

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

COMMENTS OF COMPTTEL

COMPTTEL, through undersigned counsel, hereby submits its comments in response to the Notice of Inquiry (“NOI”) issued in the above-captioned proceeding. The Commission has proposed three alternative approaches for asserting jurisdiction over retail “broadband Internet service” which it defines as “the bundle of services that facilities-based providers sell to end users in the retail market” that allows the end users to connect to the Internet and may include other services, such as e-mail and online storage.¹

The first proposal is to maintain the status quo. The Commission requests comment on whether its “information services” classification of broadband Internet service remains adequate to support effective performance of the Commission’s responsibilities after the D.C. Circuit’s decision in *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

The second proposal is to classify the Internet connectivity service that is offered as part of wired broadband Internet service as a telecommunications service to which all requirements of Title II of the Communications Act would apply. The Commission describes Internet connectivity service as a service that allows users to communicate with others who have Internet

¹ NOI at ¶1, n. 1.

connections, send and receive content and run applications on line.² The Commission clearly has authority to reclassify Internet connectivity service as a telecommunications service, but it has asked for comments on the legal and practical consequences of doing so.

Finally, the Commission proposes to classify the Internet connectivity service as a telecommunications service but then forbear pursuant to Section 10 of the Act, 47 U.S.C. §160, from applying all provisions of Title II “other than the small number that are needed to implement the fundamental universal service, competition and small business opportunity, and consumer protection policies that have received broad support.”³ The Commission characterizes this proposal as the “Third Way.”

The Commission currently classifies broadband Internet access service as an information service not subject to Title II. Prior to the *Wireline Broadband Order*⁴ the Commission classified the transmission component of wireline broadband Internet access service as a telecommunications service subject to all provisions of Title II. As a result, the Commission has an ample record with respect to how these two different approaches worked in terms of

² In the *Open Internet NPRM*, the Commission proposes a different term and different definition for essentially the same function. There it defined “broadband Internet access” as “Internet Protocol data transmission between an end user and the Internet” and “broadband Internet access service” as “any communication service by wire or radio that provides broadband Internet access directly to the public.” *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, Notice of Proposed Rulemaking, FCC 09-93 at App. A, Section 8.3 (rel. Oct. 22, 2009) (*Open Internet NPRM*). In this proceeding the Commission uses the term “broadband Internet service” to “refer to the bundle of services that facilities-based providers sell to end users in the retail market” while acknowledging that it has referred to this bundle of services as “broadband Internet access” in prior orders. NOI at n. 1. In order to avoid ambiguity and confusion, the Commission should use consistent terminology and definitions for the services.

³ *Id.* at ¶ 2 and n.1 and ¶¶74-93.

⁴ *In the Matter of Appropriate Framework For Broadband Access To The Internet Over Wireline Facilities*, W.C. Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, FCC 05-150 (rel.Sept. 23, 2005) (“*Wireline Broadband Order*”).

promoting broadband infrastructure investment and availability. Therefore, COMPTTEL will limit its comments to the proposed Third Way.

I. PRESERVING SECTION 251 RIGHTS

COMPTTEL supports reclassifying broadband Internet connectivity service as a telecommunications service. As the Commission noted, doing so would eliminate the uncertainty created by the D.C. Circuit's decision in *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) and would provide "the Commission express authority to implement . . . rules furthering universal service, privacy, access for persons with disabilities, and basic consumer protection, among other federal policies."⁵

If the Commission determines to adopt the so-called Third Way for establishing a legal foundation for Internet connectivity service and forbears from applying all of Title II to the service except Sections 201, 202, 208, 254 and possibly 222 and 255, 47 U.S.C. §§ 201, 202, 208, 254, 222, 255, it must forcefully reaffirm, as it did in the *Wireline Broadband Order* classifying broadband Internet access service as an information service that incumbent local exchange carriers continue to be subject to all interconnection, unbundling, resale and other obligations imposed by Section 251 of the Act.⁶ As the National Broadband Plan recognized, facilities such as end user loops are critical inputs used by competitive providers to provision retail broadband services to their businesses and residential customers.⁷ In order to achieve the goal of robust competition in the business and residential markets, the Plan recommends, among other things, that the Commission comprehensively review its wholesale competition regulations

⁵ NOI at ¶52.

⁶ *Wireline Broadband Order* at ¶¶ 126-127.

⁷ National Broadband Plan, Chapter 4 at 47-49.

to guarantee widespread availability of wholesale inputs for broadband services provided to small business, mobile and enterprise customers.⁸ The Commission must ensure that any forbearance action it takes in the classification context does not inadvertently frustrate its efforts to promote the widespread availability of wholesale inputs. To avoid such a possibility the Commission must affirm that the transmission facilities underlying Internet connectivity service remain common carrier facilities subject to Title II of the Act.

