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## Press Release

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### PHOENIX CENTER DEMONSTRATES THAT THE FCC'S IMPLEMENTATION OF SECTION 10 FORBEARANCE PROHIBITS "TITLE II LITE"

#### *Agency Has Never Granted Forbearance in the Face of a "Terminating Monopoly"*

WASHINGTON, D.C. – According to its preamble, the stated purpose of the Telecommunications Act of 1996 ("Act") is to "provide for a pro-competitive, *de-regulatory* national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans..." The key statutory tool to facilitate Congress's deregulatory mandate is contained in Section 10 of the Act, which provides the Federal Communications Commission with the express legal authority to forbear from enforcing various portions of the Communications Act once certain conditions are met. As a new study released today by the Phoenix Center entitled *Section 10 Forbearance: Asking the Right Questions to Get the Right Answers* explains, however, the Commission's precedent in implementing Section 10 prevents the agency from using its forbearance authority as a way to establish some sort of "Title II Lite."

Among other things, the authors show how the agency's *Phoenix Forbearance Order* rejects the validity of forbearance in the presence of either monopoly or duopolistic competition. Given the Commission's repeated finding that Broadband Service Providers are "terminating monopolists" as a justification for implementing Open Internet Rules, the Commission cannot reclassify broadband Internet access as a telecommunications service and then easily use its forbearance authority to create what is colloquially referred to as "Title II Lite." In fact, if broadband is classified as a common carrier Title II service, then the Commission's stance on broadband competition—combined with the agency's conclusions about duopolistic competition in the *Phoenix Forbearance Order*—could require, for the first time, the price regulation of all retail broadband connections. If the Commission wants to continue to use the notion of a "terminating monopoly" to justify Open Internet rules, then its cleanest legal option is to move forward under Section 706 as the D.C. Circuit in *Verizon v. FCC* instructed.

"At bottom, the FCC is supposed to use its Section 10 authority to forbear from rules that have outlived their usefulness," said study co-author and Phoenix Center Chief Economist Dr. George S. Ford. "Yet for many proponents of Title II reclassification, they would have the FCC exercise its Section 10 authority for the perverse purpose of imposing more regulation."

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“The FCC can’t have it both ways,” claims study co-author and Phoenix Center President Lawrence J. Spiwak. “Either the Commission has to find that Broadband Service Providers are not terminating monopolies, in which case the agency can use its Section 10 forbearance authority; or, the agency can continue to claim that Broadband Service Providers are terminating monopolies, in which case the FCC cannot use Section 10 to forbear from Title II regulations.”

A full copy of the paper, PHOENIX CENTER POLICY BULLETIN NO. 37, *Section 10 Forbearance: Asking the Right Questions to Get the Right Answers*, may be downloaded free from the Phoenix Center’s web page at: <http://www.phoenix-center.org/PolicyBulletin/PCPB37Final.pdf>.

*The Phoenix Center is a non-profit 501(c)(3) organization that studies broad public-policy issues related to governance, social and economic conditions, with a particular emphasis on the law and economics of the digital age.*