Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act	)	GN Docket No. 09-47
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Development 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	)	GN Docket No. 09-137

REPLY COMMENTS — NBP PUBLIC NOTICE #30

COMMENTS OF PUBLIC KNOWLEDGE

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REPLY COMMENTS OF PUBLIC KNOWLEDGE

Public Knowledge respectfully submits these *Reply Comments* in response to the Commission's Public Notice in the above captioned dockets.

SUMMARY

Public Knowledge (PK) files these *Reply Comments* in the National Broadband Plan (NBP) to address the question of reclassification of broadband service as a Title II service. As noted by PK and others throughout this proceeding,[1] reclassification would provide a firm grounding in law for Commission authority to promote and protect broadband Internet service. This reclassification would facilitate numerous goals previously cited by the Commission as critical to the success of the NBP such as reform of universal service to include broadband and enhanced data collection to determine the true state of broadband availability and affordability. Reclassification would also greatly enhance the free and open character of the Internet, and would expand the range of opportunities for more aggressive regulatory steps geared to promote widespread deployment and adoption of advanced telecommunications services.[2]

Opponents of reclassification, while praising the open and interconnected nature of the Internet, generally criticize the reclassification of broadband as a Title II service for imposing a host of "burdensome" "old" or "command and control" regulations on the provision of broadband services. This criticism is unwarranted and mistaken. Classification of broadband access as a Title II service need not entail any new regulation on providers. In this regard, PK notes that, in the *Wireline Framework Order*, the Commission permitted wireline providers to

[1] Comments of Public Knowledge, et al. in A National Broadband Plan for Our Future, GN Docket No. 09-51, at 24-25 (filed June 8, 2009); Comments of the Consumer Federation of America and Consumers Union in A National Broadband Plan for Our Future, GN Docket No. 09-51 (filed June 6, 2009), at 17-20; Comments of National Telecommunications Cooperative Association in A National Broadband Plan for Our Future, GN Docket No. 09-51, at 33-35 (filed June 8, 2009).

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 58, § 706 (codified at 47 U.S.C. § 157 note).

offer broadband as a telecommunication service on a competitive, detariffed basis.[3] In other words, carriers may already offer services on a Title II basis without meeting any of the traditional common carrier requirements beyond compliance with the prohibition on unreasonable rates and practices in Sections 201 and 202 and interconnection under Section 251.

Plainly then, Title II would not impose heavy-handed regulation. What reclassification ***would*** do is to eliminate existing uncertainty over the Commission's authority to take necessary action to fulfill the goals of the NBP. The regulatory certainty resulting from reclassification would serve the public, the industry, and the Commission.

The Commission based its decision to classify broadband as an information service on several factors: the level of integration of the transmission and information processing components,[4] the expectation that new facilities based competitors would emerge,[5] and the conclusion that the Commission retained adequate authority under Title I to protect consumers and otherwise safeguard the development of the Internet.[6] Events demonstrate that all three of these assumptions warrant reevaluation. The information processing elements of broadband have become increasingly disaggregated, including DNS service.[7] New facilities based competitors have not emerged. To the contrary, the broadband market has become more concentrated since

