Reclassifying Broadband as a Title II Telecommunications Service: A Legal and Policy Assessment

By Christopher S. Yoo*

I. INTRODUCTION

On May 6, 2010, FCC Chairman Julius Genachowski announced his plans to initiate proceedings to explore deviating from the FCC’s longstanding position that broadband is an “information service” governed by Title I of the Communications Act of 1934 and instead to reclassify it as a “telecommunications service” subject to Title II. On June 17, 2010, the Commission issued a Notice of Inquiry seeking comment on this possibility. Broadband for America commissioned me to provide an opinion as to the likely success of this initiative as a legal matter and to assess its policy implications. As a legal matter, the attempt to reclassify broadband Internet access as a Title II service would conflict with the plain language of the statutes enacted by Congress, the unbroken line of prior FCC decisions, and the reasoning of the Supreme Court’s *Brand X* decision. As such, it is unlikely to survive judicial scrutiny. As a matter of policy, the history of common carriage regulation suggests that reclassifying broadband Internet access as a Title II service is likely to create serious implementation problems. It would certainly be inconsistent with Congress’s stated policy of “preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”

Just as in 1984 with respect to cable television, the more straightforward way to accommodate a new telecommunications technology is for Congress to adopt new legislation explicitly giving the FCC regulatory authority over broadband. Congressional leaders have already indicated their intention to pursue such legislation, and a wide range of labor organizations, industry participants, and civil rights groups have indicated their support. Indeed, Representative Henry Waxman recently proposed just such legislation.

II. UNDERSTANDING THE DEBATE OVER RECLASSIFICATION

The Communications Act of 1934 established the basic regulatory regime that continues to govern the federal regulation of communications technologies. Title I of the Act created the

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FCC and established the basic rules under which it operates. The next two titles gave the FCC the authority to regulate the two primary communications technologies that existed at that time: Title II to govern telephony and Title III to govern broadcasting. In 1984, Congress added another substantive title (known as Title VI) to govern the emerging new technology of cable television.

Included in the preliminary provisions of Title I is a section giving the FCC the authority to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” This provision has long been understood as giving the FCC the implied (or “ancillary”) authority to go beyond the strict letter of its statutory mandate when necessary to carry out the responsibilities assigned to it by Congress. According to the courts, this section does not represent a freestanding or unlimited grant of authority to the FCC. Instead, it only gives the FCC the authority to take actions that both fall within the FCC’s authority over “interstate and foreign communications by wire or radio” and are “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.” In short, any exercises of this ancillary authority must be asserted in connection with some explicit grant of regulatory authority appearing in Titles II, III, or VI. As the Supreme Court has noted, allowing the FCC to exercise its ancillary authority “without reference to the provisions of the Act” would give it “unbounded” authority.

For this reason, the courts have carefully scrutinized all FCC assertions of ancillary authority, approving some, while invalidating others.

The conclusion that broadband Internet access is an “information service” and not a “telecommunications service” has its roots in the FCC’s earliest attempts to regulate early precursors to the modern Internet. The FCC has repeatedly reaffirmed this conclusion on multiple occasions over the past decade, concluding that cable modem service, wireline broadband services, broadband over powerline, and wireless broadband services are all “information services” governed by Title I rather than a “telecommunications services” governed by Title II. The Supreme Court’s 2005 Brand X decision explicitly upheld this

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4 Midwest Video Corp., 440 U.S. 689, 706 (1979) (Midwest Video II); accord Comcast v. FCC, 600 F.3d 642, 655 (D.C. Cir. 2010).
5 For examples of successful assertions of ancillary authority, see, e.g., Southwestern Cable, 392 U.S. at 178; United States v. Midwest Video Corp., 406 U.S. 649, 662-63, 667-68 (1972) (plurality opinion); id. at 675 (Burger, C.J., concurring in the result). For unsuccessful assertions of ancillary authority, see, e.g., FCC v. Midwest Video Corp., 440 U.S. 689, 708-09 (1979) (Midwest Video II); American Library Ass’n, 406 F.3d at 702-08.
6 Most notably, the FCC’s Second Computer Inquiry concluded that “enhanced services” (the precursor to modern “information services”) were not common carriage services subject to Title II. Any regulation of enhanced services were based on the FCC’s Title I ancillary jurisdiction. Amendment of Section 64.702 of the Commission’s Rules & Regulations (Second Computer Inquiry), Order, 77 F.C.C.2d 384, 430-35 ¶¶ 119-132 (1980) (Computer II Final Decision), aff’d sub nom Computer Commc’ns Indus. Ass’n v. FCC, 693 F.2d 198, 209-14 (D.C. Cir. 1982).
conclusion with respect to cable modem service. In the process, the Court noted that the FCC may possess ancillary authority over some aspects of broadband regulation, although the Court declined to express a view as to whether particular exercises of ancillary authority would be legal. This was consistent with an earlier Supreme Court decision noting that the FCC had “decid[ed] Internet services are not telecommunications services.”

