

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

In the Matter of )  
 ) GN Docket 10-127  
Framework for Broadband Internet Service )  
 )

**COMMENTS OF  
COMMUNICATIONS WORKERS OF AMERICA**

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July 15, 2010

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The Communications Workers of America (“CWA”) submits these comments in response to the Commission’s Notice of Inquiry (“*NOI*”) in the above-captioned proceeding.<sup>1</sup>

CWA agrees with the *NOI*’s observation (¶ 1) that the D.C. Circuit’s *Comcast* decision<sup>2</sup> “appears to undermine prior understandings about the Commission’s ability under the current [Title I] framework to provide consumers basic protections when they use today’s broadband Internet services.” We also agree that action is needed to dispel the uncertainty created by the *Comcast* decision and to provide the Commission with a sound jurisdictional footing to proceed with the *Open Internet* rulemaking proceeding<sup>3</sup> and to implement many of the recommendations of the National Broadband Plan (“NBP”).<sup>4</sup>

CWA notes, however, that either route proposed in the *NOI* – whether to rely on a renewed justification for Title I ancillary authority over broadband networks (*NOI* ¶¶ 30-51), or reclassification under Title II, coupled with forbearance (*id.* ¶¶ 52-99) – could present difficult and unsettled legal questions. As a result, either option faces an uncertain fate in inevitable court appeals, as well as considerable delays associated with such appeals. We therefore believe that the best approach would be targeted legislation that clarifies the FCC’s authority to implement

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<sup>1</sup> *Framework for Broadband Internet Services*, GN Docket No. 10-127, Notice of Inquiry, FCC 10-114 (rel. June 17, 2010) (“*NOI*”).

<sup>2</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>3</sup> *Preserving the Open Internet*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (Oct. 22, 2009) (“*Open Internet*”).

<sup>4</sup> FCC, *Connecting America: The National Broadband Plan* (March 16, 2010) (“NBP”).

the NBP and to adopt rules in the pending *Open Internet* rulemaking while, at the same time, preserving broadband network providers' incentives to invest in their networks and their flexibility to innovate over those networks.

If the Commission nevertheless proceeds with adopting one of the *NOI*'s proposals, CWA believes that it should pursue the option of providing a renewed and expanded justification of its Title I authority over broadband service providers. Properly read, *Comcast* leaves the Commission with sufficient Title I jurisdiction, ancillary to its Title II authority, to implement the NBP and to adopt open Internet rules in the *Open Internet* rulemaking. This approach is also the most consistent with the Commission's goal in this proceeding, a goal which we support: Maintaining the pre-*Comcast* status quo with respect to "light touch" regulation of broadband service providers.

**TARGETED LEGISLATION CLARIFYING THE COMMISSION'S AUTHORITY TO ADOPT OPEN INTERNET RULES AND TO IMPLEMENT THE NBP IS THE ONLY SWIFT AND SURE WAY TO OVERCOME THE *COMCAST* DECISION.**

CWA agrees with the *NOI*'s conclusion (¶ 9) that unfortunately, the *Comcast* decision has cast into doubt "whether the Commission's current legal approach is adequate to implement Congress's [broadband] directives." We also share the Commission's goal of "addressing broadband Internet service in a way that is consistent with the Communications Act, reduces uncertainty that may chill investment and innovation if allowed to continue, and accomplishes Congress's pro-consumer, pro-competition goals for broadband." *Id.* ¶ 10. In particular, CWA strongly endorses the Chairman's stated goal of "continu[ing] the same light-touch approach to broadband access policy" that existed before *Comcast*.<sup>5</sup>

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<sup>5</sup> Statement of Chairman Julius Genachowski, GN Docket No. 10-127, at 1 (June 17, 2010) ("Chairman's Statement.").

CWA therefore understands and appreciates the dilemma that the *Comcast* decision has thrust upon the Commission. Absent Congressional action to affirm the Commission’s authority over broadband, the Commission in the *NOI* must work within the framework established by the current Act if the Commission is to carry out the proposals in the NBP and the *Open Internet* proceeding. The *NOI* proposes two alternatives – a renewed justification for the exercise of Title I ancillary authority over broadband (*NOI* ¶¶ 30-51), and reclassification of facilities-based broadband services under Title II, coupled with forbearance (*id.* ¶¶ 52-99) – to restore the status quo as it stood before *Comcast*.

CWA supports the goal of restoring the pre-*Comcast* status quo. The Commission must recognize, however, that pursuing either of these administrative alternatives could present difficult and unsettled legal questions. As a result, either route carries with it inevitable court appeals with uncertain outcomes, as well as considerable delays associated with the appeals process. Those uncertainties and delays threaten the Commission’s ability to implement the NBP and to adopt open Internet rules in a timely fashion.

Accordingly, CWA believes that the best solution to the problems created by the *Comcast* decision lies outside the Commission and the court appeals process: targeted Congressional legislation. Specifically, what is needed is targeted legislation that clarifies the Commission’s authority to implement the NBP and to adopt appropriate rules in the *Open Internet* proceeding while, at the same time, preserving broadband network providers’ incentives to make job-creating investments in their networks and their flexibility to innovate over those networks.

We note that both the *NOI* (¶ 9) and Chairman Genachowski<sup>6</sup> have made clear the Commission’s support for such legislation and their willingness to work with Congress to enact

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<sup>6</sup> Chairman’s Statement at 1 (“Let me take this opportunity today to say clearly: I fully support this Congressional effort. A limited update of the Communications Act could lock in an effective broadband framework to promote

such legislation. CWA applauds the Commission's support for targeted legislation. CWA has joined with other labor, environmental and civil rights groups urging Congress to enact such narrowly targeted legislation. *See* Exhibit 1. The focus at this point should be facilitating enactment of that legislation as promptly as possible, because targeted legislation is the only sure and prompt way out of the quagmire that the *Comcast* decision has created.

