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

In the Matter of	)	
	)	
Framework for Broadband Internet Service	)	GN Docket No. 10-127

COMMENTS OF FREE PRESS

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EXECUTIVE SUMMARY

In the aftermath of the recent D.C. Circuit ruling in *Comcast v. FCC*, the FCC is ill-equipped to achieve America's most important broadband goals. The decision jeopardizes the Commission's ability to implement proposals to bring broadband to all Americans, promote competition, preserve the open Internet, and facilitate the use of broadband to serve other national priorities. In response to the *Comcast* case, the Commission can and should classify broadband Internet connectivity service as a telecommunications service under the Communications Act. By doing so, it will restore a sound foundation for its broadband agenda. If the FCC fails to act, it will abandon its duty to protect and promote the public interest and it will jeopardize America's long-term global competitiveness.

Pursuing a limited Title-II classification restores the Commission's authority to move forward. The factual record and relevant legal precedent unassailably support the conclusion that the proposed policy shift is both necessary and wise. And a limited Title-II classification will uphold the commonly shared principles of universal service, competition, interconnection, nondiscrimination, consumer protection, and reasoned deregulation — principles that created the Internet revolution.

Broadband Serves as Critical Infrastructure in the 21st Century.

Broadband is today's most important communications platform for commerce, speech, innovation, and creativity. Broadband infrastructure functions like the electrical grid or national highways: Without it, the United States cannot hope to remain an economic competitor, and those who cannot access it will remain left behind in today's information age. But it is also much more than that: it creates myriad forums of democratic engagement and cultural expression that simply did not exist before the advent of the Internet.

Recognizing that broadband performs these vital functions in society, America's broadband policy coheres around a few important principles: (1) We must bring affordable broadband access to all Americans. (2) We ought to lead the world in broadband deployment, adoption, and innovation. (3) We must preserve the value of the open Internet as a platform for dynamic economic growth and innovation, a vibrant forum for speech and culture, and a space for active civic engagement. (4) And, we must use broadband as a tool in achieving other important policy goals, including advancing consumer welfare, improving public safety and homeland security, delivering health care, achieving energy independence and efficiency, and educating America's children. Indeed, the FCC just submitted a National Broadband Plan to Congress that addressed these very principles.

***Comcast v. FCC* Threatens the FCC's Ability to Make Broadband Policy.**

But just as we have come to broad consensus around these goals, the FCC faces a substantial obstacle in fulfilling them: as a result of a recent court decision, the agency that oversees "communication over wire and radio" may find itself without the ability to pursue many critical aspects of the nation's communications policy. In *Comcast v. FCC,* the D.C. Circuit held that even though Comcast had intentionally and secretly blocked access to lawful content on the Internet, the FCC's prior regulatory choices regarding its oversight of broadband — relying on a

theory of "ancillary" authority to adopt broadband policy — precluded the Commission from stopping Comcast's practices.

Comcast was an important test case in determining whether the Commission's 2002 choice to classify broadband Internet service as an information service under the Communications Act would allow the Commission to make critical broadband policy. After *Comcast*, the Commission's authority to make rules for broadband has been severely curtailed.

The decision has far-reaching consequences. Because *Comcast* questions the overall regulatory framework the FCC has used to adopt broadband policy, its holding implicates not only the narrow question of whether broadband providers may block content on the Internet but also the FCC's ability to adopt key proposals in its National Broadband Plan. In the words of Austin Schlick, General Counsel of the FCC, the *Comcast* decision jeopardizes plan recommendations "aimed at accelerating broadband access and adoption in rural America; connecting low-income Americans, Native American communities, and Americans with disabilities; supporting robust use of broadband by small businesses to drive productivity, growth[,] and ongoing innovation; lowering barriers that hinder broadband deployment; strengthening public safety communications; cybersecurity; consumer protection, including transparency and disclosure; and consumer privacy."

The FCC Should Classify Broadband Internet Connectivity as a Telecommunications Service Under the Communications Act and Pair that Determination with Tailored Forbearance.

In response to the dilemma created by *Comcast*, the FCC can and should classify broadband Internet connectivity as a telecommunications service under Title II of the Communications Act. It should also pair that action with tailored forbearance pursuant to the Act. Making this change will allow the agency to reestablish its authority over broadband networks and move forward effectively and efficiently with the nation's broadband policy agenda.

- The Commission should adopt a broad, functional definition for broadband Internet connectivity that focuses on the sending and receiving of IP data packets from end to end on the network of networks known as the Internet. This definition must include IP data transmission over wireless networks. No functional distinction justifies the disparate treatment of wired and wireless networks, and the Commission must have a secure foundation for making broadband policy in the wireless space if we are to achieve the nation's broadband goals.
- Broadly speaking, Title II of the Communications Act lays out several key obligations that Congress has deemed critical for two-way communications networks: non-discrimination, affordable access, interconnection, competition, and consumer protection. In moving to a Title-II framework, the Commission must not forbear the sections of the Act that promote these basic objectives. Thus, at a minimum, the Commission must apply section 201, 202, 208, 222, 251(a), 255, and 256 of the Act to all broadband service providers. To facilitate interconnection and competition, it should also retain section 214's oversight over service discontinuances and preserve its ability to apply the unbundling provisions of section 251(b) and (c).

Classifying Broadband Connectivity as a Title II Service Provides the Commission with Bounded Authority and Ensures the Commission's Ability to Move Forward with Broadband Policy.

A Title-II framework that applies basic obligations to broadband network operators will put the agency on a sound path toward achieving America's broadband goals: it will not lead to either sweeping or burdensome regulation, and there is no evidence that it will diminish investment in broadband networks.

- Because broadband providers offer a service that sends and receives IP data packets without change in the form or content of those packets, broadband providers offer a telecommunications service as that term is defined in the Communications Act. The telecommunications service offerings of broadband providers are functionally separable from information services — such as e-mail or webhosting — offered by those same providers. The fact that broadband providers may bundle such services together in one package does not and should not affect the regulatory classification of these discrete services.
- Classifying broadband Internet connectivity as a telecommunications service would comport with the 1996 Telecommunications Act and the historical policies on which that Act was based. The Act embodies the principle that one set of obligations applies to the infrastructure that provides the capacity to transmit and receive information, and that a different set of obligations applies to content providers who use that infrastructure to transmit information. By recognizing broadband connectivity as two-way data transmission, the Commission would remain faithful to this distinction.
- Classifying broadband Internet connectivity as a telecommunications service will not lead to greater regulation of other services; instead, it will provide clearer guidance to all players in the market regarding the rights and obligations of broadband connectivity providers, information service providers, and consumers.
- Classifying broadband Internet connectivity as a Title-II service should not diminish investment or occasion job losses. First, the action proposed here simply seeks to maintain basic, light-touch regulation on the nation's critical communications infrastructure. Second, a variety of factors beyond regulatory structure affect a business's investment calculations. What evidence we have suggests that investment in the network thrives under a Title-II framework. Third, both investment analysts and broadband company executives have downplayed any fears that Title-II classification will significantly affect either the investments or the financial health of broadband companies. Finally, many corporate constituents, including new and smaller players in the broadband industry and companies who operate on the edge of the network, actively welcome Title-II classification.

A Move to Title II Will Withstand Judicial Review.

In *National Cable & Telecommunications Association v. Brand X Internet Services* (*Brand X*), the Supreme Court held that the FCC retains the discretion to determine whether the bundle of services offered by broadband providers should be classified as a unitary information service or whether it should be classified as a package including a telecommunications service

and other information services. As a result, the agency's change in policy will be upheld so long as it is a reasonable interpretation of the Act, and here, there can be no doubt that it is reasonable to classify broadband Internet connectivity as a distinct telecommunications service.

- *Brand X* makes clear that the statute confers discretion on the agency to make classification determinations. It emphasizes that the FCC retains the expert policy judgment to answer this technical, dynamic, and complex question. It also commands the FCC to revisit the wisdom of its policy on a continuing basis.
- The FCC has good reasons to revisit its prior determination that the broadband bundle did not contain a separately identifiable telecommunications service. First, in 2010, marketplace facts reveal that providers offer and consumers value a distinct connectivity service. Consumers want fast connections at low prices from their broadband providers; any other services are simply incidental. Second, the evidence now reveals that the FCC erred when it predicted that an information service classification would lead to greater competition in the market for broadband services.
- The Supreme Court has instructed that in matters of administrative policy, "change is not invalidating," and that the forces of change do not always or necessarily point in the direction of deregulation. Revisiting the classification determinations is an appropriate and much-needed exercise.

The Other Options for Moving Forward with Broadband Policy Either Abandon Critical Policy Objectives or Delay Implementation at a Time When Americans Cannot Afford to Wait.

Other proposals for responding to the *Comcast* dilemma do not allow the Commission to move forward with its broadband agenda on a timely or secure basis.

- Various parties have suggested that Congress could step in and restore the Commission's authority over broadband networks. While Congress has begun discussions regarding comprehensive revisions to the Communications Act, the legislative process necessarily operates more slowly than the administrative process. The last time Congress updated the Communications Act, it took at least five years. Because we cannot afford to wait that long to pursue the nation's broadband goals, congressional efforts cannot and should not supplant Commission action.
- The Commission should not attempt to rely on section 706 of the Telecommunications Act to reestablish its authority over broadband networks. This section focuses on the Commission's efforts to encourage broadband deployment, but based on prior case law, it may establish only an uncertain and incomplete source of authority for the Commission. And because this approach is untested, the Commission may only discover that its section 706 authority is incomplete several years from now, significantly jeopardizing efforts to implement the National Broadband Plan and other critical broadband policy initiatives.
- Forming a technical advisory group does not give the agency the authority it needs to adopt critical broadband policy initiatives. Indeed, it is difficult to see

how a technical advisory group could realistically adopt a universal service policy to bring broadband to all Americans. Other norms that might be discussed in such a group — such as privacy protections, open Internet rules, or truth-in-billing initiatives — will have little meaning absent agency authority to enforce those norms.

- Some opponents of a Title-II approach have urged the Commission to continue to rely on new theories of Title-I ancillary authority. Such a path is legally suspect in the wake of the *Comcast* decision. In addition, it would require the Commission to develop a distinct theory of authority for every broadband policy it adopts. Undoubtedly, each theory will be litigated before a federal court of appeals, which may take years. At the end of each round of litigation, consumers may be left exactly where they are now — without universal affordable access to broadband and without clear protection from harmful action by broadband providers. In the meantime, the United States will have wasted precious time in implementing the National Broadband Plan — falling further behind global competitors in the broadband space.

The Commission can and should reestablish its authority over broadband networks by classifying broadband Internet connectivity as a telecommunications service. Doing so will establish a stable, bounded, and conservative foundation for its broadband agenda.

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I. INTRODUCTION

In 2010, the Federal Communications Commission stands at a crossroads. Our elected officials agree that bringing affordable broadband access to all Americans is *the* infrastructure challenge of the 21st century. Broadband is today's most important communications platform for commerce, speech, innovation, and creativity. But just as we have achieved widespread consensus that bringing broadband to all Americans and supporting the growth of its many uses must be national priorities, the FCC faces a challenge of its own: as a result of a recent court decision, the agency that oversees "communication over wire and radio" may find itself without the ability to pursue many critical aspects of America's communications policy.

In early April, the Court of Appeals for the D.C. Circuit issued a decision in *Comcast v. FCC*: the D.C. Circuit held that even though Comcast had intentionally and secretly blocked access to lawful content on the Internet, the FCC's prior regulatory choices regarding its oversight of broadband — relying on a theory of "ancillary authority" to adopt broadband policy — precluded the Commission from stopping Comcast's practices. In 2002 and 2005, the FCC decided to classify broadband Internet service as an "information service" regulated only under the Commission's ancillary authority, which is established in Title I of the Communications Act. In order to adopt policy using ancillary authority, the Commission must demonstrate that the proposed policy is necessary to fulfill some express statutory mandate found elsewhere in the Act. The *Comcast* matter presented an important test case in determining whether the information-service classification would nonetheless allow the Commission to use a theory of ancillary authority to protect consumers from harmful activity by the owners of these networks. While the FCC interpreted its own jurisdiction broadly, the court dramatically narrowed its scope.

The decision has far-reaching consequences. Because *Comcast* questions the overall regulatory framework the FCC has used to adopt broadband policy, its holding implicates not only the narrow question of whether broadband providers may block content on the Internet but also the FCC's ability to adopt key proposals in its National Broadband Plan. In the words of Austin Schlick, the Commission's General Counsel, the *Comcast* decision may jeopardize plan recommendations "aimed at accelerating broadband access and adoption in rural America; connecting low-income Americans, Native American communities, and Americans with disabilities; supporting robust use of broadband by small businesses to drive productivity, growth and ongoing innovation; lowering barriers that hinder broadband deployment; strengthening public safety communications; cybersecurity; consumer protection, including transparency and disclosure; and consumer privacy."[1]

In order to shore up its ability to protect consumers and small businesses, bring broadband to rural and low income Americans, preserve the value of an open Internet, and ensure America's competitiveness in the global marketplace, the Commission can and should classify the transmission service associated with broadband Internet access as a "telecommunications service" under the Communications Act. In so doing, the Commission would eliminate the need to rely on its now-limited ancillary authority; instead, it could adopt rules pursuant to the substantive mandates in Title II of the Communications Act, many of which impose express statutory obligations on telecommunications service providers.

Classifying broadband transmission as a telecommunications service is the safest, surest, and fastest way to achieve the nation's broadband goals, including promoting universal access

[1] Posting of Austin Schlick to Blogband: the Official Blog of the National Broadband Plan, http://blog.broadband.gov/ (Apr. 7, 2010).

and ubiquitous adoption; preserving the value of the Internet for commerce, innovation, education, democratic engagement, and creative pursuits; and keeping pace with our global competitors. This solution presents the most conservative option for the Commission.

- It will harmonize the Commission's regulatory framework with the 1996 Telecommunications Act and bedrock principles of communications policy. The 1996 Act and the policies on which it was built distinguished between basic communications infrastructure on the one hand and the varied uses of that infrastructure on the other.
- It need not and will not lead to heavy-handed regulation. Rather, it will merely allow the FCC to pursue the proposals already on the table with more stable legal grounding.
- It will withstand judicial scrutiny because it is supported by key Supreme Court precedents.

By contrast, the other options at the FCC's disposal either fail to accomplish critical communications policy goals, or fail to do so in a reasonable time frame, or both.

- While Congress may eventually engage in a comprehensive revision of the Communications Act, the last revision of the Act took five years. Though the chairmen of both the House and Senate Commerce Committees have begun discussion regarding an update to the Communications Act and appear open to more expedited action, they have made it clear that the Commission must run its classification proceeding in parallel with Congress's efforts. Our national broadband agenda cannot afford to wait until 2015.

- Section 706 of the 1996 Act — which suggests the FCC should encourage broadband deployment — may not grant the FCC sufficient authority to pursue its policy goals. Rather, relying on section 706 carries legal and practical risks. Moreover, it requires the Commission to pursue this uncertain strategy for several years before getting any conclusive guidance from the courts as to whether that strategy is sustainable.
- Forming a technical advisory group will not, in itself, allow the Commission to achieve its broadband goals. Moreover, standards to promote competition and protect consumers in the broadband space will have no meaning without basic Commission oversight over broadband networks.
- Given the breadth of the D.C. Circuit's ruling in *Comcast*, continuing to rely on ancillary authority is not a sensible option: it subjects the Commission's agenda to serial and significant litigation uncertainty, and it may result in several critical broadband policies being invalidated in the courts.