The FCC’s attempt to invoke its ancillary authority to justify its decision to sanction Comcast for interfering with BitTorrent traffic was less successful. Although the court of appeals recognized that cable modem service fell within the FCC’s general jurisdictional grant over “interstate and foreign communications by wire or radio,” the assertion of authority in that case was not reasonably ancillary to any of the FCC’s statutorily mandated responsibilities. Indeed, the court of appeals reviewed each statutory provisions that the FCC cited as a possible basis for ancillary authority and held that each was either (a) simply a statement of policy or a mandate to file a report that had no substantive legal effect, (b) a provision that the FCC had already recognized was not an independent grant of authority, or (c) a novel argument impermissibly being raised for the first time on appeal.

The court of appeals recognized that the Supreme Court’s Brand X decision had mentioned that the FCC could exercise ancillary authority over cable modem service. The court of appeals noted, however, that the fact that the FCC possesses ancillary authority over some aspects of broadband Internet access does not automatically give it jurisdiction over all aspects of that technology. Instead, each assertion of ancillary authority must be evaluated on its own terms.

8 Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 976 (2005) (noting that “the Commission has jurisdiction to impose additional regulatory obligations [on information service providers] under its Title I ancillary jurisdiction to regulate interstate and foreign communications”); id. at 996 (noting that “the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.”); id. at 1002 (reasoning that the FCC can resolve any inconsistency in its treatment of DSL and cable modem services “when it decides whether, pursuant to its ancillary Title I jurisdiction, to require cable companies to allow independent ISPs access to their facilities,” although the Court expressed no view as to whether the FCC should impose such requirements).


10 Comcast, 600 F.3d at 651-61.

11 Id. at 647-51. In addition to reviewing the relevant Supreme Court precedents, the court of appeals cited National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 612 (D.C. Cir. 1976), which recognized that rather than providing “sweeping authority over [a technology] as a whole,” the Supreme Court’s ancillary jurisdiction precedents “command[] that each and every assertion of jurisdiction over cable television must be independently and justified as reasonably ancillary to” some explicit regulatory authority provided by the statute).
Because of the concern that the court of appeals’s decision in the Comcast case “greatly hampers” the FCC’s ability to carry out its statutory mandate, Chairman Genachowski has proposed what he calls a “third way” that would reclassify broadband Internet access as a Title II service while simultaneously forbearing from all but six of the forty-eight provisions of that Title. In addition, the Chairman has indicated that he plans to reclassify the transmission component as a standalone telecommunications service and offer it on a nondiscriminatory basis to all comers even when broadband Internet access providers choose not to offer transmission as a standalone service and instead offer it only on an integrated basis combined with other functionalities, a position considered and rejected by the Supreme Court in Brand X, by the court of appeals in Comcast, and by six prior FCC decisions. The FCC has recently released a Notice of Inquiry seeking comment on the Chairman’s third-way proposal as well as on the possibilities of continuing to regulate broadband Internet access through Title I ancillary jurisdiction and subjecting broadband Internet access to the full panoply of Title II regulation.

Before discussing the policy implications of this proposal, I assess whether reclassifying broadband Internet access as a Title II telecommunications service is likely to succeed as a legal matter. The problem is that reclassifying broadband Internet access in this manner would contradict the plain language of relevant statutes as well as the decisions by the Supreme Court, the court of appeals, and a long line of FCC precedent. The problems that the FCC’s third way proposal will face on judicial review undermine claims that reclassifying broadband Internet access would put regulatory policy on the soundest legal foundation and poses the fewest risks of failing in court.

III. RECLASSIFICATION’S UNLIKELY PROSPECTS FOR SUCCESS

The biggest problem with any attempt to reclassify broadband Internet access as a Title II service is that it would conflict with the plain language of the Communications Act of 1934 (as amended). It would also be inconsistent with recent decisions by the Supreme Court and court of appeals, as well as longstanding FCC precedent.