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[3] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report & Order & Notice of Proposed Rulemaking,* 20 FCC Rcd. 14,853, ¶¶ 89-95 (2005) [hereinafter *Wireline Framework Order*].
[4] Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, *Declaratory Ruling & Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798, ¶ 43 (2002) [hereinafter *Cable Modem Order*].
[5] *Cable Modem Order* ¶ 73; *Wireline Framework Order* ¶ 91.
[6] *Cable Modem Order* ¶¶ 75-79 (discussing scope of Title I authority), ¶ 95 (stating that Title II classification was "not necessary for the protection of consumers or to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory"); *Wireline Framework Order* ¶ 109 ("We recognize that both of the predicates for ancillary jurisdiction are likely satisfied for any consumer protection… obligation that we may subsequently decide to impose on wireline broadband Internet access service providers.), ¶ 145 ("We… reserve the ability to act under our ancillary authority in the event of a pattern of anti-competitive conduct"), ¶ 146 ("[The consumer protection] framework necessarily will be built on our ancillary jurisdiction under Title I; this jurisdiction is ample to accomplish … consumer protection goals….").
[7] *Compare Cable Modem Order* ¶¶ 37-38, *with* Prem Ramaswami, *Introducing Google Public DNS*, OFFICIAL GOOGLE BLOG, Dec. 3, 2009, http://googleblog.blogspot.com/2009/12/introducing-google-public-dns.html (describing a DNS service consumers can use in place of that offered by their ISP), *and* OpenDNS, Solutions: Household, http://www.opendns.com/solutions/household (same).

the *2005 Wireline Framework Order* as a result of the decline in the number of ISPs available through "intramodal" competition with no increase in the number of "intermodal" competitors.

Finally, recent events have called into question the ability of the Commission to protect the open Internet or implement the NBP using its Title I ancillary authority.[8] Rather than continue to act in the shadow of regulatory uncertainty, the Commission should, as part of the National Broadband Plan, begin a new proceeding to examine whether to reclassify broadband access service.

ARGUMENT

I. THE COMMISSION HAS THE AUTHORITY TO RECLASSIFY BROADBAND ACCESS

As noted by PK in its initial filing,[9] the Commission retains full authority to reclassify broadband access. As the *Brand X* Court noted, the *Cable Modem Order* itself constituted a change in policy.[10] Further, the *Brand X* court did not find that the statutory language compelled a finding of "information service." To the contrary, the *Brand X* court repeatedly stated that the statute was ambiguous with regard to the definitional question. While the Court found the classification of cable modem service as an information service was "reasonable" and "permissible,"[11] classification as a Title II telecommunications service would be equally reasonable.

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[8] *See* Matthew Lasar, *What's Next If The DC Court Says FCC Has No Power Over ISPs*, ARS TECHNICA, Jan. 17, 2010, http://arstechnica.com/tech-policy/news/2010/01/could-dc-court-strip-fcc-power-over-isps.ars; Cecilia Kang, *FCC Looks At Ways To Assert Authority Over Web Access*, WASH. POST, Jan. 15, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/01/14/AR2010011404717.html; Marguerite Reardon, *Judges Question FCC Authority in Comcast Case*, CNET NEWS, Jan. 8, 2010, http://news.cnet.com/8301-30686_3-10430647-266.html.

[9] *Supra* note 1.

[10] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 981 (2005) (explaining that when an agency changes its position, it need only explain its reasons for doing so); *see also Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 863-64 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").

[11] *Brand X*, 545 U.S. at 985-987.

The continued reliance by the Commission and the courts on the presence of a separate, clearly identifiable transmission component further reinforces the flexibility that the Commission has in defining broadband access service. For example, for purposes of CALEA, the Commission saw fit to classify providers of broadband access as "telecommunications carriers" based on the presence of a transmission element mingled with, but distinct from, the information services.[12] Courts have also recognized that the facilities used to provide broadband access qualify as telecommunications facilities under the Communications Act.[13]

A. The Commission Should Reclassify Because Reclassification Would Better Serve The Goals of the National Broadband Plan

Contrary to the assertions of some, the Commission does not need to prove that its previous determination to classify broadband access as an information service is no longer accurate or was mistaken. Rather, as the Supreme Court explained in *FCC v. Fox Television Stations, Inc.*:

> We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance. . . . [O]f course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.[14]

In other words, the Commission may reclassify broadband as a Title II service simply because it finds that Title II classification would better serve the goals of the National Broadband Plan than the current Title I classification. Title II classification would provide greater certainty and

