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

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

COMMENTS

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Executive Summary

ACA members bring to this proceeding more than a decade of providing broadband Internet service under a consistent federal policy – a light regulatory touch. This policy has contributed significantly to the success of small and medium-size cable companies in delivering broadband to smaller markets and rural areas, particularly in markets where the cost of infrastructure and delivering service is often substantially higher than in urban markets. Against this background, ACA is concerned about the practical implications for smaller providers of subjecting these services to a regulatory framework developed a century ago for analog voice telephone service. In developing its regulatory framework for broadband service, the Commission appears poised to depart from its highly successful "light touch" regulatory environment for broadband Internet services and impose, for the first time, economic regulation on broadband Internet service providers.

The Commission's "Third Way" proposal – reclassification of broadband Internet service as a telecommunications service and forbearance from two-thirds or more of Title II common carrier obligations -- risks foisting on smaller providers increased regulatory burdens and costs. Before making such a major shift in the governing regulatory framework, as a matter of law and sound policy, the Commission must fully assess and weigh the costs and benefits of its "third way" proposal, particularly with respect to the burdens of significantly increased regulation for small entities.

In ACA's view, the Title II burdens associated with the Third Way proposal will have a significant economic impact on small broadband Internet service providers. These include both direct economic regulation of the rates, terms, conditions and practices associated with the provision of Internet service and the administrative recordkeeping, reporting and filing obligations of common carriers under the Commission's rules. The cumulative impact of the

new regulatory burdens associated with common carrier status counsels restraint. If the Commission moves forward with its "Third Way" proposal, it should forbear to the greatest extent possible to minimize the burdens on small providers.

Regardless of whether the Commission reclassifies the transmission component of the integrated broadband Internet service on the basis that it is today being offered as a stand-alone telecommunications service or that it must be so provided, the action will change the legal status of the service and simultaneously impose new legal obligations with significant economic impacts on small providers where today there are none. This is true notwithstanding the ultimate level of forbearance exercised by the Commission with respect to this service. For this reason, the act of reclassifying the service as a common carrier offering is in the nature of a legislative ruling, requiring both a formal notice-and-comment rulemaking under the Administrative Procedure Act and a regulatory flexibility act analysis under the Regulatory Flexibility Act.

ACA is particularly concerned that the Commission has indicated its intent to move directly from the NOI while skipping both of these important procedural requirements mandated by law. Only after conducting initial and final Regulatory Flexibility Act analyses can the Commission properly quantify the extent of the impact of reclassification on small entities, and articulate its efforts to minimize the significant economic impact of regulatory burdens on smaller entities. As it is, the Commission has left ACA and its members in the dark about the precise extent of the new regulatory burdens associated with common carrier status for broadband Internet services, and this uncertainty affects both operations and investment incentives.

To ease the immediate impact on small operators, should the Commission decide to reclassify broadband Internet service as a stand-alone telecommunications service offering,

the Commission must delay implementation of its classification (or classification and forbearance) decision until it can conduct and complete the rulemaking proceedings necessary to implement the “unforborn” provisions of Title II to the newly declared common carrier service.

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I. INTRODUCTION.

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burdens and costs. Before making such a major shift in the governing regulatory framework, as a matter of law and sound policy, the Commission must fully assess and weigh the costs and benefits of its "Third Way" proposal, particularly with respect to the burdens of significantly increased regulation for small entities.

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ACA is particularly concerned that the Commission has indicated its intent to move directly from the NOI while skipping two important procedural requirements mandated by law: a formal notice-and-comment rulemaking under the Administrative Procedure Act and the analyses required by the Regulatory Flexibility Act. Only after conducting initial and final regulatory flexibility analyses can the Commission properly quantify the extent of the impact of reclassification on small entities, and articulate its efforts to minimize the significant economic impact of regulatory burdens on smaller entities. As it is, the Commission has left ACA and its members in the dark about the precise extent of the new regulatory burdens associated with common carrier status for broadband Internet services, and this uncertainty affects both operations and investment incentives.

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American Cable Association. ACA represents nearly 900 independent cable companies that serve more than 7 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in nearly every congressional district. The companies range from family-run cable businesses serving a single town to multiple system operators with small systems in small markets. More than half of ACA's members serve fewer than 2,000 subscribers. All ACA members face the challenges of building, operating, and upgrading broadband networks in lower density markets. Most ACA members provide broadband Internet access, delivering this critical service to homes and businesses across the nation.