The key statutory term for determining whether a firm is subject to Title II is “telecommunications,” which the statute defines as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” The FCC and the Supreme Court have characterized a transmission as telecommunications if it provides a “pure” transmission capability over a path that is virtually “transparent” in terms of interaction with customer

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13 See Brand X, 545 U.S. at 997-99; sources cited supra 7.
14 Genachowski, supra note 12, at 4-5.
information. A firm that “offer[s] telecommunications for a fee directly to the public” provides a “telecommunications service,” and that service is subject to Title II.

A service is subject to a different regulatory classification if, instead of offering pure and transparent transmission, the service combines transmission with computer processing. In the words of the statute, an “information service” is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” As the italicized language indicates, information services use telecommunications, but combine it with computer processing and/or storage.

As the FCC has repeatedly noted, Congress envisioned that information services and telecommunications services would represent mutually exclusive categories. If a provider offers pure and transparent transmission between points of the end user’s choosing to the public for a fee, it offers a “telecommunications service” that is subject to Title II. If the provider instead offers an integrated service that combines transmission with computer processing or storage, it offers an “information service” that is not subject to Title II.

The FCC has concluded (in a decision subsequently upheld by the Supreme Court) that broadband Internet access providers offer information services, not telecommunications services. Instead of offering standalone transmission, broadband Internet access providers offer a suite of services, such as email, newsgroups, and webpage hosting, that combine computer processing with transmission. In addition, broadband Internet access providers typically include spam filtering, virus protection, and a wide range of other services that far exceed the transparent transmission associated with telecommunications services.

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16 Brand X, 545 U.S. at 976, 979, 988, 990, 993-94, 1000 (citing Computer II Final Decision, 77 F.C.C.2d at 419-20 ¶¶ 94-96; and Univ. Serv. Rep., 13 FCC Rcd. at 11540 ¶ 81.
18 Broadband Internet access services are “information services” even if the same network provider simultaneously offers other services that are more heavily regulated. For example, the fact that Verizon’s FiOS and AT&T’s U-verse platforms offer multichannel video does not subject their Internet access services to Title VI cable service regulation. Similarly, the fact that wireless providers offer telephone calling does not subject their Internet access services to Title II telecommunications service regulation.
19 Computer II Final Decision, 77 F.C.C.2d at 420-21 ¶ 97.
24 See Cable Modem Declaratory Ruling, 17 FCC Rcd. at 4847 ¶ 95 (“The Commission has a long history of classifying information services as Title I services and thus not subject to the obligations and requirements imposed on services subject to Title II.”).
An even clearer example of the type of computer processing that is always offered as part of broadband Internet access service (and which played a key role in both the Supreme Court’s and the FCC’s analysis of this issue) is the Domain Name System (DNS). Specific numerical addresses for particular physical locations exist in the Internet, known as “Internet protocol” or “IP” addresses. End users rarely, if ever, use these. Instead, end users generally rely on domain names, which are often the name of a company or an institution followed by “.com”, “.gov”, “.edu”, or some other leading top level domain. DNS is the system that translates the domain name into the IP address that identifies the physical location where the resource being accessed resides.

For example, someone wishing to visit the website for the University of Pennsylvania would not typically enter one of its two IP addresses, which are 128.91.34.233 and 128.91.34.234. Instead, most people will access the website by its domain name (“upenn.edu”) preceded by the prefix needed to identify it as web content (“http://www.”). DNS will determine which of the two addresses will serve the particular request. Similarly, if one is in Japan and enters “www.google.com”, DNS will automatically redirect the request to the Japanese language version of Google’s website available at “www.google.co.jp”.

DNS thus represents an essential function that is offered by every broadband Internet access provider. Indeed, as the Supreme Court has noted, “[a] user cannot reach a third-party’s Web site without DNS.” DNS plays an even more important role now that the Internet has transformed from a means for transmitting person-to-person communications (such as email or file transfers) into an important distribution platform for mass media content (such as webpages and videos). Unlike the subject of person-to-person communications, mass media content can (and typically does) reside in more than one location. Storing content in multiple locations reduces the burden on the long-haul network and increases the speed with which content can be provided to end users by locating the content closer to the end user. Storing (also known as “caching”) the same content in multiple locations also reduces server congestion and provides content owners with a degree of protection against denial of service attacks.

