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ATTACHMENT A – Declaration of Tyrone Garrett

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## **Executive Summary**

ACA's primary concern has been about the practical implications for smaller providers of subjecting the broadband Internet service to a regulatory framework developed a century ago for the monopoly provision of analog voice telephone service. Departing from the Commission's highly successful "light touch" regulatory environment for broadband Internet services to impose, for the first time, economic regulation on broadband Internet service providers 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.

The record in this proceeding fully supports ACA's view, expressed in its initial Comments, that the Title II burdens associated with the Third Way proposal will have an *immediate and significant* economic impact on small broadband Internet service providers. The consequences of reclassification will include 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 direct economic regulatory and administrative burdens ACA identified with common carrier status in its Comments should be viewed as just the visible tip of the economic iceberg small providers will have to navigate under the Third Way. ACA members will also face the prospect of numerous indirect economic burdens, vastly increased pole attachment rental rates, and the prospect of additional regulatory and tax burdens imposed at the state and local levels.

The consequences of reclassification will include, at a minimum:

### Direct Regulatory Burdens under Title II:

- Increased behavioral and economic regulation under Sections 201 and 202.
- Increased legal expenses and time associated with case-by-case adjudication of rates, terms, conditions of service under Section 208.
- Increased costs resulting from:
  - Compliance with customer proprietary network information rules pursuant to Section 222.
  - Compliance with disabilities access guidelines pursuant to Section 255.
  - Administrative recordkeeping, reporting and filing requirements associated with common carrier status.
- Increased legal expenses and time associated with potential liability for monetary damages and federal court litigation under Sections 206, 207 and 209.

### Indirect Burdens Caused by Need to Reflect Provision of Stand-alone Telecommunications Service:

- Costs associated with changes to:
  - Consumer marketing and billing materials.
  - IT systems used for billing, accounting, ordering and maintenance.
  - Customer service operations.
  - Network reconfiguration.
  - Business model for broadband Internet service
  - Need to review and revise subscriber terms of service and related agreements.

### Additional Regulatory and Economic Burdens Associated with Reclassification:

- Vastly increased pole attachment rates.
- Likelihood of burdensome state and local telecommunications regulation.
- Prospect of state telecommunications taxes.

The increased direct and indirect regulatory burdens and costs flowing from reclassification could also negatively impact broadband deployment and consumer prices, with many of the increased costs of providing service being passed along to consumers through retail rate increases. Such results appear starkly at odds with the Commission's overarching policy goal, which ACA shares, of making available affordable broadband Internet service to all Americans.

The cumulative impact of the new regulatory burdens associated with common carrier status means that the Commission cannot go directly from the NOI to a declaratory ruling that has the force of law and alters the default regulatory classification of broadband Internet service. The record clearly supports ACA's contention that because the act of reclassifying the service as a common carrier offering is in the nature of a "legislative ruling" that imposes new legal obligations on providers and therefore requires *both* a formal notice-and-comment rulemaking under the Administrative Procedure Act ("APA") and the two regulatory flexibility analyses specified by the Regulatory Flexibility Act ("RFA"). The Commission cannot lawfully move directly from the NOI to a ruling having the force of law while skipping both of these important procedural safeguards mandated by law.

Proponents of reclassification via the Third Way have a tendency to characterize the companies on the other end of this proposal as "corporate behemoths," "Big Phone Big Cable," and "giant corporations." But the regulatory requirements associated with the Third Way will fall just as directly on the shoulders of the smallest providers as it will the largest. Unfortunately, the Commission has not given consideration to the disparate impacts such a "one-size-fits-all" approach will have on small and mid-size providers—those least capable of shouldering the substantial new regulatory burdens that will likely be imposed by all levels of government.

Conducting a notice-and-comment rulemaking in advance of a decision to reclassify will permit the Commission and affected parties the opportunity to identify with specificity and provide targeted commentary on the factual and legal basis undergirding reclassification and the precise scope of the rules that will be applicable to broadband Internet service providers post-reclassification. The record compiled in response to the NOI should provide an adequate basis for such a notice of proposed rulemaking. Because such proceedings

also require the Commission to perform an initial and final regulatory flexibility analysis, it must assess and quantify the burdens reclassification will have on small entities and propose or at the very least, seek comment on, means of ameliorating disproportionate impacts. Taking these steps will improve the quality of the Commission's decision making and will ensure that any final rules adopted are consistent with the public interest in receiving service from financially viable broadband service providers.

ACA submits that achievement of the Commission's goals of affordable broadband Internet service available to all Americans and establishing a regulatory framework that promotes investment and innovation will not be possible unless the Commission takes full account, and develops means of mitigating, the disproportionate economic burdens reclassification will impose on small providers.

In light of the legal problems that could result from the lack of assessment of the magnitude of the regulatory burdens associated with reclassification, their 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 either conduct a rulemaking proceeding prior to changing the regulatory status of broadband Internet service, and/or 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.

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

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

**REPLY COMMENTS**



**I. INTRODUCTION AND SUMMARY.**

ACA's primary concern about the Third Way proposal has been about the practical implications for smaller providers of subjecting broadband Internet services to a regulatory framework developed a century ago for the monopoly provision of analog voice telephone service. Departing from the Commission's highly successful "light touch" regulatory environment to impose, for the first time, economic regulation on broadband Internet service providers 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.

The record in this proceeding fully supports ACA's view, expressed in its initial Comments, that the Title II burdens associated with the Third Way proposal will have an *immediate and significant* economic impact on small broadband Internet service providers. The consequences of reclassification will include 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. But that is just the start. ACA members will also face the prospect of numerous indirect economic burdens, vastly increased pole attachment rental rates, and the prospect of additional regulatory and tax burdens imposed at the state and local levels.

The cumulative impact of the new regulatory burdens associated with common carrier status means that the Commission cannot go directly from the NOI to a declaratory ruling that alters the default regulatory classification of broadband Internet service. The record clearly supports ACA's contention that because the act of reclassifying the service as a common carrier offering is in the nature of a "legislative ruling," it requires *both* a formal notice-and-comment rulemaking under the Administrative Procedure Act and the regulatory flexibility analyses specified by the Regulatory Flexibility Act. The Commission cannot lawfully move directly from the NOI to a ruling having the force of law while skipping both of these important procedural safeguards mandated by law.

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 either conduct a rulemaking proceeding prior to changing the regulatory status of broadband Internet service, and/or 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.



## II. THE RECORD DEMONSTRATES THAT RECLASSIFICATION OF BROADBAND INTERNET SERVICE WILL SIGNIFICANTLY INCREASE REGULATORY BURDENS.

### A. There is No Doubt that Reclassification Will Subject Broadband ISPs to Burdensome Economic Regulation.

The Commission's "Third Way" proposal would combine reclassification of the "Internet connectivity" component of broadband Internet service as a stand-alone telecommunications service with potential forbearance under section 10 of the Communications Act from the majority of the provisions of Title II.<sup>1</sup> Left operative will be the "core" Title II provisions the Commission believes necessary for it to carry out the purposes for which it was created by Congress.<sup>2</sup> The *NOI* identifies these core provisions as Sections 201, 202, and 208; also proposed for exemption from forbearance are Sections 222, 254 and 255.<sup>3</sup> Nonetheless, the Commission also appears to contemplate exempting from forbearance eleven additional provisions either closely related to the core provisions or not otherwise subject to forbearance: Sections 206, 207, 209, 214(a), (d), (e), 218, 224, 225,

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<sup>1</sup> *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 at ¶ 2 (rel. June 17, 2010) ("*NOI*"); 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 Aug. 12, 2010).

<sup>2</sup> *NOI* at ¶ 3; Communications Act of 1934, as amended, 47 U.S.C. §§ 151, et seq. (Federal Communications 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.").

<sup>3</sup> See *NOI* at ¶¶ 68, 74-86; 47 U.S.C. §§ 201 (duty to service upon reasonable request; charges, practices, classifications and regulations in connective with service to be just and reasonable); 202 (unlawful to make unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services); 208 (any person can file complaint with Commission for violations or omissions); 222 (carriers must protect confidentiality of customer proprietary network information); 254 (requires carriers to make payments into the Universal Service Fund and authorizes payments from the USF to eligible carriers, as defined in Section 214(e)); and 255 (requires equipment and services to be accessible to and usable by individuals with disabilities "if readily achievable").

229, 251(a), 253, and 257(c).<sup>4</sup> Regardless of whether the Commission retains six or seventeen provisions of Title II following reclassification, the associated burdens on small operators will be significant and detrimental to their business as it exists today, and also to their ability to deploy, upgrade and improve their broadband Internet service offerings.