II. RECLASSIFICATION OF BROADBAND INTERNET SERVICE WILL SIGNIFICANTLY INCREASE REGULATORY BURDENS.

A. Reclassification Into Title II Must Be Accompanied With Substantial Forbearance.

The *NOI* asks about three possible sources of Commission authority to adopt measures addressing issues arising within the Commission's "core responsibilities" with respect to wire and radio communications, such as competition, universal access, consumer protection, and public safety.[1]

The second and third approaches each involve revisiting the Commission's four earlier broadband Internet service classification orders in light of changing marketplace and legal conditions, identifying the "Internet connectivity service" that is offered as part of wired

[1] *NOI* at ¶ 1-2.

broadband Internet service as a "telecommunications service."[2] The second approach would consist of the reclassification of what the Commission calls "the broadband Internet connectivity service" from an integrated "telecommunications" component of an integrated retail "information service offering" to a stand-alone "telecommunications service" offering, subject to all of the provisions of the Title II pertaining to common carriers.[3]

The third approach, or "Third Way," combines reclassification of broadband Internet connectivity as a telecommunications service with forbearance under section 10 of the Communications Act from the majority of the provisions of Title II applicable to providers of telecommunications services.[4] What would remain are the core Title II provisions the Commission believes necessary for it to carry out the purposes for which it was created by

[2] *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶ 2 (2002); *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14,853, 14,980 (2005); *In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service,* Memorandum Opinion and Order, 21 FCC Rcd. 13,281, ¶ 9 (2006); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, *Declaratory Ruling*, 22 FCC Rcd. 5901, ¶¶ 18, 22–26 (2007); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 968 (2005).

[3] "The term 'information service' means 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." 47 U.S.C. § 153(20). "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." 47 U.S.C. § 153(46).

[4] *NOI* at ¶ 2; 47 U.S.C. § 160. *See also* Austin Schlick, "A Third-Way Legal Framework For Addressing The *Comcast* Dilemma" (May 6, 2010), *available at* http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html (last visited July 15, 2010).

Congress.[5] The *NOI* identifies these as including, *at a minimum*, sections 201, 202, 208, 222, 254 and 255.[6] Beyond that, it explores in some detail 11 additional provisions that may not ultimately be subject to forbearance: sections 206, 207, 209, 214(a), (d), (e), 218, 224, 225, 229, 251(a), 253, and 257(c).[7] Thus, the *NOI* makes clear the Commission's preference for its "Third Way" approach by devoting extensive discussion to what the Third Way would consist of and how it may be implemented.

ACA submits that the Commission may best protect consumers and ensure fair competition by retaining, to the greatest extent possible, the minimal regulatory environment it established for broadband Internet services beginning in 2002. The inevitable effect of reclassification will be increased financial and administrative burdens associated with common carrier status. ACA strongly counsels the Commission not to adopt the second approach: reclassification with no forbearance. The application of all Title II obligations for the first time to all broadband Internet service providers would be extremely burdensome and is not necessary for the accomplishment of the Commission's stated goals in this proceeding, particularly in light of the absence of marketplace problems today.[8] Nor would reclassification together with full application of Title II common carrier regulation satisfy the

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[5] *NOI* at ¶ 3; 47 U.S.C. § 151 (The Commission created "[f]or 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 people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications.").

[6] *See, e.g., NOI* at ¶ 68; 47 U.S.C. §§ 201, 202, 208, 222, 254 255.

[7] 47 U.S.C. §§ 206, 207, 209, 214(a), (d), (e), 218, 224, 225, 229, 251(a), 253, 257(c).

[8] Indeed, the *NOI* references only a handful of actual and reported incidents of broadband Internet service provider behavior inconsistent with the four principles contained in the Commission's Internet Policy Statement. *See NOI* at ¶ 95. *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review - Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd. 14986 (2005) ("*Internet Policy Statement*").

Commission's stated goals of promoting investment and innovation in the broadband Internet service market.

Yet even the "Third Way" – reclassification into Title II coupled with forbearance – is fraught with both significant economic regulatory burdens and regulatory uncertainty.

B. Title II Burdens Associated With the Third Way Will Remain Substantial.

In comparison to the full application of Title II to broadband Internet service, the burdens of the compliance with the Third Way may appear restrained, but they still would be substantial. Especially for the hundreds of smaller cable and broadband Internet service providers with no experience under Title II regulation, the Third Way would impose new and serious regulatory burdens and costs. These burdens include the potential for direct economic regulation of the rates, terms, conditions and practices associated with the provision of the newly recognized telecommunications service under Title II, and the administrative, accounting and reporting requirements associated with common carrier status under the Commission's rules.[9]

The core of the proposal is that should the Commission decide to classify "wired broadband Internet connectivity (and no other components of wired broadband Internet service) as a telecommunications service," it could then forbear under section 10 from applying all but a handful of key statutory provisions to the service.[10] The sections indentified for definite exclusion from forbearance are sections 201, 202, 208 and 254.[11] In

[9] *See* 47 C.F.R. Parts 32-69.

[10] *NOI* at ¶ 68.