Classifying broadband transmission as a telecommunications service would avoid the problems associated with each of these proposals. The Commission can and should take that step now if it wishes to establish a safe, sound, and conservative foundation for its broadband agenda.

II. BACKGROUND

1. The Commission classifies broadband Internet service as an integrated information service to be regulated under Title I of the Communications Act.

Although computers first connected through packet-switched networks in 1969,[2] broadband Internet connectivity — that is, high-speed, always-on access to the interconnected networks of computers that now forms the Internet — is a phenomenon of somewhat more recent vintage.[3] When President Bill Clinton signed the historic 1996 Telecommunications Act, he streamed it over the Internet.[4] Around the same time, cable companies pioneered widespread access to this high-speed service, providing cable modem access to the Internet via the coaxial cable wires that historically provided cable television service to many American homes.[5] By 2002, high-speed Internet access was available in a majority of American households.[6] As the technology became increasingly available, the Commission confronted numerous questions

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[2] *See Inquiry Concerning High- Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185; *Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶ 9 (2002) (*Cable Modem Order*), *aff'd*, *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[3] In its Notice of Inquiry in this proceeding, the Commission states that it uses the term "broadband Internet service" to "refer to the bundle of services that facilities-based providers sell to end users in the retail market. This bundle allows end users to connect to the Internet, and often includes other services such e-mail and online storage." *Framework for Broadband Internet Service*, GN Docket No. 10-127, 2010 WL 2467985, ¶ 1 n.1 (2010) (*Broadband Authority NOI*). The Commission also refers to the connectivity or transmission service within that bundle as "Internet connectivity service" or "broadband Internet connectivity service." *Id.* We use these terms in the same way here.

[4] *See* S. Derek Turner, *Dismantling Digital Deregulation: Toward a National Broadband Strategy* 6 & n.2 (2009) (*Dismantling Digital Deregulation*), *available at* http://www.freepress.net/files/Dismantling_Digital_Deregulation.pdf.

[5] *Cable Modem Order* at ¶ 9.

[6] *Id.* at ¶ 1.

about "the legal status [of cable modem service] under the Communications Act of 1934" and about "what regulatory treatment [of the service] . . . is appropriate under the law and will best serve consumers."[7]

In a 2002 Declaratory Ruling and Notice of Proposed Rulemaking, the Commission first answered these questions: the *Cable Modem Order* concluded that broadband Internet service offered via cable modem was an "information service" under the Communications Act, and that the service did not contain a separable "telecommunications service" component.[8] Under the Communications Act, an "information service" is:

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[9]

By contrast, a telecommunications service is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[10] "Telecommunications," in turn, is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[11] Although the Commission recognized that cable modem service had a telecommunications component — i.e., that some data was transmitted, unchanged, from user to user, it concluded that consumers experienced broadband Internet access as an "integrated service" in which services such as e-

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[7] *Id.* at ¶ 7.
[8] *Id.*
[9] 47 U.S.C. § 153(20).
[10] *Id.* § 153(46).
[11] *Id.* § 153(43).

mail, web browsing, and access to newsgroups were not functionally separable from the transmission of data across the coaxial cable.[12] Subsequent orders classified wireline broadband Internet service, wireless broadband Internet service, and broadband Internet service provided over power lines as information services as well.[13]

The regulatory consequences that followed from these decisions were significant: Historically, telecommunications carriers (and their services) were regulated under Title II of the Communications Act.[14] By contrast, information services have been regulated under the Commission's Title I or ancillary authority.[15]

2. *Comcast v. FCC* Limits the Commission's Ancillary Authority.

In *Comcast*, the D.C. Circuit reviewed an FCC order ruling that Comcast's selective interference with the use of peer-to-peer applications on its network violated federal Internet

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[12] *Cable Modem Order* at ¶ 38.

[13] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33; *Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10; *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242; *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (2005) (*Wireline Broadband Order*), *aff'd*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd. 13281 (2006) (*BPL Order*); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd. 5901 (2007) (*Wireless Broadband Order*).

[14] *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 973-74 (2005) (*Brand X*).

[15] *See, e.g.*, *Cable Modem Order* at ¶¶ 75-79.

policy.[16] The underlying facts were not in substantial dispute: Comcast first denied but subsequently admitted that it had singled out peer-to-peer applications for targeted delaying or blocking.[17] In response, various public interest groups and other interested individuals, led by Free Press, brought complaints at the FCC challenging Comcast's conduct as unlawful.[18] In adjudicating Free Press's complaint, the Commission recognized that "[t]he record leaves no doubt that Comcast's network management practices discriminate among applications and protocol rather than treating all equally."[19] The FCC held that Comcast's actions impermissibly interfered with users' ability to access lawful content of their choice and applications of their choice in a manner that was inconsistent with its Internet Policy Statement.[20] As a result, the

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[16] *Comcast Corp. v. FCC*, 600 F.3d 642 (2010); *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices — Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management"*, WC Docket 07-52, Memorandum Opinion and Order, 23 FCC Rcd. 13028, ¶¶ 41-53 (2008) (*Comcast Order*); *see also Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements*, CS Docket Nos. 95-20, 98010; *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185; *Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd. 14986 (2005) (*Internet Policy Statement*).

[17] *Comcast Order* at ¶ 9.

[18] Formal Complaint of Free Press and Public Knowledge against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices — Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* WC Docket 07-52 (Nov. 1, 2007).

[19] *Comcast Order* at ¶ 41.

[20] *Internet Policy Statement* at ¶ 4.

FCC ordered Comcast to cease and desist from its selective blocking and to publicly disclose its network management practices.[21]

Comcast's petition for review argued that the FCC lacked the ability to adjudicate the dispute between Comcast and the public interest groups bringing the petition and did not address the propriety of Comcast's actions. Among other arguments, Comcast questioned the Commission's statutory authority to regulate blocking and delaying of content by broadband Internet access providers. The Commission rested its authority to compel the cessation of these practices on its ancillary jurisdiction. Under the ancillary jurisdiction doctrine, the Commission retains authority to implement policies that are "reasonably ancillary to the effective performance of the Commission's various [statutorily prescribed] responsibilities."[22]

In April, the D.C. Circuit granted Comcast's petition for review.[23] The court held that the FCC could not prohibit Comcast's blocking using its ancillary authority. The decision held that in general, whenever the Commission wishes to adopt policies regarding broadband Internet access, it must justify those policies as necessary to implementing the three operative titles of the Act that govern the technologies over which the Commission has oversight: Title II telecommunications, Title III broadcasting services, and Title VI video services.[24] That is, because the FCC has classified broadband Internet service as a Title I service, any regulation of broadband is permissible only to the extent that it is necessary "in order to prevent frustration of a regulatory scheme expressly authorized by statute."[25]

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[21] *Comcast Order* at ¶ 54.
[22] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).
[23] *Comcast*, 600 F.3d at 644.
[24] *Comcast,* 600 F.3d at 652-53, 654, 655, 656, 657-58, 660, 660-61.
[25] *Id.* at 656.

Because the bulk of the Communications Act addresses telecommunications services, broadcasting and other spectrum issues, and video services and does not address information services, the ruling undoubtedly hampers the Commission's ability to move forward with broadband policy under the information-services framework in two significant ways.[26] First, if it wishes to pursue broadband policy under the current Title I framework, the FCC must now make a clearer and closer link between any particular broadband policy and the FCC's oversight over traditional telecommunications carrier services, broadcasting, and one-way cable video distribution. Second, it requires the FCC to make broadband policy in a fundamentally backward-looking, rather than forward-looking, way; it constrains the FCC to make broadband policy by looking at broadband's effect on legacy technologies, rather than grappling directly with the question of what policies make the most sense for the basic communications infrastructure of our age. These constraints will make it difficult for the Commission to adopt and defend the best policy choices for consumers.

III. DISCUSSION

The Commission should classify broadband Internet connectivity service as a telecommunications service under the Communications Act of 1934. Inaction is not an option: after *Comcast*, key aspects of the Commission's broadband agenda have been placed at risk. By

[26] Indeed, individual members of the panel appeared skeptical of the entire concept of ancillary jurisdiction as a doctrine with continuing legal significance. For example, Judge A. Raymond Randolph called the whole doctrine as "out of step with contemporary Supreme Court jurisprudence." Judge David B. Sentelle characterized it as a potentially "unbridled roving commission to do good." Transcript of Oral Argument at 4, 46, *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. petition for review filed Sept. 4, 2008) (*Comcast* Transcript).

pairing this shift in classification with appropriate forbearance under the Act,[27] the Commission will be able to make policies that promote deployment and adoption as well as protect consumers in the broadband era. This approach: (1) is faithful to the 1996 Telecommunications Act and the Commission's historical approach to regulating transport networks; (2) provides a coherent and bounded theory regarding the Commission's authority over broadband networks; (3) provides the Commission the flexibility to forbear from unnecessary regulations and tailor its policies to provide light-touch regulation where the markets are not functioning properly; and (4) would withstand subsequent judicial review. By contrast, the other options available to the Commission will not allow it to move forward quickly and soundly.

[27] In 1996, Congress revised the Communications Act to create a process called forbearance. The forbearance process allows the FCC to refrain from imposing any of the Act's obligations on telecommunications service providers if the Commission finds that such forbearance is in the public interest. 47 U.S.C. § 160.

1. In the wake of *Comcast*, the Commission should not rely on its ancillary authority to enact critical broadband policies.

America's broadband policy coheres around a few important principles: (1) We must bring affordable broadband access to all Americans.[28] (2) We ought to lead the world in broadband deployment, adoption, and innovation.[29] (3) We must preserve the value of an open Internet as a platform for dynamic economic growth and technological innovation, a vibrant forum for speech and culture, and a space for active civic engagement.[30] (4) And, we must use broadband as a tool in achieving other important policy goals, including advancing consumer welfare, improving public safety and homeland security, delivering health care, achieving energy independence and efficiency, and educating our children.[31] The proposals in the broadband plan, as well as other policy initiatives launched by the FCC, all seek to address one or more of these goals.

According to the Commission's General Counsel, a wide variety of those proposals — including those aimed at accelerating broadband access and adoption in rural America; connecting low-income Americans, Native American communities, and Americans with disabilities; supporting robust use of broadband by small businesses to drive productivity, growth

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[28] American Recovery and Reinvestment Act, Pub. L. No. 111-5, § 6001(k)(2)(A)-(B), 123 Stat. 115, 516 (2009) (Recovery Act); Press Release, The White House, Statement from the President on the National Broadband Plan (Mar. 16, 2010), *available at* http://www.whitehouse.gov/the-press-office/statement-president-national-broadband-plan.

[29] Julius Genachowski, Chairman, FCC, Broadband: Our Enduring Engine for Prosperity and Opportunity, Prepared Remarks Before the National Association of Regulatory Utility Commissioners (Feb. 12, 2010), *available at* http://www.narucmeetings.org/Presentations/Genachowski%20NARUC%20Winter%20Speech.pdf.

[30] Julius Genachowski, Chairman, FCC, Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity, Prepared Remarks at the Brookings Institution (Sept. 21, 2009), *available at* http://www.openinternet.gov/read-speech.html.

[31] *See, e.g.*, Recovery Act, § 6001(k)(2)(D).

and ongoing innovation; lowering barriers that hinder broadband deployment; strengthening public safety communications; and cybersecurity; providing consumer protection, including transparency and disclosure; and protecting consumer privacy — will face significant legal challenges and delayed implementation if the FCC fails to clarify its authority over broadband networks.[32]

We focus here on the litigation risk associated with implementing the following specific policy proposals under an ancillary authority framework:

- reforming the Universal Service Fund to promote broadband deployment and adoption in rural and low-income communities;[33]
- promoting transparency and disclosure in the pricing and provision of broadband Internet connectivity service, as a means of promoting competition and driving down costs;[34]
- adopting more robust privacy protections to encourage adoption and use of broadband Internet connectivity services;[35]
- developing programs to increase broadband accessibility and increase adoption rates among Americans with disabilities;[36]
- using broadband to enhance public safety and ensure homeland security;[37] and

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[32] Posting of Austin Schlick to Blogband: the Official Blog of the National Broadband Plan, http://blog.broadband.gov/ (Apr. 7, 2010).

[33] Federal Communications Commission, *Connecting America: the National Broadband Plan* 140-552 (2010) (*National Broadband Plan*), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf.

[34] *Id.* at 44-47.

[35] *Id.* at 17, 36.

[36] *Id.* at 181-82.

[37] *Id.* at 314-23.

- preserving the Internet as an open platform for commerce, speech, and culture.[38]

A. The Commission will face significant difficulty in transforming the Universal Service Fund to support broadband for rural and low-income communities.

In the National Broadband Plan, the Commission proposes to transform three existing programs — the High Cost program, the Lifeline program, and the Link-up America program — to support the deployment and adoption of broadband Internet connectivity.[39] The High Cost Fund currently supports the deployment and adoption of telephone service in rural areas, insular areas, and localities where the cost of providing telephone service is prohibitively high.[40] The Lifeline and Link-up programs provide discounts that make basic local telephone service affordable for low-income consumers.[41]

Reforming these programs to support broadband deployment and adoption will be absolutely critical to closing the domestic digital divide. Only 50 percent of rural Americans subscribe to broadband at home, and rural Americans are twice as likely as their urban and suburban counterparts to say that their homes are unserved by broadband access.[42] Similarly, only 40 percent of low-income Americans say that they subscribe to broadband at home, and cost is the number one reason that non-adopters have not yet subscribed to broadband in the home.[43]

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[38] *See Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd. 13064 (2009) (*Open Internet NPRM*).

[39] *National Broadband Plan* at 142-51, 168, 172-73.

[40] *See, e.g.*, *Connect America Fund*, WC Docket No. 10-90; *National Broadband Plan for Our Future*, GN Docket No. 09-51; *High-Cost Universal Service Support*, WC Docket No. 05-337, Notice of Inquiry and Notice of Proposed Rulemaking, 2010 WL 1638319 (2010); *National Broadband Plan* at 140.

[41] *National Broadband Plan* at 140.

[42] John Horrigan, *Broadband Adoption and Use in America* 7 (Federal Communications Commission, Omnibus Broadband Initiative Working Paper Series No. 1, 2010) (*Broadband Adoption and Use*).

[43] *Id.* at 3, 5.

We need to change these statistics for the better, and transforming the universal service program is a first step towards doing so.

(1) Under the status quo, the FCC will face difficulty establishing direct authority to reform its High Cost Fund.

The FCC established the High Cost Fund based on its authority to implement section 254 of the Communications Act.[44] The text of the Communications Act, *Comcast*, and earlier case law all suggest that any attempt to add broadband to the list of supported services will face substantial difficulties. Section 254 of the Communications Act provides that "universal service" is "an evolving level of *telecommunications services* that the Commission shall establish under this section, taking into account advances in telecommunications and information technologies and services."[45] While the Commission may *take into account* advances in information technologies and services, the statute reiterates that when determining which types of services may be eligible for subsidy, the Commission must consider the extent to which "such *telecommunications services*," not information services, meet various specified criteria.[46] As a result, an attempt to use Title I to reform the Universal Service Fund will be vulnerable to the argument that Congress specifically described universal service as a "telecommunications service," and that if it had wanted the FCC to subsidize information services, it certainly knew how to use that language.[47]

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[44] 47 C.F.R. § 54.1(b).

[45] 47 U.S.C. § 254(c) (emphasis added).

[46] *Id.* ("The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which *such telecommunications services* [meet various criteria].") (emphasis added).