CWA believes that, to the extent that the Commission feels the need to move forward with adopting one of the *NOI*'s proposals, the preferable approach would be to pursue the course that most closely tracks the status quo before the *Comcast* decision. That approach would be a renewed and strengthened Title I approach to the Commission's exercise of ancillary authority over broadband. As we show in Exhibit 2, properly read, *Comcast* leaves that avenue open for the Commission.

The Title I option has another advantage over the Title II reclassification approach. The Title I route would pose substantially less risk than the Title II route of chilling job-creating investment and innovation by broadband network providers.<sup>7</sup>

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investment and innovation, foster competition, and empower consumers. I commit all available FCC resources to assisting Congress in its consideration of how to improve and clarify our communications laws.”).

<sup>7</sup> *See* CWA, *The U.S. Broadband Industry Investment and Employment* (April 2010), attached as Exhibit 3.

## CONCLUSION

For the foregoing reasons, CWA believes that the best solution to the problem created by *Comcast* is the enactment of targeted legislation by Congress that clarifies the Commission's authority to implement the NBP and to adopt appropriate open internet rules while, at the same time, preserving broadband network providers' incentives to invest in their networks and to innovate. To the extent that the Commission nevertheless proceeds with taking action in the *NOI*, it can, and should, rely on an expanded explanation justifying its exercise of Title I authority over broadband ancillary to its Title II jurisdiction.

Respectfully submitted,

  
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July 15, 2010

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**EXHIBIT 1**

**AFL-CIO**



**MMTC**  
Minority Media &  
Telecom Council



National  
Urban League



June 18, 2010

Dear Chairman Rockefeller and Chairman Waxman:

As leaders of national civil rights, labor, and environmental organizations, we urge you to move forward quickly on narrowly targeted legislation that clarifies Federal Communications Commission authority to protect an Open Internet and to apply Universal Service funding to broadband.

The build-out of affordable high speed Internet to every American household, business, and community, along with programs to ensure that every American has the skills needed to participate fully in our digital society, remain critical tasks for our nation.

Fortunately, under the leadership of President Obama and FCC Chairman Julius Genachowski, we now have a National Broadband Plan that provides a blueprint to address these infrastructure challenges.

Yet the United States continues to lag behind the rest of the world in high-speed networks. Our nation has fallen to 15th in the world in broadband adoption. More than 100 million Americans do not have broadband at home. There is a persistent digital divide based on race, income, geography, and age. Further, most U.S. broadband networks cannot deliver the speeds necessary to run advanced applications and services that foster sustainable communities and enable cost-effective improvements in education, energy, health, entrepreneurship, and public services.

We are united in our support of those elements of the National Broadband Plan that spur building and upgrading our high-speed networks, providing affordable access and digital skills to every American and building high speed capacity to every community anchor institution.

Unfortunately, the recent *Comcast* court decision threatens to divert our attention from these critical national objectives. The court concluded that the FCC had not demonstrated that it has jurisdiction over broadband Internet access. As a result, some question whether the FCC has authority to enforce its 2005 Open Internet principles and to use the Universal Service Fund to support the build-out of advanced broadband networks.

We can avoid further delays in building out a world class network if Congress quickly moves to pass legislation that clarifies FCC authority to protect an Open Internet and to apply Universal Service funding to broadband. Such narrowly targeted legislation would:

- Make clear that federal Universal Service funding may be used to support broadband build out and programs to encourage broadband adoption and use by low-income households;
- Establish the FCC Open Internet principles as the law of the land, ensuring that broadband Internet service providers (ISPs) do not prevent users from sending and receiving the lawful Internet content of their choice; running lawful applications and services of their choice, subject to the needs of law enforcement; and connecting their choice of legal devices that do not harm the network, all subject to reasonable network management;
- Require broadband Internet access, service, application, and content providers to make available to consumers transparent and accurate information, in widely spoken languages, including Spanish, about the capabilities and network management practices of their offerings;

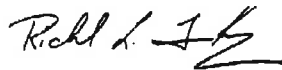
- Ensure that broadband ISPs do not engage in unreasonable discrimination against any lawful Internet content, application, or service that harms competition or consumers;
- Ensure that minority business and entrepreneurs are given meaningful opportunities to participate in the build out of high-speed networks.

Such a narrowly tailored bill will make clear that the FCC has authority to protect free speech on the Internet and to foster universal, affordable high-speed networks. Most important, it will allow us to move forward to make the job-creating investments necessary to implement the recommendations and meet the goals of the National Broadband Plan.

We must ensure that any action or inaction does not widen the digital divide. Instead, we must broaden opportunity for all consumers and communities, to increase diversity and ensure that all Americans can engage in the Internet Age. We don't want to go backward or push further into the future the time when the digital divide is finally closed. We urge you to proceed quickly with targeted legislation that firmly grounds FCC jurisdiction to protect an open Internet and to promote universal, affordable broadband. We cannot afford inaction which will slow the closing of the digital divide by shifting costs to the poor and discouraging deployment to low income and other disadvantaged Americans. Meanwhile, we recognize that there are important long-range issues that should be included in a more comprehensive update of the Communications Act.

In this way, we will make sure that all Americans, and most especially our children, have access to the unlimited information on the Internet, and that our nation will lead the world in advanced communications networks capable of supporting sustainable communities and spurring economic growth and job creation today and into the future.

