

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

Framework for Broadband Internet
Service

GN Docket 10-127

**REPLY COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
(CCIA)**

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The Computer & Communications Industry Association (“CCIA”), by and through counsel, files these Reply Comments in response to the Notice of Inquiry released June 17, 2010, in this docket (“NOI”). CCIA confines these Reply Comments to a few points raised in the Initial Comments of the major broadband Internet access providers.

SUMMARY

The Commission’s faith in the “Third Way” as the best statutory approach for adopting the rules proposed in the *Open Internet NPRM*¹ must remain resolute. The arguments of the major Internet Access Providers (“IAPs”), such as AT&T, Comcast, and Verizon, who seek to avoid almost any regulation of their services, ignore the Supreme Court’s rationale as well as the clear market data on which the NOI relies. Opposition to the use of Title II authority on broadband Internet access was to be expected, but this record provides no reasonable basis for the Commission now to abandon the Third Way.

A few arguments were particularly ill-conceived and thus merit direct address. First, it is simply incorrect to assert that the Commission will not receive judicial deference for a conclusion that the transmission component of retail broadband Internet access is “telecommunications.” The Supreme Court could not have been clearer in *Brand X* that the Commission’s interpretation of the statutory term “telecommunications service” warrants deference.

Secondly, as CCIA explained in its Initial Comments, the voluntary bundling of information services with transmission service is not a valid basis for maintaining the Title I

¹ *Preserving the Open Internet*, GN Docket No. 09-191, Notice of Proposed Rulemaking, FCC 09-93 (rel. Oct. 22, 2009).

classification of broadband Internet access. The Supreme Court in fact warned against this practice in *Brand X*.

Third, the relative degree of consumer awareness regarding competitive alternatives to information services such as domain name services (“DNS”) is not a valid or appropriate basis for determining whether to apply Title II to broadband transmission.

Fourth, reliance on purported competition within the wireless services market should not supplant the adoption of Title II-based Open Internet rules. Market data indicates that the wireless market exhibits considerable concentration and that, within this concentration, consumers are not likely to change service providers due to mechanisms like early termination fees (“ETFs”). This data suggests that the wireless market is not susceptible to discipline by new entrants or smaller carriers.

Finally, the Commission should not be deterred by IAP threats that they will cease network investment, because empirical data for the period 2001 to 2008 shows that investment by incumbent wireline carriers decreased dramatically *after* the Commission relaxed its unbundling regulations. Deregulation and decreased investment have a remarkably direct correlation, and the Commission has no basis to predict otherwise in this proceeding.

The Commission has ample reason to adopt the “Third Way” approach and to impose the requirements of sections 201, 202, 208, 222, 254, and 255 on retail broadband Internet access. Nothing in the record should cause it to steer away from this course.

I. THE COMMISSION MUST NOT LOSE SIGHT OF THIS ADMINISTRATION'S COMMITMENT TO AN OPEN INTERNET

Applying Title II authority to the telecommunications service component of retail broadband Internet access is the “best assurance for the protection of broadband consumers.”²

Title II is “a tested statutory rubric that has plainly defined goals,” and thus provides more solid ground for adopting the rules proposed in the *Open Internet NPRM*.³ Several commenters agree.⁴

In addition to the many reputable companies and trade associations that have voiced strong support for the “Third Way” approach, the Commission has the support of the Administration that has declared its commitment to preserving an open Internet. President Obama has been clear and consistent in his position that an open Internet is crucial to the nation’s economic growth and democratic well-being.

While campaigning, then-Senator Obama addressed a group in the heart of Silicon Valley by stating that

And as President I intend to work with you to write the next chapter in the story of American innovation. That’s part of the reason why I’m running for President of the United States. **To seize this moment, we have to ensure free and full exchange of information, and that starts with an open Internet.** I will take a back seat to no one in my commitment to network neutrality, because once providers start to privilege some applications or web sites over others, then the smaller voices get squeezed out and we all

² Comments of the Computer & Communication Industry Association (CCIA) at 3 (July 15, 2010).

³ CCIA Comments at 3.