ACA documented in its initial Comments the baseline additional regulatory burdens associated with the Third Way.<sup>5</sup> These burdens include the potential for direct economic regulation of the rates, terms, conditions and practices associated with the provision of the newly recognized Title II telecommunications service, and the administrative, accounting and reporting requirements associated with common carrier status under the Commission's rules.<sup>6</sup> ACA noted that these will be especially difficult for the hundreds of smaller cable and broadband Internet service providers with no experience under Title II regulation.<sup>7</sup>

Because the *NOI* speaks only in vague terms of what the Commission might, or might not do, and which provisions of Title II may or may not be subject to forbearance

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<sup>4</sup> See *NOI* at ¶¶ 77, 86-92; 47 U.S.C. §§ 206 (carrier liability for monetary damages); 207 (recovery of damages and forum election); 209 (damages awards); 214(a) (discontinuance of service), (d) (impairment of service), (e) (eligibility to receive USF support), 218 (inquiries into carrier management and business), 224 (regulation of pole attachment access and rates), 225 (establishes Telecommunications Relay Service program supported by carrier contributions), 229 (FCC obligated to implement Communications Assistance to Law Enforcement Act), 251(a)(2) (carriers prohibited from installing network features incompatible with disabilities access guidelines per Section 255), 253 (FCC preemption authority over state/local barriers to entry), and 257(c) (FCC to make periodic reports to Congress concerning elimination of barriers to entry by entrepreneurs/small businesses).

<sup>5</sup> ACA's ability to adequately document its concerns about regulatory burdens was hampered, of course, by the lack of specificity and tentative nature of the *NOI*'s proposals. It was simply impossible to accurately assess the burdens of a regulatory action phrased in terms of what the Commission may or may not do, and the extent to which it may or may not forbear from various provisions of Title II. Nonetheless, ACA was able to ascertain that the cumulative likely burdens resulting from the Third Way will be both substantial and deleterious to its members. See *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010), Comments of the American Cable Association at 8 (filed July 15, 2010) ("ACA Comments").

<sup>6</sup> See ACA Comments at 6-13; 47 C.F.R. Parts 32-69. These burdens include increased FCC behavioral and economic regulation under Sections 201 and 202, rate regulation through case-by-case adjudication pursuant to Section 208; financial and administrative burdens associated with the obligation to collect and remit mandatory universal service fund ("USF") contributions for the newly defined telecommunications service component of broadband Internet service; costs of compliance with new obligations under Sections 222 (telecommunications carriers to protect customer proprietary network information) and 255 (telecommunications equipment and services to be accessible by persons with disabilities "if readily achievable").

<sup>7</sup> ACA Comments at 6.

under section 10, it was impossible for ACA to determine the full extent of the new obligations and quantify their costs to providers.<sup>8</sup> Yet there should be no doubt that these burdens will impose a substantial economic burden on many of its member companies. The record overwhelming supports ACA's concerns and demonstrates the extremely significant economic impact on network operators that will result from reclassification under Title II.

**B. The Direct and Indirect Economic Burdens of Baseline Title II Regulation will be Substantial for Small Providers.**

**Direct Regulatory Burdens.** ACA identified the primary direct burden of common carrier status under Title II in its initial Comments as the inevitability of significantly increased FCC behavioral and economic regulation under Sections 201 and 202.<sup>9</sup> 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 "reasonable" and not "unjustly or unreasonably discriminatory."<sup>10</sup> ACA observed that even if the Commission intends, in the first instance, to forbear from applying Section 203 tariff filing requirements, the Commission inevitably will be asked to adjudicate the justness and reasonableness of broadband Internet connectivity practices, rates, terms and conditions through complaint adjudication under Section 208.<sup>11</sup> ACA argued that 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.<sup>12</sup> ACA also documented the administrative recordkeeping, reporting and filing requirements associated

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<sup>8</sup> See ACA Comments at 8.

<sup>9</sup> ACA Comments at 8; 47 U.S.C. §§ 201, 202.

<sup>10</sup> Sections 201 and 202 are "self-executing" in the sense that they impose direct duties on carriers and declare violations thereof to be "unlawful."

<sup>11</sup> ACA Comments at 9.

<sup>12</sup> ACA Comments at 9; 47 C.F.R. §§ 1.711-1.736.

with common carrier status that will place significant burdens in terms of time and direct expenditure, particularly on smaller entities, noting that the level of burden of compliance and cumulative effects of these filings can be substantial.<sup>13</sup>

The record overwhelmingly supports ACA's contention that the Commission's Third Way proposal will have a substantial, immediate and adverse economic impact on broadband Internet service providers. Comcast asserts that reclassification will "subject broadband ISPs to extensive regulations designed to control monopoly market power, regulations that would increase the costs of providing broadband."<sup>14</sup> CTIA states that the Third Way will impose significant regulatory burdens on broadband Internet access service; the core statutory provisions identified by the Commission will subject providers "to the regulation of rates, terms and conditions of service, as well as their network management practices, through the Section 208 complaint process."<sup>15</sup> Verizon and Verizon Wireless observe that the "applicability of Sections 201, 202 and 208 to broadband Internet access service would impose enforceable legal limitations on rates."<sup>16</sup> Time Warner Cable explains:

Because Sections 201, 202, and 208 would continue to apply, any consumer or upstream service, content, or application

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<sup>13</sup> ACA Comments at 11-13. Additional FCC administrative recordkeeping, reporting and filing burdens associated with common carrier status include: domestic Section 214 discontinuance approvals; Form 395 (Common Carrier Annual Employment Report and Discrimination Complaint Requirement); Form 499-A and 499-Q (Annual and Quarterly Telecommunications Reporting Worksheet – USF); Section 64.2009 (Annual CPNI Compliance Certification). As ACA stated in its Comments, the costs of compliance for some of these filings can be substantial, particularly for ACA members not already providing VoIP or telecommunications services, in terms of establishing compliance programs, compiling the required data and filling out reports. *Id.* at 11-12.

<sup>14</sup> *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010), Comments of Comcast Corporation at 36 (filed July 15, 2010) ("Comcast Comments").

<sup>15</sup> *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010), Comments of CTIA – The Wireless Association at 38-39 (filed July 15, 2010) ("CTIA Comments").

<sup>16</sup> *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010), Comments of Verizon and Verizon Wireless at 93 (filed July 15, 2010) ("Verizon Comments"). They add that such limitations on pricing flexibility will reduce "providers' ability to earn reasonable returns on their infrastructure investments." *Id.*

provider could invoke the broad “just and reasonable” and nondiscrimination requirements in Sections 201 and 202 and their procedural rights under Section 208 to challenge a broad array of terms and conditions that the Commission has pledged to leave to broadband Internet access service providers’ discretion and ask that the Commission regulate prices or compel nondiscriminatory access for non-facilities based providers.<sup>17</sup>

According to AT&T, the overhang of case-by-case adjudication under Section 208 is substantial, even if the Commission forbore from all substantive provisions except Sections 201 and 202:

[B]roadband providers could still face potential and uncertain liability whenever they engage in anti-piracy measures, network-management techniques, or various commercial arrangements with particular applications and content providers. That fear could chill such initiatives, to the detriment of broadband providers, application and content providers, and ultimately consumers.<sup>18</sup>

AT&T also observes that Sections 201 and 202 could expose broadband providers to “liability when they engage in (for example) creative retail pricing arrangements.”<sup>19</sup> In addition, CTIA highlights how reclassification could trigger other fees and burdens, including requirements to pay local number portability and regulatory fees, all of which will increase

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<sup>17</sup> *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010), Comments of Time Warner Cable at 66 (filed July 15, 2010) (“Time Warner Comments”). Indeed, it is not difficult to envision the Commission itself determining that the public interest requires regulation of the rates charged for the new broadband Internet connectivity service through tariff filings under Section 203 or other means. The Commission has already signaled its interest in broadband rate levels. For example, the Commission is currently seeking comment on whether it should consider “affordability as a component of broadband availability” in its most recent Section 706 Notice of Inquiry. See *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Seventh Broadband Deployment Notice of Inquiry, FCC 10-148, GN Docket 10-159 at ¶ 9 (rel. Aug. 6, 2010) (“Seventh Broadband Deployment NOI”). Similarly, the National Broadband Plan discussed affordability as an impediment to broadband adoption in its National Broadband Plan. *Connecting America: The National Broadband Plan* at 10-11, 168, 171-172, 216 (rel. Mar. 16, 2010), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> (last visited Aug. 12, 2010) (“National Broadband Plan”).

<sup>18</sup> *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010), Comments of AT&T at 95 (filed July 15, 2010) (“AT&T Comments”).

<sup>19</sup> AT&T Comments at 96.

the cost of providing the service.<sup>20</sup> Several commenters also observe that Sections 201 and 202 contain the regulatory basis upon which interconnection, unbundling, resale, and price regulation have been imposed in the past and could be imposed in the future.<sup>21</sup>

At the same time, it is also highly likely that the new regulatory framework for broadband Internet service will go well beyond Sections 201 and 202 and will include the regulatory burdens associated with most, if not all, of the seventeen provisions discussed in the NOI as candidates for "non-forbearance." If so, the burdens will increase markedly. For example, Cablevision and Time Warner discuss how reclassification could subject broadband providers to actions for damages under Sections 206, 207 and 209 of the Act.<sup>22</sup> These provisions establish carrier liability to injured parties for monetary damages; authorize any party claiming to be damaged by a common carrier to either ask the Commission to recover damages caused by violations, or seek recovery by private suit in federal district court; and authorize the Commission to order carriers to pay damages to complainants.<sup>23</sup>

As Cablevision states, "One of the most dramatic effects of classifying Internet connectivity under Title II would be the threat of an immediate expansion of potential legal

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<sup>20</sup> CTIA Comments at 35.