Sincerely,



Richard Trumka  
President  
AFL-CIO



Larry Cohen  
President  
Communications Workers of America



Edwin D. Hill  
President  
International Brotherhood of Electrical Workers




Brent Wilkes  
National Executive Director  
League of United Latin American Citizens



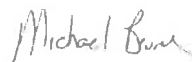
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Michael Brune  
Executive Director  
Sierra Club

cc Majority Leader Harry Reid  
Speaker Nancy Pelosi

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**EXHIBIT 2**

**PROPERLY READ, THE COMCAST DECISION LEAVES THE  
COMMISSION WITH SUFFICIENT TITLE I JURISDICTION  
ANCILLARY TO TITLE II TO ADOPT OPEN INTERNET RULES.**

While the D.C. Circuit’s *Comcast* decision<sup>1</sup> certainly affects the legal analysis that the Commission must use to justify its authority to implement several aspects of the NBP and to adopt open Internet rules, it does not, and should not, affect the ultimate conclusion that the Commission has such authority. Moreover, the *Comcast* decision does not compel the Commission to go the Title II reclassification route to achieve the result. Rather, we believe that, consistent with the *Comcast* decision, the Commission may justify its authority based on its Title I ancillary jurisdiction. Specifically, the Commission may adopt the proposed open Internet rules as “ancillary to its section 201 common carrier authority.” *Comcast*, 600 F.3d at 660.

Other parties have already argued persuasively that the *Comcast* decision does not prevent the Commission from exercising its ancillary authority under Section 254 to implement the NBP’s universal service recommendations.<sup>2</sup> But a careful reading of the *Comcast* decision reveals that it also does not foreclose the Commission from exercising its Title I authority ancillary to its Title II jurisdiction to implement other NBP recommendations and to adopt open Internet rules.

**A. The Comcast Court Specifically Declined to Reach the Issue of Ancillary Jurisdiction Based on Section 201.**

We begin with what the *Comcast* court explicitly stated it was *not* deciding: Whether the Commission might exercise authority over broadband providers’ Internet access service practices as “ancillary to its section 201 common carrier authority.” 600 F.3d at 660. The D.C. Circuit

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<sup>1</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>2</sup> *See, e.g.*, Letter from Gary L. Phillips, General Attorney and Associate General Counsel, AT&T Services, Inc., to Marlene Dortch, GN Docket Nos. 09-51 & 09-137, & WC Docket Nos. 05-037 & 03-109 (filed April 12, 2010); Letter from Jonathan E. Nuechterlein, Counsel, AT&T Inc., to Marlene Dortch, GN Docket Nos. 09-51 & 09-191, & WC Docket No. 07-52 (filed April 14, 2010).

declined to reach this issue for two reasons, neither relating to the merits of the Section 201 ancillary jurisdiction argument. First, the court found that the Section 201 ancillary jurisdiction argument that the Commission made in the *Comcast/BitTorrent Order* under review – that by blocking P2P traffic, Comcast had shifted the burden of that traffic to other providers, some of whom were telecommunications carriers subject to Title II – was abandoned because the Commission failed to make that argument on appeal. *Comcast*, 600 F.3d at 660. Second, the court found that the Section 201 ancillary jurisdiction argument that the Commission did make on appeal – that VoIP services compete with traditional telecommunications common carrier services subject to Title II – was barred under *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943), because that argument was not a basis for the Commission’s decision in the *Comcast/BitTorrent Order* that it had ancillary jurisdiction over the practices at issue there. *Comcast*, 600 F.3d at 660. As a result of these procedural defects, the *Comcast* court specifically refused to reach the merits of either argument. *Id.*

Thus, the *Comcast* decision clearly leaves open the opportunity for the Commission to base its NBP implementation and its open Internet access rules on its Title I jurisdiction ancillary to its Section 201 authority over the “charges, practices, classifications, and regulations” of telecommunications common carriers.

**B. Imposing Open Internet Rules Is Reasonably Ancillary to the Commission’s Effective Performance of Its Statutorily Mandated Responsibilities Under Section 201 Specifically and Title II Generally.**

The Commission’s effort to rely on its Title I ancillary jurisdiction in *Comcast* failed because, according to the court, the legal justifications offered by the Commission did not satisfy the second prong of the *American Library* test.<sup>3</sup> Thus, while the *Comcast* court readily conceded

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<sup>3</sup> *American Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

that Section 2(a)'s broad grant of authority over all "interstate and foreign communications by wire or radio" gave the Commission subject matter jurisdiction over broadband Internet access (*Comcast*, 600 F.3d at 646-47), it held that the Commission had "failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility'" (*id.* at 661). This was so, according to the court, because (1) some of the Communications Act provisions on which the Commission had relied – Sections 1 and 230(b) – were mere "statements of policy" which, by themselves, were insufficient to satisfy the second prong of the *American Library* test (*id.* at 651-58); and (2) the other Communications Act provisions on which the Commission had relied – Sections 706, 256, 623 and Title III – were insufficient because, for varying reasons, the Commission had failed to explain the link between them and its regulation of Comcast's Internet service, no such link was plausible, or (in the case of Section 706) the Commission itself had previously determined that the provision did not constitute an independent grant of authority (*id.* at 658-61).

Relying on the Commission's Section 201 authority over telecommunications carrier "charges, practices, classifications and regulations" as the predicate for the exercise of Title I ancillary jurisdiction to implement the NBP and to adopt open Internet rules does not suffer from these defects. There are, of course, the two Section 201-based arguments that the *Comcast* court recognized but declined to decide: (a) that by shifting traffic to Section 201 common carrier networks subject to Title II, P2P blocking – and by analogy, practices such as unjust or unreasonable discrimination, lack of transparency and lack of competition, that are reflected in the existing Internet principles and proposed Internet rules – affect Title II carriers' rates, charges, practices, classifications or regulations; and (b) VoIP traffic, which is a substitute for

Title II common carrier voice service, likewise affects common carriers' rates, charges, practices, classifications and regulations.

There are, however, other, and stronger, Section 201 and Title II-based ancillary jurisdiction arguments that the Commission can rely upon beyond the two mentioned in *Comcast*. There are several arguments, but they all stem from the critical and inextricable links, drawn by the Act itself as well as by longstanding Commission and court precedent, among “telecommunications,” “telecommunications services,” and “information services.” (The broadband Internet access at issue in the *Open Internet* proceeding and in the NBP is, of course, a species of “information service.”)

