relies on a framework separating the transmission component from the information service of broadband Internet access service.

IV. Wireless broadband Internet connectivity should be subject to the same Title II provisions as wireline broadband.

The Commission should not subject wireless Internet access to a separate regulatory framework.[43] As Public Knowledge points out, the definition of a telecommunications service includes both wired and wireless broadband.[44] Under the Communications Act, a telecommunications service is defined as "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*."[45] Classifying wireless broadband connectivity as a telecommunications service would also enable the Commission to support the deployment of wireless broadband as part of the universal service program.[46] Because wireless broadband connectivity meets the definition of a telecommunications service and because Title III fails to

[42] *See Media Access Project comments*, at 18.
[43] *See Free Press comments,* at 55-64; *see also MAG-Net comments*, at 7-8; *see also Media Access Project comments*, at 20; *see also Public Knowledge comments*, at 28.
[44] *Public Knowledge comments*, at 28.
[45] 46 U.S.C. § 153(46) (emphasis added).
[46] *See Free Press comments*, at 59.

grant sufficient authority for many of the Commission's goals such as universal service reform, the Commission should classify wireless broadband connectivity as a telecommunications service under Title II.[47]

For MAG-Net's constituents, wireline and wireless Internet connections have similar practical functionalities and serve the same needs of the community.[48] Wireless connectivity is especially important for minority communities, who are rapidly adopting new wireless technologies.[49] Media Access Project argues further that the lines between wired and wireless services are blurring; for example, mobile phones are often used to connect to WiFi service.[50] "Internet users and consumers hardly can be expected to understand or accept any policy approach or framework in which they could be subjected to different rules and protections depending on the platform over which their device most efficiently chooses to operate."[51]

CONCLUSION

The free and open Internet, the deployment of broadband Internet access to all Americans, and the enforcement of basic consumer protection rules all depend on classifying broadband Internet connectivity as a telecommunications service. If the Commission continues to rely on Title I ancillary authority, it will invite future litigation and uncertainty, as well as the erosion of consumer protection principles and the contraction of investment and innovation.[52]

The Benton Foundation strongly supports the Third Way as a solution to the challenges of the adverse decision in *Comcast v. FCC* and a changing marketplace for broadband. The proposal is consistent with pre-2002 classifications of Internet service, which have long held that

[47] *Id.*, at 56.
[48] *See MAG-Net comments*, at 8.
[49] *See Media Access Project comments*, at 23.
[50] *See Media Access Project comments*, at 25.
[51] *Media Access Project comments*, at 25.
[52] *NASUCA comments*, at 15.

the transmission component is separable from the information service. Benton urges the Commission to bring its broadband policy in line with current consumer views of broadband and reduces legal uncertainty regarding its authority to pursue the goals of the National Broadband Plan.

Respectfully submitted,

/s/

Amina Fazlullah
Policy Counsel
Benton Foundation
amina@benton.org
(650) 814-8003

Alexandra Wood
Law Clerk

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