[11] *NOI* at ¶ 68. Sections 201 and 202 establish the fundamental obligations of common carriers under the Act. Section 201 requires communications common carriers to provide service upon reasonable request, permits the FCC to require interconnection, requires that all "charges . . . be just and reasonable," and authorizes the FCC to establish "rules and regulations as may be necessary in the public interest." 47 U.S.C. § 201(a), (b). Section 202 makes it unlawful for a common carrier "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for or in connection with like communication service," or "to make or give any undue or unreasonable preference or advantage" to any person, class of person or

addition, the *NOI* states that two other provisions *might* also be implemented for the connectivity service, sections 222 and 255.[12]

Beyond this core of six Title II provisions, the *NOI* suggests that the Commission *may* also refrain from forbearing from an additional 11 other Title II provisions. Specifically, in discussing retention of the Commission's authority to adjudicate complaints against common carriers pursuant to section 208, the *NOI* explores refraining from forbearing from the associate enforcement provisions of section 206, 207 and 209.[13] The *NOI* further suggests that retention of section 214(e), section 251(a)(2) and section 225 authority may be required to allow effective implementation and enforcement of the six retained core Title II provisions.[14] The *NOI* questions whether section 10 permits the Commission to forbear from provisions which do not directly impose obligations on common carriers, such as sections 224, 253, 229 and 257(c).[15] Finally, the *NOI* also questions whether the

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locality or to "subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a). Section 208 provides that anyone may file a complaint against a common carrier for violations of the Act, and gives the FCC adjudicatory authority with respect to that complaint. 47 U.S.C. § 208. Section 254 establishes FCC administered universal service contribution and subsidy programs for providers of telecommunications services. 47 U.S.C. § 254. Section 254(d) requires all providers of telecommunications service to contribute to USF on an "equitable and nondiscriminatory basis." 47 U.S.C. § 254(d).

[12] *NOI* at ¶ 68. Section 222 requires telecommunications carrier to keep confidential "customer proprietary network information" as well as proprietary information of other telecommunications service providers and equipment manufacturers. 47 U.S.C. § 222. Section 255 requires telecommunications service providers to make their services accessible to individuals with disabilities, unless not reasonably achievable. 47 U.S.C. § 255.

[13] *NOI* at ¶ 77. Section 206 establishes carrier liability for damages. 47 U.S.C. § 206. Section 207 provides for recovery of damages and forum election. 47 U.S.C. § 207. Section 209 establishes damages awards. 47 U.S.C. § 209.

[14] *NOI* at ¶ 86. Section 214(e) establishes the designated carriers eligible to receive USF support. 47 U.S.C. § 214(e). Section 251(a)(2) prohibits carriers from installing network features, functions or capabilities that do not comply with the disabilities access guidelines established pursuant to section 255. 47 U.S.C. § 251(a)(2). Section 225 establishes the telecommunications relay service (TRS) program supported by contributions from common carriers. 47 U.S.C. § 225.

[15] Section 224 grants the Commission regulatory authority over pole attachments. 47 U.S.C. § 224(b). Section 253 grants the Commission preemption authority over state and local barriers to entry into telecommunications markets. 47 U.S.C. § 253(d). Section 229 obligates the Commission to implement CALEA. 47 U.S.C. § 229(a). Section 257 directs the Commission to make periodic reports to Congress concerning elimination of previously identified barriers to market entry by entrepreneurs and other small businesses. 47 U.S.C. § 257(c).

Commission should forbear from other provisions closely tied to its "core" mission under the Act with respect to public safety, such as sections 214(a)&(d) and 218, so that it may proceed with cyber security and data gathering initiatives.[16]

In summary, the Commission is presently poised to retain anywhere from between six to 17 provisions of Title II.[17] Thus, the Third Way would likely result in the imposition of more than a dozen common carrier obligations imposed for the first time on broadband Internet service providers, with substantial regulatory burdens and costs. It is impossible, however, to determine the full extent of the new obligations and their costs to providers because the *NOI* speaks only in vague terms of what the Commission might, or might not do, and which provisions of Title II will, or may or may not, be subject to forbearance under section 10.

As it is, the Commission has left ACA and its members in the dark about the precise extent of the new regulatory burdens associated with common carrier status, and this uncertainty affects both operations and investment incentives. What follows is ACA's best "guestimate" of the burdens associated with the Commission's Third Way proposal.

The Burden of Direct Economic Regulation. The primary direct burden of common carrier status under Title II is associated with the likelihood of significantly increased FCC behavioral and economic regulation under Sections 201 and 202.[18] These self-executing provisions form the core of common carrier regulation by requiring that the rates, terms, and conditions of service (and all practices related thereto) be just and

[16] *NOI* at ¶ 91-92. Section 214(a) and (d) govern carrier discontinuance and impairment of service. 47 U.S.C. § 214(a), (d). Section 218 authorizes the FCC to make inquiries into the management of the business of all carriers subject to the Act. 47 U.S.C. § 218.

[17] The complete list of provisions that the *NOI* indicates may not be subject to forbearance are: Sections 201, 202, 206, 207, 208, 209, 214 (a), (d), (e), 218, 222, 224, 225, 229, 251(a)(2), 253, 254, 255, and 257(c). 47 U.S.C. §§ 201, 202, 206, 207, 208, 209, 214 (a), (d), (e), 218, 222, 224, 225, 229, 251(a)(2), 253, 254, 255, 257(c)..