[47] *Cf. Barnhart v. Sigmon Coal Co.*, 34 U.S. 438, 452 (2002). At least one potential bill in Congress proposes to "change" the Universal Service Fund statute to allow the fund to support broadband access. *Universal Service: Reforming the High-Cost Fund: Hearing Before the*

Opponents of a Title-II classification argue that other language in section 254 justifies the extension of the High Cost Fund to support broadband, but the Commission should view such claims with skepticism.[48] First, both *Comcast* and *Texas Office of Public Utility Counsel v. FCC* (*TOPUC*) counsel against relying heavily on section 254(b) of the Act.[49] Section 254(b) describes a series of principles that should inform the Commission's decisionmaking as it adds services to the list of those eligible for universal service funds.[50] One of the principles suggests that "access to advanced telecommunications and information services should be provided in all regions of the [n]ation."[51] While these kinds of broad principles are helpful, *Comcast* implies that they do not, by themselves, "delegate regulatory authority."[52] In analyzing this exact language, *TOPUC* held that while it "identifies seven principles the FCC should consider in developing its policies; it hardly constitutes a series of specific statutory commands."[53] And

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Subcomm. on Comm., Tech., and the Internet of the H. Comm. on Energy & Commerce, 111th Cong. __ (2009) (statement of Rep. Boucher, Chairman, House Subcomm. On Comm., Tech., and the Internet), *available at* http://energycommerce.house.gov/Press_111/20091117/boucher_statement.pdf.

[48] At a minimum, the FCC should examine with a gimlet eye such proposals coming from incumbent telephone and cable providers, since their positions have shifted according to their business interests over the years. For example, in 2008, when no classification loomed, Verizon argued that the High Cost Fund could not be used to subsidize broadband Internet service. *See* Comments of Verizon and Verizon Wireless, *Federal-State Joint Broad on Universal Service*, WC Docket No. 05-337; *High-Cost Universal Service Support*, CC Docket No. 96-45, at 31 (Apr. 17, 2008). Similarly, in 1997, when very few telephone companies offered Internet access, both AT&T and BellSouth argued that universal service funds could not be used to support Internet access in schools and libraries. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776, ¶¶ 438-39, nn.1139, 1140, 1141 (1997).

[49] *See generally Comcast*, 600 F.3d at 642; *see also Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 440-43 (5th Cir. 1999).

[50] 47 U.S.C. § 254(b).

[51] *Id.* § 254(b)(2).

[52] 600 F.3d at 652.

[53] *Texas Office of Pub. Util. Counsel*, 183 F.3d at 421.

TOPUC specifically declined to read the section to override limitations contained elsewhere in the Act.[54] The Act describes the supported services as telecommunications services in two distinct places, and the FCC should not risk going forward with its USF policy in the face of such limiting language.

Other proposals to reform USF without relying on Title II authority fare no better. The National Cable and Telecommunications Association's proposal to address the universal service issue — that somehow the E-Rate program could be expanded to support broadband deployment to all Americans, not just public schools — borders on preposterous. The language of the statute authorizing the E-Rate program provides that the Commission may support advanced services "for all public and nonprofit elementary and secondary school classrooms."[55] Even if the program could be used to support the general use of broadband in the homes of elementary and secondary students — a contention that itself removes the statutory tether of the classroom — it would not solve the deployment and adoption problem with respect to anyone except children or households with children. Such logic will provide cold comfort to childless adults or empty nesters who remain unserved or underserved without government intervention. Nor is it clear how such a program could be efficiently administered and remain remotely tethered to the statutory mandate — would it subsidize deployment to one house on a rural road where two growing children live, but not the house next door occupied by a retired couple? In short, the

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[54] *Id.* The case defers to the agency on the question of whether the Commission can elect to support information services for schools and libraries, but it disapproves of the agency's choice as not the "best reading of the relevant statutory language." *Id.* at 442. In finding the statute ambiguous, the case relies principally on specific statutory mandates to enhance access to advanced services for *schools, libraries and health care providers*, as well as legislative history supporting the notion that Congress intended subsection (h) of the Act to allow subsidies for Internet access in these limited fora. Obviously these considerations would not apply to proposals to transform the generic High Cost Fund to support broadband.

[55] 47 U.S.C. § 254(h)(2)(A).

Commission cannot adopt this approach if it is remotely serious about bringing broadband to rural and low-income families.

Commissioner McDowell's proposal to condition future subsidies on a guarantee that recipients would offer broadband suffers similar flaws — it, too, would create a program ill-equipped to close the broadband deployment gap.[56] In fact, this approach runs afoul of several major principles articulated in the National Broadband Plan's proposal for universal service reform: (1) it fails to support broadband directly, relying on an oblique and uncertain method for spurring deployment;[57] (2) it distorts the market by effectively supporting broadband deployment

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[56] In his statement dissenting from the Commission's Notice of Inquiry in this proceeding, Commissioner McDowell claimed that "this idea was agreed to in principle by a bipartisan group of four Commissioners in late 2008," but this statement overreads the record. In 2008, the FCC issued a Further Notice of Proposed Rulemaking in its Universal Service dockets. *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link Up*, WC Docket No. 03-109; *Universal Service Contribution Methodology*, WC Docket No. 06-122; *Numbering Resource Optimization*, CC Docket No. 99-200; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *IP-Enabled Services*, WC Docket No. 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd. 6475 (2008). A joint statement of four Commissioners specifically declined to "pre-judge any of the proposals set forth" in the Notice, though it did express general support for the notion that supporting broadband was a critical issue to be resolved in further proceedings. *Id.* at 6903.

[57] *See* Comments of Free Press, *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link Up*, WC Docket No. 03-109; *Universal Service Contribution Methodology*, WC Docket No. 06-122; *Numbering Resource Optimization*, CC Docket No. 99-200; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *IP-Enabled Services*, WC Docket No. 04-36, at 20-23 (Nov. 26, 2008); *National Broadband Plan* at 143 ("*Support broadband deployment directly.* The federal government should, over time, end all financial support for networks that only provide 'Plain Old Telephone Service' (POTS) and should provide financial support, where necessary and in an economically efficient manner, for broadband platforms that enable many applications, including voice.").

by legacy telephone companies but not by emerging providers;[58] and (3) it perpetuates, rather than phases out, support for "plain old telephone service."[59] In short, it is barely a reform measure at all.

(2) Under the status quo, the FCC will also face difficulty relying on ancillary authority to reform the High Cost Fund.

Section 4(i) establishes the Commission's ancillary authority.[60] In a recent filing, AT&T argues that the language in section 1 of the Act, in combination with section 4(i), ought to suffice to provide the Commission jurisdiction to reform the Universal Service Fund.[61] Section 1 establishes the FCC as a body to regulate communication by wire and radio and sets the goal of "mak[ing] available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[62] But the D.C. Circuit specifically rejected an identical claim in *Comcast*: it held categorically that the policy statement contained in section 1 of the Act "cannot provide the basis for the Commission's exercise of ancillary authority."[63] Stating the painfully obvious,

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[58] *National Broadband Plan* at 145 ("The eligibility criteria for obtaining support from CAF should be company- and *technology-agnostic* so long as the service provided meets the specifications set by the FCC.") (emphasis added).

[59] *Id.* at 143.

[60] *Comcast*, 600 F.3d at 646.

[61] Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act*, GN Docket No. 09-47; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 09-137; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Lifeline and Link-Up*, WC Docket No. 03-109, attachment at 6 (Jan. 29, 2010) (*AT&T White Paper*).

[62] 47 U.S.C. § 151.

[63] 600 F.3d 651-52, 654-655. *See also id.* at 655 ("[T]he Commission maintains that congressional policy by itself creates 'statutorily mandated responsibilities' sufficient to support the exercise of section 4(i) ancillary authority. Not only is this argument flatly inconsistent with

the Commission should not rely on reasoning previously rejected by the D.C. Circuit in setting broadband policy.

Nor is the rest of AT&T's appeal to ancillary jurisdiction any more persuasive. AT&T implies that the Commission has previously recognized that section 254(a) of the Act "does not limit [universal service] support to telecommunications services."[64] But this flatly misreads the Commission's 1997 *Universal Service Report and Order*. The language quoted by AT&T comes from a discussion of which services may be supported in schools and libraries, not which services may be supported by the general High Cost Fund.[65] And this is a distinction with a statutory difference: taken in its full context, the Commission's order states, "We observe that section 254(c)(3) grants us authority to 'designate additional services for support' [for schools and libraries] . . . . *The generic universal service definition in section 254(c)(1) . . . [is] explicitly limited to telecommunications services.*"[66] Indeed, the Commission has historically distinguished between the services supported under section 254(c)(1) — the so-called generic universal service provision — and the "additional services" that may be available to educational institutions and libraries.[67]

Southwestern Cable, *Midwest Video I*, *Midwest Video II*, and *NARUC II*, but if accepted it would virtually free the Commission from its congressional tether."). AT&T's proposed reliance on section 706 of the 1996 Telecommunications Act fails for similar reasons — it is a policy statement that the Commission itself has determined does not create an "express delegation of regulatory authority." *Id.* at 655, 658-59. We discuss the possibility that the Commission could revisit this determination in section 5.B, *infra*.

[64] *AT&T White Paper* at 6 (quoting *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776, ¶ 437 (1997) (internal quotation marks omitted)).

[65] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776, ¶ 437 (1997) (*1997 Universal Service Order*).

[66] *Id.* (emphasis added).

[67] *See, e.g.*, *id.*; *Federal-State Joint Board on Universal Service*, Recommended Decision, 18 FCC Rcd 2943, ¶ 19 (2002).

Absent reliance on section 1, section 254(a) or section 254(c), only one of AT&T's proposed statutory hooks remains: section 254(b).[68] But as noted above, the courts have repeatedly held that the principles in section 254(b) cannot extend the Commission's authority beyond limitations created by the operative language of the Communications Act itself.[69] If the principles contained in section 254(b) do not create direct authority to extend universal service support to information services, the Commission certainly should not rely upon authority ancillary to the principles as a foundation for its efforts to reform the High Cost Fund.[70] If the Commission wants to expand broadband deployment to those Americans who currently lack access in their area and wants to put those efforts on the soundest legal footing, it will not rely on ancillary authority.

(3) The Commission faces even more significant litigation risk in its efforts to bring broadband to low-income Americans.

As a part of universal service reform, the FCC has also proposed extending its Lifeline and Link-up programs to broadband access. These reforms face dramatic litigation risk if challenged on jurisdictional grounds. While Congress has recognized and sanctioned the existence of the Lifeline program, the Communications Act does not formally authorize it.[71]

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[68] *AT&T White Paper* at 8.

[69] *See, e.g.*, *Texas Office of Pub. Util. Counsel*, 183 F.3d at 421; *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199 (10th Cir. 2001).

[70] *See Comcast*, 600 F.3d at 655.

[71] *See* 47 U.S.C. § 254(j) (providing that nothing in that section shall "affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission."); *see also 1997 Universal Service Order* at ¶ 331 ("The Joint Board found that Congress did not intend for section 254(j) to codify the existing Lifeline program, but that it intended to give the Joint Board and the Commission permission to leave the Lifeline program in place without modification. . . .").

Rather, the Commission established Lifeline and Link-up under its authority under sections 201 and 205 of the Communications Act.[72]

To extend Lifeline and Linkup to broadband access, the Commission would have to rely on its direct or ancillary authority under sections 201, 205, or 254 of the Act. Section 201 requires common carriers to charge reasonable rates.[73] Section 205 authorizes the Commission to prescribe reasonable charges for common carriers.[74] Section 254 mandates universal access to telecommunications services.[75]

Relying on sections 201 and 205 will undoubtedly be difficult. Sections 201 and 205 impose obligations on *telecommunications* carriers and do not mention access to either telecommunications services or information services for low-income families.[76] Indeed, the Commission arguably established the Lifeline and Link-up programs for telephony based on its authority ancillary to these sections, [77] and an extension to broadband would have to be justified based on a showing that subsidizing broadband would promote reasonable rates for traditional telecommunications services. Extending these programs to broadband would build another layer of ancillariness onto a program already essentially built on ancillary authority. Given the D.C. Circuit's skepticism of the doctrine, the FCC can and should develop a firmer statutory tether.

Nor does relying on section 254 of the Act create a sufficiently strong link to provide assurance to the Commission or stakeholders who believe these programs must be extended to

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[72] *See, e.g.*, *1997 Universal Service Order* at ¶¶ 329-30.

[73] 47 U.S.C. § 201(b).

[74] *Id.* § 205(a).

[75] *Id.* § 254.

[76] *Id.* §§ 201, 205.

[77] *See Comcast*, 600 F.3d at 656 (characterizing the Commission's pre-1996 efforts to promote universal service as based on jurisdiction ancillary to its direct statutory authority to set reasonable interstate telephone rates).

support broadband. And though the universal service statute does mention low-income consumers,[78] it, too, specifies that the Commission shall subsidize telecommunications services, not information services. Moreover, while Congress specifically acknowledged that the USF statute should not impede implementation of the Lifeline program, the provision acknowledging Lifeline did not confer any additional authority on the FCC.[79]

The Commission should also be skeptical in relying on the language in section 254(b) as a source of its authority. As stated above, section 254(b) sets out the kinds of policy principles that the courts have recognized do not delegate statutory responsibilities. The only clause in section 254 that actually singles out low-income consumers does not provide much support for the notion that the Commission could create a low-income subsidy program: one of the four principles on which the Commission bases universal service policy states that low-income consumers should have access to the same services at comparable rates to their "urban" counterparts.[80] It is not clear what Congress meant when it suggested that low-income consumers should enjoy the same rates as urban consumers, but it would certainly be a stretch to argue that rate parity counsels in favor of a subsidy. Nor should the Commission rely on section 254(b)(1), which provides that "quality services should be available at just, reasonable, and affordable rates."[81] Reliance on this provision imposes no apparent limiting principle on the Commission's authority — it could just as easily be used to support a program regulating the rates of broadband service providers or subsidizing the adoption of information services such as

[78] 47 U.S.C. § 254(b)(3).
[79] *Id.* § 254(j).
[80] *Id.* § 254(b)(3).
[81] *Id.* § 254(b)(1).

e-mail, web-browsing or online video. In sum, if we want to close the digital divide, the FCC should not rely on risky ancillary authority to do so.

B. The Commission will face difficulty in implementing even a modest reform such as requiring broadband Internet connectivity providers to disclose performance- and price-related metrics.

The National Broadband Plan recognized that accurate and consumer-friendly disclosure requirements "help foster a competitive marketplace" and that "fixed broadband consumers, however, have little information about the actual speed and performance of the service they purchase.[82] For example, in the current marketplace, many providers disclose only an "up to" speed, and the actual download speed experienced on broadband connections in American households is only approximately 40–50 percent of the advertised "up to" speed to which they subscribe.[83] A recent FCC survey found 91 percent of broadband users think their download speeds should match those promised always or most of the time.[84] In the future, the Commission may require providers to disclose maximum and average upload/download speeds, uptime, delay, and jitter, as well as a list of standard applications that can be used with a particular service offering.[85] It has also suggested that consumers are entitled to "clear, understandable, and

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[82] *National Broadband Plan* at 44.

[83] *National Broadband Plan* at 21; *see also id.* ("The lack of standards makes it nearly impossible for consumers to compare providers and their offers."); Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, *Consumer Information and Disclosure*, CG Docket No. 09-158; *Truth-in-Billing and Billing Format*, CC Docket No. 98-170; *IP-Enabled Services*, WC Docket No. 04-36, at 8-16 (Oct. 13, 2009).