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26 Brand X, 545 U.S. at 999; Cable Modem Declaratory Ruling, 17 FCC Rcd. at 4821-22 ¶¶ 37-38; Wireline Broadband Access Order, 20 FCC Rcd. at 14864 ¶ 15
27 Indeed, many systems will reject any attempt to submit IP addresses directly.
28 Brand X, 545 U.S. at 999; accord id. (“‘DNS is a must. . . . [N]early all of the Internet’s network services use DNS. That includes the World Wide Web, electronic mail, remote terminal access, and file transfer.’” (quoting P. ALBITZ & C. LIU, DNS AND BIND 10 (4th ed. 2001) (alteration in original)).
29 Christopher S. Yoo, Innovations in the Internet’s Architecture that Challenge the Status Quo, 8 J. ON TELECOMM. & HIGH TECH. L. 79, 89 (2010).
These advantages have led an ever-growing quantity of Internet content to be duplicated and stored at multiple locations across the Internet. Sometimes the content is stored in caches maintained by ISPs, other times in the thousands of servers maintained by third-party Content Delivery Networks (CDNs) such as Akamai and Limelight, and still other times in the growing number of server farms maintained by large content providers such as Google. Media reports indicate that the top two CDNs alone (Akamai and Limelight) delivered more than 40% of all professional video traffic last year.31

When an end user accesses content that is stored in multiple places across the Internet, it is DNS—and not the end user—that decides which of the many content storage locations is the closest and least congested and routes the request to that location. Moreover, no DNS provider caches the IP addresses for every domain name in the world. If the local DNS server does not know the IP address associated with a domain name that an end user has requested, it passes the query along to other DNS servers until it either finds a DNS server that knows the IP address, reaches one of the authoritative servers that maintain definitive lists of addresses for a particular domain, or fails to find the address, in which case it will return “HTTP Error 404: File not found.” DNS is thus not provided by a single entity. By its very design, it is provided by a distributed system of caches authoritative servers spread throughout the world that rely heavily on computer processing and storage.

Any use of broadband Internet access to connect to the Internet thus requires the use of the distributed network of DNS servers, which determines the exact location to which the transmission will connect. As the Supreme Court recognized in Brand X, over the dissent’s specific objection, DNS constitutes much more than mere routing or simply the use of computer processing for the management, control, or operation of a telecommunications service that would fall outside the definition of an information service.32 Moreover, DNS providers are increasingly offering “smart DNS” functions that increase the functionality of the services offered by broadband Internet access providers. These new services include faster name resolution, greater network security, protection against denial of service attacks, botnet detection, web error redirection, parental controls, and host of other advanced services. These additional services undercut the already untenable claim that broadband Internet access is a telecommunications service still further.

For this reason, as both the Supreme Court and the FCC have recognized, the fact that all Internet-based communications represent an inextricable combination of transmission and computer processing makes it impossible to characterize broadband Internet access as the offering to the public of a pure and transparent transmission between points of the end user’s choosing without change in form or content.33 Broadband Internet access providers simply do not offer the pure and transparent transmission on a stand-alone basis independent from computer processing needed to constitute a telecommunications service. While it is true that the

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30 Akamai alone maintains 50,000 servers at 2,000 locations across the Internet.
31 Hardesty & Tombes, supra note 23 (reporting that Akamai served 31.9% and Limelight served 12% of the 22.5 billion professional video views in 2009).
32 See Brand X, 545 U.S. at 999 n.3 (rejecting argument advanced Id. at 1012-13 n.6 (Scalia, J., dissenting).
33 Brand X, 545 U.S. at 999-1000; Wireline Broadband Access Order, 20 FCC Rcd. at 14864 ¶ 15; Cable Modem Declaratory Order, 17 FCC Rcd. at 4821-22 ¶¶ 37-38.
FCC may change its construction of the statute,\textsuperscript{34} step one of the framework announced by the
Supreme Court in \textit{Chevron} for evaluating the propriety of agencies’ constructions of statutes
they administer prevents agencies from interpreting statutes in ways that contradict the statute’s
plain language.\textsuperscript{35}

Even in the unlikely event that a court would regard the language of the statute as
sufficiently ambiguous to reach step two of the \textit{Chevron} analysis, the FCC would still have to
justify its deviation from its precedents in order to avoid having its decision invalidated as
arbitrary and capricious.\textsuperscript{36} In the past, the FCC has repeatedly rejected all previous attempts to
characterize broadband Internet access as a telecommunications service.\textsuperscript{37} As the Supreme Court
has noted, “The agency must show that there are good reasons for the new policy.”\textsuperscript{38} A majority
of the Court has indicated that the agency that is changing a policy must explain “why it now
reject[s] the considerations that led it to adopt that initial policy.”\textsuperscript{39} The recognition by the
Supreme Court, the court of appeals, and the FCC that the market for broadband Internet access
has become so competitive as to render such regulation unnecessary will make it difficult for the
FCC to clear this hurdle.\textsuperscript{40}

IV. MISUNDERSTANDINGS ABOUT THE NEED FOR TITLE II RECLASSIFICATION

The FCC and policy advocates who favor the third-way proposal contained in the Notice
of Inquiry have offered a wide range of arguments in support of their claims that Title II
reclassification is needed. A close review of these arguments reveals serious flaws in the
analyses underlying them.