[18] 47 U.S.C. §§ 201, 202.

reasonable and not unjustly or unreasonably discriminatory.[19] Carriers may distinguish among classes of customers and offer differing levels of service, but are prohibited from discriminating among "similarly situated" customers.[20]

The tariff filing requirements of sections 203 and 208 complaint processes are the statutory means by which the Commission traditionally regulated the service offerings of common carriers to ensure compliance with the commands of sections 201 and 202.[21] Although the Commission intends, in the first instance, to forbear from section 203's tariff filing requirements, the Commission may and likely will be asked to adjudicate the justness and reasonableness of broadband Internet connectivity practices, rates, terms and conditions through complaint adjudication. This economic regulation of retail service provision at the federal level is likely to be extremely burdensome to small entities, which may be forced to defend their rates and practices on a case-by-case basis before the Commission in either formal or informal complaint proceedings.[22]

Each provision made applicable for the first time to broadband Internet service providers will impose compliance costs. Additional financial burdens associated with common carrier status are the obligation to collect and remit mandatory USF contributions for the newly identified "telecommunications service" component of the broadband Internet connectivity service.[23] The current quarterly contribution factor for interstate telecommunications carriers is 13.6 % of end-user interstate telecommunications

[19] Sections 201 and 202 are "self-executing" in the sense that they impose direct duties and declare violations thereof to be "unlawful."

[20] 47 U.S.C. §§ 201, 202.

[21] 47 U.S.C. §§ 203, 208.

[22] 47 C.F.R. §§ 1.711-1.736.

[23] The Commission calculates the quarterly USF contribution factor based on the ratio of total projected quarterly costs of the universal service support mechanisms to contributors' total projected collected end-user interstate and international telecommunications revenues, net of projected contributions.

revenues.[24] Given the fact that the majority of ACA members are not now providing broadband Internet service on a common carrier basis,[25] they will be required, for the first time, to ascertain the portion of their revenues from "broadband Internet connectivity service" that are attributable to "end-user interstate telecommunications revenues" and pay 13.6% toward USF support.[26]

Similarly, ACA members offering broadband Internet, but not already providing either traditional telecommunications services or Voice over Internet Protocol ("VoIP") offerings will incur the full direct economic costs of compliance with their new obligations under sections 222 and 255.[27] These will include, but not be limited to, costs associated with reconciling compliance with the somewhat different but overlapping customer privacy requirements of section 222 (concerning telecommunications carriers) and section 551 (cable subscriber privacy requirements) and establishing appropriate employee training programs and the

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[24] *Proposed Third Quarter 2010 Universal Service Contribution Factor*, Public Notice, DA 10-1055 (rel. June 10, 2010).

[25] Only approximately 40% of ACA members provide traditional telecommunications services as incumbent local exchange carriers, and may have taken the option provided by the Commission's *Wireline Broadband Internet Access Order* to continue to provide broadband on a common carrier basis. *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Service Obligations of Broadband Providers Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises Consumer Protection in the Broadband Era*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, 14901-903, ¶¶ 89-95 (2005).

[26] ACA's view that there would be burdens associated with collecting and remitting mandatory USF contributions for the newly identified "telecommunications service" component of the broadband Internet connectivity service should not be confused with its position on how best to establish a sustainable and rationale methodology for funding Universal Service to support broadband. *See In the Matter of Role of the Universal Service Fund and Intercarrier Compensation in the National Broadband Plan*, GN Docket Nos. 09-47, 09-51, 09-137, Comments of the American Cable Association (filed Dec. 7, 2009) (ACA proposed moving from the current contribution mechanism of placing an assessment on interstate telecommunications revenues to hybrid numbers/connections based approach – with a cap on revenue at current level of total USF).

[27] 47 U.S.C. §§ 222, 255. There are at least 141 ACA members who would be included within this category of operators.

costs of compliance with new disabilities-access requirements pursuant to section 255.[28] Additional compliance burdens will be associated with the additional Title II provisions ultimately determined to not be subject to forbearance by the Commission.

Administrative Recordkeeping, Reporting and Filing Burdens. Administrative recordkeeping, reporting and filing requirements associated with common carrier status will also place significant burdens in terms of time and direct expenditure, particularly on smaller entities. The list of common carrier filing and reporting requirements associated with provisions from which the Commission either will not or may not forbear include, at a minimum:

- **Domestic Section 214 Approval** – Filing is required for plans to "discontinue, reduce or impair an existing domestic telecommunications service." Carriers to notify all existing customers, states and the Department of Defense before "discontinuing, reducing or impairing service."

- **FCC Form 395 Common Carrier Annual Employment Report and Discrimination Complaint Requirement** – Filing required of all FCC "licensees or permittees of common carrier stations" with 16 or more full-time employees.

- **Form 499-A Telecommunications Reporting Worksheet (USF)** – The worksheet describes the entities (e.g., "telecommunications carriers," "telecommunications providers," and others) required to file and the funds to which they must contribute (USF, TRS, NANPA, LNPA).

- **Form 499-Q Telecommunications Reporting Worksheet (USF)** – Filing required of entities required to contribute to the maintenance of USF support mechanisms, including "FCC Form 499-A filers with interstate end-user telecommunications revenues that are sufficiently large to result in an annual contribution of $10,000 or more."