1. The Act and Court and Commission Precedent Inextricably Link “Telecommunications,” “Telecommunications Services,” and “Information Services.”

The Act itself makes clear that “telecommunications” is an integral part of “information service.” 47 U.S.C. § 153(20) (definition of “information service” includes “telecommunications”). Moreover, the difference between “information service” and “telecommunications service” turns entirely on the integration of the capability to generate, store, transform or use information content with “telecommunications,” the transport of information without charge in that information’s content or form. *Compare* 47 U.S.C. § 153(20) *with* 47 U.S.C. § 153(46). As a result, the Supreme Court in *Brand X* noted that Internet access “offers end users information-service capabilities *inextricably intertwined* with data transport.”<sup>4</sup> The *Brand X* Court also recognized that the Commission could, “in its discretion,” give “differential treatment [to] facilities-based carriers” that provide broadband Internet access. 545 U.S. at 996. That, of course, is just what the *NOI* here proposes to do.

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<sup>4</sup> *NCTA v. Brand X Internet Services*, 545 U.S. 967, 978 (2005) (emphasis added) (quoting *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11539-40 (1998)).

Perhaps even more importantly, the *Brand X* court stated not once, but *twice*, that “the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.” *Id. Accord id.* at 976 (“Information-service providers, by contrast, are not subject to *mandatory* common-carrier regulation under Title II, though 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*”) (emphasis added). Thus, there can be no serious dispute that the Commission can, pursuant to Title I, regulate broadband Internet service providers.

The only task for the Commission here then, is to find the appropriate specific provisions of the Act to which to tie its NBP recommendations and proposed open Internet rules, and to explain adequately the link between those recommendations and rules and its statutory duties under those provisions. That there are such statutory provisions in the Act, and such a link, is made clear in *Brand X*. To the extent that the *Comcast* decision could be construed to suggest otherwise – that, for example, there is no provision in Title II on which the Commission can properly rely here to meet the second prong of the *American Library* test – it is in square conflict with the Supreme Court’s *Brand X* decision

Title II generally, and the Commission’s Section 201 responsibility of ensuring that telecommunications carriers’ charges, practices, classifications and regulations are just and reasonable, furnish both the statutory provisions and the link. We note at the outset that virtually all facilities-based, last-mile providers of broadband Internet access service are also Title II carriers. ILECs and CLECs obviously are. So are wireless providers.<sup>5</sup> And so are most incumbent cable operators, at least the large ones, which (either directly or through their

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<sup>5</sup> See, e.g., *Orloff v. FCC*, 352 F.3d 415, 418-19 (D.C. Cir. 2003) (while forborne from tariff regulation, wireless providers are “carriers” subject to Title II obligations of just, reasonable and nondiscriminatory rates and practices).

subdivisions or affiliates) are certificated under Section 214 of the Act.<sup>6</sup> In fact, in terms of number of subscribers, Comcast is now the third-largest provider of landline telephone service in the nation.<sup>7</sup> And even for those cable operators that are not telecommunications carriers, their broadband Internet access service offerings would compete directly with, and thus substantially affect, the broadband Internet access service offerings, rates and practices of telecommunications carriers.

Moreover, these Title II landline, wireless and cable carriers invariably provide broadband Internet services over the same networks, or at least part of the same networks, as they provide Title II telecommunications services. As a result, broadband Internet access providers' practices and classifications with respect to their broadband Internet access service offerings – what is at issue in this proceeding – will necessarily have an impact on the charges, practices, classifications and regulations of those same providers', as well as their Title II competitors', Title II telecommunications service offerings.

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<sup>6</sup> See, e.g., *Comcast Business Communications, Inc.*, grant of authority under Section 214 of the Communications Act of 1934, as amended, 47 C.F.R. § 63.01, *et seq.* ("214 Authority"), Jan. 8, 1997, *available at* the FCC's International Bureau Electronic Filing System ("IBFS"), File Nos. ITC-214-19961122-00591 and ITC-214-19961122-00593 (IBFS Quick Search *available at* <http://licensing.fcc.gov/myibfs/>); *Comcast Phone of Illinois, LLC*, 214 Authority granted Sept. 19, 1997, *available at* the IBFS, File No. ITC-214-19970801-00447; *Comcast Phone, LLC*, 214 Authority granted, Sept. 19, 1997, *available at* the IBFS, File No. ITC-214-19970801-00449; *Comcast Phone of California, LLC*, 214 Authority granted Sept. 17, 1997, *available at* the IBFS, File No. ITC-214-19970801-00451; *Comcast Phone of Texas, LLC*, 214 Authority granted Sept. 19, 1997, *available at* the IBFS, File No. ITC-214-19970805-00468; *Comcast Phone of Michigan, LLC*, 214 Authority granted Nov. 21, 2003, *available at* the IBFS, File No. ITC-214-20031017-00480; *Time Warner Connect of San Antonio, Inc.*, 214 Authority granted Mar. 25, 1996, *available at* the IBFS, File No. ITC-214-19960201-00048; *Cox California Telecom, Inc.*, 214 Authority granted Dec. 10, 1996, *available at* the IBFS, File No. ITC-214-19961025-00535; *Cox Communications, Inc.*, 214 Authority granted Oct. 8, 1997 and Dec. 31, 1999, *available at* the IBFS, File Nos. ITC-214-19970815-00496 and ITC-214-19991207-00764, respectively; *Cox Texas Telecom, LP*, 214 Authority granted May 5, 2006, *available at* the IBFS, File No. ITC-214-20060330-00173; *Charter Communications International Inc.*, 214 Authority granted July 30, 1996, *available at* the IBFS, File No. ITC-214-19960612-00249; *CC Fiberlink, LLC, Debtor in Possession*, 214 Authority granted Feb. 28, 2003, *available at* the IBFS, File No. ITC-214-20030127-00071; *Charter Fiberlink CC VIII, LLC*, 214 Authority granted Apr. 10, 2009, *available at* the IBFS, File No. ITC-214-20090313-00122; and *Cablevision Lightpath Inc.*, 214 Authority granted Mar. 24, 1994, *available at* the IBFS, File No. ITC-214-19940128-00025.

