

Before the
Federal Communications Commission
Washington, DC 20554

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

**COMMENTS OF THE INFORMATION TECHNOLOGY INDUSTRY
COUNCIL**

The Information Technology Industry Council (“ITI”)¹ hereby submits these comments in response to the Commission’s Notice of Inquiry (“NOI”)² in the above-captioned proceeding. ITI’s members are among the leading companies in the information and communications technology industry, and are the key Internet innovators that supply the applications, content, software, hardware, and networking equipment used by providers of broadband Internet access service and their subscribers. As such, ITI has actively represented its members’ interests in the ongoing debate on the substance and process of regulating broadband Internet access service.

ITI has consistently advocated an approach to broadband that relies on clear but flexible principles to create the regulatory certainty necessary for maximum investment and innovation.³

¹ The Information Technology Industry Council (ITI) represents over forty of the nation’s leading information technology companies, including computer hardware and software, Internet services, and wireline and wireless networking companies. ITI is the voice of the high tech community, advocating policies that advance U.S. leadership in technology and innovation, open access to new and emerging markets, support ecommerce expansion, protect consumer choice, and enhance global competition. For more information on ITI, including a list of its members, please visit <http://www.itic.org/about.php>.

² *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, FCC 10-114 (rel. June 17, 2010) (“NOI”).

³ *See, e.g.*, Comments of ITI, GN Docket No. 09-191, WC Docket No. 07-52 at 1-2 (Jan. 14, 2010) (explaining how the Commission could “strik[e] the proper balance between clarifying the
(continued on next page)

ITI has historically supported the classification of broadband Internet access service as an information service and opposed reclassification of that service as a telecommunications service. The Commission's actions in this docket should be calculated to protect its policy objectives, while guarding against actions that threaten to skew market forces, impede innovation, discourage network investment or reduce the choices available to broadband subscribers generally. ITI is deeply concerned that the Commission's "Third Way" proposal, though well intentioned, could have significant unintended consequences that undermine regulatory certainty in this area, thereby threatening investment in critical sectors of the U.S. economy and potentially undermining American competitiveness going forward.

To the extent the Commission needs additional authority to execute its broadband policies, the Commission should seek such authority from Congress. In any case, if the Commission does opt to identify a separate "transmission" component of broadband Internet service and to deem that component a "telecommunications service," that decision should explicitly be limited to broadband Internet access service and expressly exclude all other information services, applications, and related devices. ITI elaborates on these positions below.

I. RECLASSIFICATION OF BROADBAND INTERNET SERVICE IS FRAUGHT WITH UNCERTAINTY AND RISKS SIGNIFICANT UNINTENDED CONSEQUENCES

Deployment and innovation have thrived under the Commission's existing framework for regulating broadband service. That approach is grounded fundamentally on the long-standing conclusion that broadband Internet access constitutes an integrated information service, irrespective of the platform over which it is provided. As the NOI notes,⁴ since the Commission

meaning of the six [open Internet] principles proposed in NPRM while at the same time preserving the flexibility to apply those principles in particular factual situations as they arise in the future") ("ITI Open Internet Comments").

⁴ NOI ¶ 94.

determined in 2002 that cable modem service was an integrated information service,⁵ adult home broadband usage rates have risen from 12% to more than 60%, the advertised speed of broadband has increased approximately 20% annually, and providers have invested robustly in the network, with cable and telephone companies spending 38 billion dollars in 2008 and 2009 alone on broadband deployment.⁶ The light regulatory touch of Title I has spurred broadband investment, incentivizing a wide array of software application developers and device manufacturers to create an enormous variety of innovative products and services, which in turn has spurred broadband demand and facilitated a virtuous cycle of innovation. While we believe there is still progress to be made in expanding broadband access and increasing speeds, we cannot ignore progress that has been made under the current regulatory environment. According to the National Broadband Plan, 82 percent of American housing units are served by two or more fixed broadband providers, and 89 percent of the American population is served by two or more 3G wireless broadband providers.⁷

The “Third Way” proposal, however, can only succeed if it provides regulatory certainty to consumers, network operators and edge-based companies. As an initial matter, while the NOI describes the Third Way as “maintain[ing] the deregulatory status quo,”⁸ implementing that proposal would inarguably impose *new* regulatory requirements on broadband Internet access service. In particular, the NOI lists six provisions of Title II – sections 201, 202, 208, 222, 254, and 255 – that would likely be applied to broadband Internet access service under the Third Way

⁵ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling*, 17 FCC Rcd 4798 (2002), *aff'd*, *National Cable Telecom. Assoc. v. Brand X*, 545 U.S. 967 (2005).

⁶ NOI ¶ 94.

⁷ Federal Communications Commission, *Connecting America: The National Broadband Plan*, at 37, 40 (Mar. 16, 2010) (“National Broadband Plan”).

⁸ NOI ¶ 69.

approach.⁹ This new regulation – and, in particular, the demands of sections 201, 202 and 208 – would raise compliance and legal costs and risks and thereby reduce the attractiveness of investment in this industry.