A. “There Is No Cop on the Beat”

Many supporters of the FCC’s third-way wrongly claim that there will be “no cop on the
beat” unless the FCC reclassifies broadband Internet access as a Title II service.\textsuperscript{41} This
suggestion flies in the face of the Supreme Court’s explicit recognition in \textit{Brand X} that the FCC
posesses the ancillary authority to require broadband Internet access providers to allow

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\item \textsuperscript{34} \textit{Brand X}, 545 U.S. at 981.
\item \textsuperscript{36} \textit{Brand X}, 545 U.S. at 981.
\item \textsuperscript{37} See supra note 7.
\item \textsuperscript{38} \textit{FCC v. Fox Television Stations, Inc.}, 129 S. Ct. 1800, 1810-11 (2009).
\item \textsuperscript{39} See id. at 1822 (Kennedy, J., concurring in part and concurring in the judgment); id. at 1831 (Breyer, J.,
joined by Stevens, Souter, and Ginsburg, JJ., dissenting).
\item \textsuperscript{40} \textit{Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.}, 129 S. Ct. 1109, 1118 n.2 (2009) (noting that “the market for
high-speed Internet service is now quite competitive” and that “DSL providers face stiff competition from cable
companies and wireless and satellite providers”); \textit{USTA I}, 290 F.3d at 428-29 (invaliding unbundled access to the
portion of the loop used to provide DSL because of the emergence of “robust competition . . . in the broadband
market” between DSL, cable modems, wireless broadband, and other technologies); \textit{Wireline Broadband Access
Order}, 20 FCC Rcd. at 14883-87 ¶¶ 55-64.
\item \textsuperscript{41} See, e.g., Gigi Sohn, It’s Time to Save the Broadband “Cop on the Beat” (Mar. 15, 2010),
http://www.publicknowledge.org/node/2957; see also Austin Schlick, General Counsel, FCC, Implications of
Comcast Decision on National Broadband Plan Implementation (Apr. 7, 2010) (suggesting that the \textit{Comcast}
decision undermines the FCC’s ability to serve as “the cop-on-the-beast for 21st Century communications
networks”), http://blog.broadband.gov/?entryId=356610.
\end{itemize}
independent ISPs access to their facilities.\textsuperscript{42} In arguing that the FCC lacks all ancillary authority, these advocates make a mistake that is the mirror image of the one made by the FCC in their arguments before the court of appeals. Just as the Supreme Court’s acknowledgement in \textit{Brand X} that the FCC possesses ancillary authority over some aspects of broadband Internet access does not mean that it can exercise ancillary authority over \textit{all} aspects of broadband Internet access, the \textit{Comcast} court’s holding that the FCC lacks ancillary authority over \textit{some} aspects of broadband Internet access does not mean that it cannot assert ancillary authority over \textit{any} aspect of broadband Internet access. On the contrary, the D.C. Circuit took care to craft its opinion so as to avoid contradicting the language in \textit{Brand X} recognizing the FCC’s Title I ancillary authority over broadband Internet access.\textsuperscript{43}

The conclusion that the FCC retains significant ancillary authority also draws support from the recent comments offered by former FCC Chairmen Reed Hundt and Michael Powell. Both concluded that even after the \textit{Comcast} decision, the FCC still has sufficient authority to implement the National Broadband Plan and to address concerns related to network neutrality.\textsuperscript{44}

Moreover, the FCC itself recognizes that the \textit{Comcast} decision still left it with considerable ancillary authority. The Notice of Inquiry seeking comment on the FCC’s proposed third way explicitly acknowledges that “the Commission can still accomplish many of its most important broadband-related goals without changing its classification of broadband Internet service as a unitary information service.”\textsuperscript{45} Moreover, his memorandum analyzing the FCC’s proposed approach describes it as a “belt-and-suspenders approach” that relies both on Title I ancillary authority as well as Title II.\textsuperscript{46} Such a statement only makes sense if the FCC continues to believe that it possesses ancillary authority over broadband Internet access.

So the Supreme Court, the D.C. Circuit, two former FCC Chairmen from both political parties, and the FCC all recognize that the FCC retains the authority to act absent reclassification. The real problem is that the FCC must exercise this authority in a manner consistent with the congressional mandate embodied in the statute.