- **Section 1.47(h) of the Commission's Rules Regarding Designation of Agent for Service of Process** – All carriers subject to the Act must designate an Agent for Service of Process that is located in the District of Columbia.

- **Section 43.21(c) Letter as Defined in the Commission's Rules** – "Miscellaneous common carriers with operating revenues in excess of set

[28] 47 U.S.C. §§ 222, 551, 255.

amount - $142 million for the 2009 year filing – "shall file with the Chief of the Wireline Competition Bureau showing its operating revenues for that year and the value of its total communications plant at the end of the year."

- **Section 64.2009 Annual CPNI Compliance Certification** – Telecommunications carriers must file an annual certification with the FCC that they are in compliance with the CPNI requirements.[29]

The level of burden of compliance for some of these filings can be substantial. For instance, the Quarterly and Annual filings of FCC Form 499 (USF contribution worksheet) may require hours or days of staff time per quarter and on an annual basis, per company.

To complete the annual CPNI compliance certification called for under Section 64.2009, each telecommunications carrier must first establish a compliance program, train employees, and keep them current on requirements in order to certify compliance to the Commission. In addition, each carrier must provide a corporate officer to review and sign the annual CPNI compliance certification. Other filing requirements, such as the filing of FCC Form 395 (common carrier employment report), is duplicative of reporting already required of cable operators under FCC Form 396, and therefore represents an unnecessary cost for the provider while providing no compensating public interest benefit.

For some ACA members already providing traditional telecommunications services or those providing VoIP services, compliance with these reporting obligations for the new "broadband Internet connectivity service" will add new compliance burdens that, depending on the company, may be substantial. For ACA members who do not provide VoIP or other telecommunications services, these recordkeeping, reporting and filing requirements will

[29] This list was derived from the Commission's web page describing common carrier filing requirements, "Information for Firms Providing Telecommunications Services" (last revised May 18, 2009), *available at* http://www.fcc.gov/wcb/filing.html (last visited July 15, 2010). It lists only those reporting requirements that apply to all telecommunications carriers, as opposed to reporting requirements that apply to various types of common carriers, interstate interexchange or exchange access providers or voice telephony providers utilizing numbering resources. It does not include filing requirements that already apply to broadband providers, such as the Form 477 Local Telephone Competition and Broadband Reporting requirement.

represent a significant new burden in terms of employee/officer time and other costs of compliance.

Cumulative Effects Are Substantial. When examined on an individual basis, some of the compliance or reporting obligations of common carriers may not appear overly burdensome. Yet the cumulative effect of these requirements on small entities already pulled in many directions, however, adds up. For ACA members providing "triple play" (broadband voice, video and data) services, the threat of economic regulation of their Internet service is significant. For ACA members who are not already providing broadband Internet service, the prospect of such enhanced regulatory burdens may prove to be a deterrent to market entry.[30] For all providers, but especially for the smaller providers with fewer subscribers over whom to spread costs, increased costs of regulation can deplete capital that could be used to deploy or upgrade broadband Internet infrastructure and other advanced services, thus threatening the Commission's top policy priority – increasing broadband Internet deployment and adoption.

C. Uncertainty Regarding the Features of the "Broadband Internet Connectivity Service" Renders Full Analysis of Compliance Burdens Difficult.

At this point, a full analysis of the compliance burdens associated with common carrier status is impossible; the *NOI* remains vague as to exactly what features and functions will comprise what the Commission will find to be the new "broadband Internet connectivity" telecommunications service and exactly which Title II provisions and associated rules the Commission will, in the final analysis, apply.[31] The *NOI* recognizes that "if the FCC were to classify a service provided as part of the broadband Internet service

[30] There are 152 ACA members who are providing video services today and not yet providing broadband.

[31] The *NOI* states that "Internet connectivity service allows users to communicate with others who have Internet connections, send and receive content, and run applications online." *NOI* at ¶ 1, n.1.

bundle as a telecommunications service it would be necessary to define what is being so provided."[32] The *NOI* suggests it may be appropriate to define the telecommunications service at a "high level" for example, "as the service that provides Internet connectivity…."[33] To this end, the *NOI* solicits comment on "approaches to defining the telecommunications service offered as part of wired broadband Internet service, assuming that the Commission finds a separate telecommunications service *is being offered today, or must be offered*."[34]

It is therefore apparent, that, should the FCC adopt its Third Way proposal, ACA members would not be able to comply with many of the newly applicable provisions of Title II until such time as the Commission defines both the parameters of the service in question and the manner in which the Title II obligations not subject to forbearance apply to this service. The *NOI* appears to acknowledge this fact by discussing the need to delay implementation of several of the new common carrier obligations, through temporary forbearance or other means, until such time as the Commission has adopted rules governing specifically how broadband Internet service connectivity providers may comply with the new obligations.[35] ACA submits that delayed implementation of any reclassification decision is not merely a matter of Commission discretion, but a necessity.