Perhaps the more serious consequence of the Third Way is the significant regulatory uncertainty it would engender, and the resulting deterrent to private investment. For example, the proposal is silent as to application to broadband service of the myriad Commission rules based in whole or in part on Sections 201 and 202, indicating that broadband Internet service could be subject to more regulation than “Third Way” proponents suggest.¹⁰ Even more worrisome is the potential of the Section 208 formal complaint process, under which future Commissions will be empowered to impose obligations over time through decisions interpreting and applying Sections 201 and 202.¹¹ Additionally, there is further risk that Title II obligations other than the six discussed above will be applied as the NOI suggests that the Commission may be required to apply, or may choose to apply, as many as eighteen additional provisions of Title II.¹² The Commission’s determination to forbear now would not bind a future Commission, which could apply additional Title II provisions if ever a majority of Commissioners thought it

⁹ *Id.* ¶¶ 68, 74-85.

¹⁰ *See, e.g.*, 47 C.F.R. 64.0000 *et seq.*

¹¹ *See* 47 U.S.C. §§ 201, 202, 208.

¹² These include sections 201 (Service and Charges), NOI ¶ 76; 202 (Discrimination and Preferences) and 203 (Schedules of Charges), *id.* ¶ 91; 206 (Liability of Carriers for Damages), 207 (Recovery of Damages), 208 (Complaints to the Commission), and 209 (Orders for Payment of Money), *id.* ¶ 77; 214 (Extension of Lines), *id.* ¶¶ 86, 88, and 91; 218 (Inquiries into Management), *id.* ¶ 88; 222 (Privacy of Consumer Information), *id.* ¶¶ 82-83; 224 (Regulation of Pole Attachments), *id.* ¶ 87; 225 (Telecommunications Services of Hearing-Impaired and Speech-Impaired Individuals), *id.* ¶ 86; 251(a)(2) (Interconnection: obligation to comply with Section 255 guidelines and standards), *id.*; 253 (Removal of Barriers to Entry), *id.* ¶¶ 87, 110; 254 (Universal Service), *id.* ¶¶ 78-81; 255 (Access by Persons with Disabilities), *id.* ¶¶ 84-85; and 257 (Market Entry Barriers Proceeding), *id.* ¶ 90.¹² The NOI also seeks comment about applying Section 229 (Communications Assistance for Law Enforcement Compliance), *id.* ¶ 89, but CALEA already applies to providers of broadband Internet service of its own accord.

appropriate.¹³ Likewise, a reviewing court could strike down some Commission forbearance determinations. Even the mere prospect of such backsliding tomorrow will likely depress deployment today, as investors must necessarily account for what requirements, business plan restrictions, and compliance costs broadband Internet access service providers will face in the future.

The application of Sections 201 and 202 to the transmission component of broadband Internet access could have a devastating impact on investment. In making network investment decisions, carriers use net present value (NPV) models that discount the future cash flows associated with investment to a particular customer serving area. These models are very sensitive to anticipated revenue generated from the investment. The revenue flows are currently generated by providing an integrated service consisting of both transmission and content. To the extent that a carrier is required by regulation under Sections 201 and 202 to sell just the transmission component to competitors, the carrier will forgo the revenue from the sale of content. Under such circumstances, the NPV model will generate results that will discourage network investment that could otherwise be made. This is a mathematical certainty.

¹³ At least one sitting Commissioner has stated that he would prefer to avoid “another forbearance binge,” and would rather subject broadband Internet access service to only “limited, targeted forbearance.” Statement of Commissioner Michael J. Copps on Chairman Genachowski’s Announcement to Reclassify Broadband, Press Release, May 6, 2010.

II. THE COMMISSION SHOULD SEEK LEGISLATION FROM CONGRESS TO CLARIFY ITS REGULATORY AUTHORITY OVER BROADBAND.

The Commission states that the “Third Way” Notice of Inquiry is intended to evaluate its legal framework for regulating broadband Internet service.¹⁴ The actions taken by the Commission in August 2005 to regulate wireline broadband service under Title I, while simultaneously adopting the Internet Policy Statement, were forward thinking actions that recognized the need for only a light regulatory touch in this area. Therefore, if questions of authority exist about the Commission’s ability to enforce the stated principles on information services or to implement reform of the Universal Service program for broadband, Congressional action to codify this limited authority would be the appropriate path forward.

To that end, ITI supports focused legislation, developed through a multi-stakeholder process, that clarifies the Commission’s authority with respect to broadband Internet access and focuses on principles to ensure openness and transparency. In addition to the principles in the Commission’s August 2005 Internet Policy Statement, legislation should additionally ensure that consumers are entitled to clear, transparent information about how their services are managed. Next, providers should be able to offer various network services as long as they do not engage in unreasonable discrimination against any lawful content, application, or service in a manner that materially harms competition or consumers. Providers should be able to engage in reasonable network management, including the offering of managed services and quality of service. Lastly, enforcement should be on a case-by-case approach in response to petitions or on the Commission’s own volition following a preliminary review demonstrating a prima facie case.