[84] John Horrigan and Ellen Satterwhite, *Americans' perspectives on online connection speeds for home and mobile devices* 3 (2010).

[85] *National Broadband Plan* at 46.

reasonably precise estimates of the likely price of different broadband service offers and plans before they sign-up [for service], as well as all applicable fees and taxes."[86]

Here, too, the Commission stands on tenuous authority. In the past, the Commission has relied on its authority to "initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans"[87] in requiring companies to provide information regarding their broadband service to the Commission itself.[88] But this statutory language arguably does not reach consumer-facing disclosure requirements.

Rather, the Commission has historically justified its disclosure and pricing-related rules based on its authority to deter telecommunications carriers from unjust and unreasonable practices under section 201(b), its authority to prohibit slamming by those carriers under section 258(a) of the 1934 Communications Act, or its authority ancillary to those sections.[89] Section 201(b) governs the rates and practices of common carriers.[90] Section 258(a) states that "no telecommunications carrier shall submit or execute a change in a subscriber's selection of a

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[86] *Id.*

[87] 47 U.S.C. § 1302(b).

[88] *See, e.g.*, *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice Over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, 23 FCC Rcd. 9691, ¶¶ 1, 8 (2008).

[89] *See, e.g.*, *Consumer Information and Disclosure,* CG Docket No. 09-158; *Truth-In-Billing And Billing Format,* CC Docket No. 98-170; *IP-Enabled Services*, WC Docket No. 04-36, 24 FCC Rcd. 11380, ¶¶ 8, 61-64 (2009). Slamming is the unlawful practice of changing a subscriber's selection of a provider of telephone service without that subscriber's knowledge or permission. *But see* Comments of Comcast Corp., *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, at 9-11 (Jan. 17, 2006) (suggesting that the Commission has limited authority to enact truth-in-billing regulations as they apply to broadband services).

[90] 47 U.S.C. § 251.

provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission may prescribe."[91]

The D.C. Circuit implicitly authorized the use of ancillary authority only "in order to prevent frustration of a regulatory scheme expressly authorized by statute."[92] While a few modest pricing-related disclosures might be justified on grounds that many consumers purchase broadband in a bundle with Title-II telephone service and Title-VI cable service, it is hard to see how the most needed reforms — such as giving consumers better speed information — would be accomplished. For example, how does providing a consumer with more precise information about the latency of his broadband service further a statutory goal of offering phone services at reasonable rates? As a result, if the Commission wishes to provide consumers the tools they desperately need to make efficient decisions among the limited choices, it should not stand up these vital reforms on ancillary jurisdiction.

C. The Commission will face difficulty extending privacy protections to consumers of broadband Internet connectivity services.

The National Broadband Plan recognizes that "while traditional telephone and cable TV networks are subject to privacy protections, ISPs operating in an unregulated environment can theoretically obtain and share consumer data through technologies such as deep packet inspection."[93] These concerns extend beyond the purely theoretical realm. In 2008, multiple broadband service providers entered agreements with NebuAd, a behavioral advertising company.[94] The broadband providers, including Charter Communications, contracted to share

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[91] 47 U.S.C. § 258(a).

[92] *Comcast*, 600 F.3d at 656.

[93] *National Broadband Plan* at 54.

[94] *See* Peter Whoriskey, *Every Click You Make*, WASH. POST (Apr. 4, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/04/03/AR2008040304052.html.

customer information with NebuAd, which NebuAd obtained by employing deep-packet inspection in the networks.[95]

While the plan acknowledges that the "existing regulatory frameworks provide only a partial solution" to consumers' privacy concerns,[96] it does not address the Commission's authority to adopt a more complete solution. Any privacy protections that the Commission seeks to require of broadband Internet access providers would likely rely on jurisdiction ancillary to section 222 of the Communications Act.[97] That section gives the Commission broad authority to require telecommunications carriers to protect the proprietary information of customers (often called CPNI), including the "quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to" by the customer.[98]

Any authority to extend these obligations to broadband Internet connectivity would rely on the Commission's ancillary authority, because section 222 speaks to the duties of telecommunications carriers, not broadband Internet connectivity service providers. In theory, as with the truth-in-billing requirements, the Commission could find a statutory hook, but it would have to demonstrate that applying these requirements to ISPs is reasonably ancillary to protecting consumers when they use traditional telecommunications services like telephony. A privacy scheme for broadband may not be "necessary" to prevent frustration of the relevant statutory mandate: protecting consumers in their use of traditional telephony.[99] As a result, the

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[95] *Id.*; *see also* Ryan Singel, *Congressmen Ask Charter to Freeze Web Profiling Plan*, WIRED (May 16, 2008), http://www.wired.com/threatlevel/2008/05/congressmen-ask/.

[96] *National Broadband Plan* at 54.

[97] 47 U.S.C. § 222.

[98] *Id.* § 222(c); *id.* § (h)(1).

[99] *Comcast*, 600 F.3d at 656.

Commission should seek firmer footing as it attempts to pursue policies protecting the privacy rights of broadband consumers.

D. The Commission will face difficulty in pursuing policies to increase broadband adoption rates among Americans with disabilities.

The National Broadband Plan also recognized "the federal government must promote innovative and affordable solutions to ensure that people with disabilities have equal access to communications services and that they do not bear disproportionate costs to obtain that access."[100] According to the Commission's own studies, only 42 percent of individuals with disabilities subscribe to broadband at home, compared to 74 percent of all Americans.[101] At the same time, "[f]or people with disabilities, communication access means the ability to compete on an equal basis for employment opportunities, benefit from educational programs, make sound financial and medical decisions, fulfill civic duties, and actively contribute to society as productive participants."[102]

Accordingly, the National Broadband Plan recommended that the Commission "extend its Section 255 rules to require providers of advanced services and manufacturers of end-user equipment, network equipment and software used for advanced services to make their products accessible to people with disabilities."[103] Section 255, in turn, requires that "a provider of

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[100] *National Broadband Plan* at 181.

[101] *Broadband Adoption and Use* at 3.

[102] *IP-Enabled Services: Impact on Video and Data Services*, *Hearing Before the Subcomm. on Telecomm. and the Internet of the H. Comm. on Energy and Commerce*, 109th Cong. __ (2005) (testimony of Karen Peltz Strauss, Legal Advisor, Communication Service for the Deaf), *available at* 2005 WL 996054.

[103] *National Broadband Plan* at 182 (footnote and citation omitted).

telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable."[104]

Recognizing that section 255 speaks to "providers of telecommunications services," and that its recommendation was directed exclusively at providers of services and equipment that fell outside this realm, the plan noted that "[t]he Commission should assure itself of its jurisdiction to extend Section 255 to all advanced services or, if it cannot do so, seek authorization from Congress."[105] Here again, each rule will stand or fall on whether it can be linked back to increasing access of legacy telecommunications services, not broadband. Given the importance of bringing broadband, not just telephony, to Americans with disabilities, the Commission should not rely on ancillary authority to move forward with accessibility and adoption efforts.[106]

E. The Commission will face difficulty in implementing aspects of its public safety agenda.

High-speed Internet access plays an important role in ensuring national security and preserving public safety: in particular, it both conveys information to the public and connects emergency workers to resources and each other. As a key element of the National Broadband Plan, the FCC proposes developing "a nationwide, wireless, interoperable broadband public safety network."[107] The plan responds to a finding made by the 9/11 Commission that "[c]ompatible and adequate communications among public safety organizations at the local,

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[104] 47 U.S.C. § 255(c).

[105] *National Broadband Plan* at 189, n.137.

[106] Indeed, in earlier filings, ATT expressed the view that the Commission *couldn't* implement accessibility rules under the information service regime. Reply Comments of AT&T Corp., *Appropriate Regulatory Treatment for Broadband Access To the Internet Over Cable Facilities*, CS Docket No. 02-52; *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket No. 00-185, at 4 (Aug. 6, 2002) (arguing Commission should not extend disability access rights to broadband).

[107] *National Broadband Plan* at 10.

state, and federal levels remains an important problem."[108] The FCC recommends mandating that public safety users be allowed to roam on commercial mobile broadband networks as a part of building and maintaining a larger interoperable network.[109] It suggests that "the public safety community should have this ability both in areas where public safety broadband wireless networks are unavailable and where there is currently an operating public safety network but more capacity is required to respond effectively to an emergency."[110] The plan also recommends that authorized public safety users, including state and local first responders, "should get priority access on commercial networks" when "a public safety broadband network is at capacity or unavailable."[111]

While these are laudable and important goals, they may be difficult to implement under the current regulatory framework. Although the Commission has instituted a similar program for wireless voice service,[112] it is hard to see how the Commission could justify its decision to require wireless data roaming and prioritization as reasonably ancillary to substantive provisions of the Communications Act. In devising the wireless priority initiative for phone service, the Commission relied on its authority under sections 201 through 205 of the Communications Act.[113] Again, those sections give the Commission expansive authority to regulate *telecommunications services*. They grant the FCC the general ability to prescribe "just and reasonable practices" for common carriers and the specific ability to determine what kinds of

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[108] *Id.* at 11 (quoting 9/11 COMM'N, THE 9/11 COMMISSION REPORT 39 (2004)).
[109] *Id.* at 314.
[110] *Id.* at 316.
[111] *Id.*
[112] *Id*. at 316.
[113] *See* 47 C.F.R. Pt. 67, App. B.

discrimination in the provision of services may be reasonable.[114] Nothing about the establishment of a new public safety program for data service will promote just and reasonable practices for traditional telecommunications service. And because the FCC already has established a public safety program for voice, it is hard to see how a proposal regarding data networks would better achieve public safety goals related to traditional telecommunication than the programs already in place. Nor is there a hook in the Communications Act that gives the Commission authority to adopt emergency preparedness initiatives regardless of technology.[115] The Commission might adopt these proposals based on its authority to regulate spectrum licensees under Title III of the Communications Act, but as set forth more fully below, this grant of authority is largely untested in the absence of other direct statutory mandates.[116] Thus, absent a stronger locus for the Commission's ability to pursue these and other public safety proposals regarding data networks, its ability to move forward may be significantly circumscribed.

F. The Commission will face difficulty in pursuing its efforts to preserve the open Internet.

The Internet's open architecture "has been critical to the network's success as an engine for creativity, innovation, and economic growth."[117] Because of the low barriers to entry in the market for content and applications that are made available over the Internet and the openness of

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[114] *See* 47 U.S.C. § 205.

[115] The Communications Assistance for Law Enforcement Act requires telecommunications carriers to provide assistance to law enforcement officers who seek to trace calls or other activity conducted over communications networks, but because that law is tailored specifically to law enforcement, it probably cannot be stretched to authorize the policy at issue here. *See generally* Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994).

[116] *See* 47 U.S.C. § 303(b), (r); *see also infra* section 2.B.

[117] *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd. 13604, ¶ 17 (2009) (*Open Internet NPRM*); *see also* BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION (2010).

the Internet, any business with a good idea can reach a vast market, and any speaker with a good idea may be heard.[118] In October 2009, the Commission opened a proceeding to ensure that the Internet's openness and the transparency of its protocols continue to be protected.[119] At its core, the proceeding aims to guarantee a level playing field for all websites and Internet technologies.[120]

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[118] *Id.* at ¶¶ 4, 17.

[119] *Id.*

[120] Though some opponents of open Internet rules have called them "a solution in search of a problem," it is clear that problems warranting Commission intervention do exist. In 2007, Verizon blocked lawful text messages sent by NARAL Pro-Choice America to the group's own members. *See* Kim Hart, *Verizon Ends Text-Message Ban*, WASH. POST (Sept. 28, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/09/27/AR2007092700823.html. Also in 2007, Comcast was caught blocking BitTorrent. *See Comcast Order*. In its defenes, Comcast told the Commission that this blocking was "consistent with industry standards" and that "many [providers] use the same or similar tools Comcast does." *See Comments of Comments of Comcast Corp.*, *Broadband Industry Practices*, WC Docket No. 07-52, Attachment C at 1 (Feb. 13, 2008). In 2008, a group of consumers brought a case against RCN for delaying and blocking peer-to-peer transmissions. Posting by Jenna Greene, The BLT: the Blog of the Legal Times, http://legaltimes.typepad.com/ (Apr. 21, 2010). The case was settled earlier this year, but under the terms of the settlement, RCN is required to refrain from throttling peer-to-peer software only until November 1, 2010. *Id.* In 2008, Germany's Max Planck Institute found that Cox Communications was consistently blocking peer-to-peer traffic over its networks during all hours of the day. *See* Todd Spangler, *Cox Accused of Blocking P2P, Too*, MULTICHANNEL NEWS (May 15, 2008), http://www.multichannel.com/article/89340-Cox_Accused_Of_Blocking_P2P_Too.php. In the context of wireless applications, AT&T blocked the use of both Skype and Slingbox over its 3G wireless networks. *See* Karl Bode, *AT&T Greenlights Slingbox Over 3G*, DSL Reports (Feb. 4, 2010), http://www.dslreports.com/shownews/ATT-Greenlights-Slingbox-Over-3G-106734. More recently, Sandvine, one company that offers blocking technologies, estimated that "approximately 90% of its 160 customers . . . use some form of application-specific traffic management policies, including most of its customers in the United States." Final Reply Comments of Sandvine, Inc., Telecom Public Notice CRTC 2008-19, at 4 (July 28, 2009), *available at* http://www.crtc.gc.ca/partvii/eng/2008/8646/c12_200815400.htm. And just a few months ago, Windstream was caught redirecting search queries from Google to its own search portal. Karl Bode, *Windstream Hijacking Firefox Google Toolbar Results*, DSL Reports (Apr. 5, 2010), http://www.dslreports.com/shownews/107744.

The problem is not isolated to the United States alone: for example, before Canada passed net neutrality rules, most major cable and telco ISPs admitted to throttling particular protocols. *See* Nate Anderson, *Editorial: "Network neutrality" or "Network Neutering"?*, Ars Technica (Sept.

The FCC should not pursue its open Internet proceeding on the basis of ancillary authority alone. The Notice of Inquiry recognizes that *Comcast* "rejected the legal theory the Commission relied on to address Comcast's interference with its customers' peer-to-peer transmission."[121] Thus, the Commission should not rely on section 230 of the Communications Act or section 706 of the Telecommunications Act, as it has proposed in its Open Internet NPRM.[122] The NPRM also notes that under section 201 of the Communications Act, it has authority "to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e] Act," but that language similarly does not confer additional authority on the Commission.[123] Rather, it merely gives the Commission the tools to "carry out" the mandatory duties created elsewhere in the statute.

As a result, the Commission must look elsewhere to find a locus for its ancillary authority. The Commission and various commenters have suggested that sections 201, 202, 214, 251, or 256 might suffice to provide a statutory nexus for the Commission's *Open Internet* rulemaking. We address each of these ideas in turn.

Section 201. In the *Comcast* matter, the Commission offered two alternate reasons that a network neutrality or open Internet rule might be considered reasonably ancillary to section 201. In its initial order, the Commission reasoned that "by blocking certain traffic on Comcast's

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29, 2009), http://arstechnica.com/tech-policy/news/2009/09/editorial-network-neutrality-or-network-neutering.ars. The practice's prevalence in a variety of markets, combined with carriers' vehement opposition to net neutrality rules, illustrates that carriers will have every incentive to engage in discriminatory conduct absent regulatory intervention.

[121] *Broadband Authority NOI* at ¶ 42.

[122] *Compare Open Internet NPRM* with *Comcast*, 600 F.3d at 651-58 (rejecting reliance on section 230), 658-59 (rejecting reliance on section 706). We discuss below the possibility that the Commission could, after further action, rely on section 706.