[12] *See American Council on Educ. v. FCC*, 451 F.3d 226, 232 (D.C. Cir. 2006).
[13] *See MediaOne Group, Inc. v. County of Henrico, Virginia*, 257 F.3d 356, 363-65 (4th Cir. 2001).
[14] *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-11 (2009) (expressly overruling contrary DC Circuit opinion)(emphasis in original, citations omitted).

authority for the Commission to implement the goals of the plan as set forth in the American Recovery and Reinvestment Act of 2009 (ARRA).[15] The ARRA requires the National Broadband Plan to "ensure that all people of the United States have access to broadband capability,"[16] a goal consistent with the Commission's universal service authority and, as noted by Consumer Federation of America, facilitated by reclassification.[17] Additionally, the Broadband Data Improvement Act requires the Commission to create benchmarks and collect data to measure the success of the plan,[18] goals facilitated by the expansive power to collect data that Title II allows.[19] It requires a "detailed strategy for achieving affordability," a goal clearly facilitated by Title II's requirement for just and reasonable rates and practices.[20] Finally, the Commission's stated goal of maintaining an "open Internet" would benefit from the mandatory interconnection and non-discrimination requirements of Title II.[21]

By way of contrast, as the Commission's recent experience defending the *Comcast BitTorrent Order*[22] demonstrates, reliance on Title I creates uncertainty for the Commission and imperils the goals of the National Broadband Plan. The endless guessing game over the limits of FCC authority and the ultimate statutory source of authority to which any Title I exercise is "ancillary" undermines the Commission's ability to take prompt and necessary action. For example, should the Commission find it necessary to require broadband providers to submit information on the cost of deployment of residential services to ensure that prices are "affordable" as required by the plan, providers could challenge the authority of the Commission

[15] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 [hereinafter ARRA].
[16] *Id.* at 118
[17] *Supra* note 1.
[18] ARRA § 6001(k)(2)
[19] *E.g.*, 47 U.S.C. §§ 213(f), 218, 219, 220
[20] 47 U.S.C. § 201, 205.
[21] 47 U.S.C. §§ 201, 202, 205, 251.
[22] Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion & Order*, 23 FCC Rcd. 13,028 (2008) [hereinafter *Comcast BitTorrent Order*].

to compel such information as beyond the scope of its ancillary authority. Worse, if the Commission were to find that broadband is not affordable, the range of options available to it under Title I remain unclear.

B. Title I Classification Has No Offsetting Advantage

The limitations and uncertainties of Title I might be justified if Title I classification conferred some particular advantage to the Commission. In its classification orders, the FCC has cited the purported "flexibility" of Title I in contrast to the supposed "heavy hand" of Title II.[23] But as the Commission has repeatedly demonstrated, the Title II framework offers the same level of flexibility as offered by Title I, but without the uncertainty surrounding the Commission's ancillary authority. In the *Wireline Framework Order* itself, the Commission permitted wireline providers to offer broadband transmission services on a "permissive detariffing basis."[24] The Commission did so without engaging in a separate forbearance proceeding under Section 10, finding ample authority under Title II to create flexible provisions that would serve the public interest. The Commission has similarly created flexible regulatory regimes for other Title II services, such as special access, where it has found that doing so would serve the public interest.[25] By contrast, when the Commission has sought to impose necessary regulation on broadband services, it has been forced to go to considerable lengths to justify its authority, in the shadow of inevitable regulatory challenges arguing that it lacks the necessary power under ancillary jurisdiction.

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[23] *See, e.g.*, *Cable Modem Order* ¶ 5; Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems, *Report & Order*, 19 FCC Rcd. 21,265, 21,344 (Joint Statement of Chairman Michael K. Powell and Commissioner Kathleen Q. Abernathy) (2004); *Wireline Framework Order* ¶¶ 73, 79, 86, 94, 95; *id*. at 14,977 (statement of Commissioner Kathleen Q. Abernathy). The wireless classification order incorporates the analysis of the previous classification orders. Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, *Declaratory Ruling*, 22 FCC Rcd. 5901, ¶¶ 26, 34 (2007).