<sup>7</sup> Press Release, Comcast, Comcast Now the Third Largest Residential Phone Services Provider in the U.S. (March 11, 2009), *available at* <http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=844>.

The impact of these broadband Internet access service offerings on Title II telecommunications service offerings already is, and will continue to be, far broader than the two potential impacts noted in the *Comcast* decision (600 F.3d at 660). Broadband is the “dial tone of the 21<sup>st</sup> Century,”<sup>8</sup> and it is rapidly displacing Title II telecommunications services as the means by which Americans communicate among one another, and with the world. Indeed, the Commission recently recognized as much:

Communications services delivered to end users over broadband technologies have grown in importance and now carry some of our most vital communications. Today, every sector of our Nation’s economy, including the financial market, operations of most enterprises, and all levels of government, rely on broadband and Internet Protocol (IP) for communications. Americans are increasingly relying on broadband and IP-based technologies as substitutes for, or complements to, communications services provided by older, conventional communications technologies.<sup>9</sup>

This dramatic shift inherently means that broadband Internet access services will be – and currently are – siphoning traffic and revenue from Title II telecommunications networks and services. That necessarily and inevitably will impact Title II telecommunications service charges, practices, and classifications subject to Section 201, and dramatically so.

The current and future potential impacts of this transition to broadband on Title II, and on telecommunications services and telecommunications carriers, are many. Here are just a few: Siphoning of telecommunications service traffic and revenue could well place upward pressure on telecommunications service rates. It also might reduce telecommunications service (as opposed to “information service”) availability. It may encourage broadband providers to engage in arbitrage to structure their offerings in a way to avoid Title II regulation, thereby potentially

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<sup>8</sup> Comments of Google, GN Docket No. 09-191, WC Docket No. 07-52, *Open Internet*, at 2 (Jan. 14, 2010).

<sup>9</sup> FCC Public Notice, “Public Safety and Homeland Security Bureau Seeks Comment on Whether the Commission’s Rules Concerning Disruptions to Communications Should Apply to Broadband Internet Service Providers and Interconnected Voice over Internet Protocol Service Providers,” DA 10-1245, at 1 (rel. July 2, 2010).

frustrating the entire purpose of Title II. It may induce telecommunications carriers to avoid universal service obligations by upgrading their combined broadband/telecommunications networks only in economically viable areas, free from regulatory universal service obligations, because the providers will claim their networks are non-Title II broadband networks. The result could be an increasing loss of universal service benefits in less economically attractive areas. More broadly, to the extent that broadband services displace telecommunications services as the dial tone of the 21<sup>st</sup> Century, that displacement could result in Title II, and the important consumer protections it embodies, becoming a meaningless vestigial appendage.

But these are just a few of the many far-reaching effects broadband Internet access providers' practices could have on Title II telecommunications carriers' charges, practices, classifications and regulations. The basic point is that, in light of the shift from traditional telecommunications services to broadband Internet access service as our nation's 21<sup>st</sup> Century dial tone service, the two categories of services, and providers' rates, practices, classifications and regulations for each category, are inextricably intertwined, and will only become more so over time.

2. Exercising Title I Authority over Broadband Ancillary to Title II Jurisdiction Is Fully Consistent with Precedent Relied on by the *Comcast* Court.

The Commission's exercise of Section 201-based Title I ancillary jurisdiction over broadband Internet access service providers' practices in this proceeding is therefore very different, and readily distinguishable, from each of the prior examples offered in *Comcast* where the Commission's claimed exercise of Title I ancillary jurisdiction was found wanting.

*American Library*, for example, upon which the *Comcast* court heavily relied (600 F.3d at 644, 646-49, 651-52, 654 & 661), involved an attempt by the FCC to rely solely on Title I, completely untethered from *any* provision of Title II, III or IV, to impose a regulation on

consumer electronic devices even when those devices were *not* engaged in communications by wire or radio. *American Library*, 406 F.3d at 700, 703 & 705. For this reason, the *American Library* court found that, unlike the *Comcast/BitTorrent Order* at issue in *Comcast*, the Commission’s TV receiver broadcast flag rules at issue in *American Library* fell outside even the first prong of the ancillary jurisdiction test.<sup>10</sup>

If the Commission exercises Title I authority over broadband Internet access as ancillary to its Section 201 jurisdiction, that would also be readily distinguishable from *Midwest Video II*,<sup>11</sup> and in a manner consistent with *Comcast*. *Midwest Video II* held that it was not reasonably ancillary to the Commission’s exercise of its Title III jurisdiction over television broadcasters to impose Title II-like, common carrier-like, access obligations on cable television systems, especially since the Act specifically barred the Commission from regulating broadcasters as common carriers.<sup>12</sup> Thus, *Midwest Video II* stands for the proposition that the Commission may not, under claim of jurisdiction ancillary to its authority over Title III broadcasting, impose common carrier-like obligations on new forms of communications by wire, in direct contravention of the Act’s prohibition on the Commission regulating Title III broadcasters in that manner.

Tying NBP implementation and the proposed open Internet rules to Section 201 and other provisions of Title II carries no such infirmity. To the contrary, the proposed open Internet rules, as CWA has proposed to modify them,<sup>13</sup> are a form of “light touch,” Title II-type regulation of

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<sup>10</sup> *American Library*, 406 F.3d at 702. In and of itself, that renders the *Comcast* court’s heavy reliance on *American Library* to analyze the second prong of the test a bit peculiar.

<sup>11</sup> *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (“*Midwest Video II*”).