⁴ See generally CCIA Comments; Comments of Google, Inc. (July 15, 2010); Comments of the Open Internet Coalition at 16-35 (July 15, 2010); Comments of Earthlink, Inc. at 16 (July 15, 2010); Comments of CBeyond, Inc., *et al.* (July 15, 2010); Comments of Covad Communications Company at 2-3 (July 15, 2010); Comments of U.S. TelePacific Corp., *et al.* at 2 (July 15, 2010); Comments of the Writers Guild of America, West at 3-4 (July 15, 2010); Comments of COMPTTEL at 3-4 (July 15, 2010).

lose. **The Internet is perhaps the most open network in history and we have to keep it that way.**⁵

In September 2009, shortly before the release of the *Open Internet NPRM*, the President stated that

Another key to strengthening education, entrepreneurship and innovation in communities like Troy is to harness the full power of the Internet. And that means faster and more widely available broadband as well as rules to ensure that we preserve the fairness and openness that led to the flourishing of the Internet in the first place. **So today FCC Chairman Julius Genachowski is announcing a set of principles to preserve an open Internet in which all Americans can participate and benefit.** And I'm pleased that he's taking that step. That's an important role that we can play. Laying the ground rules to spur innovation. That's the role of government. To provide investment that spurs innovation and also to set up common sense ground rules **to ensure that there's a level playing field for all comers who seek to contribute their innovations.**⁶

And again in February 2010, shortly after the State of the Union Address, President Obama emphasized his commitment to an open Internet in his interview with YouTube:

INTERVIEWER: Let's get back to the questions. And I've got to tell you, the number one question that came in, in the jobs and economy category, had to do with the Internet. And it came from James Earlywine in Indianapolis. He said, "An open Internet is a powerful engine for economic growth and new jobs. Letting large companies block and filter online content and services would stifle needed growth. **What is your commitment to keeping the Internet open and neutral in America?"**

PRESIDENT OBAMA: **Well, I'm a big believer in net neutrality.** I campaigned on this. I continue to be a strong supporter of it. My FCC chairman, Julius Genachowski, has indicated that he shares the view that we've got to keep the Internet open, that we don't want to

⁵ Available at <http://www.youtube.com/watch?v=g-mW1qccn8k> (emphasis added).

⁶ President Barack Obama, Remarks on Innovation and Sustainable Growth (Sept. 21, 2009), *video available at* <http://www.savetheinternet.com/blog/09/09/21/obama-agrees-fcc-net-neutrality>, *text available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Innovation-and-Sustainable-Growth-at-Hudson-Valley-Community-College/ (emphasis added).

create a bunch of gateways that prevent somebody who doesn't have a lot of money but has a good idea from being able to start their next YouTube, or their next Google, on the Internet. So this is something we're committed to. **We're getting push-back, obviously, from some of the bigger carriers** who would like to be able to charge more fees and extract more money from wealthier customers. **But we think that runs counter to the whole spirit of openness that has made the Internet such a powerful engine for not only economic growth, but also for the generation of ideas and creativity.**⁷

This Administration wants a free Internet in which all users of broadband Internet access are treated in a fair, just, and non-discriminatory manner. The Commission's duty, then, is to implement rules to achieve that result. These rules must be clear, enforceable, and firmly staked to the Commission's statutory authority. As CCIA and others have made clear, the Commission's authority over services that provide a "two-way transmission path over which end users receive and send communications" is most strongly derived from Title II.⁸

Further, this Commission may have the most knowledge of the technical and economic characteristics of the Internet than any agency in history. The NOI displays a great deal of sophistication in the Commission's understanding of the features and functionalities of each component of Internet access service as well as the evolving market for Internet-based products and services. The Commission thus should give no credence to remarks that it "[m]isconceives [h]ow the Internet [w]orks."⁹

The thorough analysis and close detail in the NOI provides the Commission with a solid basis to proceed with reaching the inexorable conclusion that the transmission component of broadband Internet access is indeed "telecommunications" and falls within its Title II authority.

⁷ Available at <http://www.youtube.com/watch?v=mP01t0Z4Hr8> (emphasis added).

⁸ CCIA Comments at 5.

⁹ Comments of AT&T, Inc. at 44 (July 15, 2010).