[24] *Wireline Framework Order*, 20 FCC Rcd. 14,853, ¶ 90 (2005).

[25] Policy and Rules Concerning Rates for Dominant Carriers, *Second Report & Order*, 5 FCC Rcd. 6786, ¶¶ 35-36 (1990); Access Charge Reform, *First Report & Order*, 12 FCC Rcd. 15,982, ¶ 289 (1997).

In short, rather than creating a more flexible regime, Title I classification has merely heightened uncertainty and increased the burden placed on the Commission when it finds that it must take action to fulfill its statutory duties to promote broadband deployment and protect consumers in the digital age. The Commission should not leave so vital an exercise as implementation of the NBP hampered and hedged in by uncertainty as to its authority. By reclassifying broadband services as Title II, the Commission can place implementation of the NBP on the firm foundation necessary for success.

II. KEY ELEMENTS RELIED UPON BY THE COMMISSION IN THE CABLE MODEM ORDER AND SUBSEQUENT CLASSIFICATION ORDERS HAVE NOT DEVELOPED AS PREDICTED OR HAVE BEEN SIGNIFICANTLY ALTERED

While the Commission need not establish that changed circumstances require the reclassification of broadband, it is true that enough has changed – or not changed – since the Commission issued the *Cable Modem Order* to warrant reexamination of the decision to classify broadband access service as an "information service." The Commission based its decision on the integrated nature of the broadband "offering," the expectation that classification as a Title I service would encourage the development of "intermodal" competition beyond the then-existing duopoly between cable and telephone company providers,[26] and the understanding that the Commission retained sufficient authority under Title I to protect consumer interests and fulfill its

[26] It is sometimes mistakenly stated that Title I classification was designed to encourage build-out by existing providers, and incumbents often cite to the expansion of broadband by existing providers and the investment by Verizon in fiber to the home as a consequence of Title I. *E.g.*, Comments of Motorola in A National Broadband Plan for Our Future, GN Docket No. 09-51, at 12-13 (filed June 8, 2009). Even if one accepts this premise, it confuses the elimination of supposed disincentives such as line sharing, an objective achieved under the *Triennial Review Order*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report & Order & Order on Remand & Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16,978 (2003), with the question of regulatory classification. Given that incumbents repeatedly maintain their intent to maintain an open, interconnected Internet, *e.g.*, Comments of Verizon and Verizon Wireless in Preserving the Open Internet, GN Docket No. 09-191, at 1 (filed Jan. 14, 2010), it is impossible to see how reclassification from Title I to Title II could impact the investment by existing providers.

statutory obligations to promote broadband deployment and use. All three of these assumptions appear questionable in light of the evidence gathered in this and other proceedings.

A. The Transmission Service and Information Service Offerings Are Less Integrated Today Than at The Time of the *Cable Modem Order*

Several factors that the Commission relied upon in its determination that the transmission and information services components of broadband were "sufficiently integrated"[27] to support the information services classification have changed, weakening the level of integration considerably. In 2002, when the Commission issued the *Cable Modem Order*, it emphasized the importance of "email, newsgroups, and the ability to create a webpage" as critical aspects of the cable modem service "offering."[28] While many broadband providers still maintain email, web hosting, and newsgroup access for consumers, it is becoming increasingly disingenuous to describe these as the totality of the "nature of the function that the end user is offered."[29] The rise of web-based email and "cloud computing" has dramatically diminished the value of the information service offerings and made them easily separable from the underlying transmission.