B. “Reclassification Would Just Restore the Status Quo”

The FCC attempts to minimize the impact of reclassification by arguing that it would just restore the status quo.\textsuperscript{47} A moment’s reflection reveals that this is simply not true. When the FCC first addressed the proper regulatory scheme to address the precursors to the modern Internet, it ruled that those services were not subject to Title II.\textsuperscript{48} On five occasions dating back to 1998, the FCC has affirmed and reaffirmed that broadband Internet access falls within its Title

\textsuperscript{42} See supra note 8.
\textsuperscript{43} Comcast, 600 F.3d at 650.
\textsuperscript{44} Ex-FCC Heads Hundt and Powell Discuss Broadband Policy (Apr. 15, 2010), http://voices.washingtonpost.com/posttech/2010/04/fcc_heads_hundt_and_powell_dis.html.
\textsuperscript{46} Schlick, supra note 12, at 5.
\textsuperscript{47} Genachowski, supra note 12, at 5; Schlick, supra note 12, at 8-9.
\textsuperscript{48} See supra note 6 and accompanying text.
ancillary authority rather than Title II.\textsuperscript{49} Given this longstanding and unbroken line of precedent, it is hard to see how reclassifying broadband Internet access would be a return to the status quo as a matter of authority.

This argument is even tougher to make from a substantive standpoint. Throughout their histories, neither cable modem nor wireless broadband service has ever been subject to anything resembling Title II regulation. Although fiber-to-the-home (FTTH) was once subject to unbundling,\textsuperscript{50} those requirements were lifted in 2003.\textsuperscript{51} Similarly, DSL was once subject to the type of unbundling obligation that the FCC’s third-way proposal envisions,\textsuperscript{52} but those restrictions were also lifted in 2003 and 2005.\textsuperscript{53}

Cable modem services and wireless broadband services have thus never been subject to anything resembling Title II jurisdiction and the other two have been exempt from such regulation since 2003. In light of this, calling the FCC’s initiative a return to the status quo would appear to be a misnomer.

C. “Reclassification Would Not Represent a New Unbundling Authority”

FCC General Counsel Austin Schlick asserts that the third-way proposal does not represent a new network unbundling authority.\textsuperscript{54} That said, the FCC’s rhetoric cannot be squared with the substance of its proposal. Reclassifying the transmission component of broadband Internet access services as a telecommunications service would require network providers take something that represents one component of a larger service and offer it to all interested parties on a standalone basis. Requiring network providers to take an input that is normally simply a component of an integrated offering and offer it to others is a quintessential unbundling requirement.

Such a decision is rendered problematic by the fact that section 201 would require these providers to unbundle their networks without being subject to the statutory restrictions contained in the explicit unbundling provisions contained in section 251. As an initial matter, the unbundling obligations apply only to incumbents providing service as of the date of the statute’s enactment, which was February 1, 1996. More importantly, unbundled access to proprietary network elements must be “necessary,” and the failure to provide access to those network elements must “impair” the carrier seeking access.\textsuperscript{55}

\textsuperscript{49} See supra note 7 and accompanying text.
\textsuperscript{50} See UNE Remand Order, 15 FCC Rcd. at 3772 ¶ 165, 3777 ¶¶ 176-177, 3780 ¶ 184, 3781-82 ¶ 187, 3919 ¶ 505, 3937.
\textsuperscript{53} Triennial Review Order, 18 FCC Rcd. at 17132-36 ¶¶ 255-263; Wireline Broadband Access Order, 20 FCC Rcd. at 14894-98 ¶¶ 77-85.
\textsuperscript{54} Schlick, supra note 12, at 7.
Good policy reasons exist for including such restrictions. If competitors exist who can serve as viable alternative sources of supply for those network elements, network providers need not incur the transaction and management costs associated with providing unbundled access. Moreover, the growing body of peer-reviewed empirical studies shows that unbundling mandates do not promote and may be reducing network providers’ incentive to invest in additional broadband Internet access capacity.\(^{56}\)

The FCC has historically been quite reluctant to enforce the “necessary” and “impair” provisions. Initially, the FCC implemented them in a way that gave anyone who asked for it the right to obtain unbundled access to a network element, only to see its actions invalidated by the Supreme Court.\(^{57}\) The FCC’s second effort to implement the unbundling mandate in a manner that gave the “impair” clause appropriate weight also failed to survive judicial review.\(^{58}\) In invalidating a related order,\(^{59}\) the court noted the emergence of limited competition in broadband Internet access and chastised the FCC for its “naked disregard of the competitive context.”\(^{60}\) The FCC’s third attempt to implement the “impair” clause fared little better, drawing a rebuke from the court for providing a definition of impairment that was “vague almost to the point of being empty.”\(^{61}\) It was not until its fourth try that the FCC was able to implement the unbundling requirement in a manner that withstood judicial review.\(^{62}\)

The problems that the FCC has faced in implementing the unbundling statute in a manner that complied with law make this reluctance understandable. Moreover, the Supreme Court has required that every exercise of ancillary authority be subject to the limits contained in a statutory


\(^{60}\) *USTA I*, 290 F.3d at 429-30.