Internet connectivity is provided over the same end user loop transmission facilities that are used to provide voice and other services that are already classified as Title II services, as well as other services that are not Internet access services.⁹ In the *Wireline Broadband Order*, the Commission reiterated that Section 251(c)(3) and the Commission’s unbundling rules “look at what use a competitive LEC will make of a particular network element when obtaining that element pursuant to Section 251(c)(3); the use to which the incumbent LEC puts the facility is not dispositive.”¹⁰ It was on this basis that the Commission determined that competitors would continue to have the same access to unbundled network elements, including DS0 and DS1 loops, regardless of the statutory classification of the service that the incumbent provides over those facilities.

The Commission must provide similar certainty with respect to the applicability of any forbearance it decides to grant in this proceeding. In the *Wireline Broadband Order*, the Commission stated that “[a]n incumbent LEC’s obligations under section 251(c) will remain

⁸ *Id.* at Recommendation 4.7.

⁹ See e.g., *Open Internet NPRM* at ¶108 (“we recognize that some services such as some services provided to enterprise customers, IP-enabled cable television delivery, facilities-based VoIP or a specialized telemedicine application may be provided to end users over the same facilities as broadband Internet access but may not themselves be an Internet access service.”)

¹⁰ *Wireline Broadband Order* at ¶127.

until the incumbent LEC is either determined not to be an incumbent LEC under section 251(b) or the *Commission forbears from Section 251 obligations*.¹¹ Because Internet connectivity is provided over the end user loop transmission facility, any decision by the Commission to forbear from Section 251 with respect to that facility must make clear that the forbearance applies only to the incumbent LEC's provision of Internet connectivity service to its end user and that it does *not* relieve the incumbent from its duty to provide competitors the same access to unbundled elements to which they were entitled before the forbearance. In other words, the incumbent LEC's use of a facility to provide Internet connectivity is not dispositive of a competitor's right to lease that same or a similar facility as an unbundled network element. COMPTTEL is concerned that in the absence of such a clarification, incumbent LECs may rely on the quoted language from the *Wireline Broadband Order* to maintain that Section 251 obligations no longer apply to their end user loop transmission facilities because the Commission has forborne from enforcing Section 251. That is clearly not the Commission's intent and the Commission must so specify.

II. REVERSING FORBEARANCE DETERMINATIONS

Both the Commission and the D.C. Circuit have opined that the Commission may reassess forbearance determinations if its predictions on the need for enforcement of a particular rule or statutory provision do not pan out. *See e.g., In the Matter of Petition of Qwest Corporation for Forbearance Pursuant To 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 at ¶83 and n.204 (rel. Mar. 15, 2005); *Earthlink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006). The Commission implies in the NOI, however, that it would be extremely difficult to reverse a

¹¹ *Id.* at n. 398 (emphasis added).

decision to forbear and that such a reversal would be at odds with Section 706, 47 U.S.C. §1302. COMPTEL disagrees that reversing a decision to forbear should be any more difficult than reversing any other decision -- the Commission would have to acknowledge that it was changing its position and explain how the new position was consistent with the public interest.

As the Commission acknowledged, it would have to find that at least one of the statutory forbearance criteria is no longer met for a particular provision of Title II in order to reverse a decision to forbear from enforcing that provision.¹² To the extent the Commission received evidence of a market failure or that the interests of consumers were not being protected or that competition was suffering as a result of non-enforcement of a particular provision of Title II, the Commission would have ample justification to reverse an earlier forbearance decision.

COMPTEL also disagrees that any such reversal would necessarily be at odds with Section 706. There is no question that Section 706 authorizes the Commission to utilize forbearance and other regulatory methods to promote competition and encourage the deployment of advanced telecommunications capability to all Americans.¹³ The Commission has repeatedly found and reported to Congress, however, that broadband “telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.”¹⁴ If the Commission were

¹² *Id.*

¹³ NOI at ¶¶98-99.

¹⁴ *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*, GN Docket No. 07-45, Fifth Report, FCC 08-88 (rel. June 12, 2008) at ¶1 (*Fifth Report*). *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*, GN Docket No. 04-54, Fourth Report, FCC 04-208 (rel. Sept. 9, 2004) at ¶8 ; *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All*

now to reverse those factual findings and conclude that during the period with minimal regulation, broadband capability was *not* being deployed to all Americans in a reasonable and timely fashion, it may have difficulty justifying the use of its forbearance authority to maintain a regulatory status quo that is not bringing broadband to all Americans in a reasonable and timely fashion.

Respectfully submitted,

/s/

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Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Third Report, FCC 02-33 (rel. Feb. 6, 2002) at ¶89; *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*, CC Docket No. 98-146, Second Report, FCC 00-290 (rel. Aug. 21, 2000) at ¶1; *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*, CC Docket No. 98-146, First Report, FCC 99-5 (rel. Feb. 21, 1999) at ¶7. (Emphasis added.)