¹⁴ NOI ¶ 1 (“This Notice begins an open, public process to consider the adequacy of the current legal framework within which the Commission promotes investment and innovation in, and protects consumers of, broadband Internet service.”)

These principles have been debated extensively amongst the members of ITI, to reflect the scope of our membership.

In May, Chairman Genachowski said that, “[s]hould congressional leaders decide to take up legislation in the future to clarify the statute and the agency’s authority regarding broadband, the agency stands ready to be a resource to Congress as it considers any such legislative measures.”¹⁵ Such Congressional action is no longer hypothetical. As the Chairman noted in his separate statement regarding the NOI, Congressional leaders in both houses are in the initial stages of drafting telecommunications reform legislation.¹⁶ Congress is also considering bills to address the captioning of video on the Internet;¹⁷ a bill to require consistent use of broadband service terminology and clear disclosure to customers;¹⁸ and a bill to amend the Communications Act of 1934 to establish a Lifeline Assistance Program for universal broadband adoption.¹⁹ Any of these efforts could form an appropriate legislative vehicle for narrowly tailored legislation in this area, and the Commission should direct its efforts toward an open, multi-stakeholder, legislative effort.

The importance of following Congress’s lead is particularly heightened here, given that a bipartisan majority of Congress has expressed strong concerns regarding the negative effects of

¹⁵ Chairman Julius Genachowski, Federal Communications Commission, “The Third Way: A Narrowly Tailored Broadband Framework,” at 6 (May 6, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf.

¹⁶ NOI at Statement of Chairman Genachowski (“Recently, the Chairmen of the key Senate and House Committees—Chairmen Rockefeller, Kerry, Waxman, and Boucher—launched a process to update the Communications Act... I fully support this Congressional effort. A limited update of the Communications Act could lock in an effective broadband framework to promote investment and innovation, foster competition, and empower consumers. I commit all available FCC resources to assisting Congress in its consideration of how to improve and clarify our communications laws.”).

¹⁷ H.R.3101 and S.3304.

¹⁸ S.3110.

¹⁹ H.R. 3646.

reclassification, and expressly asked the Commission to await Congressional action.²⁰ Under these circumstances, it is incumbent on the Commission to work with Congress rather than moving ahead despite Congressional requests for restraint. Congressional action has the additional virtue of avoiding a lengthy federal court battle that a Commission decision to reclassify will certainly set off.

III. ANY RECLASSIFICATION OF BROADBAND INTERNET SERVICE SHOULD EXPRESSLY EXCLUDE ALL OTHER INFORMATION SERVICES, APPLICATIONS, AND DEVICES

If the Commission chooses to reclassify broadband Internet access service under Title II, such reclassification must explicitly apply only to broadband Internet access service. The NOI properly asserts that “[t]he focus of this proceeding is limited to the classification of broadband Internet service” and states that the Commission “do[es] not intend to address in this proceeding the classification of information services such as e-mail hosting, web-based content and applications, voicemail, interactive menu services, video conferencing, cloud computing, or any other offering aside from broadband Internet service....”²¹ ITI agrees; any deviation from this proposal would have severe negative consequences for the flourishing markets for other information services, applications, content, and devices. Information services, as well as innovation in general, have thrived in the present unregulated and lightly regulated environment.

²⁰ See NOI at Dissenting Statement of Commissioner Robert M. McDowell; Letter from Senator Sam Brownback *et al.*, U.S. Senate, to the Honorable Julius Genachowski, Federal Communications Commission (May 24, 2010) (signed by 37 Senate Republicans); Letter from the Honorable Al Green *et al.*, U.S. House of Representatives, to the Honorable Julius Genachowski, Chairman, Federal Communications Commission (May 24, 2010) (signed by 74 Democratic House members); Letter from the Honorable Joe Barton, *et al.*, U.S. House of Representatives, May 28, 2010 (signed by 171 Republican House members).

²¹ NOI ¶ 107.

Thus, any order reclassifying the broadband Internet access service must explicitly disclaim any application to or effect on these other offerings.²²

CONCLUSION

For the reasons stated above, ITI urges the Commission to carefully consider the serious threat to broadband investment posed by the proposed “Third Way.” To the extent the Commission requires additional legal authority with respect to broadband, it should turn to Congress. Finally, any reclassification must be narrowly and explicitly limited to broadband Internet access service only, leaving the rest of the Internet ecosystem untouched by Title II.

Respectfully submitted,

**THE INFORMATION TECHNOLOGY
INDUSTRY COUNCIL**

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²² See ITI Open Internet Comments at 4; Reply Comments of the Information Technology Industry Council, GN Docket No. 09-191; WC Docket No. 07-52, at 4-5 (filed April 26, 2010).