Having issued that decision, the Commission would then be equally capable of determining which substantive regulations will be enforced on that service, such as the privacy protections of section 222 and the Universal Service obligations in section 254, and which regulations are unnecessary. The Commission's conviction in its own judgment must not be diminished by the arguments of the IAPs whose opposition to all forms of regulation is to be expected. The Third Way is a well-founded, workable approach to achieving the open Internet that this Administration desires.

II. THE RECORD CONTAINS NO VALID BASIS FOR THE COMMISSION TO ABANDON THE "THIRD WAY"

A few arguments from the major IAPs merit a brief response. Resting on unsound legal interpretation and ignoring market data, the major IAPs attempt to shake the Commission's resolve to adopt the Third Way by arguing that the courts will not uphold it, consumers will not understand it, and competition in wireless services can replace it. These positions defy the Supreme Court's analysis in *Brand X*, are insulting to consumers, and ignore the mounting evidence of untenable concentration in the wireless market. None of these IAP arguments should deter the Commission from adopting the Third Way approach as a basis for establishing its proposed Open Internet rules.

A. The Commission Would Be Afforded *Chevron* Deference for the Third Way

As CCIA demonstrated in its comments, "the Commission has broad discretion in determining which services are 'telecommunications' under the Act" and "surely will enjoy considerable deference" in adopting the Third Way.¹⁰ In *Brand X*, the Supreme Court "'had no difficulty concluding that *Chevron* applies'" to the Commission's decision whether cable-based

¹⁰ CCIA Comments at 12.

Internet access is a telecommunications or an information service.¹¹ Yet the Verizon Companies nonetheless warn the Commission that, if appealed, the Third Way will not be entitled to *Chevron*¹² deference.¹³ This warning ignores the plain language of *Brand X*.

The Supreme Court’s analysis in *Brand X* focused on the Commission’s “statutory interpretation” of the “term ‘telecommunications service.’”¹⁴ Accordingly, its discussion of *Chevron* deference referred four times to agencies’ “interpretation” of their enabling statutes, and noted that “in *Chevron* itself, this Court deferred to an agency interpretation” of its statute.¹⁵ The Court also quoted its *Chevron* opinion which held that “[a]n agency interpretation” of its enabling statute “is not instantly carved in stone.”¹⁶ The Court then found that the term “telecommunications” does “admit of two or more reasonable ordinary usages,” and thus “is ambiguous in this way.”¹⁷ For all these reasons, the Court stated that it had “no difficulty concluding that *Chevron* applies” to the Commission’s choice of statutory classification for cable modems.¹⁸ *Brand X* is thus very clear that the Commission will be accorded deference in its interpretation of the Act, and more particularly of the term “telecommunications service.”

The Verizon Companies attempt to ignore *Brand X* by asserting that “this proceeding concerns the extent of the Commission’s statutory authority over broadband Internet

¹¹ CCIA Comments at 13 (quoting *National Cable and Telecommc’ns Ass’n v. Brand X Internet Svcs.*, 545 U.S. 967, 989 (2005)).

¹² *Chevron USA, Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

¹³ Comments of Verizon and Verizon Wireless at 34-38 (July 15, 2010) (the “Verizon Companies Comments”).

¹⁴ *Brand X*, 545 U.S. at 980.

¹⁵ 545 U.S. at 982 (citing *Chevron*, 467 U.S. at 857-58).

¹⁶ *Id.* (quoting *Chevron*, 467 U.S. at 981).

¹⁷ *Id.* at 989.

¹⁸ *Id.* at 982.

access service.”¹⁹ So did *Brand X*. The sole question in the *Cable Modem Order*²⁰ was whether cable modems are Title I services, thus depriving the Commission of much of the regulatory authority in the Act, or Title II services, thus authorizing the Commission to regulate cable modems under, among other provisions, sections 201 and 202 of the Act.²¹ The Commission chose Title I, and the Supreme Court upheld that decision as a reasonable “interpretation” of the ambiguous definitions of “telecommunications” and “information services” in the Act.²²

To interpret the statutory term “telecommunications services” is necessarily to interpret the Commission’s authority. This interpretation will be accorded deference under *Brand X*, and the Commission should not be shaken by unfounded assertions to the contrary.