\(^{61}\) *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 572 (D.C. Cir. 2004)

\(^{62}\) *Covad Commc’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).
provision underlying the assertion ancillary authority. The Supreme Court, the court of appeals, and the FCC have all recognized that the market for broadband Internet access has become sufficiently competitive to vitiate the need for the type of access regime associated with unbundling. Chairman Genachowski’s recent dismissal of the idea that cable companies have broadband monopolies and his statement, “I believe virtually every market has competition,” suggests that he shares this understanding.

As a result, the FCC’s efforts to mandate that broadband Internet access providers offer the transmission component on a nonintegrated basis would likely run afoul of the policies established by Congress reflected in section 251. As has been often noted, the FCC only has what authority Congress gives to it. The problem is thus not that there is no cop on the beat, but rather that the FCC has been trumped by a higher authority: Congress. Should the FCC Chairman disagree with those policies, the only appropriate course of action is to seek a change in the statute, not to evade these restrictions by distorting the definition of telecommunications service.

D. “Failure to Reclassify Would Interfere with the National Broadband Plan”

FCC General Counsel Austin Schlick observed that “[t]he Comcast/BitTorrent opinion has no effect at all on most of the [National Broadband] Plan.” The FCC has acknowledged that over half of the National Broadband Plan consists of recommendations to other agencies. Other portions represent a call on Congress to provide subsidies. Other goals, such as freeing up more spectrum, providing better access to utility poles and rights of way, and reforming intercarrier compensation, are fully within the FCC’s power. None of these goals would be affected by reclassification.

Many of the relevant statutes already give the FCC authority to implement other aspects of the National Broadband Plan, as detailed by the Notice of Inquiry seeking commentary on the proposed third way. For example, the universal service provision explicitly gives the FCC the authority to promote advanced telecommunications services for schools, health care institutions, and libraries. Although this section does not define “advanced telecommunications services,” section 706(b) of the Act defines “advanced telecommunications capability” as “high-speed,
switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”

Other provisions give authority to other agencies. For example, 7 U.S.C. § 950aaa-2 authorizes the Department of Agriculture to provide grants or loans “for the purpose of financing the construction of facilities and systems to provide telemedicine services and distance learning services in rural areas” and to expedite consideration for loans to enable the exchange carriers to provide “advanced telecommunications services” in rural areas.” Another statute, 40 U.S.C. § 14504(a)(1), authorizes the Appalachian Regional Commission to provide grants and technical assistance “to increase affordable access to advanced telecommunications . . . in the region.”

The Plan clearly envisions that some of its goals will require additional legislation. That said, the FCC and other federal agencies retain ample power to begin to implement a large percentage of the Plan’s goals.

E. “Reclassify Broadband Internet Access Would Be No Different from Reclassifying Wireless Telephony”

The FCC suggests that reclassifying broadband Internet access as a Title II service would simply duplicate the approach laid out by Congress for wireless telephony, which subjected wireless telephony to Title II regulation while giving the FCC the authority to forbear from applying any provisions to wireless telephony except for 47 U.S.C. §§ 201, 202, and 208.

The FCC’s experience relying on Title II to regulate wireless telephony does not shed much light on the propriety of subjecting wireless broadband to the same regulatory regime. As an initial matter, the wireless services involved voice communications, which is the quintessential telecommunications service. The FCC’s success in regulating wireless telephony under Title II does not necessarily mean that following the same approach with respect to broadband is likely to be similarly successful.

Most importantly, wireless telephony classified as a Title II service by statute, not by FCC action. To the extent that the FCC believes that the transmission component of broadband Internet access services should be governed by Title II, they should follow the same approach and seek legislation rather than distorting the existing statutory categories in ways unlikely to survive judicial review. Wireless thus does not establish a precedent for allowing an agency to determine the proper regulatory classification for a communications technology. Instead, this experience underscores that this responsibility properly resides with Congress.