<sup>21</sup> See, e.g., *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010), Comments of Charter Communications at 5 (filed July 15, 2010) ("Charter Comments") ("sections 201 and 202, from which the Commission is not proposing to forbear, contain the regulatory hooks for unbundling, resale, and price regulation"); Comcast Comments at 37 (Sections 201 and 202 have provided the basis for common carrier regulation, and pose significant risks to investment and innovation); *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010), Comments of the National Cable & Telecommunications Association at 46-55 (filed July 15, 2010) ("NCTA Comments") (Sections 201 and 202 are "the 'bedrock' obligations of common carrier law that the Commission has used to impose price regulation, resale, and access requirements" as well as physical interconnection); AT&T Comments at 41 (Sections 201 and 202 are broad in scope and future Commissions can determine what conduct is "unjust" or "unreasonable" or "unreasonably discriminatory" despite this Commission's vague assurances that regulation will be applied with a "light touch"); Verizon Comments at 102 (the core retained sections of Title II – 201, 202 and 208 – will subject broadband providers to complaints over rates and terms of service, subjecting them to regulation by virtue of complaints);

<sup>22</sup> *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010), Comments of Cablevision Systems Corporation at 18-20 (filed July 15, 2010) ("Cablevision Comments"); Time Warner Comments at 66.

<sup>23</sup> 47 U.S.C. §§ 206, 207, 209.

liabilities for ISPs.”<sup>24</sup> Carrier liability under Section 206 is very broad for practices and charges deemed to be unjust or unreasonable, and plaintiffs are entitled to attorneys’ fees where their suits are successful.<sup>25</sup> Even if the Commission were to forbear from these sections, Cablevision states, the legality of such forbearance is untested, legal challenges to the Commission’s authority to forbear these provisions are likely to occur, and forbearance determinations are reversible. As a result, “forbearance provides the broadband sector with little long-term security and significant uncertainty.”<sup>26</sup>

For ACA members, an immediate expansion of potential legal liabilities and the prospect of federal court litigation and/or FCC enforcement proceedings are matters of great concern. It is likely that after reclassification broadband Internet providers would need to institute more bureaucratic internal processes and recordkeeping to be able to respond to potential complaints about their services practices. This could be a substantial burden even before a complaint is filed, and obviously responding when complaints are filed, whether before the Commission or in federal court, will involve additional expenditures of management, staff, and attorney time and financial resources. The cost of defending oneself from a complaint is largely a fixed cost regardless of whether the operator is large or small. Smaller operators, however, will have a far more difficult time managing these additional costs as they have a smaller revenue base supporting their operations.

In short, the record fully supports ACA’s claim that reclassification will result, by operation of law, in the immediate imposition of direct economic regulation of the Internet service under Sections 201 and 202 through the Section 208 complaint process, and thereby impose significant economic burdens on small entities.

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<sup>24</sup> Cablevision Comments at 18.

<sup>25</sup> Cablevision Comments at 18; see 47 U.S.C. § 206.

<sup>26</sup> Cablevision Comments at 20.

**Indirect Regulatory Burdens.** ACA's Comments focused primarily on the direct economic costs of the immediate effects of reclassification, and demonstrated that they will be substantial. The record also reveals that providers also will face substantial indirect burdens in seeking to comply with the Commission's finding/directive that they offer "broadband Internet connectivity service" to the public on a common carrier basis. The burdens arise from the simple fact that, despite what the Commission may "find" or decide to mandate, broadband Internet service providers today *are not now* actually "offering" the transmission component of broadband Internet service to the public on a stand-alone basis.<sup>27</sup>

AT&T argues that Commission use of the "definitional contrivance" of "Internet connectivity" to set national broadband policy "would raise a host of unsettling implementation questions."

For example, if the Commission concludes (erroneously) that consumers perceive this supposed "service" as separate from the other functionalities in broadband Internet access service, would providers have to begin identifying these functionalities separately in their marketing and billing materials? Would consumers have to receive two separate bills or perhaps two separate line items on the same bill, even though they have always purchased broadband Internet access as a single service? If not, then how could the Commission plausibly claim that broadband Internet access providers offer – and consumers perceive that they obtain – two separate and discrete services rather than a single, integrated service? Reclassification would also require substantial and costly changes to IT systems that Internet access providers currently use for billing, accounting, ordering, and maintenance—changes that would be extremely time consuming and expensive to implement."<sup>28</sup>

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<sup>27</sup> See AT&T Comments at 62-64; Time Warner Comments at 36.

<sup>28</sup> AT&T Comments at 62-63.



Additionally, AT&T writes, if the Commission determines that “Internet connectivity service” is a Title II service, revenues for that regulated functionality would have to be booked separately from revenues for the unregulated information-service functionality, and reconfiguring the accounting systems so that they are capable of separately tracking and booking such revenues “would be a monumental task.”<sup>29</sup> Relatedly, providers may also need to adopt new ordering and provisioning processes, and make changes to their customer service and maintenance systems, all at significant cost to the provider.<sup>30</sup> Time Warner Cable warns that significant indirect costs would be incurred if the Commission were to force broadband Internet service providers to extract and then offer a stand-alone transmission service “as providers would have to reconfigure their networks to permit compliance with the new rule while also revamping their business models.”<sup>31</sup>

Thus, in addition to completely altering the current business models of broadband Internet service providers, the indirect economic burdens associated with reclassification may also include network reconfiguration, marketing, accounting, ordering, maintenance, and billing system changes, together with changes in customer service systems. Operators may also need to review and revise their “terms of service” and related subscriber agreements, in consultation with legal counsel, to comply with the Commission’s determination that they provide the broadband Internet connectivity component of their Internet service on a common carrier basis. Many of these costs would include fixed costs on operators regardless of their size, which would have a disproportionate impact on smaller operators.

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<sup>29</sup> AT&T Comments at 63 n.114.

<sup>30</sup> AT&T Comments at 63 n.114.

<sup>31</sup> Time Warner Comments at 39.

As ACA noted in its Comments, viewed individually each separate common carrier regulatory or reporting requirement may not appear onerous.<sup>32</sup> The cumulative effect of both the direct and indirect regulatory burdens associated the Third Way proposal, combined with the need to revamp providers' business models, however, will be quite substantial and will be particularly burdensome for small and mid-size providers.

**C. Additional Burdens Will Include Vastly Increased Pole Attachment Rental Rates, the Potential for State and Local Regulation, Fees and Tax Assessments.**

As extensive as the direct and indirect regulatory burdens discussed above will be, they are just the first level of regulatory and economic burden associated with the imposition of common carrier status. The record also demonstrates that cable broadband Internet service providers will face the prospect of vastly increased pole attachment rental rates, and like other providers, the potential imposition of state and/or local regulation, and increased state tax liability

**1. Vastly Increased Pole Attachment Rates.**

Section 224 is among the provisions of Title II that may (or may not) be candidates for the exercise of the Commission's forbearance authority under section 10.<sup>33</sup> The NOI questions whether the Commission has the authority to forbear from provisions such as section 224, where Congress is directing the Commission, rather than providers, to take certain actions.<sup>34</sup> As NCTA and Time Warner Cable aver, this very simplistic view of Section 224 overlooks the important federal rights granted to network operators, which

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<sup>32</sup> ACA Comments at 13.

<sup>33</sup> NOI at ¶ 87.

<sup>34</sup> NOI at ¶ 87.

includes the right of attachment and the right to receive a regulated rate.<sup>35</sup> There is absolutely no factual or legal basis supporting Commission forbearance from the entirety of Section 224. Moreover, NCTA observes: “Complete forbearance from Section 224 creates the possibility that cable operators and other broadband providers would lose rights to access utility poles. *That would be a disastrous result.*”<sup>36</sup>

Similarly disastrous would be Commission action designating a component of broadband Internet service to be a telecommunications service without simultaneously forbearing from the application of the Section 224(e) telecommunications rate formula to the attachments of cable operators for this newly created service. According to NCTA, reclassification and an “all or nothing approach to forbearance under Section 224,” therefore “would impose hundreds of millions of dollars in additional costs every year,” and constitute an unwarranted and unreasonable reversal of Commission policy.<sup>37</sup> ACA fully agrees. Retention of the cable rate for cable operators providing cable and Internet services on a commingled basis has been instrumental in the ability of smaller cable operators to deploy broadband facilities and offer advanced services in sparsely populated rural areas.

The Commission has already recognized the significant economic burden that cable Internet service providers would bear if their pole attachment rates were to be re-set pursuant to the current telecommunications rate formula under Section 224(e).<sup>38</sup> Moreover,

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<sup>35</sup> NCTA Comments at 73-75; Time Warner Comments at 64 (“to the extent the Commission could forbear from [Section 224], it would leave broadband Internet access service providers worse off than other common carriers, as they would be subject to the core obligations of Title II without its benefits.”).

<sup>36</sup> NCTA Comments at 75 (emphasis added).

<sup>37</sup> NCTA Comments at 75.