In addition to these advanced services, ISPs and consumers alike recognize the importance of the basic transmission function when deciding between ISPs. For example, advertisements for Verizon's FiOS broadband service focus exclusively on the service's superior ability (as compared to cable-based offerings) to transfer data at high speeds, be it for downloading songs, software, video games, or movies; uploading video clips, large files, photo albums, or full videos; or playing data-intensive video games.[30] Similarly, although cable operator Comcast does mention enhanced services such as email accounts and home pages, it

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[27] *Brand X*, 545 U.S. at 990.
[28] *Cable Modem Order* at 4821-22.
[29] *Id.* at ¶ 38.
[30] *See* Verizon, Verizon FiOS Internet: Fios vs. Cable, http://www22.verizon.com/Residential/FiOSInternet/FiOSvsCable/FiOSvsCable.htm.

does so after claiming to be "Way faster than DSL," and highlighting "Incredibly fast speed" as its first listing under "Features and Benefits."[31] In fact, Comcast had deployed advertisements that favorably compare the speed of its service to that of DSL.[32] ISPs today compete on their ability to move packets to and from the Internet – which is the essence of the provision of basic telecommunications services. Even DNS, which both the Commission and the *Brand X* Court recognized as the inextricably integrated core information service "offered" by cable modem providers, is now available as a stand alone service from Google and other providers.[33]

Indeed, it is noteworthy that while broadband providers have invested significant resources in capacity and technologies to augment capacity, in order to meet consumer demand, they have done little to change the nature of the information services offerings. For example, cable providers have touted the development and deployment of DOCSIS 3.0, but have not felt the need to explain how they will convert their networks to IPv6. And to the extent that wireless is considered a broadband service, AT&T and Verizon engage in heated competition over the capacity of their wireless networks to support web surfing and other transmission-based services rather than the virtues of their wireless email service.

In other words, while the Commission may have been justified in 2002 in determining that the "offer" of service relied heavily on the integration of information services with the underlying transmission component, this assumption has become increasingly tenuous as the market has matured, competing information services have become available, and consumers have become increasingly sophisticated in their use of these services. Broadband access providers reflect this reality both in their transmission-speed based marketing and in their

[31] *See* Comcast, Comcast High Speed Internet Service: Broadband Internet Service, http://www.comcast.com/Corporate/Learn/HighSpeedInternet/highspeedinternet.html.
[32] *See* Comcast, The Slowskys, http://www.theslowskys.com.
[33] *See* Ramaswami *supra* note 7; OpenDNS, *supra* note 7.

continued investment in capacity rather than new information services. The Commission should therefore reexamine whether its initial conclusions on the integration of the transmission and information service component continue to warrant classification under Title I rather than Title II.

B. Facilities-Based Competition Has Not Emerged as Expected

The Commission predicted that classification of broadband access as a Title I service would spur the development of facilities-based competition.[34] That prediction has not borne fruit. As noted in comments filed by the Department of Justice Antitrust Division in the Commission's National Broadband Plan proceeding, the national broadband market remains highly concentrated. To the extent consumers have a choice, they have a choice between a DSL provider (or possibly Verizon FIOS) and a cable modem service provider[35] – ***exactly*** the same facilities based choice consumers had when the Commission established the existing regulatory classification.

Nor does it appear that any new facilities-based providers will emerge in the near future – and certainly not as a consequence of the Commission's classification decision. None of the alternative platforms the Commission anticipated would provide competition, such as broadband over power line (BPL), have proven economically viable. While wireless remains a possible source of platform-based competition, it remains unclear whether these services genuinely compete with wireline providers. At present, it would appear that most consumers regard wireless "broadband" through their CMRS handsets as a complimentary service to their wireline

[34] *Brand X*, 545 U.S. at 1001-02.
[35] Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, *Fifth Report*, 23 FCC Rcd. 9615, ¶ 34 (2008); PEW INTERNET & AMERICA LIFE PROJECT, HOME BROADBAND ADOPTION 23 (2009).

broadband connection, not as a substitute.[36] The ability of wireless providers to compete with wireline offerings in the manner envisioned by the Commission's classification orders is further complicated by the dominance of AT&T and Verizon in the wireless market and the vertical integration of their wireless broadband, wireline broadband, and special access services.