B. Voluntary Bundling of Information Services Is Precisely What the Supreme Court Decried in *Brand X*

AT&T, Comcast, and the Verizon Companies each maintain the pretense that their broadband Internet access services are so tightly integrated that they must be deemed “information services” and left largely unregulated.²³ To a great degree, this “integration” is achieved through the voluntary accretion of pure information services onto the transmission component of their retail

¹⁹ Verizon Companies Comments at 36-37.

²⁰ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002).

²¹ Along with the service’s popularity, controversy has grown about its legal status under the Communications Act of 1934, as amended (‘the Act’), and about what regulatory treatment (if any) is appropriate under the law and will best serve consumers. The purpose of this proceeding is to resolve these issues.

Id., 17 FCC Rcd. at 4800 ¶ 1.

²² *Brand X*, 545 U.S. at 996-97.

²³ AT&T Comments at 74-75; Verizon Companies Comments at 51; Comments of Comcast Corporation at 22-24 (July 15, 2010).

broadband offerings: Comcast adds security, backup, and Norton software to its cable modem service;²⁴ Verizon adds “online file backup and a Small Business Center portal, which includes professional/social networking forums[.]”²⁵ As CCIA stated in its Initial Comments, this kind of voluntary bundling of services as a means of avoiding regulations already has been anticipated and rejected by the Supreme Court.²⁶

In *Brand X*, the Supreme Court noted that the parties in favor of Title II classification warned that the Commission’s *Cable Modem Order* analysis “allows any communications provider to ‘evade’ common-carrier regulation by the expedient of bundling information service with telecommunications.”²⁷ The Court rejected that argument, because it “did not believe that these results follow from the construction the Commission adopted.” To the contrary, the Court stated that

As we understand the *Declaratory Ruling*, the Commission did not say that any telecommunications service that is priced or bundled with an information service is automatically unregulated under Title II. The Commission said that a telecommunications input used to provide an information service **that is not “separable from the data-processing capabilities of the service”** and is instead “part and parcel of [the information service] and is integral to [the information service’s] other capabilities” is not a telecommunications offering.

This construction does not leave all information-service offerings exempt from mandatory Title II regulation. “It is plain,” for example, that **a local telephone company “cannot escape Title II**

²⁴ Comcast Comments at 23-24.

²⁵ Verizon Companies Comments at 51.

²⁶ CCIA Comments at 12 & n.38.

²⁷ *Brand X*, 545 U.S. at 997 (citation omitted in original).

regulation of its residential local exchange service simply by packaging that service with voice mail.”²⁸

The major IAPs are engaged in exactly the sort of “packaging” that the Supreme Court already has denounced. Plainly a social networking service is “separable” from the transmission component of Comcast’s and Verizon’s retail broadband Internet access service. As CCIA stated, these providers “should not be allowed to bootstrap telecommunications services into the ‘information services’ category in a game of self-service deregulation.”²⁹ The Commission thus should not be swayed by IAPs’ voluntary offerings of bundled services as grounds to abandon Title II authority completely.

C. Surmising That Consumers Are Not “Savvy” Enough to Warrant Fair Treatment Is Unhelpful

As the NOI states³⁰ and CCIA has argued, recent market data demonstrates that the information component of Internet access services is “separable” from the telecommunications component.³¹ The rise of independent third-party vendors for email, DNS, web hosting, and web portal services demonstrates that these functionalities are easily distinguished from the transmission functionality of broadband Internet access.³²

²⁸ 545 U.S. at 997-98 (quoting *Cable Modem Order*, 17 FCC Rcd. at 4823 ¶ 39; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11,501, 11,530 ¶ 60 (1998)) (emphasis added).

²⁹ CCIA Comments at 12.

³⁰ NOI ¶¶ 56, 58.

³¹ CCIA Comments at 14.

³² CCIA Comments at 14; *see also* Open Internet Coalition Comments at 22-23; Earthlink Comments at 7; Comments of Data Foundry, Inc. at 11-13 (July 15, 2010) (“The only thing that was ever inseparable about the transmission and information processing components of broadband Internet access service was the cable and incumbent telephone companies’ joint desire to avoid having to comply with the very common carrier obligations that Congress reaffirmed in 1996[.]”).