<sup>38</sup> See, e.g., *In the Matter of Implementation of Section 224 of the Act, A National broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, FCC 10-84, WC Docket No. 07-245, GN Docket No. 09-51, at ¶ 118 (rel. May 20, 2010) (“*Pole Attachment FNPRM*”) (“We believe that pursuing uniformity by increasing cable operators’ pole rental rates – potentially up to the level yielded by the current telecom formula – would come at the cost of increased broadband prices and reduced incentives for deployment.”).

as NCTA and CTIA argue, reversal of the Commission's stance would also produce a result at odds with decades of Commission precedent on cable pole attachment rates, the goals of the National Broadband Plan, and the Commission's recent *Pole Attachment FNPRM* seeking to lower attachment rates for telecommunications carriers, all of which recognize that "substantial increases in pole attachment rates would undermine investment and deployment of broadband facilities."<sup>39</sup> The National Broadband Plan contains a very conservative estimate that the rate difference could amount to approximately \$90 million to \$120 million annually, given the estimated 30-40 million poles subject to Commission-regulated rates used by the cable industry.<sup>40</sup> Cable commenters estimate a far greater difference between the two rates for the industry as a whole of \$208 million to \$672 million annually.<sup>41</sup> NCTA succinctly states: the effects of the sudden rate increases following reclassification "would be particularly harmful in rural areas where the per-subscriber cost of pole access can often be substantially higher than in urban and suburban areas."<sup>42</sup>

"Disastrous" and "particularly harmful" to rural providers are exactly the correct descriptions of the economic impact of sudden reclassification on ACA member companies. Suburban and rural providers generally must attach their equipment to a greater number of poles than their urban counterparts, yet have fewer subscribers per mile over which to

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<sup>39</sup> NCTA Comments at 74-75; *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002) (upholding Commission decision that cable television systems offering commingled cable and Internet access services should continue to pay the cable rate); National Broadband Plan at 110 (recognizing that the cable rate formula is "'just and reasonable' and fully compensatory for utilities" and recommending that the Commission conduct a rulemaking to "revisit it's application of the telecommunications carrier rate formula to yield rates as close as possible to the cable rate;" *Pole Attachment FNPRM* at ¶¶ 115-148; CTIA Comments at 36 ("classifying broadband Internet connectivity as a telecommunications service could undercut the Commission's ability to establish uniform pole attachment rates 'as close as possible to the cable rate . . .'" per the National Broadband Plan and may render inapplicable the Commission's reasoning supporting application of the cable rate to attachments carry cable Internet services by requiring application of the rate formula for telecommunications carriers provided in Section 224(e)(1)).

<sup>40</sup> *Pole Attachment FNPRM* at ¶ 116.

<sup>41</sup> *Pole Attachment FNPRM* at ¶ 116.

<sup>42</sup> NCTA Comments at 75.

spread the costs. Some ACA members currently paying the “cable only” rate for attachments carrying cable and Internet services will face rate increases of 400 percent.

Wire Tele-View, a cable and Internet service provider with approximately 1,000 subscribers in rural Pennsylvania states that Wire Tele-View’s pole attachment rate would jump from \$2 per pole/per year under the cable rate to \$10 per pole/per year under the telecommunications rate, a nearly 400 percent rate increase.<sup>43</sup> Wire Tele-View provides service in an area with the highest unemployment rate in Pennsylvania. Increases in pole attachment rates cannot be passed along to Wire Tele-View’s subscribers because they cannot afford to pay more for the service. The prospect of a potential increase of nearly 400 percent in the pole attachment rate will drive Wire Tele-View out of business.<sup>44</sup> As a result, up to 1,000 consumers will be without access to broadband, and seven Wire-Tele View employees will be out of jobs.<sup>45</sup>

SEMO Communications Incorporated (“SEMO”), a provider of broadband Internet, cable, and VoIP services to 20 mainly rural communities in Southeastern Missouri, and NewWave Communications, a provider of broadband Internet, cable and VoIP services to mainly rural communities in Arkansas, Illinois, Kentucky, Missouri, South Carolina, and Tennessee, report that their pole attachment rates from one utility would jump from about \$9 per pole/per year (“Cable Rate”) to about \$35 per pole/per year (“Telecom Rate”).<sup>46</sup> SEMO reports that the prospect of a potential increase of nearly 400 percent in the pole attachment

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<sup>43</sup> Comments of Darlene Mills, General Manager, Wire Tele-View Corporation at the Independent Show in Baltimore, Maryland (July 27, 2010), audio available at <http://www.americancable.org/node/2293> (last visited Aug. 12, 2010).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See Declaration of Tyrone Garrett, President of SEMO Communications Incorporated, at 1, attached hereto as Attachment A (“Garrett Declaration”); Declaration of James M. Gleason at 1, attached hereto as Attachment B (“Gleason Declaration”).

rate “has caused SEMO to indefinitely delay expansion plans to deploy broadband plant” to several currently unserved rural communities.<sup>47</sup> SEMO further explains:

The impact of increased pole attachment rates would have a chilling effect on the expansion plans of SEMO. Our company would be paying the higher rates for pole attachments, which will lessen SEMO’s ability to use its cash flow to build these systems. Pole attachments are a fixed expense, and if they go up, they will have a negative impact on the economic viability of SEMO, as well as negative effects on expansion plans and jobs. In today’s credit market environment, we have found that bank financing for rural builds is extremely difficult to obtain. Any increase in pole attachment rates will have an adverse effect on broadband deployment by SEMO, and we believe, goes against the intent of the national broadband plan.<sup>48</sup>

NewWave also reports that, while any pole attachment rate increase would have some effect on plans to expand service areas, “[a]n increase the magnitude of 400% in the pole attachment rate would have a significant, detrimental impact on NewWave and its plans to expand to other rural areas”<sup>49</sup> NewWave would also be “forced to evaluate certain current rural areas served to determine if continued service is viable.”<sup>50</sup> Moreover, such an increase “will force NewWave to evaluate retail rates and pass increased costs on to consumers.”<sup>51</sup>

Clearly, a change in the regulatory status of broadband Internet service that will have the immediate consequence of raising providers’ yearly pole attachment rental costs by 400 percent will have an adverse impact on the provision of service to existing subscribers. As the supermarket cashier in the film *Terms of Endearment* said to the beleaguered protagonist, Emma, who discovering she was short of cash initially put things back but then,

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<sup>47</sup> Garrett Declaration at 1.

<sup>48</sup> Garrett Declaration at 1.

<sup>49</sup> Gleason Declaration at 1.

<sup>50</sup> Gleason Declaration at 1.

<sup>51</sup> Gleason Declaration at 1.

to give her son a treat, began adding items: “We’re going in the wrong direction.”<sup>52</sup> The Commission, too, is going in *exactly* the wrong direction with its Third Way proposal, with pole attachment rate increases for small and rural providers perhaps one of the starkest examples of the “Wrong Way” to maintain affordable broadband Internet services.<sup>53</sup> At the very least, as discussed in Section IV, until the Commission rationalizes the pole attachment rate scheme applicable to broadband Internet service providers under Section 224, it either should not move ahead on reclassification, or must delay implementation of any decision until it can complete any and all rulemaking proceedings related to the change in regulatory status of Internet service providers.

## **2. Likelihood of State and Local Telecommunications Regulation.**

The record demonstrates that reclassification will have myriad untoward consequences with the very great likelihood that among them will be burdensome state and local regulation. Although the NOI adverts to this possibility in passing, and indicates that the Commission may need to exercise its preemption authority, it pays scant attention to the near-term practical implications that reclassification as telecommunications carriers likely will have on providers.<sup>54</sup>

It bears noting that in its 1998 Universal Service Report, the Commission itself recognized that classification of broadband Internet transmission as a Title II common carrier

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<sup>52</sup> *Terms of Endearment* is a 1983 film adapted by James L. Brooks from the novel by Larry McMurtry and starring Shirley MacLaine, Debra Winger, and Jack Nicholson. It covers the relationship between Aurora Greenway (MacLaine) and her daughter Emma (Winger). See Wikipedia, [http://en.wikipedia.org/wiki/Terms\\_of\\_Endearment](http://en.wikipedia.org/wiki/Terms_of_Endearment); [http://www.script-o-rama.com/movie\\_scripts/t/terms-of-endearament-sccript-transcript.html](http://www.script-o-rama.com/movie_scripts/t/terms-of-endearament-sccript-transcript.html) (last visited Aug. 12, 2010)

<sup>53</sup> AT&T Comments at 39-91 (describing the Commission's Third Way proposal as the “Wrong Way.”)