Finally, PK notes that the decision to reclassify would not turn on a finding that no competing services have emerged or are likely to emerge. Rather, the failure of widespread facilities-based competition to develop in the manner anticipated by the *Wireline Framework* and other reclassification orders raises questions as to whether Title I classification genuinely serves the public interest. When considered with the other factors in favor of Title II classification, the hope that Title I classification would encourage facilities-based competition cannot justify retaining the existing rule.

C. The Commission Must Retain Authority to Protect Consumers and an Open Internet

The Commission stressed in its reclassification orders that it retained the authority under its Title I ancillary jurisdiction to protect consumers and preserve the open nature of the Internet. As the Commission stated in the *Wireline Framework Order*:

> The broadband marketplace before us today is an emerging and rapidly changing one. Nevertheless, consumer protection remains a priority for the Commission. We have a duty to ensure that consumer protection objectives in the Act are met as the industry shifts from narrowband to broadband services. Through this Notice, we thus seek to develop a framework for consumer protection in the broadband age -- a framework that ensures that consumer protection needs are met by all providers of broadband Internet access service, regardless of the underlying technology. This framework necessarily will be built on our ancillary jurisdiction under Title I; as we explain in the Order, this jurisdiction is ample to

[36] Ex Parte Submission of the United States Department of Justice in A National Broadband Plan for Our Future, GN Docket No. 09-51 (filed Jan. 4, 2010), at 5. The exception to this is Clearwire, which provides a fixed wireless service using WiMAX technology. Given Clearwire's commitment to basic principles of Title II regulation – interconnection and non-discrimination – there is no basis to conclude that reclassification as a Title II service would in any way impact Clearwire's deployment.

> accomplish the consumer protection goals we identify below, and we will not hesitate to exercise it.[37]

Since then, the Commission has consistently relied on its ancillary authority as the means by which it can protect consumers and fulfill its statutory responsibilities[38] – including the goals of the National Broadband Plan. The recent oral argument in the Comcast/BitTorrent case[39] has provided the Commission – and the industry at large – with a rude reminder of the uncertainty over the nature and extent of Commission's authority. The hostility of the panel to the idea of an expansive use of Title I authority, which one judge criticized as claiming a "roving commission to do good,"[40] has given rise to serious speculation that the *Comcast* court may eliminate or severely restrict the Commission's Title I authority by judicial fiat.[41] Even if the *Comcast* court decides on procedural grounds, the confusion generated by the decision would place the Commission's attempts to protect the openness of the Internet in jeopardy and undermine its effort to implement the National Broadband Plan.

Authority over broadband providers and the provisioning of broadband services lies at the heart of an effective broadband plan. For example, the Commission applied the National Security Emergency Preparedness (NSEP) Telecommunications Service Provider System (TSP) to broadband providers through its ancillary authority.[42] With this authority in question, it remains unclear how the Commission could apply NSEP and ensure that the National Broadband Plan

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[37] *Wireline Framework Order* ¶ 146 (footnotes omitted).
[38] Consumer Information and Disclosure, *Notice of Inquiry*, 24 FCC Rcd. 11,380, ¶¶ 61-64 (2009); Preserving the Open Internet, *Notice of Proposed Rulemaking*, 24 FCC Rcd. 13,064, ¶¶ 83-85 (2009).
[39] *See* Reardon, *supra* note 8.
[40] Nate Anderson, *Skeptical Judges Ask FCC if Comcast P2P Smackdown Was Legal*, ARS TECHNICA, Jan. 8, 2010, http://arstechnica.com/tech-policy/news/2010/01/skeptical-judges-ask-fcc-if-comcast-p2p-smackdown-was-legal.ars.
[41] Matthew Lasar, *What's Next If The DC Court Says FCC Has No Power Over ISPs*, ARS TECHNICA, Jan. 17, 2010, http://arstechnica.com/tech-policy/news/2010/01/could-dc-court-strip-fcc-power-over-isps.ars; Cecilia Kang, *FCC Looks At Ways To Assert Authority Over Web Access*, WASH. POST, Jan. 15, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/01/14/AR2010011404717.html.
[42] *Wireline Framework Order* ¶¶ 116-18.

adequately enhances public safety as required by ARRA.[43] Nor is it clear how the Commission could implement necessary initiatives around "affordability" or "maximizing utility" when its authority to compel even basic information reports remains at issue.