AT&T discounts this data on the ground that only “unusually tech-savvy consumers” understand how to obtain information services from third-party vendors.³³ That assertion is both unhelpful and myopic. It is impolitic in the extreme for any IAP to belittle the knowledge of its own subscribers as a means of obtaining continued unregulated treatment for its product. This argument is simply another “expedient”³⁴ for ‘self-service deregulation’ and says nothing to the technical issue of separability.

Moreover, A&T’s view is particularly cynical in light of the Commission’s lament in the National Broadband Plan that “22% of non-adopters cite digital literacy as their main barrier to broadband adoption.”³⁵ It is unseemly for AT&T to use that unfortunate statistic to its advantage in this way. Further, the Commission is dedicated to increasing consumers’ digital literacy, and has suggested the creation of a “Digital Literacy Corps” and “Online Digital Literacy Portal” that would be funded with federal money.³⁶ Consumers are going to become increasingly aware of the competitive alternatives to the information services that IAPs presently bundle with Internet access. To persist in classifying broadband Internet access as “information” services thus would be decidedly regressive.

Further, the fact that third-party vendors like Go Daddy, Google, and TypePad have entered the market and have, particularly in the email market, overtaken entrenched providers in itself demonstrates that consumers are more “savvy” than AT&T acknowledges. The fact remains that these standalone information services are being widely used. With the adoption of enforceable

³³ AT&T Comments at 72 (citing NOI ¶ 66, which may be a typographical error, as that paragraph does not discuss third-party information service offerings).

³⁴ *Brand X*, 545 U.S. at 997.

³⁵ FCC, Connecting America: The National Broadband Plan, § 9.3 at 174 (“NBP”).

³⁶ NBP, Recommendation 9.3 and pp. 174-178.

Open Internet principles that will assure other entrants that their services will reach consumers, these services are likely to become even more popular. But to argue that information services are inseparably integrated into broadband Internet access on the ground that consumers are not “savvy” enough to find third-party vendors is simply counterfactual.

D. Reliance on the Wireless Market to Establish Competition in Internet Access Services Is Unwise

The Verizon Companies suggest that “intense competition” among wireless services renders the establishment of Open Internet rules unnecessary.³⁷ They provide a litany of statistics about pricing plans and network investment in an effort to demonstrate that “competition is thriving”³⁸ and thus the Commission cannot “compel a provider to dedicate its property to the use of others.”³⁹ This effort is misplaced, for two reasons. First, the proposed Open Internet rules focus on what “consumers are entitled to” obtain via retail Internet broadband access,⁴⁰ and not on wholesale unbundling. Secondly, this ostensible “competition” is occurring within a concentrated oligopoly whose market share is only rising.

The proposed Open Internet rules are about the fair treatment of broadband end users: consumers, businesses, and non-profit organizations. Though some commenters have reminded the Commission that procompetitive wholesale rules may be a more sure path to securing consumer welfare,⁴¹ and that the unbundling regime of section 251 must not be

³⁷ Verizon Companies Comments at 69; *see generally id.* at 69-78.

³⁸ *Id.* at 66.

³⁹ *Id.* at 63.

⁴⁰ Four of the six proposed Open Internet rules begin with this language: “To encourage broadband deployment and promote the open and interconnected nature of the public Internet, consumers are entitled to” *Open Internet NPRM* ¶ 5.

⁴¹ Data Foundry, for example, notes that “[t]he wholesale approach mirrors the requirement the Commission successfully imposed for more than two decades on *all* non-cable facilities based

forgotten,⁴² the overriding theme of the *Open Internet NPRM* is consumer protection.⁴³ CCIA agrees that competition for end users is a valuable incentive for IAPs to provide reasonable and non-discriminatory service. It nonetheless also supports the Commission’s adoption of Open Internet protections at the retail level rather than placing all of its reliance on competitive forces. This is another lesson of the *Comcast* enforcement proceeding: though wireline broadband, typically provided only by the incumbent carrier, and cable modems, also typically available from one source, may be fierce competitors in some areas,⁴⁴ undisclosed manipulation of consumers’ Internet access and traffic routing still occurred.