<sup>54</sup> *NOI* at ¶¶ 109-10.

service would encourage states to assert jurisdiction over Internet access services.<sup>55</sup> This is undoubtedly true. Many commenters discussed the adverse consequences that removal of the current “blanket federal preemption” of state regulation of information services would have, thereby subjecting broadband service providers “to a patchwork of overlapping and potentially contradictory requirements.”<sup>56</sup>

For example, Cablevision states that broadband service providers may become subject to state and local telecommunications franchise fees, right-of-way fees, and a “collage of legal requirements from hundreds of different state and local jurisdictions” that would constitute “a regulatory nightmare.”<sup>57</sup> Charter explains that:

If the FCC believes it possible to segregate “Internet connectivity” from an integrated broadband service offering, and then regulate it as telecommunications, a municipality could correspondingly argue that such “Internet connectivity” is subject to telecommunications regulation at the local level. Given the inconsistency among the federal circuits and the Commission regarding local management of rights-of-way under section 253 of the Communications Act, for example, and the prospect for municipalities to secure an additional revenue stream of franchise fees, it is not hard to see that, with reclassification, these highly litigious local issues will become an even greater concern – both politically and economically – for broadband providers, including franchised cable operators.<sup>58</sup>

Time Warner Cable observes that classifying broadband transmission as Title II telecommunications service “might well prompt states to impose regulations on that service,” as several are already attempting “to regulate purportedly severable intrastate aspects of

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<sup>55</sup> *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, ¶¶ 75-77 (1998) (“*Universal Service Report*”).

<sup>56</sup> See, e.g., Cablevision Comments at 21-24; NCTA Comments at 77-80; Time Warner Comments at 67-69.

<sup>57</sup> Cablevision Comments at 23-24.

<sup>58</sup> Charter Comments at 8-9. See also Barbara Esbin and Gary Lutzker, “Poles, Holes, and Cable Open Access: Where the Information Superhighway Meets the Local Right-of-Way,” 10 *CommLaw Conspectus* 23 (2001) (discussing interplay of regulatory classification decisions under the Communications Act, local franchising requirements and the Commission’s Section 253 preemption authority).



interconnected voice-over-Internet Protocol (“VoIP”) service as a telephone service under state law – in spite of the Commission’s order preempting regulation in that arena.”<sup>59</sup>

Comcast too describes how states “currently play a significant role in regulating Title II services, and although broadband Internet service is undoubtedly an interstate service, certain states (and even localities) will not hesitate to attempt to impose their own visions of appropriate regulation on broadband ISPs once the Commission opens the Title II door,” unless the Commission expressly preempted such actions.<sup>60</sup>

NCTA explains that even if the Commission attempts to block states from exercising regulatory authority, there remains “a substantial likelihood that states and localities will attempt to, and may be successful at, imposing costly regulations.”<sup>61</sup> NCTA warns that: “State public service commissions could move to apply state regulations for telecommunications services that include requirements for certification, tariff filing, reporting requirements, and regulatory fees,” and “FCC forbearance from Title II requirements would not prevent state commissions from applying state telecommunications rules.”<sup>62</sup> Additional state regulatory burdens including certification requirements, tariff filing, reporting requirements, and regulatory fees will have a significant impact on smaller operators because it is not evident that they can easily be passed along to subscribers.

The risk of state regulation is heightened in this proceeding, according to NCTA, because unlike the Commission’s preemption of state economic regulations applicable to VoIP because the impermissibly intruded on the Commission’s deregulatory approach, the Commission’s goal here is regulatory. Given that the Commission itself may seek to impose

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<sup>59</sup> Time Warner Comments at 67.

<sup>60</sup> Comcast Comments at 39-40.

<sup>61</sup> NCTA Comments at 77.

<sup>62</sup> NCTA Comments at 77-79 (*citing Universal Service Report* at ¶ 48).

nondiscrimination requirements and plans to retain the broad sweep of Sections 201 and 202, NCTA asserts, states would likely claim wide leeway to regulate in ways that would be found to be consistent with this new federal regulatory regime.<sup>63</sup>

NCTA explains further that the prospect of state regulation “may also be heightened by the Commission’s proposal to classify only the last mile broadband transmission facility, defined as a facility with end points at the home and at the nearest gateway switch, head end or aggregation point” in light of Commission precedents treating digital subscriber line service as a local exchange service. Isolation of the local portion of Internet service for federal classification purposes “could fuel state commission claims that the transmission component is an intrastate service with end points within the state.”<sup>64</sup>

AT&T argues that states will “vigorously oppose” limitations on their authority.<sup>65</sup> Time Warner Cable too notes that “experience teaches that states will vigorously resist any effort by the Commission to preempt their efforts to regulate.”<sup>66</sup> Time Warner Cable observed how, in specific response to the NOI, the National Association of Regulatory Utility Commissioners (“NARUC”) “is poised to adopt a resolution opposing any attempt by the Commission to preempt state regulation and asking instead that the Commission avoid any action that would ‘limit the ability of States to influence the advancement of the broadband ecosystem.’”<sup>67</sup>

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<sup>63</sup> NCTA Comments at 78.

<sup>64</sup> NCTA Comments at 79.

<sup>65</sup> AT&T Comments at 121.

<sup>66</sup> Time Warner Comments at 68.

<sup>67</sup> Time Warner Comments at 68; National Association of Regulatory Utility Commissioners, Resolution Opposing Federal Preemption of States’ Jurisdiction over Broadband Internet Connectivity Services, Draft Resolutions Proposed for Consideration at the 2010 Summer Committee Meetings of the National Association of Regulatory Utility Commissioners at 30-32 (as submitted July 2, 2010), *available at* <http://summer.narucmeetings.org/2010ProposedResolutions.pdf> (last visited Aug. 12, 2010).

In fact, the NARUC Board of Directors adopted a version of the resolution opposing FCC interference with the ability of states to regulate broadband Internet connectivity at its 2010 Summer Committee Meetings on July 21, 2010. The Resolution urges the Commission, if it adopts its “Third Way” proposal, to (i) refrain from prejudicing States’ authority reserved under Section 253 of the Act “to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers,” and (ii) refrain from forbearing application of Title II provisions which reserve authority to the States, “as such forbearance would be contrary to the bi-jurisdictional oversight of broadband Internet connectivity service.”<sup>68</sup> AT&T characterizes the NARUC position as a “fourth way” that would include “bi-jurisdictional regulatory oversight for broadband Internet connectivity service.”<sup>69</sup>

Consistent with this position, the National Association of State Utility Consumer Advocates (“NASUCA”) warns in its Comments that forbearance “could threaten the important role played by state regulation of broadband Internet and Internet connectivity services,” by “completely hobbling, if not forbidding, state mediation, arbitration, resolution and approval of carrier interconnection agreements regarding broadband transmission services.”<sup>70</sup> Comments filed by three state utility commissions (California, Ohio and Pennsylvania) also emphasize “necessity for an ongoing role for the States” including shared jurisdictional responsibility for, *inter alia*, universal service and disabilities programs,

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<sup>68</sup> National Association of Regulatory Utility Commissioners, Committee on Telecommunications, Resolution Opposing Federal Preemption of States’ Jurisdiction over Broadband Internet Connectivity Services, adopted July 21, 2010 at the 2010 NARUC Summer Committee Meetings, *available at* <http://www.naruc.org/Resolutions/Resolution%20Opposing%20Federal%20Preemption%20of%20State%20Jurisdiction%20over%20Broadband%20Service.pdf> (last visited Aug. 12, 2010).

<sup>69</sup> AT&T Comments at 122

<sup>70</sup> *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010), Comments of the National Association of State Utility Consumer Advocates at 25 (filed July 15, 2010) (“NASUCA Comments”). NASUCA urges the Commission to “realize how inextricably linked such services are with both ‘regular’ Title II services and broadband connectivity.” *Id.*

consumer protection, emergency services, ensuring telecommunications service, network access, and dispute resolution and enforcement action.<sup>71</sup>

Thus, it is virtually certain that broadband Internet service providers will be “forced to participate in a series of state regulatory proceedings, and to pursue a concomitant series of preemption petitions, given the inevitable efforts to impose regulation on the new ‘telecommunications service’ at the state level.”<sup>72</sup> Even if the Commission were to deem the Internet traffic traversing these facilities as interstate, states would very likely seek to litigate their right to treat the service as intrastate. It seems clear to ACA that no matter which regulatory jurisdiction “wins” such fights, the costs of securing victory (or defeat) will be disproportionately burdensome for smaller operators.

### 3. Prospect of State Telecommunications Taxation.

The record is similarly clear that reclassification may either automatically trigger state telecommunications tax assessments or encourage states to extend telecommunications taxes to broadband Internet service providers, increasing costs for small providers. For example, Time Warner Cable and CTIA warn that classification under Title II could allow states and localities to impose the more burdensome tax regimes that generally apply to regulated industries to broadband Internet providers, who “would suddenly be at risk of losing the protection of the Internet Tax Freedom Act (“ITFA”).”<sup>73</sup>

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<sup>71</sup> *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010), Comments of the California Public Utilities Commission and the People of the State of California at 9, 10-18 (filed July 15, 2010) (“CPUC Comments”); *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010), Comments of the Pennsylvania Public Utility Commission Comments at 2-3, 6 (filed July 15, 2010) (“PPUC Comments”); *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010), Comments of the Public Utilities Commission of Ohio at 9 (filed July 14, 2010) (“PUCO Comments”).

<sup>72</sup> Time Warner Comments at 69.