[123] *Comcast*, 600 F.3d at 642 (holding that section 4(*i*)'s mandate to prescribe all regulations necessary to implement the Act did not, in itself, create a substantive mandate).

Internet service, the company had effectively shifted the burden of that traffic to other service providers, some of which were operating their Internet access services on a common carrier basis subject to Title II."[124] While the D.C. Circuit did not ultimately address this claim, it did express skepticism that Comcast's actions could be sanctioned because they "marginally increas[ed]" the variable costs of a limited number of DSL providers who continue to offer broadband as a Title II service by choice. Moreover, even if this rationale withstood judicial scrutiny, it has clear limits: It would only reach network management practices that result in automatic traffic-shifting, which is a unique characteristic of peer-to-peer applications. The rationale would not, by contrast, reach circumstances in which traffic is governed by a server-client relationship. For example, if Comcast tried to block Google, no traffic would be shifted to DSL; the customer would simply be unable to access content on Google's site.

The section 201 argument advanced by the Commission in court fares no better. The Commission argued on appeal that the availability of Voice over Internet Protocol (VoIP) services may affect the prices and practices of traditional telephony common carriers subject to section 201 regulation. Such a rationale may justify imposing rules that affect VoIP services, but again, it would not allow for extending the rules' reach to implement broader net neutrality regulations. So long as broadband providers confined themselves to degrading or blocking data and other content more generally on the Internet, rather than degrading or blocking VoIP, it is hard to see how any comprehensive open Internet rule to address all such practices would retain a sufficiently close nexus with section 201 to provide adequate certainty to the Commission in moving forward with policymaking.

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[124] *Id.* at 660.

Section 202. Under the current regulatory framework, the Commission should not rely on authority ancillary to section 202 of the Communications Act to pursue its Open Internet rules. Section 202 prohibits telecommunications carriers from engaging in unjust and unreasonable discrimination.[125] In a short discussion, the Center for Democracy and Technology posits that "if network operators are allowed the option of offering broadband Internet access services on a completely unregulated basis, that option could enable them to end run [s]ection 202(a) and render that provision a dead letter."[126] Assuming that section 202 applies directly only to traditional telecommunications carriers (as we must under a Title I framework), it is hard to see how such an end-run might occur. For example, how would blocking an application such as the SlingPlayer, which redirects video content from a user's DVR, subvert a carrier's nondiscrimination obligations with respect to voice traffic? To the extent that such a rule might be justified, it is likely to be woefully underinclusive: section 202 can only provide a firm link with respect to products that somehow affect traditional telecommunications, such as VoIP applications. As a result, relying on section 202 puts the Commission on a litigious and risky path in making rules to preserve the Internet as a vibrant forum for speech, commerce, innovation, and culture.

Section 214. In its Broadband Authority Notice of Inquiry, the Commission suggests that the obligations of section 214 may provide a basis for making network neutrality rules. Section 214 mandates that a common carrier may not "impair service to a community" and recognizes that impairment may occur if the adequacy or the quality of telecommunications

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[125] 47 U.S.C. § 202(a).

[126] Reply Comments of the Center for Democracy and Technology, *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52, at 12 (Apr. 6, 2010).

service is diminished.[127] While these mandates would provide a statutory link if broadband service providers were classified as telecommunications carriers and therefore were subject to the obligations of section 214 in their offering of broadband service, the Commission has yet to make that change. Therefore, an open Internet rule based on section 214 must be justified based on its ability to prohibit impairment of traditional telecommunications.[128] As a result, reliance on section 214 creates nearly identical risks as reliance on section 202.

Sections 251 and 256. Finally, the interconnection obligations imposed on common carriers do not provide a sufficiently stable statutory nexus for adopting open Internet policies. Section 251 mandates that telecommunications service providers must interconnect "directly or indirectly" with the facilities and equipment of other providers.[129] Section 256 asks the Commission to coordinate interconnectivity in the public telecommunications networks.[130]

As a threshold matter, the D.C. Circuit has rejected section 256 as a basis for ancillary authority to prohibit broadband Internet connectivity providers from blocking of lawful content. In *Comcast*, the court held:

> Section 256 directs the Commission to 'establish procedures for . . . oversight of coordinated network planning . . . for the effective and efficient interconnection of public telecommunications networks.' 47 U.S.C. § 256(b)(1). In language unmentioned by the Commission, however, section 256 goes on to state that '[n]othing in this section shall be construed as expanding ... any authority that the Commission' otherwise has under law, id. § 256(c) — precisely what the Commission seeks to do here.[131]

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[127] 47 U.S.C. § 214(a).

[128] *Cf. Comcast*, 600 F.3d at 655 (holding that in order to exercise ancillary authority, the Commission must demonstrate a link between the proposed policy and its effect on the services which the Commission currently regulates – telephony, broadcasting, and cable).

[129] 47 U.S.C. § 251.

[130] *Id.* § 256.

[131] *Comcast*, 600 F.3d at 659.

Thus, the Commission must rely on section 251 alone as creating the basis for ancillary authority.

While somewhat more sensible than many of the other proposals regarding ancillary authority,[132] any reliance on the principle of interconnection does not provide the Commission with certainty as it moves toward a net neutrality rule. The relevant language in section 251 mandates only that telecommunications carriers interconnect with each other.[133] This language might be used to require broadband network operators to ensure that their networks interconnect on the grounds that most Title-II voice traffic will slowly be migrated to IP-based networks. But it is harder to see how this language might reach non-discrimination obligations so long as prioritization does not undermine the physical connections between the networks.

In sum, if the Commission wishes to act in each of these critical policy areas, it faces independent and significant litigation risk with respect to each. If we as a nation are determined to achieve these key broadband goals and achieve them quickly, the Commission must address the dilemma created by *Comcast*.

2. The Commission should respond to the Comcast dilemma by classifying broadband Internet connectivity as a telecommunications service and pairing this decision with appropriate forbearance.

Classifying the transmission service offered within a broadband Internet service bundle as a telecommunications service provides the Commission with the simplest, surest, and speediest resolution to the issues raised by *Comcast*. Each policy goal would no longer require

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[132] *See, e.g.*, Letter from Kyle McSlarrow, President and CEO, National Cable & Telecommunications Association, to Julius Genachowski, Chairman, FCC, *A National Broadband Plan for our Future*, GN Docket No. 09-51; *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52 (Mar. 1, 2010) (proposing that universal service goals could be achieved by relying on an expansion of the E-rate program).

[133] 47 U.S.C. § 251(a).

the Commission to twist itself into an ancillary authority pretzel; rather, the FCC could make policy based a straightforward reading of the obligations that the Act imposes on telecommunications service providers. But in order for such an approach to succeed, it must define the service appropriately and employ a judicious and sensible forbearance regime. A well-designed approach will allow the Commission to pursue the nation's broadband goals without creating a burdensome regulatory regime. It should also keep faith with the text and principles of the Communications Act. We lay out our proposal below.

A. The Commission should adopt a broad, functional definition of broadband Internet connectivity.

The Commission should adopt a functional definition of Internet connectivity service that encompasses the capacity to send Internet data packets to and from points of a user's choosing on the network of networks known as the Internet. Consider, as a guide, the following example: Imagine a subscriber to Verizon's residential broadband service who wishes to read the Washington Post online. To view the contents of the Post, an application on the user's computer (a browser) communicates with an application at the Washington Post (the server which hosts the website). These two applications communicate by sending and receiving IP data packets. The user's broadband service provider is responsible for ensuring those packets are sent and received but does not alter the contents of those packets in transit. The network operator may choose specific network routes, schedule and queue the packets, and manage any congestion caused by traffic traveling over the network as a whole.

Using this example as a guide, the transmission of Internet data packets from the Post's server to the user's computer, without material change in the form or content of the information

as sent and received, is telecommunications.[134] The content and applications (for example, the offering of the story itself by the server and the use of the browser by the user) are information services that allow for publishing, storing, or making available information (in the case of the server) and the retrieving or acquiring of information (in the case of the browser) via telecommunications over a broadband network.[135]

Thus, Internet connectivity service is that service which transmits data from end to end over the Internet, the international computer network of both federal and non-federal interoperable packet-switched networks.[136] At a minimum, that service includes the sending, receiving, addressing, routing, scheduling, or queuing of data packets from one end point of a user's choosing to another on the Internet.

This functional definition characterizes broadband Internet connectivity service as one kind of telecommunications because it delivers information to and from points of a user's choosing.[137] Defining the broadband Internet connectivity service as end-to-end in nature has some important regulatory consequences. It effectively recognizes that broadband Internet access providers are telecommunications carriers subject to regulation under Title II of the Communications Act so long as they offer their services to the public. But it does not necessarily prejudge whether other players in the transmission space (for example, backbone transmission providers) should be considered telecommunications carriers under the Act. This determination will depend on whether those providers offer data transmission to and from points of a user's choosing "directly to the public, or to such classes of users as to be effectively

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[134] *See* 47 U.S.C. § 153(43); *id.* § 153(46).
[135] *See id.* § 153(20).
[136] *Id.* § 230(f)(1).
[137] *Id.* § 153(43).

available directly to the public."[138] And the Commission need not resolve that question in this proceeding.[139]

Defining the service as any other than end-to-end in nature may create significant statutory difficulties. The language of the Telecommunications Act speaks to data transmission to and from "points of a user's choosing."[140] In the case of this example, the points of the user's choosing are his own computer and the Washington Post's server. When the user purchases transmission, he expects his broadband provider to get data sent all the way to the Washington Post and back — regardless of whether his broadband provider transports the data entirely by itself or enters into peering or other arrangements to get the traffic to its ultimate destination. In fact, many users may be unaware of or indifferent to the existence of such arrangements. As such, the service as perceived by the end user includes the transmission of data all the way from one endpoint to another, not merely transmission from the user to a router where traffic may be handed off to another carrier.

In addition, the Commission should not rely on a rigid, layers-based approach to defining broadband Internet connectivity.[141] The concept of "Internet connectivity service" should not be defined to include activity solely at the Internet layer and below, as such a definition would create too great a risk of loopholes. Such a definition would leave network operators free to engage in harmful behavior at higher layers or through layer-violating

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[138] *Id.* § 153(46).

[139] By definition, this proposal would exclude content delivery networks, which provide access to particular stored content placed on various servers throughout the Internet, as well as other information service providers such as e-mail providers, cloud computing service providers, and other content and application providers who may use connectivity to deliver their services to end users. We discuss arguments to the contrary more fully in section III.D, *infra*.

[140] *Id.* § 153(43).

[141] *Broadband Authority NOI* at ¶ 60.

technologies such as Deep Packet Inspection. This higher behavior could potentially impact lower layer operations in the network but without clearly implicating Commission authority to oversee the activity. At the most extreme, network operators could install a higher-level service as a mandatory hop in the middle of the network communication, and could then assert that the use of the service terminated the Internet Protocol conversation initiated by the user, freeing up the rest of the network for harmful behavior not subject to Commission oversight.

The service described above clearly meets the definition of telecommunications. A telecommunications service "offers" the transmission of data "between or among points specified by the user . . . without change in the form or content of the information as sent and received."[142] The Commission has repeatedly recognized that an offering to transmit IP data packets from one point to another constitutes a telecommunications service. For example, in 2008, the Commission held that Compass Global offered telecommunications when it sold the capacity to "receive and transmit communications in Internet Protocol."[143] In so doing, the Commission concluded that a service that does not offer net protocol conversion to the end user does not offer an information service.[144] Indeed, the FCC recognized as early as 1998 that services "that result in no net protocol conversion to the end user are classified as basic services [and] are deemed telecommunications services."[145] The Commission has therefore held unequivocally that IP data transmission itself does not constitute "a capability for generating,

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[142] 47 U.S.C. § 153.

[143] *Compass Global, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd. 6125, ¶ 17 (2008).

[144] *See id.* at ¶ 20; *see also Petition for Declaratory Ruling That ATT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, 19 FCC Rcd. 7457, ¶ 12 (2004).

[145] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11501, ¶ 50 (1998) (*Stevens Report*).

acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[146] It has also specifically rejected that IP data transmission somehow warrants different regulatory treatment than other types of transmission: in concluding that Compass Global offered a telecommunications service, it specifically rejected Compass's argument that "its service must be an information service because it utilizes only IP and does not transmit voice traffic using traditional methods."[147]

The data transmission service offered by broadband providers is not inextricably intertwined with information service offerings. Given the above, the transmission of IP data packets between the user's end hosts and the end host on the other end of the IP connection is clearly "telecommunications" under the Act. For it to be a "telecommunications service," it needs to be "offered to the public."[148] The Commission has historically regarded a telecommunications offering that is inextricably intertwined with information service offerings as offering "integrated" information services but not offering a distinct telecommunications service.[149] For example, the 2002 *Cable Modem Order* discussed several such information services, including e-mail, newsgroups, and webhosting.[150] These services themselves undoubtedly constitute information services, as they manipulate and/or store information.[151] If a service includes both telecommunications and information service components, the Commission asks whether "a telecommunications input used to provide an information service that is not

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[146] 47 U.S.C. § 153(20).
[147] *Compass Global* at ¶ 17.
[148] 47 U.S.C. § 153(46).
[149] *See, e.g.*, *Cable Modem Order* at ¶ 38.
[150] *Id.*
[151] 47 U.S.C. § 153(20).

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."[152]

In 2010, it is plainly obvious that the various supposedly integrated service offerings of broadband providers (such as e-mail, data storage, caching and DNS) are all *functionally* separate from the offer of data transmission — that is, successful data transmission does not depend on the network operator providing any of these services.[153] A consumer need not use any of these offerings even if they are included in a broadband service bundle by a provider: indeed, third-party providers dominate the market for e-mail, data storage, and caching, and consumers can and increasingly do choose independent domain name resolution services.[154]

Moreover, even if a user subscribes to his broadband service provider's e-mail offering, he uses transparent data transmission if he does anything else on the Internet (for example, using a VoIP application like Skype or a peer-to-peer file sharing application like BitTorrent). As such, plain-vanilla data transmission retains a distinct identity within the broadband bundle.

Similarly, caching and DNS are functionally separate from the transmission service. A broadband subscriber utilizes caching, for example, only when accessing the World Wide Web.[155] Other applications like Internet telephony or live streaming video do not use caching.

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[152] *Cable Modem Order* at ¶ 39.

[153] *See Brand X*, 545 U.S. at 991. In section 4.B, *infra*, we discuss in detail empirical evidence that demonstrates both that (1) the separate markets that exist for information services and (2) consumers' current perceptions of broadband connectivity, as such perceptions can be inferred by the providers' own offerings and statements and consumer choices in the market for information services.

[154] *See infra* section 4.B; *see also* Susan Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 905 (2009).

[155] *Cf.* LARRY PETERSON & BRUCE DAVIE, COMPUTER NETWORKS: A SYSTEMS APPROACH 656 (4th ed. 2007) (discussing caching as a functionality pertinent to web pages; JAMES KUROSE & KEITH ROSS, COMPUTER NETWORKING: A TOP-DOWN APPROACH 108-12 (4th ed. 2008) (discussing caching as a functionality relevant only to the web and HTTP).

Thus, users can and do regularly use their IP data transmission service without using caching. Similarly, while DNS is used by many applications, the use of DNS is not required for an application to function on the Internet. For example, a client-server application that includes the IP address of the server does not use DNS. Similarly, an IP telephony application that allows users to enter the IP address of the called party does not use DNS either. Even applications that use DNS do not need to use the Internet access provider's DNS server. Instead, users can (and an increasing number of users do) use third party DNS offerings.[156] In sum, broadband Internet connectivity subscribers do not need and often do not use more than the capability of transmitting IP data packets between their own end hosts and other end hosts attached to the Internet.

