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# Press Release

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**FOR IMMEDIATE RELEASE**
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## FCC's "Third Way" Lacks Credibility with Financial Markets, Thus Deterring Investment

*Phoenix Center Says Title I Remains a Legitimate Option Until Congress Adopts Better Framework*

WASHINGTON, D.C. – In a new study released today entitled *The Broadband Credibility Gap*, the Phoenix Center examines the financial effects of the FCC's proposed "Third Way" for broadband regulation. According to FCC Chairman Julius Genachowski, this "Third Way" would essentially entail having the Commission reclassify broadband transport as a "telecommunications service" under Title II of the Communications Act, coupled however with aggressive use of the FCC's forbearance authority under Section 10 of the Communications Act to eliminate many of the more burdensome requirements of Title II regulation.

To explore this important topic, the Phoenix Center first analyzes the reclassification issue in terms of a "broadband credibility gap." The Phoenix Center provides a simple game theoretic analysis that exposes the underlying issue surrounding regulatory classification. The Phoenix Center demonstrates that a "light touch" toward regulating broadband is not credible, since the present Commission cannot bind future actions of the agency. Moreover, the Center cites the current Commission's own actions to demonstrate that it lacks the necessary self-discipline or mindset for light touch regulation.

Next, the Phoenix Center considers the investment effects of reclassification using a theoretical model of investment. In this model, a model firm faces either "weak" or "strong" regulation. This model shows that an increase in the ex ante probability of "strong" regulation—that is, reclassification—weakens investment incentives. To support this theory, the Phoenix Center provides empirical evidence from the financial markets supporting the negative investment effects implied by the theory. This same evidence also reveals that investors have no confidence that the Commission possesses the self-discipline required to successfully implement "light touch" regulation.

"Reclassification is the policy choice of the litigator in that it provides legal certainty, assuming it is successful defended on appeal", says study co-author and Phoenix Center Chief Economist Dr. George S. Ford. "Unfortunately, the cost of legal certainty is increased financial uncertainty in that reclassification greases the wheels of the regulatory machine. As Chairman Genachowski observes, reduced private investment is the inevitable and natural consequence of reclassification."

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Finally, the Phoenix Center shows that the *Comcast* decision is not a threat to ancillary authority for broadband; the Commission merely has to adhere to the well-established legal framework of ancillariness. The *Comcast* court makes clear that Title I continues to provide sound legal footing to protect consumers from harm—at least until Congress decides to update and amend existing Communications law with a cleaner framework.

As study co-author and Phoenix Center President Lawrence J. Spiwak notes, the "Commission lost in *Comcast* because it simply wrote a bad order." According to Spiwak, "The *Comcast* court makes it abundantly clear that if the FCC wants to create a legally enforceable Title I regime to protect consumers, it is certainly within its powers to do so. The FCC just needs to make a sound argument about what it wants to do and tie such actions to a clearly delineated authority under the Act. As such, there is no need to open the door to heavy-handed regulation under Title II, unless opening that door is the point of reclassification."

PHOENIX CENTER POLICY PAPER NO. 40: *The Broadband Credibility Gap,* may be downloaded free from the Phoenix Center's web page at: http://www.phoenix-center.org/pcpp/PCPP40Final.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 telecommunications and high-tech industries.

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