<sup>73</sup> Time Warner Comments at 67; 47 U.S.C. § 151 note, §§ 1101(a), 1104, 1105(8)(B) (prohibiting “non-grandfathered” states or political subdivisions thereof from imposing new “taxes on Internet access” and “multiple or discriminatory taxes on electronic commerce,” but excluding from the definition of “tax” “any . . . fee

Although the Internet Tax Freedom Act prohibits states from levying —Internet access taxes against providers or consumers of —Internet access services with the exception of —grandfathered states, see Pub. L. No. 110-108, 121 Stat 1024 (2007) (extending moratorium through 2011), the Act separately defines —telecommunication carrier and telecommunications service as —the meaning given such services in Section 3 of the Communications Act of 1934 (47 U.S.C. 153). As a result, a determination by the Commission that broadband Internet connectivity service is a telecommunications service under the Communications Act could deprive broadband providers of the continued protection of the Internet Tax Freedom Act.<sup>74</sup>

Many commenters argue that although the Commission can curtail state regulation through preemption in specific cases, its ability to intervene in matters of state taxation is far more circumscribed.<sup>75</sup> Charter, for example, describes how reclassification would disturb the taxation and regulatory regimes that states have crafted over the years for broadband and telecommunications services. The NOI, however, addresses only the Commission’s ability to preempt states’ attempts to impose regulatory requirements on broadband Internet connectivity services but fails to recognize that reclassification would invite massive new state property taxes and even local franchising obligations on “telecommunications” facilities and services over which the Commission may have far less jurisdiction to control.<sup>76</sup>

According to Cablevision, states and localities are “constantly seeking to assess taxes and fees on broadband providers, and these efforts have greatly intensified since the country entered the current economic downturn; franchise fees, rights-of-way fees, and taxes on “telecommunications services” are common in states and localities; and “removing the blanket protection offered by the current information service designation would, at best,

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related to obligations or telecommunications carriers under the Communications Act of 1934 (47 U.S.C. 151 et seq.)”.

<sup>74</sup> CTIA Comments at 36, n. 84.

<sup>75</sup> See, e.g., NCTA Comments at 79-80; Time Warner Comments at 67-69; CTIA Comments at 35-36 n.84.

<sup>76</sup> Charter Comments at 7.

make combating these kinds of state and local regulations and fees into a constant series of protracted battles.”<sup>77</sup>

Charter explains that, in general, states impose taxes on utility property (including telecommunications) on a central assessment basis, while non-telecommunications property (like cable and broadband) is taxed on a local assessment basis. The former establishes tax value on a corporate-wide (value of enterprise) basis, while local assessment establishes value of property residing only within the state. “Consequently, tax liability is usually much higher under central assessment than under local assessment,” with a resulting property tax liability increase, in Charter’s estimate, for that company of 2-3 times current levels in some states, and as much as 4-6 times in others.<sup>78</sup> On an industry-wide basis, Charter estimates, the additional tax burden on all cable operators could be 10 to 12 times that of Charter’s own tax burden, if not significantly more.<sup>79</sup>

For ACA members, the preparation of such state telecommunications tax filings could become quite complicated, as the operator may be forced to establishing bookkeeping and accounting processes to track income and expenses related to the newly created broadband Internet connectivity service.

### **III. BURDENS OF RECLASSIFICATION WILL ADVERSELY IMPACT BROADBAND PRICES AND DEPLOYMENT.**

The direct economic regulatory and administrative burdens ACA identified with common carrier status in its initial Comments should be viewed as just the visible tip of the economic iceberg small providers will have to navigate under the Third Way. The record demonstrates also that immediately below the surface lay vastly increased pole attachment

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<sup>77</sup> Cablevision Comments at 24-25.

<sup>78</sup> Charter Comments at 7.

<sup>79</sup> Charter Comments at 7-8.

rates, the potential for new state and local regulatory obligations, associated fees, and tax burdens. Many commenters assert that increased regulatory burdens and costs flowing from reclassification could negatively impact broadband deployment, and that many of the increased costs of providing service will also be passed along to consumers through retail rate increases.<sup>80</sup>

Obviously, a change in the regulatory status of broadband Internet service that will have the immediate consequence of raising some providers' yearly pole attachment rental costs by 400 percent will have an adverse impact on the provision of service to existing subscribers. Equally importantly, it will have an adverse effect on the ability to achieve "universal broadband availability," which the Commission recently identified as "the great infrastructure challenge of our time."<sup>81</sup> Pole attachment rate increases for small and rural providers are not only stark examples of the "Wrong Way" to maintain affordable service, as discussed above in Section III, they also are absolutely antithetical to the goal of increasing broadband investment and deployment.<sup>82</sup>

The Commission itself has recognized that increased pole attachment costs can adversely affect broadband deployment. The Pole Attachment FNPRM documented the deleterious effect on cable operator incentives to offer new advanced services if they were required to pay the current telecom rate for all their poles.<sup>83</sup> Both the Pole Attachment

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<sup>80</sup> See, e.g., Comcast Comments at 36 (new regulatory burdens will increase the cost of providing and using broadband); AT&T Comments at 63 n.114 (significant provider costs of compliance that include changes to accounting, billing, ordering, provisioning, customer service and maintenance systems will ultimately be borne by subscribers); Charter Comments at 9 (it is the consumer who will eventually shoulder the economic burden of reclassification); and NCTA Comments at 79-80 (reclassification may either automatically trigger state telecommunications tax assessments or encourage states to extend telecommunications taxes to broadband Internet service providers, putting, "upward pressure on the price for broadband that could impede the goal of wider adoption.").

<sup>81</sup> *Seventh Broadband Deployment NOI* at ¶ 3.

<sup>82</sup> AT&T Comments at 39-91 (describing the Commission's Third Way proposal as the "Wrong Way.")

<sup>83</sup> *Pole Attachment FNPRM* at ¶ 116.

FNPRM and the National Broadband Plan cited the distorting effect the telecommunications rate formula can have on the deployment decisions of attachers in general, the especially deleterious impact of these rates “in rural areas, where there often are more poles per mile than households,” and the additional deterrent effect on cable broadband deployment of uncertainty regarding potential pole attachment rate increases.<sup>84</sup>

It is also evident that reclassification will increase the costs of providing broadband Internet service as operators institute service and system changes to comply with the new regulatory mandates. Additional state and local regulatory burdens will also increase the cost of service and drain operator resources. Time Warner Cable asserts that the significant costs of compliance with reclassification mandate will discourage investment, as the Commission itself has consistently found in the past.<sup>85</sup> Charter states that it is consumers who will “eventually shoulder the economic burden of reclassification” through increased prices as providers and state and local governments begin to re-test and litigate the parameters of regulatory authority over the newly minted telecommunications service.<sup>86</sup>

Yet in the smaller markets and rural areas serving fewer and lower-income consumers per mile, it is likely that a large portion of these costs will be absorbed by the provider rather than passed along to subscribers. Very clearly, reclassification would subject providers, and especially small and mid-sized providers to what Kazantzakis “Zorba the Greek” might label the “full catastrophe” of a common carrier regulatory framework and its

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<sup>84</sup> *Pole Attachment FNPRM* at ¶¶ 115, n.311; National Broadband Plan at 110 (*citing In the Matter of a National Broadband Plan for Our Future*, Notice of Inquiry, GN Docket No. 09-51, 24 FCC Rcd. 4342 (2009), Comments of the American Cable Association at 8-9 (filed June 8, 2009)).

<sup>85</sup> Time Warner Comments at 39-40.

<sup>86</sup> Charter Comments at 9.



attendant obligations and consequences designed without regard for the size of the provider and its ability to bear the costs.<sup>87</sup>

Such results appear starkly at odds with the Commission's overarching policy goal, which ACA shares, of making available affordable broadband Internet service to all Americans. The deterrent effect on cable broadband deployment of suddenly increased pole attachment rates alone should be of equal if not greater concern to the Commission, and suggests that the Commission approach the question of reclassification with extreme deliberation and care. ACA submits that achievement of the Commission's goals of affordable broadband Internet service available to all Americans and establishing a regulatory framework that promotes investment and innovation will not be possible unless the Commission takes full account and develops means of mitigating the disproportionate economic burdens reclassification will impose on small providers.

#### **IV. THE RECORD SUPPORTS ACA'S CONCLUSION THAT RECLASSIFICATION WOULD BE A LEGISLATIVE RULING REQUIRING A RULEMAKING PROCEEDING AND REGULATORY FLEXIBILITY ANALYSIS.**

ACA challenged the Commission's attempt to cast the regulatory classification question as one of pure statutory interpretation, such that Commission action on the NOI would be an "interpretative ruling" rather than a "legislative ruling."<sup>88</sup> To the contrary, ACA

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<sup>87</sup> See Barbara Esbin, The Progress & Freedom Foundation Blog, *R.I.P. Ancillary Jurisdiction; Hello Common Carriage* (Jan. 15, 2010) (discussion of possibility that the FCC might consider steps to reclassify broadband Internet service from an unregulated "information service" to a highly regulated "telecommunications" or utility service under the Act), available at <http://blog.pff.org/archives/2010/01/print/005877.html> (referencing Nikos Kazantzakis, *Zorba the Greek*, see [http://en.wikipedia.org/wiki/Zorba\\_the\\_Greek\\_%28novel%29](http://en.wikipedia.org/wiki/Zorba_the_Greek_%28novel%29); [http://en.wikiquote.org/wiki/Zorba\\_the\\_Greek](http://en.wikiquote.org/wiki/Zorba_the_Greek) (unsourced quote: "Wife; children; house; everything. The full catastrophe.") (last visited Aug. 12, 2010).