In addition, the wireless industry is not uniformly recognized as truly competitive. In its July 2010 *Views and News* issue, Economics and Technology, Inc. (“ETI”) concluded that “widespread ‘effective competition’ is not present in all sectors of the wireless industry.”⁴⁵ In 2008, which is the most recent data set used in the *CMRS Report*, Verizon Wireless and AT&T held 61% market share.⁴⁶ The four largest carriers — Verizon Wireless, AT&T, Sprint, and T-

providers of information services under *Computer II*.” Data Foundry Comments at 13 (emphasis in original).

⁴² E.g., Covad Comments at 3-4; U.S. TelePacific, *et al.* Comments at 3; COMPTTEL Comments at 5.

⁴³ E.g., *Open Internet NPRM* §§ 7 (“customers have limited options for high-speed broadband Internet access service”), 14 (“[t]he rules we propose today address users’ ability to *access* the Internet”) (emphasis in original), 53 (“The Act and Commission precedent likewise demonstrate the importance of protecting users’ interests as a Commission goal.”).

⁴⁴ In its comments on the *Open Internet NPRM*, CCIA noted that “that the wireline-cable duopoly blankets 96.5% of American homes.” GN Docket No. 09-191, Reply Comments of CCIA at 4 (Apr. 26, 2010) (citing and quoting Comments of Verizon and Verizon Wireless, Declaration of Michael D. Topper § 15 (Jan. 14, 2010) (“There are about 27 million households in Verizon’s local service territory, and 96.5% of them are in areas that have access to both Verizon’s DSL service and cable modem broadband.”)).

⁴⁵ Economics and Technology, Inc., *Views and News* at 1 (July 2010) (appended hereto as **Attachment A**).

⁴⁶ *Views and News* at 1.

Mobile — held 89% market share.⁴⁷ And in the wholesale wireless market, smaller carriers are largely dependent on the two largest carriers, AT&T and Verizon, for high-capacity transport and backhaul services.⁴⁸ As such, smaller carriers cannot be expected to discipline the retail wireless market to any meaningful degree.

In addition, the continued prevalence of early termination fees (“ETFs”) “is itself evidence of a less-than-competitive market.”⁴⁹ AT&T and Verizon both impose a \$350 ETF for smartphones, though pursuant to a recent litigation settlement the ETF is now pro-rated over the life of a service contract.⁵⁰ The Commission has acknowledged, according to ETI, that ETFs are “probably the largest quantifiable cost to consumers who wish to switch service providers.”⁵¹ With these types of mechanisms still in place to prevent consumers from changing their wireless carrier, it is questionable whether competition among the largest carriers will have any demonstrable effect on carrier market share. Moreover, it demonstrates that, in the wireless market, consumers are not so likely to assume the burden of switching providers if they are mistreated. Not only are consumers forced to purchase a new phone when they leave a carrier, there being no regulatory obligation to support handset portability, but they must pay a

⁴⁷ *Id.*

⁴⁸ For example, the United States Cellular Corporation stated that “for most cell sites, and particularly those in rural areas, the market for backhaul services does not provide effective competitive alternatives to incumbent local exchange carriers’ special access services.” GN Docket No. 09-47, *NBP Public Notice # 11*, Comments of United States Cellular Corporation at 3 (Nov. 4, 2009) (emphasis in original). T-Mobile USA has echoed these concerns, stating that “a number of ILECs have no plans to offer fiber-based connectivity and their supplies of DS1s and DS3s may be limited. Under these circumstances, the market has failed and Commission intervention is necessary” Docket No. 09-47, *NBP Public Notice # 11*, Comments – NBP Public Notice # 11 of T-Mobile USA, Inc. at 8 (Nov. 4, 2009).

⁴⁹ *Views and News* at 2.

⁵⁰ *Id.*

⁵¹ *Id.*

considerable ETF in addition. For all these reasons, there is no reason to exclude wireless services from the consumer protections available under Title II.

E. The Commission Should Not Accede To Threats That The “Third Way” Will Halt Network Investment

The longstanding mantra of telecommunications network operators that regulation thwarts investment appears again in this docket.⁵² Essentially it is a thinly veiled threat that incumbent carriers use to sway public opinion and deter the Commission from fulfilling its obligations to serve the public interest. And that threat has been revealed as baseless.