Given that the information service offerings of broadband providers can be functionally separated from transmission, the mere fact that service providers *choose* to offer these services in a bundle does not alter the fundamental nature of each service. Even if "additional capabilities are classified as . . . information service[s], the packaging of these multiple services does not by itself transform [a] telecommunications component . . . into an information service."[157] The Commission has a long history of ignoring such tying arrangements and focusing on the characteristics of the service at issue, and by classifying broadband Internet connectivity as a telecommunications service, it would make a decision in line with those precedents. For example, in 1998, the Commission rejected the notion that an incumbent local exchange carrier could escape Title II regulation of its residential local exchange service simply by packaging that

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[156] *See* section 4.B, *infra*.

[157] *Regulation of Prepaid Calling Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, ¶ 15 (2006), *vacated in part sub nom. Qwest Servs. Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007) (*Prepaid Calling Card Order*).

service with voice mail.[158] Similarly, in its regulation of prepaid calling cards, the Commission held that menus that allowed users to access sports, weather, or restaurant information did not convert the telecommunications service offered by prepaid calling card providers into an information service.[159] Finally, the experiences of today's broadband providers lay bare the flaws in the argument that bundling determines classification. Many broadband providers today offer "triple-play" packages in which consumers can purchase a package that includes phone, broadband, and subscription video services.[160] No one has suggested that either the phone service or the video service offered in such packages should be considered an information service. As Justice Scalia put it most convincingly in his dissent in *Brand X*, "[t]he pet store may have a policy of selling puppies only with leashes, but any customer will say that it does offer puppies — because a leashed puppy is still a puppy, even though it is not offered on a 'stand-alone' basis."[161] Mere bundling cannot and should not convert a telecommunications service into an information service. Because broadband service providers sell a functionally distinct offering of IP data transmission to the public, that offering can and should be classified as a telecommunications service.

B. The classification should encompass wireless Internet connectivity service.

Wireless Internet access service plays an increasingly important role in the broadband ecosystem. In June 2005, Americans were using fewer than 60,000 wireless broadband

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[158] *Stevens Report* at ¶ 60.

[159] *Regulation of Prepaid Calling Order* at ¶¶ 3, 11, 15; *see also Brand X*, 545 U.S. at 998 ("[W]ere a telephone company to add a time-of-day announcement that played every time the user picked up his telephone, the "transparent" information transmitted in the ensuing call would be only trivially dependent on the information service the announcement provides.").

[160] *See, e.g.*, The Comcast Triple Play, http://www.comcast.com/Corporate/Learn/Bundles/bundles.html (last visited July 12, 2010).

[161] 545 U.S. at 1008 (Scalia, J., dissenting).

connections; by the end of 2008, 43 times that many high-speed Internet connections employed wireless technology.[162]

Wireless broadband connectivity must be classified as a telecommunications service alongside wireline connectivity services because it, too, meets the definition of a telecommunications service under the Communications Act. Moreover, the wireless broadband market currently fails to meet consumers' needs and Title III represents an unstable source of authority for Commission efforts to solve the wireless market's problems. Classifying both wireless and wireline broadband Internet connectivity as telecommunications services will give the Commission the necessary authority to execute the *National Broadband Plan*'s wireless provisions and prevent unnecessary market distortions that may result from disparities between wireless and wireline broadband regulation.

(1) Wireless Internet connectivity is a telecommunications service.

As an initial matter, wireless broadband transmission plainly meets the definition of a telecommunications service. Both wired and wireless broadband data transmission are IP-based, and both involve sending data packets from the source of a communication to its destination, without change. And as in the case of wireline broadband connectivity, this capability is not inextricably linked with other information services such as e-mail that a network provider may also offer to its users. Wired and wireless networks may require different types of network management,[163] but none of these distinctions affect the source or destination of the

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[162] FEDERAL COMMUNICATIONS COMMISSION, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2008 9 (2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf (*Form 477 Report*).

[163] *See generally* Scott Jordan, *Do Wireless Networks Merit Different Net Neutrality than Wired Networks?*, *Research Conference on Communication, Information and Internet Policy* (TPRC) (2010), *available at* http://www.ics.uci.edu/~sjordan/papers/tprc2010.pdf (categorizing and explaining differences in network management between wired and wireless networks,

transmission, or the form or content of the information so transmitted — they merely impact the speed and intermediate path of the packets. As a result, creating an artificial distinction between wired and wireless broadband transmission does not comport with the Act, which defines telecommunications as data transmission "regardless of the facilities used."[164]

(2) Consumers Need FCC Intervention in the Dysfunctional Wireless Broadband Market.

Consolidation and lack of competition in the wireless broadband market have resulted in high prices, lack of meaningful choice, and poor service quality. The mobile wireless industry, which serves the vast majority of wireless broadband consumers, lacks meaningful competition. A thorough evaluation of the four factors that the Commission considered in the *Fourteenth Report*[165] — market structure, provider conduct, market performance, and consumer behavior — shows that the largest wireless companies exercise undue market power to the detriment of consumer choice and innovation.[166]

In its review of competition in the wireless market, the Commission found that the weighted national average of Herfindahl-Hirshman Indexes (HHIs) at the end of 2008 was 2848—a 6.5 percent increase in concentration over the previous year and far beyond 1800, the

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concluding that the operations are not so different as to support the use of distinct rules for net neutrality for wired and wireless networks).

[164] 47 U.S.C. § 153(46).

[165] *See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services*, WT Docket No. 09-66, Fourteenth Report (2010), 2010 WL 2020768 (*Fourteenth Report*), *available at* http://www.fcc.gov/14report.pdf.

[166] *See* Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New American Foundation and Public Knowledge, *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 09-66 (June 15, 2009).

generally accepted threshold for "highly concentrated" markets.[167] Provider conduct, including parallel pricing, also demonstrates the lack of competition in the wireless market. For example, in 2009, Verizon and AT&T charged the same prices for a variety of combinations of data, text messages, and voice minutes.[168] Early termination fees and exclusive handset arrangements further hinder consumers who wish to "vote with their feet" for new services and pricing.

Wireless providers have demonstrated their unwillingness to correct these problems without FCC oversight. Incumbent providers continue to seek supracompetitive profits without fear that a new entrant will undercut their prices — a sign that the market lacks effective competition. Data prices in particular seem well removed from their actual cost, indicating a lack of price rivalry. For example, under AT&T's recently announced iPhone data pricing structure, customers pay a $20 fee for tethering in addition to data-use charges.[169] Aside from increased data consumption (for which iPhone consumers already pay), AT&T has no additional costs from tethering that justify the monthly charge. AT&T's ability to extract this fee highlights the lack of effective competition in the wireless broadband market and the need for action by the Commission.

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[167] *Fourteenth Report* at 15. HHI is an indicator of the amount of competition among firms in an industry. Department of Justice and Federal Trade Commission, *Merger Guidelines,* 1997, section 1.5. *See also* Neil B. Cohen & Charles A. Sullivan, *The Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration,* 62 TEX. L. REV. 453, 461 (1983). The Commission calculated the average HHI value for all mobile wireless services; it does not currently compute a separate HHI value for mobile broadband service.

[168] Bill Shrink.com, the Ultimate Cell Phone Plans Comparison, http://www.billshrink.com/blog/wp-content/themes/shrinkage/images/graphics/cell-phone-plans.png (last visited June 10, 2010).

[169] *See* Posting of Josh Levy to FreeMyPhone, http://www.freepress.net/freemyphone (June 8, 2010).

(3) The policy goals articulated by the Commission require revisiting the classification of wireless broadband.

Implementing several key broadband policy proposals may depend exclusively on Title-II classification of wireless services, and other proposals may suffer only incomplete execution unless the Commission classifies wireless Internet connectivity as a telecommunications service.

Universal service. The Commission's current research into solutions for closing the broadband gap shows that 4G wireless is the lowest cost technology to reach 90 percent of unserved housing units.[170] A classification decision that treats wireless broadband differently from wireline broadband could prevent the Commission from employing this important, cost-effective tool in its efforts to close the digital divide.[171]

Data roaming. Extending automatic voice roaming obligations to data services will help promote badly needed competition in the data market, drive down prices, and expand the adoption and utility of mobile broadband — especially among low-income and rural consumers.[172] But comments filed in the Commission's data roaming proceeding demonstrate disagreement over whether the Commission had adequate authority under Title III to implement automatic data roaming rules. Verizon and AT&T argue that wireless broadband is an

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[170] Federal Communications Commission, *The Broadband Availability Gap* 13 (Omnibus Broadband Initiative, OBI Technical Paper No. 1, 2010), *available at* http://download.broadband.gov/plan/the-broadband-availability-gap-obi-technical-paper-no-1.pdf.

[171] Despite its cost advantages, 4G technology may not be the best option for all un-served areas, given its relatively lower performance characteristics. Nevertheless, Title-II classification ensures that the Commission at least has the option of supporting 4G wireless through the Universal Service program where appropriate.

[172] For a more detailed discussion of the importance of data roaming to a well-functioning mobile wireless broadband, see Comments of Free Press, *Roaming Obligations of Commercial Mobile Service Providers and Other Providers of Mobile Data Services,* WT Docket No. 05-265 (June 14, 2010).

information service and therefore, under section 153(44), [173] is not subject to common carrier requirements—which the Commission has determined include automatic roaming obligations.[174] Classifying wireless broadband as a telecommunications service would solidify the Commission's authority to use sections 201(b) and 202(a) to enforce an automatic data roaming obligation.

Public safety. As set forth more fully above, the Commission's ability to create a nationwide, interoperable public safety network depends exclusively on a sound foundation for its authority over wireless data networks.

Other consumer protection measures. As set forth above, wireless carriers employ some of the most notorious pricing tactics in the markets for communications services. As such, consumers need the same protections in the wireless market as they do in the market for wired broadband. Similarly, consumers expect the same level of privacy protection in the mobile data space as they do over mobile voice and wired broadband. Indeed, mobile data users likely do not realize that their private information receives protection while they use their phones for voice service, but that protection expires when they use *the same devices* for data service.[175] Title-II

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[173] 47 U.S.C. § 153.

[174] *Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, WT Docket No. 00-193, Notice of Proposed Rulemaking, 15 FCC Rcd 21628, ¶ 15 (*2000 Roaming NPRM*).

[175] *See Wireless Broadband Order* at 5927 (concurring statement of Commissioner Michael J. Copps) ("Under our precedent, a consumer who uses the CMRS features of the device to place a phone call can be secure in the knowledge that our Title II CPNI rules require the carrier to protect his or her call and location information. But what about when that very same consumer uses that very same device just moments later to send an email via Wi-Fi, to call up a map of his or her location via a browser, or even to place a VoIP call to another Internet user? Because *those* services--which the customer can be excused for thinking of as functionally identical to the CMRS call--are now classified as Title I information services, the carrier appears to be entirely free, under our present rules, to sell off aspects of the customer's call or location information to the highest bidder. *Caveat emptor*, indeed!").

classification could bring to smartphones and other mobile data devices a consistent set of consumer protections more in line with consumer expectations.

(4) Title III may not provide the authority the Commission needs to promote competition and consumer choice in the wireless broadband market.

The limits to the Commission's Title III authority over wireless broadband connectivity remain untested. Little, if any, precedent illuminates the scope of the Commission's authority to regulate licensees in the absence of the statutory mandates to regulate broadcasting and mobile voice service. Because uncertain or inadequate statutory authority could put important broadband policies on hold during protracted litigation, timely progress toward the Commission's wireless goals requires the solid statutory foundation that only telecommunications service classification can provide.

In the *2007 Wireless Broadband Order*, the Commission determined the commercial mobile service (CMRS) provisions of section 332 inapplicable to wireless broadband services.[176] Section 332 applies the substantive provisions of Title II to commercial mobile services, and it contains a similar forbearance provision to that contained in section 10 of the Act.[177] In that order, the Commission noted that, even absent the common carrier authority provided to CMRS services, the Commission retained the general jurisdiction to "regulate radio communications and transmission of energy by radio," "grant, revoke or modify licenses," and "make such rules restrictions and conditions as may be necessary to carry out the provisions of the Act."[178] But these mandates must have some boundaries, and little precedent explores those contours. Indeed,

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[176] In the 2007 order, the Commission cited tension in the Communications Act that made CMRS status logically incompatible with their finding that wireless broadband is an information service. Reclassifying wireless broadband as a telecommunications service eliminates the tension. *Wireless Broadband Order* at ¶¶ 40-56.

[177] 47 U.S.C. § 332.

[178] *Wireless Broadband Order* at ¶ 56 (internal quotations omitted).

in the Commission's recent wireless data roaming proceeding, various commenters cautioned that the Commission's general Title III authority cannot be unbounded.[179] In particular, the Commission should be wary of relying on section 303(r), which grants the Commission only the authority to "carry out" provisions found elsewhere in the Act.[180]

(5) Isolating Wireless Broadband as an Information Service Could Have Negative Consequences.

Isolating the regulatory treatment of wireless broadband from that of similar wired services may lead to unintended consequences. If the Commission distinguishes wireless broadband from wireline high-speed Internet access for regulatory purposes, it should reexamine the state of broadband competition without considering wireless broadband to be a meaningful competitor to wired offerings. Under such a distinct regulatory silo model, very different protections would apply to consumers and to competition, and the markets and the services for wireless and wireline broadband would function in distinct and independent ways. In its most recent report on the status of high-speed Internet access, the Commission's Wireline Competition Bureau includes wireless broadband, both fixed and mobile service, in its conclusions about the number of provider choices available in each census tract.[181] Additionally, the National Broadband Plan recommends that the FCC, NTIA, and Congress take steps to "foster wireless-wireline competition at higher speed tiers."[182] By singling out broadband delivered wirelessly for an information service classification, the Commission would implicitly find that wireless

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[179] *See, e.g.,* Comments of T-Mobile USA, Inc., *Reexamination of Roaming Obligations of Commercial Mobile Service Providers and Other Providers of Mobile Data Services,* WT Docket No. 05-265, at 2 (June 14, 2010); Comments of Sprint Nextel Corp., *Reexamination of Roaming Obligations of Commercial Mobile Service Providers and Other Providers of Mobile Data Services,* WT Docket No. 05-265, at 4 (June 14, 2010).

[180] 47 U.S.C. § 303(r).

[181] *Form 477 Report* at 30.

[182] *National Broadband Plan* at 35.

high-speed Internet service is a service *so* different in kind that it does not compete with wired broadband, and it should consider a new, fresh inquiry into broadband competition in a market that excludes more than 25 million high-speed wireless connections.[183]

Isolating regulation of wireless broadband may also skew investment incentives. The nation's dominant broadband providers have described Title-II classification as threatening to innovation and investment.[184] These doomsday prophecies misstate the impact of FCC action on broadband provider investment,[185] but if the Commissions lends credence to them, applying Title II obligations to the wired sector exclusively could skew business decisions. If wireless and wireline broadband are regulated separately, companies and investors may choose to shift their focus to the technology governed by the regulations they prefer, ultimately hindering the FCC's ability to achieve its goals. For example, although wireless technology will be a valuable part of the effort to expand the reach of broadband to unserved areas, low speeds make many wireless connections ill-suited for today's advanced applications. More than half of all wireless connections operate at speeds slower than 200 kbps upstream or 768 kbps downstream.[186] Isolating wireless may ultimately, and unwisely, redirect investment away from the high-quality,

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[183] *Form 477 Report* at 9. Indeed, Free Press has never espoused the view that wireless broadband competes with wired broadband, though it does share the same definitional characteristics that make both wireless and wired broadband a telecommunications service.