III. LACK OF REGULATORY FLEXIBILITY ANALYSIS MEANS DELAYED

[32] *NOI* at ¶ 63. ACA notes that it seems somewhat backwards for the Commission to be asking for comment on the features of a service it is already preparing to declare fits within the terms of a "telecommunications service" under the statute. This suggests that the Commission is preparing to declare that a telecommunications service *must* be offered to the public, rather than finding that one *is* being offered. *See* discussion *infra*, at Section III.C.

[33] *NOI* at ¶ 64.

[34] *NOI* at ¶ 63 (emphasis added).

[35] *See NOI* at ¶ 80 (delayed implementation of universal service fund contribution obligation until Commission can adopt rules directing how providers can contribute on an equitable and nondiscriminatory basis); ¶ 222 (consideration of whether it would be in the public interest to apply section 222 customer proprietary network information requirements until Commission can first interpret the specific provisions of section 222 in the broadband context); ¶ 85 (consideration of delayed application of section 255 requirements that telecommunications carriers make their services accessible to individuals with disabilities until after Commission conducts a notice-and-comment proceeding allowing detailed consideration of disabilities-access issues in broadband context).

IMPLEMENTATION IS REQUIRED.

The *NOI* recognizes the significant dislocations the contemplated alteration of regulatory status would visit upon affected providers and suggests that the Commission "could delay the effective date of a classification (or classification and forbearance) decision for 180 days after release, or another suitable period."[36] Additionally, in light of the non-self-executing nature of the common carrier obligations imposed pursuant to sections 222, 254(d) and 255, the *NOI* suggests that the effective date of these provisions "could be phased-in on an even longer timetable," permitting the Commission to conduct notice-and-comment proceedings to establish how the statutory obligations would apply in the broadband Internet connectivity service context.[37]

ACA respectfully submits that delayed effective dates for this vast alteration of regulatory status is not merely discretionary on the part of the Commission, but essential to the lawfulness of the contemplated action. The *NOI* casts the regulatory classification question before the Commission as one of pure statutory interpretation, suggesting that Commission action following closure of the comment period would be in the nature of an "interpretative rule" rather than a "legislative rule."[38] Yet the practical effect of the change in

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[36] *NOI* at ¶ 100.

[37] *NOI* at ¶ 100. Specifically, the *NOI* asks whether the Commission should delay implementation of the USF contribution obligation, through temporary forbearance or other means, until it adopts rules governing specifically how broadband Internet connectivity providers should calculate their contribution, consistent with requirement that all telecommunications carriers contribute on an equitable and nondiscriminatory basis, "possibly as part of comprehensive Universal Service Fund reform." *NOI* at ¶ 80. The *NOI* questions whether it would be in public interest to apply section 222 to broadband Internet connectivity service immediately, or whether it be more effective for the Commission first to interpret the specific provisions of section 222, including the definition of "customer proprietary network information" in the broadband context before requiring broadband Internet service providers to comply. It also seeks comment on how to reconcile the differing obligations of sections 222 and 631 for cable operators providing broadband service. *NOI* at ¶ 82. Finally, comment is sought on whether to apply section 255 only after a separate notice-and-comment rulemaking proceeding that allows detailed consideration of disabilities-access issues in the broadband Internet context. *NOI* at ¶ 85.

[38] Broadband Reclassification *NOI* ¶ 29, n.81 ("because the broadband Internet service classification questions posed in this part II.B involve an interpretation of the Communications Act, the notice and comment procedures we follow here are not required under the Administrative Procedure Act;" *see* 5 U.S.C. § 553(b) (notice and comment requirements "do[] not apply to "interpretive rules"); *Syncor Int'l Corp. v. Shalala*, 127 F. 3d 90, 94

regulatory status for affected providers will be an immediate and potentially significant increase in regulatory burdens, including recordkeeping and reporting burdens. It will, in short, immediately alter the rights and duties of the affected providers.

A. The Regulatory Flexibility Act Requires Assessment of Impacts on Small Entities Before the Imposition of New Regulatory Obligations.

Congress has recognized that federal regulatory and reporting requirements designed for application to large scale entities can have a disproportionately burdensome impact (including legal, accounting, and consulting costs) upon small businesses.[39] Further, that failure to recognize differences in size and scale and resources of regulated entities "has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity."[40]

Accordingly, the *RFA requires* administrative agencies to assess the level and extent of the regulatory burdens, their impact on small entities, and also to consider flexible regulatory proposals aimed at minimizing the impact on small entities, when contemplating the imposition of rules with significant economic impact on small entities.[41] Specifically, this legal obligation attaches to notice-and-comment rulemakings under the Administrative Procedure Act[42] The process requires consultation with both the Small Business

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(D.C. Cir. 1997) (change in interpretation of statute does not require notice and comment procedures). *See also* Howard Buskirk, "FCC to Move Forward on Broadband Plan While Classification Debate Continues," Communications Daily (June 21, 2010) (reporting that FCC General Counsel Austin Schlick said that the Commission may proceed directly from the Notice of Inquiry to issuance of an "interpretive rule" as opposed to a "legislative rule" because neither reclassification nor forbearance involve rulemaking on the part of the Commission, but rather "an interpretation of the statute.").