<sup>88</sup> *NOI* at ¶ 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 (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

argued, the practical effect of the change in regulatory status for affected providers from default unregulated to default regulated under Title II will be an immediate and potentially significant increase in regulatory burdens, including recordkeeping and reporting burdens.

As ACA stated:

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 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.<sup>89</sup>

In short, reclassification will immediately alter the rights and duties of the affected providers in the manner of a legislative ruling, regardless of whether the Commission achieves its goal by 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. The practical effect of either will be the immediate imposition of new rights and duties on broadband Internet service providers.

Simply put, determinations such as these have to be accomplished through notice-and-comment rulemaking proceedings under the APA and, therefore, be accompanied by

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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.”).

<sup>89</sup> ACA Comments at 17-18.

an initial and final regulatory flexibility analysis.<sup>90</sup> Several commenters agree with ACA's assessment that reclassification would be a legislative ruling requiring a notice of proposed rulemaking to initiate the process and, consequently, both an initial and final regulatory flexibility analysis before the new rules could become operative.

CTIA, for example, concurs with ACA's assessment that the APA imposes significant procedural restraints on the Commission's ability to act without first engaging in further rulemaking proceedings.

The Commission's proposed path to adopt new rules for broadband providers runs afoul of the APA as it impermissibly seeks to use a Declaratory Ruling to both overturn existing regulation and to impose additional regulation without the benefit of a notice and comment rulemaking. Despite claims in the NOI that the Commission is merely [giving] an "interpretation of the Communications Act as the D.C. Circuit noted in *Sprint v. FCC*, "when an agency changes the rules of the game . . . more than a clarification has occurred." As the D.C. Circuit has explained, notice and comment rulemaking is required when an agency "grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests." The Commission's NOI is clear; the purpose of the proceeding is to apply Title II common carriage regulation in order to position the Commission to impose regulatory obligations that do not currently apply. As a result, this proceeding would "impose obligations" and have "other significant effects on private interests."<sup>91</sup>

Similarly, NCTA challenges the Commission's view that it could subject broadband Internet service to traditional telephone regulation for the first time by way of an interpretative ruling "deemed sufficiently routine or ministerial as to not require notice and comment."<sup>92</sup>

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<sup>90</sup> Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237, *as amended*, 5 U.S.C. §§ 501, *et seq.* ("APA"); Regulatory Flexibility Act, of 1980, Pub. L. 96-35494 Stat. 1164, *as amended*, 5 U.S.C. §§ 603, 604 ("RFA").

<sup>91</sup> CTIA Comments at 85-86. CTIA also argues that in addition to the policy considerations that weigh against the Commission's altering the current light touch regulatory approach to broadband Internet services, and the insurmountable obstacles under the Administrative Procedure Act, the Commission lacks legal authority to adopt its proposed Third Way. CTIA Comments at 66.

<sup>92</sup> NCTA Comments at 27.

Time Warner asserts that all of the new obligations associated with the Third Way “would comprise the type of ‘legislative rules’ for which notice and comment is mandatory, and the NOI’s assertion that the Commission need not comply with that basic requirement is mistaken . . . even though the NOI does afford some opportunity for public comment, its apparent willingness to disregard the APA is disconcerting.”<sup>93</sup>

Moreover, NCTA explains, as the name implies “an interpretive rule merely interprets or clarifies a statute or rule that the agency has been entrusted to administer and is, therefore not subject to the notice and comment requirements of Section 553 of the APA or the Regulatory Flexibility Act.”<sup>94</sup> This contrasts to a legislative rule, which results in a substantive change and requires formal notice and comment procedures. While the two can sometimes be confused, NCTA writes “no such ambiguity exists here. The monumental decision to change the regulatory framework of broadband Internet service is not a simple interpretation of statutory language.”<sup>95</sup>

According to NCTA, “the complex technical, legal and policy judgments that bear on the determination whether broadband Internet services are integrated information services go well beyond simple interpretation of the words of the Act.”<sup>96</sup> Reversing course when the Commission already has given the regulatory status of broadband Internet services definitive interpretation goes beyond “clarification” all the way to “amendment” and, NCTA asserts, an amendment to a legislative rule “must itself be legislative.”<sup>97</sup> Verizon and Verizon Wireless concur that where, as here, the Commission seeks to reverse course and

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<sup>93</sup> Time Warner Comments at 29.

<sup>94</sup> NCTA Comments at 27.

<sup>95</sup> NCTA Comments at 28; see ACA Comments at 19.

<sup>96</sup> NCTA Comments at 28.

<sup>97</sup> NCTA Comments at 29.

add substantive new regulatory obligations, it is engaging in a legislative ruling and can only properly proceed by means of a notice-and-comment rulemaking.<sup>98</sup>

NCTA, Time Warner Cable, Verizon and Verizon Wireless thus conclude, as ACA has, that the Commission' proposed reversal of course that finds a telecommunications services component within the integrated broadband information service would constitute the type of change that cannot be accomplished through an interpretive ruling, but must be made within a notice-and-comment rulemaking proceeding.<sup>99</sup>

Conducting a notice-and-comment rulemaking in advance of a decision to reclassify will permit the Commission and affected parties the opportunity to identify with specificity and provide targeted commentary on the factual and legal basis undergirding reclassification and the precise scope of the rules that will be applicable to broadband Internet service providers post-reclassification. The record compiled in response to the NOI should provide an adequate basis for such a notice of proposed rulemaking. Because such proceedings also require the Commission to perform an initial and final regulatory flexibility analysis, it must assess and quantify the burdens reclassification will have on small entities and propose or at the very least, seek comment on, means of ameliorating disproportionate impacts. Taking these steps will improve the quality of the Commission's analysis and will ensure that any final rules adopted are consistent with the public interest in receiving service from financially viable broadband service providers.

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<sup>98</sup> Verizon and Verizon Wireless Comments at 96-98.

<sup>99</sup> NCTA Comments at 29; Time Warner Comments at 29; Verizon and Verizon Wireless Comments at 98-99 ("the D.C. Circuit has said, 'a refusal to initiate a rulemaking naturally sets off a special alert' when a change in existing law is sought 'on the basis of a radical change in its factual premises.'"); and ACA Comments at 19-20.

## V. THE RECORD SUPPORTS ACA'S CALL FOR DELAYED IMPLEMENTATION.

While the record definitively demonstrates that reclassification will have a significant, economic impact on small and mid-sized providers, it is impossible to quantify that impact based solely on the information contained in the NOI. In its Comments, ACA objected that the lack of specificity as to the nature and scope of the rules that would be newly imposed on the “broadband Internet connectivity service” deemed a common carrier offering by the Commission made it difficult to assess the precise level of economic burden the new regulatory obligations would impose on providers and to develop means of lessening the impact on small entities, as required by law.<sup>100</sup> The record supports these concerns, and also demonstrates how the uncertainty itself will result in increased economic burdens, as investors pull back from the sector and the cost of capital rises.<sup>101</sup>

ACA raised concerns in its Comments that the lack of specificity with respect to new compliance burdens of broadband Internet service providers under Title II, which would be required in an initial regulatory flexibility analysis.<sup>102</sup> Equally, if not more importantly, the Commission has omitted seeking comment on steps it could take to mitigate them, as required by the RFA. As ACA wrote in its Comments, Congress in enacting the RFA

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<sup>100</sup> ACA Comments at 21.

<sup>101</sup> See, e.g., AT&T Comments at 62-64 (among the numerous implementation problems that arise from Commission definitional contrivance of creating a new “broadband Internet connectivity service” is the Commission’s failure to define it with sufficient specificity to allow providers to understand their obligations); Time Warner Comments at 35 (lack of specificity as to the nature of the purported telecommunications service violates elementary administrative law norms of fair notice; will make it impossible to gauge compliance; and the failure to resolve basic service parameter questions “casts serious doubt on the reclassification proposal from the outset”); Cablevision Comments at 32 (regulatory costs and uncertainty will depress investment in the broadband industry, cost jobs and slow broadband revenue growth); and Charter Comments at 3 (reclassification will create an uncertain regulatory environment, threatening the development of managed and specialized services that need room for experimentation and growth, and sufficient regulatory certainty to invite investment, contrary to the Commission’s longstanding policy goals and the National Broadband Plan).

<sup>102</sup> ACA Comments at 21.

recognized that regulation designed for application to large scale entities can impose “unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses” with limited resources.<sup>103</sup> It also recognized the adverse impact of one-size-fits-all regulation on competition in the marketplace, including “discourage[ing] innovation and restrict[ing] improvements in productivity.”<sup>104</sup> To avoid such adverse consequences, the RFA requires administrative agencies to consider “alternative regulatory approaches” which do not conflict with statutory objectives to “minimize the significant economic impact of rules” on small businesses *when considering proposed rules*.<sup>105</sup> This obligation under the RFA applies where, as here, agencies are contemplating the imposition of rules with significant economic impact on small entities.<sup>106</sup>

In this case, 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 legal force of common carrier obligations under sections 201 and 202 and related provisions would attach immediately upon reclassification, with no consideration having been given to means of mitigating disproportionate burdens on small providers through alternative regulatory approaches.