[184] *See, e.g.,* Posting of Eric Savitz to Tech Trader Daily, http://blogs.barrons.com/techtraderdaily/2010/05/06/comcast-disappointed-with-fcc-move-to-reclassify-broadband/ (May 6, 2010 12:30 EST); Press Release, Verizon, Verizon Statement on FCC Vote on Broadband Internet Services Inquiry (June 17, 2010), *available at* http://newscenter.verizon.com/press-releases/verizon/2010/Verizon-Statement-on-FCC-Vote-on-Broadband-Internet-Services-Inquiry.html.

[185] *See* S. Derek Turner, *Finding the Bottom Line: The Truth About Network Neutrality & Investment* (2009), *available at* http://www.freepress.net/files/Finding_the_Bottom_Line_The_Truth_About_NN_and_Investment_0.pdf.

[186] *Form 477 Report*, at 15.

fast Internet access service consumers need to get the most out of broadband, and toward limited performance services that lack adequate market pressure or regulatory oversight to protect consumers and promote competition. If the Commission wants to implement the National Broadband Plan effectively and efficiently, it must classify wireless broadband Internet connectivity as a telecommunications service.

C. The Commission must apply section 10 forbearance in a way that protects consumers and promotes competition.

The Commission should pursue forbearance and reversals of forbearance carefully. In addition to the six provisions laid out by the Commission in its Third Way proposal, it should also impose the obligations contained in sections 214, 251(a), and 256 on broadband service providers.

(1) The Commission must require broadband Internet connectivity providers to comply with sections 201, 202, 208, 222, and 255 of the Communications Act.

Under his Third Way proposal, FCC Chairman Julius Genachowski has recommended broad forbearance but intends to apply sections 201, 202, 208, 254, and possibly 222 and 255, to all broadband service providers.[187] Although the Commission should undergo a comprehensive evaluation before forbearing from any parts of Title II, leaving these sections undisturbed is an essential component of preserving Commission authority over broadband services. The Commission has never granted forbearance from sections 201, 202, and 208; in fact, in crafting section 332 of the Communications Act to apply Title II regulations to CMRS providers, Congress prohibited the Commission from granting forbearance from sections 201, 202, and 208 for CMRS services.[188] Sections 201 and 202 provide fundamental Commission authority over two-way interstate communications — and section 208 enables the complaint system used in

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[187] *Broadband Authority NOI* at ¶¶ 68, 74.

[188] *Id.* at ¶ 75.

practice to enforce these and other Title II regulations.[189] Sections 222, 254, and 255 provide direct authority to fulfill three fundamental Commission duties: protect the privacy of broadband service users, promote increased deployment and adoption through the Universal Service Fund, and ensure that broadband services are accessible to individuals with disabilities.[190] Without each of these provisions, the Commission may find itself unable to fulfill key components of the National Broadband Plan.

(2) The Commission must retain authority to ensure network connectivity, interconnection, and reliability.

The outcome of this proceeding must ensure the Commission's authority to preserve connectivity and reliability for the nation's broadband infrastructure. At home and abroad, high-speed Internet access is no longer a luxury good; it is a virtual necessity like access to water and electricity.[191] Broadband networks increasingly carry ever more varied communications, including voice and video services that historically have been transmitted over distinct media. Thus, while retail broadband services obviously have distinct economic value in themselves, they also hold up our entire economy and increasingly serve as our basic means for sending and

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[189] *Id.* at ¶¶ 76-77.

[190] *Id.* at ¶¶ 78-85.

[191] In one of the most well-known and widely criticized comments on high-speed access services, in 2001 recently appointed Chairman Michael Powell commented that the notion of a digital divide was somewhat like a "Mercedes Benz divide" – everyone may want one, but that doesn't mean has the right to one. *See, e.g.*, Ben Scott and Craig Aaron, *The United States of Broadband*, *TomPaine.com* (July 11, 2005), http://www.tompaine.com/articles/2005/07/11/the_united_states_of_broadband.php. Contrast the statements of Chairman Powell in 2001 with current views in 2010: As of July 1, 2010, Finnish citizens have a basic legal right to access to broadband transport services at a reasonable monthly price. Stacey Higginbotham, *Is Broadband a Basic Right? Finland Says Yes!*, *GigaOm* (July 1, 2010), http://gigaom.com/2010/07/01/is-broadband-a-basic-right-finland-says-yes/.

receiving information.[192] Thus, the potential harms from any short- or long-term disconnections of this essential infrastructure, or any other defects in network reliability, are staggering.

Broad forbearance from regulations and statutory provisions related to interconnection and reliability may jeopardize the Commission's ability to protect against such harms. Left alone, the market can and will eventually produce circumstances where adequate interconnection and network reliability measures are not in a network operator's financial self-interest. But decisions to skimp on interconnection or reliability costs would generate substantial externalities in the form of potential harm for other network operators and users.

Indeed, we witness harms of this form even in sectors where the Commission retains clear oversight authority. Consider the cable television industry: The Commission has established rules requiring reasonable negotiation for carriage of channels on nondiscriminatory terms, yet disagreements routinely result in non-carriage and Commission adjudication.[193] And for broadcast retransmission, where the Commission has no such adjudicatory backstop in place yet where carriage is considered essential by both content companies and cable distributors, private negotiations nevertheless produce disconnections that create substantial harm for

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[192] *See, e.g.*, *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*, ET Docket No. 04-35, WC Docket No. 05-271, GN Docket Nos. 09-47, 09-51, 09-137, Public Notice, 2010 WL 2663026 (2010), at 1 ("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.") (*Public Safety Service Disruption PN*).

[193] *See, e.g.*, *Tennis Channel Files an FCC Complaint Against Comcast*, BLOOMBERG BUSINESSWEEK (Jan. 6, 2010), *available at* http://www.businessweek.com/news/2010-01-06/tennis-channel-files-an-fcc-complaint-against-comcast-update1-.html (discussing a program access complaint filed by Tennis Channel against Comcast, alleging discrimination in favor of Comcast's own content).

consumers.[194] In both these areas, the Commission's authority to intervene is well established. Excessive forbearance of essential sources of authority over broadband would create an even greater risk of disruption by endangering the Commission's ability to intervene. More than broadcasting and cable, broadband connectivity is our economy's lifeblood. For such critical infrastructure, the Commission must have authority to oversee interconnection.

To ensure Commission authority over network connectivity, the Commission should not forbear from sections 251(a) and 256 of the Act. Two separate provisions in the Communications Act relate to connections between and among telecommunications service providers: Section 201(a) establishes a duty for common carriers "to establish physical connections with other carriers," and section 251(a) establishes a duty for telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Two additional sections, 255 and 256, set out additional provisions related to network connectivity and access, and section 251(a) establishes a duty to comply with guidelines and standards developed under those sections.[195] Although the Commission's proposed forbearance would leave 201 and 255 in place, sections 251(a) and 256 provide distinct authority that must not be set aside. Since the loss of the authority provided by 251(a) and 256 would imperil the Commission's ability to ensure continued network

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[194] *See, e.g.*, Comments of Free Press, Parents Television Council, and Consumers Union, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, at 6-7 (May 18, 2010) (discussing disruptions of service that may result from stalled or terminated carriage negotiations, and the merits of limited interim carriage as part of reform to help alleviate the resulting consumer harms).

[195] Although the *Broadband Authority NOI* suggests that section 255 will continue to apply under the Commission's proposed limited Title-II framework, failure to apply section 251(a)(2) may undermine this policy objective. *See Broadband Authority NOI* at ¶¶ 84-85.

connectivity, forbearance from applying these provisions would not be consistent with the public interest, and thus at least one provision of the section 10 test would not be met.[196]

Although their language is similar, sections 201 and 251(a) provide distinct sources of authority for the Commission to ensure interconnection, and section 201 does not render 251(a) superfluous or unnecessary. Among other distinctions, section 201 does not confer authority to the Commission to regulate purely intrastate telecommunications activity. On its face, section 201 applies to "every common carrier engaged in interstate or foreign communication by wire or radio."[197] Section 201 was enacted as part of a dual regulatory scheme under which states regulated the activity of intrastate-only service and the Commission regulated interstate carriers. Section 251 was part of an effort to move away from this system and to give the Commission authority to regulate both intrastate and interstate telecommunications activity.[198] The D.C. Circuit has similarly interpreted sections 201 and 251 to create distinct, although overlapping, regulatory regimes, though the court found that dial-up Internet traffic implicated both regimes because the communications involved were inherently interstate in nature even though they traveled over local, intrastate phone calls.[199] Because section 201 does not include purely

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[196] *See* 47 U.S.C. § 160 (stating that the Commission may forbear from applying obligations to telecommunications carriers when "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;" "enforcement of such regulation or provision is not necessary for the protection of consumers;" and "forbearance from applying such provision or regulation is consistent with the public interest").

[197] 47 U.S.C. § 201(a).

[198] *See, e.g.*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98; *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, First Report and Order, 11 FCC Rcd 15499, ¶¶ 84-86 (1996) (*Local Competition Order*).

[199] *Core Communications, Inc., v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010) ("Dial-up internet traffic is special because it involves interstate communications that are delivered through

intrastate activity, its applicability without section 251 is unclear regarding broadband services that do not involve any interstate communications.

Section 214 also serves a vital role in establishing Commission authority over disconnections, transfers of service, and network security and reliability. The Commission cannot forbear entirely from applying the mandates contained in section 214.[200] Many aspects of the section, such as those requiring certificates for extensions of lines and notifications of minor network changes, likely warrant forbearance under the analysis prescribed in section 10 of the Act. But forbearance from other portions of section 214 would jeopardize the Commission's ability to ensure the continued connectivity of our nation's dominant communications infrastructure, to promote competition through the review of mergers of broadband companies, and to ensure adequate security of network infrastructure in response to increasing cyberattacks.

Ensuring continued connectivity of all citizens to the broadband network infrastructure requires the Commission to apply its statutory oversight over discontinuances to broadband connections. If the Commission forbears from applying section 214 in entirety, broadband service providers could be legally permitted to disconnect service at will.[201] Forbearance, then, would threaten the ability of individuals and organizations to connect to the network and would generate economic and social externalities that could not be easily remedied. Moreover,

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local calls; it thus simultaneously implicates the regimes of both § 201 and of §§ 251-252. Neither regime is a subset of the other.").

[200] *See Broadband Authority NOI* at ¶ 88.

[201] Even without section 214, the Commission might retain some authority through section 201 to regulate specific disconnections as unreasonable practices. However, the scope of such authority would be relatively unclear if the Commission had previously declared its section 214 authority over service disconnections as unnecessary to serve the public interest. Furthermore, even if section 201 were used to create broad protections against unfair disconnections, the "just and reasonable" standard would still create gaps and hurdles to enforcement that would threaten the practical benefits of such protections.

disconnection has particularly significant consequences because most consumers are served by at most two broadband service providers.[202] As a result, disconnection can leave a consumer with few (or no) other options for affordable, effective connectivity.

By establishing Commission authority over service additions and discontinuances, section 214 also provides the Commission with authority to review mergers involving telecommunications service providers. Current mergers involving broadband companies are reviewed by the FCC pursuant to its authority over spectrum license holders[203] or telecommunications services under section 214.[204] But as voice and video services continue to converge onto broadband and IP platforms, it is no longer difficult to imagine a future merger or acquisition of a company that offers only broadband service.[205] Such a transaction may well include no transfer of traditional voice service or spectrum license, and thus may provide no hook for Commission review. Forgoing statutory authority to review mergers of broadband

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[202] The Commission's National Broadband Plan revealed that 96 percent of all homes in the United States have 2 or fewer choices for wireline broadband service. *National Broadband Plan* at 37.

[203] In the proposed merger between Comcast and NBC, the Commission has reviewing authority pursuant to its section 310(d) authority over spectrum licensees. *Commission Seeks Comment on Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses*, MB Docket No. 10-56, Public Notice, 24 FCC Rcd. 2651, 2651 n.1 (2010) (citing 47 U.S.C. § 310(d)).

[204] The proposed merger between Qwest and CenturyTel suggests FCC reviewing authority under sections 214 and 310(d) of the Communications Act, and section 2 of the Cable Landing License Act. *Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc., D/B/A/ CenturyLink for Consent to Transfer of Control*, WC Docket No. 10-110, Public Notice, 2010 WL 2148726 (2010).

[205] *Cf.* Saul Hansell, *Verizon Boss Hangs Up on Landline Phone Business*, N.Y. TIMES, Sept. 18, 2009; Comments of AT&T, Inc. on the Transition From the Legacy Circuit-Switched Network to Broadband, *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, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 09-137 (Dec. 21, 2009).

service providers would hamstring the Commission's ability to protect competition in the broadband market and to ensure that broadband services are operated by businesses with sufficient financial standing to keep connectivity constant; thus, forbearance from broadband merger authority cannot be consistent with the public interest. Such a result would also be inconsistent with the Commission's stated goals for any form of reclassification resulting from this proceeding.[206] Without section 214, the Commission could even find itself without authority to intervene in the acquisition of a broadband service provider by a foreign government, including governments known to have unfriendly views toward free speech and commerce online — a result that should be concerning to all participants in the Internet ecosystem.

Finally, forbearance from section 214 might also jeopardize the Commission's ability to ensure that the broadband network infrastructure is robust and reliable in the face of growing security threats. Section 214(d) authorizes the Commission to require a carrier to "provide itself with adequate facilities for the expeditious and efficient performance of its service."[207] As noted in the National Broadband Plan, broadband infrastructure "may or may not be built to the[] high standards" of carrier-class reliability expected from older communications networks.[208] The Plan therefore recommended that the Commission begin a proceeding to determine the "reliability and resiliency standards" for broadband infrastructure, and "to determine what action, if any, the FCC should take" to improve network reliability and resiliency.[209] Authority to mandate any changes from network operators to improve the reliability of their networks would almost certainly require section 214. Thus, forbearance from section 214 would likely jeopardize the

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[206] *See Broadband Authority NOI* at ¶ 97.

[207] 47 U.S.C. § 214(d).

[208] *National Broadband Plan* 322-23.

[209] *Id.* at 323.

Commission's authority to ensure adequate security and reliability of broadband infrastructure — a result plainly inconsistent with the public interest.

Continued enforcement of sections 251, 256, and 214 would not disrupt the status quo. Retention of Commission authority over broadband service providers that includes sections 251, 256, and 214 would be well within the collective current understanding regarding the role of the Commission in the broadband market.[210] Continued applicability of these sections would not confer new authority above and beyond what the Commission assumed it retained prior to the D.C. Circuit decision in *Comcast*. For example, after adopting the *Wireline Broadband Order* and the accompanying *Internet Policy Statement* in 2005, the Commission asserted that it had the duty to "preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age," among other goals.[211]

Similarly, Title-II classification that applied sections 251, 256, and 214 to broadband Internet connectivity providers would mirror the Commission's regulatory regime for CMRS, and the Commission has previously looked to the mobile voice market for guidance on how to move forward after *Comcast*.[212] The Commission unmistakably retains authority to regulate CMRS interconnection with telecommunications carriers, and these obligations have helped, rather than hindered, the robust development of the wireless voice market.[213]

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[210] *See Broadband Authority NOI* at ¶¶ 69-70, 73 ("[T]he forbearance discussed here would be designed to maintain a deregulatory status quo for wired broadband Internet service…").