[39] Regulatory Flexibility Act of 1980, Pub. L. 96-354, 94 Stat. 1164, *as amended*, 5 U.S.C. §§ 601, *et seq.* ("*RFA*").

[40] *Id., Congressional Findings and Declaration of Purpose*, (a)(4).

[41] 5 U.S.C. §§ 603, 604.

[42] Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237, *as amended*, 5 U.S.C. §§ 501, *et seq.* ("*APA*").

Administration and the Administrator or the Office of Information and Regulatory Affairs within the Office of Management and Budget.[43]

The *RFA* requires agencies to perform an initial and final regulatory flexibility analysis in all notice-and-comment rulemaking proceedings under the *APA*.[44] The Commission has signaled that it intends to move from the *NOI* to issue what it terms an "interpretive ruling" classifying (or more accurately, reclassifying) broadband Internet service as a common carrier offering. As demonstrated below, because the contemplated reclassification will alter the legal rights and obligations of broadband Internet service providers and have a significant economic on small companies, the Commission must perform a regulatory flexibility analysis that includes consideration of means to ameliorate disproportionate burdens on small entities. Accordingly, the *NOI*, which lacks this essential analysis, cannot form the basis for an immediately effective Commission action imposing common carrier status on broadband Internet service providers.

B. Reclassification of Broadband Internet Service as a Telecommunications Service Will Impose New Regulatory Obligations on Providers.

It is indisputable that a change in regulatory classification from an unregulated information service to a regulated telecommunications service will result in the imposition of new regulatory duties and obligations on broadband Internet service providers. As the *NOI* acknowledges, the whole point of the reclassification exercise is to provide the Commission with a solid legal foundation upon which to impose additional regulatory and reporting requirements. This is true whether reclassification is accomplished by the Commission

[43] 5 U.S.C. § 609(b), (e).

[44] 5 U.S.C. § 603(a) ("Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretive rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities.").

determining that broadband Internet service providers today *are* providing a stand-alone telecommunications service or *must* provide such a service. If the Commission moves forward with its Third Way proposal, *there will be regulation* of broadband Internet service providers where there is none today.

C. Reclassifying a Service as a Common Carrier Offering is a Legislative Ruling Requiring a Notice-and-Comment Rulemaking.

Agencies can issue interpretative rules to resolve ambiguities or to transform a vague duty or right into a sharply delineated duty or right.[45] Interpretative rules, however, cannot be used to make new laws, rights, and duties.[46] Courts have developed various tests to determine if an agency's classification of a document as an interpretive rule is proper. For example, if a rule "clarifies a statutory term" or "reminds parties of existing statutory duties" the court will consider it to be an interpretative rule.[47] In contrast, the courts have held that a ruling that creates *new law, rights or duties*, is properly considered to be a legislative rule.[48]

What the Commission has sketched out in the *NOI* are two different forms of regulatory action: finding that a telecommunications service *is* being provided today by applying the terms of the statutory definition to the attributes of the broadband Internet service as opposed to declaring that the public interest requires that the service *must be* provided on a common carrier basis. Yet the practical effect of either will be the imposition of new law, rights and duties on broadband Internet service providers.

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[45] *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994).

[46] *See, e.g., Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) ("Ultimately, an interpretive statement simply indicates an agency's reading of a statute or a rule."). *See, e.g., Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) ("Ultimately, an interpretive statement simply indicates an agency's reading of a statute or a rule.").

[47] *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992).

[48] *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (*en banc*); *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952) ("Generally speaking . . . 'regulations', 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretive rules are statements as to what the administrative office thinks the statute or regulation means.").

The first action, "finding" by statutory interpretation that providers *are* today offering a separately identifiable telecommunications service, involves an interpretation of how the terms of the statutory definition of "telecommunications service" applied to the facts of how the broadband Internet service is provided today. Yet, it seems unlikely that the courts would accept this as an "interpretative ruling," as it the undeniable *practical effect* of such reclassification will be a significant alteration of the legal rights and responsibilities of broadband Internet service providers and their subscribers. Should the Commission reclassify broadband Internet service, providers will not be "reminded" of their existing duties, they will be told the nature and extent of their new duties.

Indeed, the act of regulatory classification under the Communications Act is of a wholly different nature than the mere interpretation of the terms of a particular provision of the Act. Given the service-specific regulatory framework of the Act, regulatory classification is determinative not only of the rights and obligations of the provider and its customers, but also of the extent of the Commission's authority to regulate the service.[49] Where reclassification results in the immediate imposition of common carrier status, with its self-executing regulatory duties, it can hardly be considered a mere "interpretative ruling." For example, section 201 commands that all common carriers provide service upon reasonable request and declares that "any [] charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . ."[50] These duties will attach by operation of law upon reclassification. For this reason, reclassification into common carrier status would

[49] *See Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010); *see also* Barbara Esbin, The Progress & Freedom Foundation, "Ancillariness, the Definition Wars, and the Next Communications Act," Progress on Point, Vol. 17, Issue 8 (May 2010) (all regulatory consequences under the Act flow from the definitional service and provider categories), *available at* http://www.pff.org/issues-pubs/pops/2010/pop17.8-next_communications_act.pdf (last visited July 15, 2010).