ETI has published two white papers on the correlation between regulation and investment. In March 2009, it published *The Role of Regulation in a Competitive Telecom Environment* (appended hereto as **Attachment B**), in which it demonstrated that the three largest incumbent wireline carriers, AT&T, Verizon, and Qwest, decreased the amount they spent on network facilities dramatically after the Commission dismantled many of its section 251 unbundling rules. In 1996, these carriers invested a combined \$142 Billion, in 2001 that figure increased to \$155 Billion, but in 2007 it dropped to \$101 Billion.⁵³ AT&T invested **33% less** in its network in the period 2002-2007 as compared with the period 1996-2001. Verizon invested **23% less** in that second period, and Qwest invested **64% less**.⁵⁴ Thus, despite promises that deregulation would spur them to invest, these carriers dropped their investment significantly after

⁵² AT&T Comments at 93-94; Comcast Comments at 36-38; Verizon Companies Comments at 12-20.

⁵³ Lee Selwyn *et al.*, *The Role of Regulation in a Competitive Telecom Environment*, Economics & Technology, Inc., at 23 (Mar. 2009) (“*Role of Regulation*”) available at [http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/crtc-2008-117-MTS-Appendix2.pdf/\\$FILE/crtc-2008-117-MTS-Appendix2.pdf](http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/crtc-2008-117-MTS-Appendix2.pdf/$FILE/crtc-2008-117-MTS-Appendix2.pdf).

⁵⁴ *Role of Regulation*, Figure 3.

the Commission adopted the *Triennial Review Order*⁵⁵ and the *Triennial Review Remand Order*.⁵⁶ This data proves the opposite of what the major IAPs assert; deregulation decreases investment. As ETI summarizes it, “[d]espite achieving most of their deregulatory wish list, the ILECs have not increased their levels of capital spending, and their forecasts of increased competition and competitive investment have not come even close to materializing.”⁵⁷

The second ETI paper, titled *Regulation, Investment and Jobs*, was released in February 2010 (appended hereto as **Attachment C**). It shows that incumbent LECs in 2008 spent roughly half of what they spent in 2001 on their networks.⁵⁸ It also shows that the Regional Bell Operating Companies (“RBOCs”) eliminated almost 140,000 jobs between 2001 and 2007, or 35% of its workforce.⁵⁹ This significant decrease in employment figures is not consistent with America’s employment rate overall: “while overall employment growth economy-wide was interrupted for a short period starting in 2001 but then recovered and began growing again,

⁵⁵ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 *et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2003), *vacated and remanded in part, aff’d in part*, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*TRO*”). In that order, the Commission removed several elements from the Unbundled Network Element (“UNE”) list, including switching for enterprise customers and OCn loops, as well as the high-frequency portion of loops and so-called “greenfield” loops.

⁵⁶ *Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand, 20 FCC Rcd. 2533 (2005) (“*TRRO*”). In that order, the Commission removed all so-called “entrance facilities” and mass-market switching from the UNE list and significantly limited access to DS-1 loops.

⁵⁷ *Role of Regulation* at 27.

⁵⁸ Susan M. Gatey, *et al.*, *Regulation, Investment and Jobs*, Economics & Technology, Inc., at 13-14 & Figure 1-4 (Feb. 2010) available at http://www.publicknowledge.org/pdf/eti_wholesale_study_20100211.pdf.

⁵⁹ *Id.* at 17-18 & Figure 1-7.

telecom sector employment plummeted.”⁶⁰ As another comparison, the wireless industry experienced a 1% *increase* in total number of jobs between 2001 and 2008.⁶¹

If it were true that deregulation spurs investment and creates jobs, then a 35% decrease in jobs would not happen. Plainly the RBOCs did not hold up their end of the bargain that was struck via the *TRO* and *TRRO*. There is no reason that the Commission should strike a similar bargain with respect to the legal framework for critical broadband infrastructure and telecommunications.

CONCLUSION

For all these reasons, the Commission should adopt the “Third Way” framework of legal authority, applying sections 201, 202, 208, 222, 254, and 255 to retail end user broadband Internet access service with appropriate exercise of its section 10 forbearance authority.

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⁶⁰ *Id.* at 16-17.

⁶¹ *Id.* at 21 & Figure 1-11.

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