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70 7 U.S.C. § 950aaa-2 (a)-(b), (b)(1).
71 Genachowski, supra note 12, at 6; Framework for Broadband Internet Service NOI, supra note 45, at 33-34
72 47 U.S.C. § 332(c).
V. The Policy Implications of Reclassifying Broadband Internet Access as a Title II Service

Reclassifying broadband Internet access as a Title II service would also likely be bad policy for two distinct reasons. First, common carriage has long been fraught with problems. Second, history has shown that forcing a new communications technology to fit into a regulatory regime that was developed for a completely different context before that new technology ever existed almost invariably results in significant anomalies that lead to protracted disputes and litigation.

1. The Inauspicious Legacy of Common Carriage Regulation

The regulatory tools typically used to implement Title II were developed for a very context quite different from the one surrounding the Internet. As an initial matter, Title II regulation arose at a time when the industry was dominated by a single company that faced no competition and was not open to entry by competitors. Transmission technologies were largely uniform and stable, network demand and market shares were relatively predictable, and incentives to invest in competitive infrastructure were relatively unimportant. None of these things are true for the Internet, which is characterized by competition, wide swings in market share and network demand, significant differences in transmission technologies, a high degree of innovation, and great importance on investment incentives.

In addition, as those familiar with the history of regulation well know, common carriage has proven notoriously difficult to implement. Consider nondiscrimination, which was the centerpiece of the FCC’s pre-Comcast proposal for regulating broadband Internet access. The textbook definition of discrimination is a price differential that is not justified by differences in product quality or cost. Such a regime might be manageable if every industry participant used the same production technology and offered similar products. Such regimes are extremely difficult to implement when cable modem service, fiber-based service, DSL service, and wireless broadband vary widely both in terms of cost and in terms of product quality. Nondiscrimination mandates also limit network providers’ to customize their offerings to meet particular customers’ needs. Indeed, the benefits from allowing more diverse offerings was one of the reasons for declining to subject enhanced services to Title II regulation in the Second Computer Inquiry.

Another classic problem with common carriage regulation is the mandate that rates be just and reasonable, which would apply to broadband Internet access under the FCC’s proposed third way. The problems with scrutinizing rates for their reasonableness are well documented. Regulations, courts, and commentators have yet to settle on the proper basis for

76 Computer II Final Decision, 77 F.C.C.2d at 431-32 ¶ 123.
77 47 U.S.C. § 201(b).
calculating costs, allocating shared costs, and determining the proper rate of return. In addition, rate regulation has traditionally been vulnerable to systematic biases that tended to inflate rates and skew the technologies used. Moreover, rate regulation only work well when sales volumes are relatively stable and predictable, as is not true for broadband Internet access.

In addition, disputes over reasonableness are likely to spill over into terms and conditions other than price. These disputes place regulators in the position of having to engage in comprehensive regulation of business relationships under circumstances in which monitoring that relationship is likely to be quite difficult.  

These are just some of the problems that have plagued Title II regulation for over seventy-five years. If broadband Internet access is reclassified as a telecommunications service, it will be encounter the same regulatory problems and be subject to the same regulatory precedents.

2. The Problems with Putting Square Pegs in Round Holes

Finally, the FCC’s third-way proposal must deal with the inevitable mismatches that can result when taking a regulatory regime developed for one technology (telephony) and forcing it onto a technology to which it was never intended to apply. Such solutions are rarely satisfactory. Because legislators did not have the new technology in mind when developing the previous regulatory regime, how the rules will apply to the new technology is largely arbitrary, and any satisfactory developments are largely accidental.

Consider the history of regulation of cable television. Cable television did not fit nicely into either of the boxes created by the 1934 Act for broadcasting and telephony. For thirty years, regulators struggled to shoehorn it into one regulatory box or the other until finally in 1984, Congress stepped in and enacted a regulatory regime designed specifically for cable.

This suggests that the appearance of a new communications technology is likely eventually to require new legislation. Indeed, a number of key legislators have already started the process of putting that legislation together. In the meantime, subjecting broadband Internet access to a 75-year-old regime developed in a different era for a different technology is unlikely to make things better. Although the FCC has given assurances of its intention to forbear from all but six of the forth-eight provisions of Title II, there has already been some slippage. The FCC has already added another provision, and policy advocates have already signaled their willingness to push for more.

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Rather than engaging in an extra round of regulatory proceedings and protracted litigation, the better course would for Congress to begin developing the legislation that is likely to be the best long-term answer to questions about whether and how broadband Internet access should be regulated. Shoehorning broadband Internet access into statutory language that simply does not fit is unlikely to serve as a satisfactory solution.