<sup>12</sup> *Midwest Video II*, 440 U.S. at 702-05 & 708-09. The D.C. Circuit has specifically acknowledged this as the holding of *Midwest Video II*. See *American Library*, 406 F.3d at 701.

<sup>13</sup> See Comments of CWA, *Open Internet* (Jan. 14, 2010); Reply Comments of CWA, *Open Internet* (April 26, 2010).

broadband Internet access service providers. The open Internet rules are thus a comfortable fit with the exercise of Title I authority ancillary to the Commission's Section 201 jurisdiction.

*NARUC II*,<sup>14</sup> relied upon by the *Comcast* court (600 F.3d at 650), is likewise inapposite to the exercise of authority ancillary to Title II to implement the NBP and to impose open Internet rules. The *NARUC II* court held that the Commission's purported exercise of Title I authority to preempt state common carrier regulation of two-way, point-to-point non-video communications services over cable systems was improper because it was not reasonably ancillary to the Commission's Title III jurisdiction over television broadcasting, and because it was contrary to the Act's Section 2(b) prohibition on Commission jurisdiction over intrastate communications. *NARUC II*, 533 F.2d at 612-17. Neither defect would be present here. Broadband Internet access service is clearly an interstate service, and the Commission would be acting pursuant to Section 201 ancillary authority, not Title III. Unlike in *NARUC II*, where the Commission attempted to stretch its Title III ancillary jurisdiction to the non-video service aspects of cable systems, the broadband Internet access services at issue here are provided over the same networks, or at least parts of the same networks as telecommunications services, and therefore fall squarely within Title II. Moreover, as noted above, those telecommunications services are also inextricably intertwined with broadband Internet access services.

None of the other cases cited or discussed in *Comcast* was an example of a court striking down an attempted Commission exercise of ancillary authority. To the contrary, they were examples of Commission exercises of Title I ancillary authority that were upheld by the courts. Indeed, just as, if not more so than, the inside wiring rules at issue in *NARUC III*,<sup>15</sup> the open Internet rules are "necessary 'to encourage competition in the provision . . . of [broadband

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<sup>14</sup> *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*").

<sup>15</sup> *NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989) ("*NARUC III*").

Internet access],”<sup>16</sup> and because broadband and telecommunications networks are integrated, broadband Internet access providers’ networks and services “are integral to *telephone communication*.”<sup>17</sup> Moreover, when tied to the Commission’s Section 201 authority, the proposed open Internet rules would no longer be “altogether different regulatory requirements” from those to which they are ancillary. *Comcast*, 600 F.3d at 651. Rather, the open Internet rules would be “light touch” versions of the Section 201 regulations to which they are ancillary.

The Commission therefore can, consistent with *Comcast*, impose reasonable open Internet rules as reasonably ancillary to its Section 201 jurisdiction. Any other reading of *Comcast* would mean that, notwithstanding the Commission’s “broad authority” and role as “the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio,”<sup>18</sup> Congress left the Commission powerless to address the dial tone of the 21<sup>st</sup> Century, requiring it to sit idly by while that new dial tone gradually transforms Title II of the Act, and the protections it offers the public, into a dead letter.

Nothing in the *Comcast* decision suggests such a dire reading of the Act. On the contrary, the *Comcast* court observed that the exercise of ancillary jurisdiction is appropriate where “regulation of services otherwise beyond the Commission’s authority [are necessary] in order to prevent frustration of a regulatory scheme expressly authorized by statute.” 600 F.3d at 656. The relationship between Title II telecommunications services and broadband Internet access services is every bit, if not more, symbiotic than the “potentially symbiotic relationship” (*id.* at 656) between basic and enhanced services that the D.C. Circuit recognized, and found to

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<sup>16</sup> *Comcast*, 600 F.3d at 657 (quoting *NARUC III*, 880 F.2d at 429).

<sup>17</sup> *Comcast*, 600 F.3d at 657 (quoting *NARUC III*, 880 F.2d at 427).

<sup>18</sup> *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (quotations, footnotes & citations omitted).

be sufficient for the exercise of Title II ancillary jurisdiction, in *CCIA*.<sup>19</sup> The Commission therefore has authority, ancillary to its Title II jurisdiction, to implement the NBP and to adopt open Internet rules, modified as CWA has suggested.

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<sup>19</sup> *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) (“*CCIA*”) (quoted in *Comcast*, 600 F.3d at 655-56).