This is not to say that the Commission could not develop rationales on a case-by-case basis, over time, after a significant expenditure of resources. But the Commission assumed when it classified broadband access as an information service that it had clear and unambiguous authority. The demonstration that this authority remains in doubt, whatever the ultimate outcome of the pending appeal from the *Comcast BitTorrent Order*, constitutes a sufficient change in circumstances to warrant reexamination of whether the "information services" classification continues to serve the public interest.

III. ALTERNATIVELY, THE COMMISSION SHOULD CONSIDER ALTERNATE SOURCES OF TITLE I AUTHORITY

If the Commission does not use the National Broadband Plan as an opportunity to reclassify broadband access as Title II, it should at least use this as an opportunity to reframe the exercise of its Title I authority and consider what findings it should make in the National Broadband Plan that would further this new framework. In the pending proceeding to adopt network neutrality rules, Public Knowledge and others have set forth alternative frameworks for exercise of Title I authority that more closely relate to the Commission's clear jurisdiction over the transmission component.[44] The Commission should incorporate these theories, where appropriate, in the exercise of authority under the National Broadband Plan.

[43] ARRA § 6001(k)(2)(D).
[44] Comments of Public Interest Commenters in Preserving the Open Internet, GN Docket No. 09-191, at 7-17 (filed Jan. 14, 2010); Comments of The Center for Democracy & Technology in Preserving the Open Internet, GN Docket No. 09-191, at 17-19 (filed Jan. 14, 2010); *see also* Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. __ (forthcoming 2010).

Furthermore, the Commission should consider whether Section 6001 of the ARRA directing the Commission to develop and implement the National Broadband Plan is itself a source of necessary authority. Section 4(i) of the Communications Act gives the Commission authority to issue whatever orders, "not inconsistent with this Act, as may be necessary in the execution of its functions."[45] The D.C. Circuit has referred to this as the "necessary and proper" clause of the Communications Act.[46] If the Commission determines it must take certain steps to achieve the goals of the National Broadband Plan as set forth in Section 6001(k), this might constitute a source for the exercise of Title I authority for some purposes.

Given the importance of placing the Commission's authority on firm footing to the success of the plan, PK cannot recommend trying new theories of Title I authority in place of reclassification under Title II. At the same time, however, providing alternate grounds for exercise of Title I authority that more clearly relate to the functions of the Commission and the purposes of the National Broadband Plan would appear a superior alternative to simply trusting the existing reliance on "federal Internet policy" embodied in Section 230 of the Act.[47]

[45] 47 U.S.C. 154(i).
[46] *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1404 (D.C. 1996)
[47] *Comcast BitTorrent Order* ¶¶ 13, 15.

CONCLUSION

Even before the oral argument in the appeal of the *Comcast Order* raised doubt as to the extent of the Commission's authority under "ancillary jurisdiction," Public Knowledge and others in this proceeding urged the Commission to reclassify broadband access service as a Title II "telecommunications service" rather than a Title I "information service." In light of recent events raising questions and doubts that undermine the Commission's very ability to act, these arguments acquire a new urgency. The Commission has clear authority to reclassify so that it may better achieve the goals set by Congress in the ARRA, and several of the critical pillars of its decision to classify broadband access as Title I have become suspect. The Commission should therefore seize this opportunity to place the NBP on a firm regulatory foundation from the beginning and reclassify broadband access as a Title II service.

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