[50] 47 U.S.C. § 201(b).

properly be considered a legislative ruling that should be accomplished within the scope of a notice-and-comment rulemaking.

Similarly if, upon examination of the record, the Commission determines that a separate telecommunications service *must be offered*, this too that would constitute a "legislative ruling." A finding that the public interest requires providers of wired broadband Internet service to make a separate offering to the public of a stand-alone transmission – or broadband Internet connectivity – service would have the effect of compelling common carrier status to satisfy the Commissions' policy goals.[51] Such an action would, by operation of law under Title II, impose both new obligations and rights on the affected providers and the consuming public.

Either means of determining that broadband Internet connectivity service is a telecommunications service under the Act would be in the nature of a legislative ruling, and must be within the framework of a notice-and-comment rulemaking, consistent with the *APA*.

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[51] ACA notes that the Commission's authority to compel common carrier status is not certain. The distinction in the FCC's regulatory powers over common carriers as opposed to non-common carriers is clear in cases addressing FCC efforts to impose Title II regulation on private carrier services. In *Southwestern Bell*, for example, the FCC attempted to subject local exchange carriers' private dark-fiber service to Title II. *Southwestern Bell Tele. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994) ("*Southwestern Bell*"). The D.C. Circuit reversed, holding that Title II regulation could only be imposed where the entity was, in fact, providing a common carrier service. If an "entity is a private carrier for that particular service … the Commission is not at liberty to subject the entity to regulation as a common carrier." *Id*. at 1481. *Southwestern Bell* follows a long line of cases denying the FCC the ability to impose Title II regulation based simply on its notions of good policy. *Nat'l Ass'n of Regulatory Util. Commissioners v. FCC.* 525 F.2d 630 (1976) ("*NARUC I*"); *MCI Telecommunications Corp. v. Am. Tel. & Tel.Co.*, 512 U.S. 218 at 234 (1994) ("the Commission's estimations[] of desirable policy cannot alter the meaning of the federal Communications Act"). "While the Commission may look to the public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance." *Southwestern Bell,* 19 F.3d at 1481. In *NARUC I*, for example, the D.C. Circuit upheld the FCC's decision to create a private mobile radio service, including a new class of entrepreneurial operators knows as "special mobile radio systems," in the absence of any indication that the systems would in practice behave as common carriers. *NARUC I,* 525 F.2d 630. The court stated, further, that "we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities." *Id*. at 644. Where the Commission has successfully done so in the past, its rulings were based on the presence of market power or control of an essential input on the part of the affected provider. *See, e.g., Virgin islands Tele. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999). This suggests the need for the Commission to perform a market power/market failure analysis before compelling the common carrier provision of broadband Internet connectivity service, an action impossible to perform in the context of an interpretative ruling.

So considered, the determinations would have to be accompanied by an initial and final regulatory flexibility analysis.[52]

Because the Commission has not been precise in explaining what rules it wishes to apply to broadband Internet service providers under reclassification, as it would be required to do in an initial regulatory flexibility analysis, it is nearly impossible for the ACA members to comment on the costs of compliance for small entities. Equally importantly, the Commission has omitted consideration of steps it could take to mitigate them, as required by the *RFA*. It appears that the Commission will conduct such an analysis only in the rulemaking proceedings implementing the new statutory obligations of broadband Internet connectivity service providers following reclassification. Yet the obligations of common carriage under sections 201 and 202 would attach immediately upon reclassification, with no consideration given to means of mitigating any disproportionate burdens on small entities.

For these reasons, the Commission *must* delay either the reclassification decision or the effectiveness of any reclassification decision until completion of the attendant rulemaking proceedings that will include the Commission's studied evaluation of all impacts on small entities of the regulatory obligations associated with their new status as telecommunications carriers, including pertinent recordkeeping and reporting requirements.

IV. CONCLUSION.

Should the FCC go forward with its proposed reclassification of a portion of its broadband Internet service from a lightly regulated "information service" to a Title II common carrier "telecommunications service" ACA members will be subject to the potential for rate and behavioral regulation in the provision of the service, increased regulatory assessments (USF contributions), and significantly increased FCC filing and reporting requirements. The

[52] 5 U.S.C. §§ 603, 604.

costs will disproportionately burden mid-sized and smaller cable operators with fewer resources with which to respond to FCC complaints and comply with FCC common carrier filing requirements.

In light of the legal problems that could result from the lack of assessment of the regulatory burdens associated with reclassification, its impact on small entities, and the lack of consideration of flexible regulatory proposals aimed at minimizing the impact of the reclassification on small entities, as required by the RFA, the Commission must stay the effectiveness of any reclassification (or reclassification and forbearance) decision until it can complete the rulemaking proceedings that would be required for implementation of and compliance with its decision.

Respectfully submitted,

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