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**EXHIBIT 3**

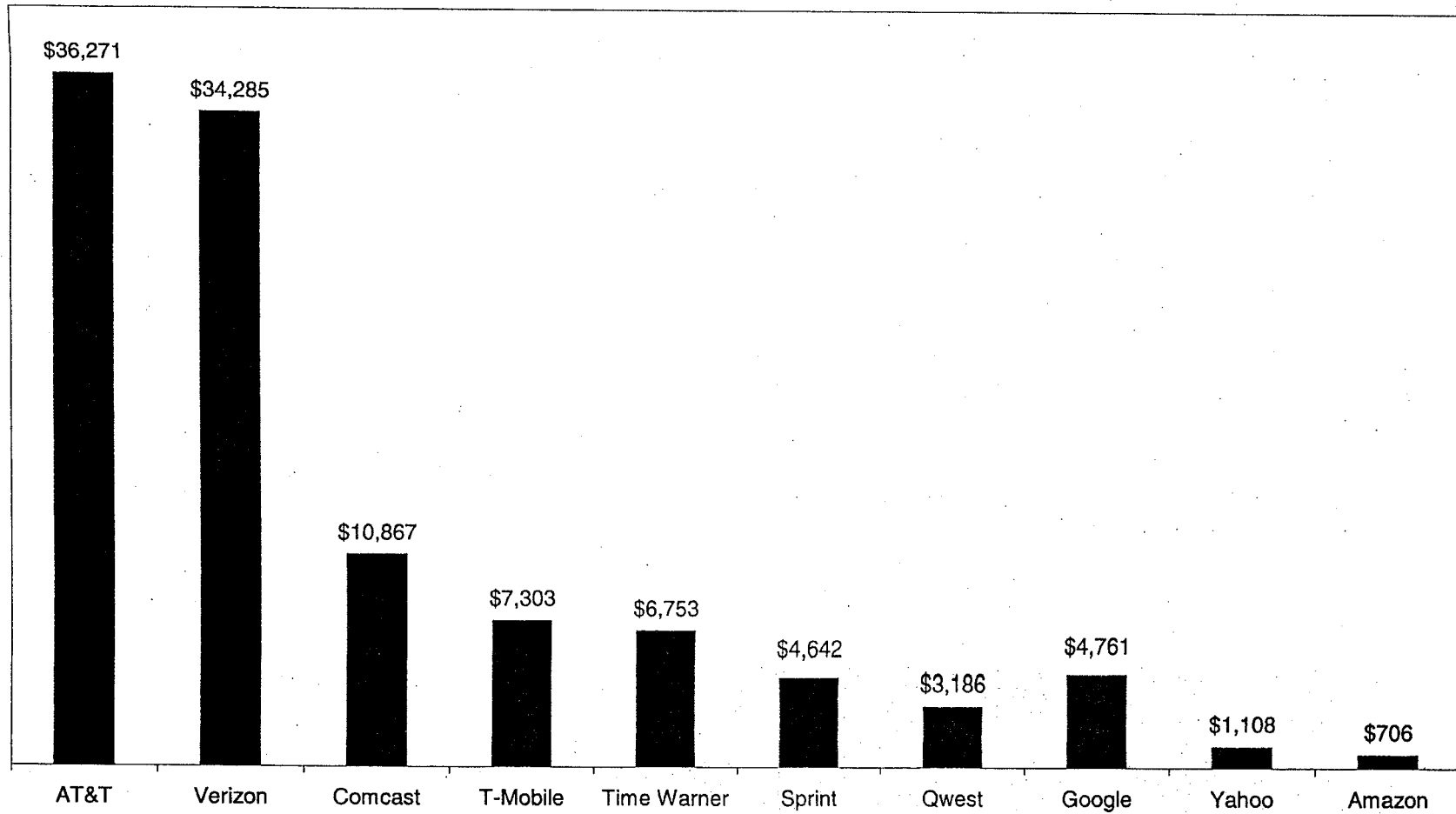


The U.S. Broadband Industry  
Investment and Employment

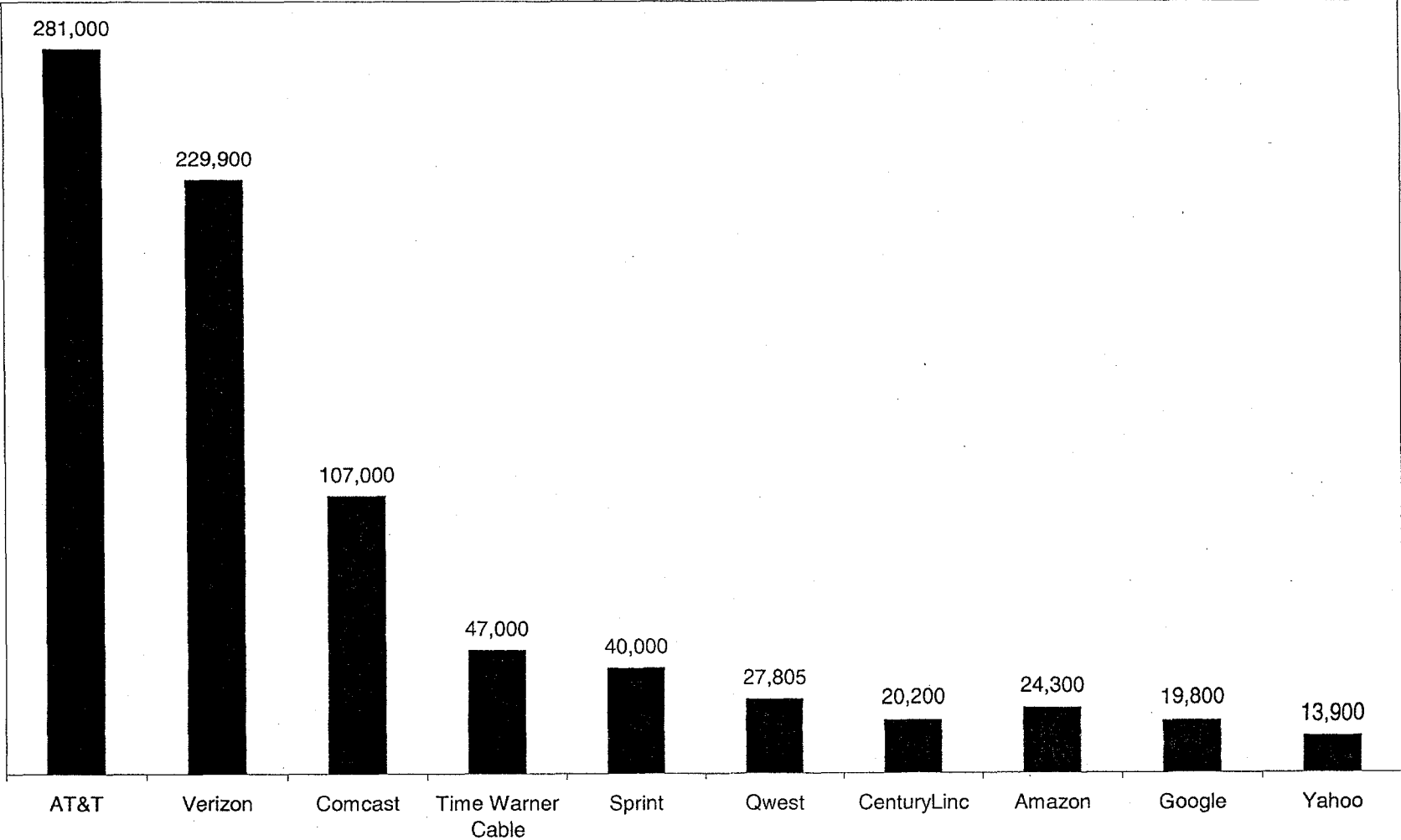
Communications Workers of America  
April 2010

# Capital Expenditures - 2008 and 2009

\$ millions



# Global Employees - 2009\*



\* Network companies' employees are primarily in the U.S., unlike the application companies.