In light of these problems with the Commission’s current course of action, ACA again urges the Commission to refrain from immediate action on reclassification and to comply with the APA – which requires a notice-and-comment rulemaking before imposing new legal obligations on broadband Internet service providers – and with the RFA – which requires the

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<sup>103</sup> 5 U.S.C. §§ 601, *et seq.*, Congressional Findings and Declaration of Purpose, (a) (2) & (3).

<sup>104</sup> 5 U.S.C. § 601 (a) (4).

<sup>105</sup> 5 U.S.C. § 601 (a) (7) & (8). The RFA defines “rule” to “mean any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553” of the APA. 5 U.S.C. § 601 (2).

<sup>106</sup> See ACA Comments at 16; 5 U.S.C. § 603.

Commission to quantify the burdens of new regulation having a significant economic impact on small entities, coordinate its actions with the Small Business Administration, and to take steps to ameliorate disproportionate burdens.<sup>107</sup>

In ACA's view, delayed implementation of any reclassification decision is not merely a matter of Commission discretion, but a necessity. 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, and consideration of means to minimize the imposition of disproportionate regulatory burdens on small providers.

## VI. CONCLUSION.

Proponents of reclassification via the Third Way have a tendency to characterize the companies on the other end of this proposal as "corporate behemoths," "Big Phone Big Cable," and "giant corporations."<sup>108</sup> But the regulatory requirements associated with the

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<sup>107</sup> The RFA requires both an initial and final regulatory flexibility analysis. 5 U.S.C. §§ 603, 604. The initial regulatory flexibility analysis to be contained in a notice of proposed rulemaking for any proposed rule must contain, among other things, a description of the reasons why action by the agency is being considered; the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the types of professional skills necessary for the preparation of a report or record; any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities, including establishment of differing compliance or reporting requirements or timetables, clarification, consolidation or simplification of compliance and reporting requirements, and exemptions from coverage of the rule, or any part thereof, for such small entities. 5 U.S.C. § 603.

<sup>108</sup> See, e.g., Gigi Sohn, Public Knowledge, *Public Knowledge Says Verizon-Google Agreement is 'Nothing More than a Private Agreement between Two Corporate Behemoths'* (Aug. 9, 2010), available at <http://www.publicknowledge.org/public-knowledge-says-verizon-google-agreement-not> (last visited Aug. 12, 2010); Free Press Advertisement, "Big Oil Big Banks Big Phone Big Cable Same \$ellout" (criticizing FCC "closed door" meetings to resolve network neutrality issues), available at <http://www.freepress.net/files/same-sellout.pdf> (last visited Aug. 12, 2010); *Statement of Commissioner Michael J. Copps on Verizon-Google Announcement* (rel. Aug. 9, 2010) ("It is time to move a **decision** forward—a decision to reassert FCC authority over broadband telecommunications, to guarantee an open Internet now and forever, and to put the interests of



Third Way will fall just as directly on the shoulders of the smallest providers as it will the largest. Unfortunately, the NOI gives *absolutely no* consideration to the disparate impacts such a “one size fits all” approach to the Commission’s mission will have on small and mid-size providers—those least capable of shoulder the substantial new regulatory burdens that will likely flow from all levels of government, including state taxing authorities.

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 federal rate and behavioral regulation in the provision of the service, increased regulatory assessments (USF contributions), significantly increased FCC filing and reporting requirements, and a plethora of related compliance burdens. Providers will also face the prospect of immediate rate increases for their pole attachments, the likelihood of attempts by state and local governments to impose service regulation and fees, and the prospect of increased state taxation burdens. The costs associated with this new regulatory framework will disproportionately burden mid-sized and smaller cable operators with fewer resources with which to respond to complaints, comply with common carrier filing requirements, and litigate the inevitable attempts to impose additional regulatory requirements, fees and taxes at the state and local levels.

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 either

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consumers in front of giant corporations.”) (emphasis in original), *available at* [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db0809/DOC-300754A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0809/DOC-300754A1.pdf) (last visited Aug. 12, 2010).

conduct a rulemaking proceeding prior to changing the regulatory status of broadband Internet service, and/or 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,

**AMERICAN CABLE ASSOCIATION**

*Barbara Esbin*

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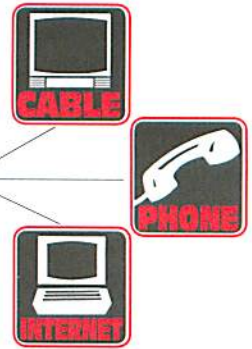
August 12, 2010

**ATTACHMENT A**

**DECLARATION OF TYRONE GARRETT**

# SEMO COMMUNICATIONS

107 SEMO Lane, P.O. Box C, Sikeston, MO 63801  
(573) 471-6594 • (800) 635-8230 • Fax (573) 471-6878



## DECLARATION OF TYRONE GARRETT

1. My name is Tyrone Garrett and I am the President of SEMO Communications Incorporated ("SEMO"). SEMO is based in Sikeston, Missouri, and provides cable television, high-speed Internet, and VoIP telephony services to 20 mainly rural communities in Southeast Missouri.
2. In my capacity as President of SEMO, I have personal knowledge of the impact that pole attachment rates, terms, and conditions can have on the ability of providers to deploy broadband and other advanced services in rural communities.
3. SEMO rents space on approximately 4,200 poles throughout its service areas.
4. Should the Federal Communications Commission reclassify the transmission component of broadband service as a "telecommunications service", the pole attachment rate SEMO would be charged by at least one pole owner under the "Telecom Rate" would increase from approximately \$9/pole/year to \$35/pole/year - a nearly 400% increase from the current "Cable Rate". It would also create uncertainty over what rate the other pole owners we rent space on could charge in the future.
5. SEMO has planned an expansion of their service area to include Grant City, Dogwood, and Painton, Missouri, as well as rural subdivisions of Scott, Mississippi, New Madrid, Stoddard, and Cape Girardeau counties in Southeast Missouri. Many of these rural areas are unincorporated, have between 50-60 homes or less, and currently have no broadband service of any kind.
6. The prospect of a potential increase of nearly 400% in the pole attachment rate has caused SEMO to indefinitely delay expansion plans to deploy broadband plant to the rural areas described above. The impact of increased pole attachment rates would have a chilling effect on the expansion plans of SEMO. Our company would be paying the higher rates for pole attachments, which will lessen SEMO's ability to use its cash flow to build these systems. Pole attachments are a fixed expense, and if they go up, they will have a negative impact on the economic viability of SEMO, as well as negative effects on expansion plans and jobs.  
In today's credit market environment, we have found that bank financing for rural builds is extremely difficult to obtain. Any increase in pole attachment rates will have an adverse effect on broadband deployment by SEMO, and we believe, goes against the intent of the national broadband plan.
7. The facts contained herein are true and correct to the best of my knowledge, information, and belief.

Tyrone Garrett  
President  
SEMO Communications Incorporated  
August 11, 2010

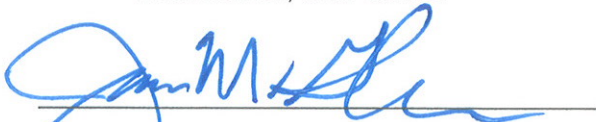
**ATTACHMENT B**

**DECLARATION OF JAMES M. GLEASON**



## DECLARATION OF JAMES M. GLEASON

1. My name is James M. Gleason and I am the President and Chief Executive Officer of NewWave Communications (“NewWave”). NewWave is based in Sikeston, Missouri, and provides cable television, high-speed Internet, and VoIP telephony services to mainly rural communities in Arkansas, Illinois, Kentucky, Missouri, South Carolina, and Tennessee.
2. In my capacity as President and CEO of NewWave, I have personal knowledge of the impact that pole attachment rates, terms, and conditions can have on the ability of providers to deploy broadband and other advanced services in rural communities.
3. NewWave rents space on approximately 220,786 poles throughout its service areas.
4. Should the Federal Communications Commission reclassify the transmission component of broadband service as a “telecommunications service,” the pole attachment rate NewWave would be charged by at least one pole owner under the “Telecom Rate” would increase from approximately \$9/pole/year to \$37/pole/year – over a 400% increase from the current “Cable Rate.” That change in price for only one expense item will force NewWave to evaluate retail rates and pass increased costs on to consumers.
5. An increase the magnitude of 400% in the pole attachment rate would have a significant, detrimental impact on NewWave and its plans to expand to other rural areas. In fact, NewWave would be forced to evaluate certain current rural areas served to determine if continued service is viable. In more sparsely populated, rural areas there are more poles per mile of cable thereby significantly affecting the cost structure to provide service. Retail pricing usually cannot vary from one part of a service area to another, therefore high-speed data service may be discontinued. Additionally, NewWave’s ability to extend its plant into newer, rural areas would be significantly curtailed.
6. The facts contained herein are true and correct to the best of my knowledge, information, and belief.



James M. Gleason  
President and Chief Executive Officer  
NewWave Communications

August 12, 2010