**Jobs at Broadband Network Companies  
Far Exceed Jobs at Applications Companies**

| <b>Network Providers</b> | <b>Employees</b> | <b>Applications Providers</b> | <b>Employees</b> |
|--------------------------|------------------|-------------------------------|------------------|
| AT&T                     | 281,000          | Amazon                        | 24,300           |
| Verizon                  | 229,900          | Google                        | 19,800           |
| Comcast                  | 107,000          | Yahoo                         | 13,900           |
| Sprint                   | 40,000           | Ebay Inc.                     | 16,400           |
| Time Warner Cable        | 47,000           | Expedia                       | 7,960            |
| Qwest                    | 27,800           | IAC                           | 3,200            |
| CenturyLinc              | 20,200           | Cbeyond                       | 1,680            |
| Cablevision              | 16,800           | Facebook                      | 800              |
| Windstream               | 7,400            | TiVo Inc                      | 510              |
| Frontier                 | 5,400            | Linkedin                      | 320              |
| MediaCom                 | 4,500            | Zynga                         | 250              |
| Cinn Bell                | 3,200            | Craigslist                    | 30               |
| <b>Total</b>             | <b>790,200</b>   | Digg                          | 18               |
|                          |                  | Flickr                        | Owned by Yahoo   |
|                          |                  | Meetup                        | 24               |
|                          |                  | Mozilla                       | 58               |
|                          |                  | OpenDNS                       | NA               |
|                          |                  | Skype                         | Owned by Ebay    |
|                          |                  | Twitter                       | 140              |
|                          |                  | Vuze                          | 30               |
|                          |                  | Youtube                       | owned by Google  |
|                          |                  | <b>Total</b>                  | <b>89,420</b>    |

**Network providers** include 12 largest telecom, cable, wireless employers, excluding privately-held Cox Cable for which data is not available. Employees are almost all in the United States.

**Applications providers** includes signatories of letter to FCC Chairman Julius Genachowski on open Internet policies, dated Oct. 19, 2009. Many employees are based overseas.

Source: yahoo.com; Craigslist.com; Lexis/Nexis; SEC Forms 10-K for year ending 2009

| Capital Expenditure, 2008 - 2009    |                  |                  |                   |                     |
|-------------------------------------|------------------|------------------|-------------------|---------------------|
|                                     | 2008             | 2009             | 2 Yr. Total       | % of Industry Total |
| AT&T                                | \$ 19,676        | \$ 16,595        | \$ 36,271         | 28.7%               |
| Verizon                             | \$ 17,238        | \$ 17,047        | \$ 34,285         | 27.2%               |
| Qwest                               | \$ 1,777         | \$ 1,409         | \$ 3,186          | 2.5%                |
| CenturyLinc                         | \$ 287           | \$ 755           | \$ 1,042          | 0.8%                |
| Windstream                          | \$ 317           | \$ 298           | \$ 615            | 0.5%                |
| TWT                                 | \$ 277           | \$ 275           | \$ 552            | 0.4%                |
| Cinn Bell                           | \$ 231           | \$ 195           | \$ 426            | 0.3%                |
| Comcast                             | \$ 5,750         | \$ 5,117         | \$ 10,867         | 8.6%                |
| Time Warner                         | \$ 3,522         | \$ 3,231         | \$ 6,753          | 5.4%                |
| Cablevision                         | \$ 909           | \$ 810           | \$ 1,719          | 1.4%                |
| Cox                                 | N/A              | N/A              | N/A               | N/A                 |
| DirectTV                            | \$ 1,765         | \$ 1,485         | \$ 3,250          | 2.6%                |
| DISH                                | \$ 1,130         | \$ 1,037         | \$ 2,167          | 1.7%                |
| Sprint                              | \$ 3,039         | \$ 1,603         | \$ 4,642          | 3.7%                |
| T-Mobile                            | \$ 3,603         | \$ 3,700         | \$ 7,303          | 5.8%                |
| MetroPCS                            | \$ 955           | \$ 832           | \$ 1,787          | 1.4%                |
| Clearwire                           | \$ 575           | \$ 1,540         | \$ 2,115          | 1.7%                |
| Leap                                | \$ 796           | \$ 700           | \$ 1,496          | 1.2%                |
| US Cellular                         | \$ 586           | \$ 547           | \$ 1,133          | 0.9%                |
| <b>Network Operators Total</b>      | <b>\$ 62,433</b> | <b>\$ 57,175</b> | <b>\$ 119,608</b> | <b>94.8%</b>        |
| Google                              | \$ 2,358         | \$ 2,403         | \$ 4,761          | 3.8%                |
| Yahoo                               | \$ 674           | \$ 434           | \$ 1,108          | 0.9%                |
| Amazon                              | \$ 333           | \$ 373           | \$ 706            | 0.6%                |
| <b>Applications Providers Total</b> | <b>\$ 3,365</b>  | <b>\$ 3,210</b>  | <b>\$ 6,575</b>   | <b>5.2%</b>         |
| <b>Industry Total</b>               | <b>\$ 65,798</b> | <b>\$ 60,385</b> | <b>\$ 126,183</b> | <b>100.0%</b>       |

Source: SEC Forms 10-K