[211] *Internet Policy Statement* at ¶ 4.

[212] Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework for Addressing the* Comcast *Dilemma*, (May 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf ("Although it would be new for broadband, this third way is a proven success for wireless communications.").

[213] *Local Competition Order* at ¶ 34; 47 U.S.C. § 310(d).

(3) The Commission Must Retain Authority to Promote Competition.

The Commission must not jeopardize its own authority to act to promote competition in the broken market for wired broadband service. As such, it should not categorically forbear from sections 251(b) and 251(c) of the Act.[214]

Although applicable only to local exchange carriers, sections 251(b) and 251(c) provide the most direct sources of competition policy authority to the Commission: the authority to require nondiscriminatory access to unbundled network elements and competitive reselling.[215] The Commission has largely abandoned open access policies of all forms for the retail broadband market, even though a recent study commissioned as part of the National Broadband Plan determined that open access policies had succeeded in promoting broadband competition in other countries[216] and the Commission has noted these policies ability to increase broadband investment.[217] We do not presume that such policies would be necessary in many or any markets, either now or in the future, but blanket forbearance prematurely takes these options off the table. In the case of these particular provisions, the Commission should decline to make a categorical, nationwide determination and engage in a market-by-market analysis to determine

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[214] Of course, other sections the Commission proposes to retain — such as sections 201 and 202 — do provide some authority to develop pro-competitive policies. We highlight section 251 here because it could be an important lever if competition diminishes in various geographic markets.

[215] 47 U.S.C. § 251(c)(3).

[216] *See* Yochai Benkler et al., *Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy from Around the World*, (Berkman Center for Internet and Society at Harvard University 2009) (*Berkman Center Study*), *available at* http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf.

[217] *Inquiry Concerning the Deployment 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 of 1996*, CC Docket No. 98-146, Second Report, 15 FCC Rcd. 20913, ¶ 196 (2000) ("The availability of unbundled network elements and line sharing has spurred tremendous invest ment in DSL deployment").

whether such policies are necessary to promote competition and protect the public interest.[218] Indeed, the Commission has previously acknowledged that when weighing competitive considerations, the market for broadband services is fundamentally local.[219] Section 10 of the Communications Act requires the Commission conduct forbearance determinations on an appropriate geographic-market basis, and it is clear from the National Broadband Plan data that competitive conditions do vary widely between local markets.

(4) The Commission should not delay implementation indefinitely.

Should the Commission wish to provide time to adjust to new requirements or smooth out any other transitional details, the Commission can delay the effective date of a classification decision, a forbearance order, or changes to Commission rules for a short, fixed window of time.[220] For example, an order addressing Title-II classification could be released at the same time as the opening of a forbearance proceeding, and could set an effective date to be the sooner of 120 days or the release of a final order in the associated forbearance proceeding. Such a window would provide a shot clock to encourage active and meaningful participation in the

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[218] *See* 47 U.S.C. § 160. The Commission's own recent approach takes these competitive concerns seriously by returning to a rigorous market power analysis. *See Petition of Qwest Corporation for Forbearance Pursuant To 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 2010 WL 2526677 (2010).

[219] *See Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, To AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd. 6547, ¶ 74 (2001) ("The relevant geographic markets for residential high-speed Internet access services are local. That is, a consumer's choices are limited to those companies that offer high-speed Internet access services in his or her area, and the only way to obtain different choices is to move. While high-speed ISPs other than cable operators may offer service over different local areas (e.g., DSL or wireless), or may offer service over much wider areas, even nationally (e.g., satellite), a consumer's choices are dictated by what is offered in his or her locality.") (footnote omitted).

[220] *Id.* at ¶ 100.

forbearance proceeding and would simultaneously ensure that the Commission does not become indefinitely unable to pursue the essential pro-consumer and pro-competition broadband policies that hinge on a clarification of statutory authority. If a fixed date is not used as part of the effective date, incumbent carriers seeking to obstruct Commission authority would have incentives to delay the proceeding, rather than participate in it and help the Commission achieve its objectives.[221] Only targeted, speedy, and thoughtful forbearance will allow the Commission to move forward in the public interest.

3. Classifying broadband Internet connectivity as a telecommunications service would endow the Commission with a bounded authority that is entirely consistent with the 1996 Telecommunications Act.

The Title II approach outlined above harmonizes the regulatory framework for broadband with long-standing principles of communications law and policy. For various reasons outlined below, it better effects communications policy's traditional distinction between connectivity and content — a distinction that has allowed speech and commerce to flourish while maintaining the integrity and stability of the nation's communications infrastructure. On the other hand, the principal policy objections to a Title II approach — that it will lead to an onerous regulatory

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[221] The Commission should not link the classification decision with its forbearance order. *See Broadband Authority NOI* at ¶ 99. Both legal and practical considerations counsel in favor of distinct and unlinked orders: First, the Act creates distinct tests for the classification question and forbearance determinations. Nothing in the Act suggests that classification should somehow be contingent on forbearance; rather, a telecommunications service is defined as such because it meets the criteria set forth in section 153. Second, as a practical matter, linking the two orders diminishes the incentives of carriers to participate productively in the forbearance process, as it allows them a separate opportunity to derail the Commission's efforts to reestablish its authority over broadband networks.

Tying the two orders helps the Commission preserve a specific political balance, but the outcome of this proceeding must not be determined on the basis of politics, but rather on the basis of sound law and good policy. Any eventual reviewing court will evaluate the Commission's ultimate order on its legal merits, not its political ones. Poison pills designed to put a political balance ahead of legal analysis would assuredly not fare well on review.

regime for the entire Internet ecosystem and will stifle investment — stem largely from an unsupported fear campaign waged by opponents of Title II classification.

A. Classifying broadband Internet connectivity as a telecommunications service would be consistent with the statutory framework set forth in the 1996 Act.

In 1996, Congress passed the Telecommunications Act to "promote competition" in the telecommunications markets and "encourage the rapid deployment of new telecommunications technologies."[222] The Act added three new definitions to the Communications Act of 1934. Under the 1996 Act, a "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[223] "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[224] By contrast, an information service is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[225]

In explaining these definitions, Congress indicated that the transmission service was a separate service distinct from information services like e-mail or web browsing that might depend on the transmission service. A Senate report sheds light on the issue by noting that the

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[222] Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). The 1996 law marked the first comprehensive revision of 1934 Communications Act. *See, e.g., TCI Cablevision of Oakland County, Inc.*, Order on Reconsideration, 13 FCC Rcd. 16400, ¶ 7 (1998).

[223] 47 U.S.C. § 153(46).

[224] *Id.* § 153(43).

[225] Id. § 153(20).

definition of telecommunications "excludes those services, such as interactive games or shopping services or other services involving interaction with stored information, that are defined as information service. *The underlying transport and switching capabilities on which these interactive services are based, however, are included in the definition of 'telecommunications services.'*"[226] Thus, if the FCC were to decide that Internet access service as now provisioned by major ISPs includes both a telecommunications service and an information service, that conclusion would be completely consistent with the legislative intent animating the 1996 Act.

Moreover, the 1996 Act was built on a regulatory framework that recognized that a basic transmission service could and should be regulated separately from information services that run over that same transmission. In particular, both Congress and the Commission recognized that the definitions in the 1996 Act were intended to codify the categories set out by the Commission in a set of orders called the *Computer Inquiries*.[227]

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[226] S. REP. 104-35, at 17-18 (1996) (emphasis added); *cf. Brand X*, 545 U.S. at 1012 (Scalia, J., dissenting) ("The first sentence of the FCC ruling under review reads as follows: 'Cable modem service provides high-speed access to the Internet, *as well as* many applications or functions that can be used with that access, over cable system facilities.' . . . . Does this mean that cable companies 'offer' high-speed access to the Internet? Suprisingly not, if the Commission and the Court are to be believed.")

[227] *See, e.g.*, H.R. REP. 104-458, at 114 (1996) ("New subsection (pp) defines 'information service' similar to the Federal Communications Commission's ('the Commission') definition of 'enhanced services.'"); *id.* at 115-116 (1995) (expressing Congress's intent to adopt the framework set forth in *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982)); *Am. Tel. & Tel. Co.*, 552 F. Supp. at 178 n.198, 223 (adopting the Commission's *Computer Inquiries* framework); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, 11 FCC Rcd. 21905, ¶¶ 102-103 (1996); *Stevens Report* at ¶ 21 ("Reading the statute closely, with attention to the legislative history, we find that Congress intended the categories of 'telecommunications service' and 'information service' to parallel the definitions of 'basic service' and 'enhanced service' developed in our Computer II proceeding, and the definitions of 'telecommunications' and 'information service' developed the Modification of Final Judgment breaking up the Bell system.").

In the *Computer Inquiries*, the Commission contrasted "basic" transmission services (telecommunications services in today's vocabulary) with "enhanced services" (now information services).[228] Basic services were "common carrier offering[s] of transmission capacity for the movement of information," and they provided "a communications path for the analog or digital transmission of voice, data, [and] video."[229] The Commission distinguished basic services from "enhanced services," which were offered over common carrier services but employed "computer processing applications that act[ed] on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information."[230]

After establishing these definitions, the Commission consistently interpreted them to hold that the telecommunications component of a bundled package (like Internet access service) was separately regulated as a basic service under the *Computer Inquiry* rules. For example, in 1988, the Commission concluded that "[s]ince the Computer II regime, we have consistently held the addition . . . of enhancements . . . to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations."[231]

Similarly, in 1995, the Commission rejected the notion that a facilities-based carrier could bundle its common carrier and enhanced services offerings into one completely unregulated enhanced services offering. A contrary approach "would allow circumvention of the [*Computer Inquiries*'] basic-enhanced framework. . . . This is obviously an undesirable and

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[228] *Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, 77 F.C.C.2d 384, ¶¶ 93, 97-98 (1980) (*Second Computer Inquiry*).

[229] *Id.* at ¶ 93.

[230] *Id.* at ¶ 86.

[231] *Filing and Review of Open Network Architecture Plans*, CC Docket No. 88-2, Memorandum Opinion and Order, 4 FCC Rcd. 1, ¶ 274 (1988) (footnotes omitted).

unintended result."[232] Because classifying broadband Internet connectivity services as telecommunications services would remain faithful to the basic/enhanced or telecommunications service/information service dichotomy and because it would prohibit broadband providers from deregulating themselves by simply bundling their telecommunications service with other service, the Commission can and should take this action.

B. The Commission's early treatment of broadband Internet service, both before and after the 1996 Act, recognized that it contained both a telecommunications service and an information service component.

The Commission's first forays into understanding the nature of Internet access service remained faithful to the *Computer Inquiry* framework and later to the 1996 Act. In 1995, the Commission held that frame relay service, an early packet-switching transmission service, constituted a basic service, even though it was offered in a bundle with enhanced services.[233] Similarly, in its first analysis of broadband Internet access over DSL, the Commission concluded:

> An end user may utilize a telecommunications service with an information service, as in the case of Internet access. In such a case, however, we treat the two services *separately*: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.[234]

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[232] *Independent Data Manufacturers Ass'n*, Memorandum Opinion and Order, 10 FCC Rcd. 13717, ¶ 44 (1995) (*Frame Relay Order*); *see also United States v. Western Elec. Co.*, 907 F.2d 160, 163 (D.C. Cir. 1990) (characterizing the same approach as creating "an enormous loophole").

[233] *Frame Relay Order* at ¶¶ 35-36, 40.

[234] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24012, ¶ 36 (1998) (emphasis added) (*Advanced Services Order*); *see also id.* at ¶¶ 3, 11, 35 (noting that packet-switched services are "basic services" and characterizing advanced services as "wireline broadband telecommunications services).

Thus, the FCC's early treatment of DSL follows its traditional treatment of facilities-based providers of enhanced services: a facilities-based provider offering an enhanced service always offers a basic service and an enhanced service. [235]

Similarly, the FCC's 1998 report to Congress regarding universal service obligations (colloquially called the *Stevens Report*) did not deviate from this analysis. In recent weeks, broadband network operators have attempted to distort the conclusions of this report — they claim that the report represented the first recognition that broadband Internet access service constituted an integrated information service.[236]

This canard dramatically distorts the context and conclusions of the *Stevens Report*. At the time the FCC issued the *Stevens Report*, approximately 98 percent of households with Internet connections then used traditional telephone services to "dial up" to their Internet access provider, which were typically separate entities from the user's telephone service providers.[237] Indeed, the report itself acknowledges this prevailing reality: in describing the state of the market at the time, it states, "Internet access providers, typically, own no telecommunications facilities.

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[235] *See, e.g.*, *Frame Relay Order* at ¶¶ 41-44 ("The assertion by AT&T and other commenters that the enhanced protocol conversion capabilities associated with AT&T's InterSpan service bring it within the definition of an enhanced service is beside the point. Under the Commission's *Computer II* and *Computer III* decisions, AT&T must unbundle the basic frame relay service, regardless of whether the [service] offering also provides a combined, enhanced protocol conversion and transport service for those customers who require it.").

[236] *See, e.g.*, Letter from Kyle E. McSlarrow, National Cable & Telecommunications Association, et al. to Julius Genachowski, Chairman, FCC, *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52; *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 2 (Feb. 22, 2010); Posting of Hank Hultquist to AT&T Policy Blog, http://attpublicpolicy.com/, "The Myth of Broadband 'Reclassification,'" (April 12, 2010) ("[I]t was the Clinton Administration FCC that definitively declined to classify Internet access as a telecommunications service. When it first looked at this issue back in 1998, the FCC (under then-Chairman Bill Kennard) said that 'classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet.'").

[237] *Broadband Authority NOI* at ¶ 13.

Rather, in order to provide those components of Internet access services that involve information transport, they lease lines, and otherwise acquire telecommunications, from telecommunications providers — interexchange carriers, incumbent local exchange carriers, competitive local exchange carriers, and others."[238] Thus, the report concluded that for the purposes of universal service contributions, the AOLs and the Earthlinks of the world — who owned no telecommunications facilities — should not be required to support universal service mechanisms directly because they already contributed indirectly when they purchased connectivity from a telecommunications supplier.[239]

The report also specifically declined to address the appropriate classification of Internet access providers who offered connectivity over their own networks, stating, "[w]e express no view in this Report on the applicability of this analysis to cable operators providing Internet access service. The Act distinguishes between Title II and Title VI facilities, and we have not yet established the regulatory classification of Internet services provided over cable television facilities."[240] In fact, in briefs filed in 1999 and 2000, the FCC twice indicated that it had yet to resolve the issue of whether high-speed Internet access offered over cable facilities constituted a cable service, a telecommunications service, or some other type of service.[241]

Finally, the Clinton FCC in no way adopted a hands-off approach to broadband Internet service providers; rather, it set aggressive policies to promote competition in the broadband

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[238] *Stevens Report* at ¶ 81.

[239] *Id.* at ¶ 3.

[240] *Id.* at ¶ 60 ("The matter is more complicated when it comes to offerings by facilities-based providers."); *Cable Modem Order* at ¶ 41 ("The [*Stevens Report*] did not decide the statutory classification issue in those cases where an ISP provides an information service over its transmission facilities.").

[241] Brief for FCC as Amicus Curiae at 9-11, 26, *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) (No. 99-35609); Pet. for Cert. of FCC at 15 n.4, *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (No. 00-843).

connectivity market. In a series of decisions in 1998 and 1999, the Kennard Commission required incumbent telephone companies to resell their DSL services to competitors at reasonable wholesale rates and also required these companies to "line-share" with competing Internet service providers.[242] In short, the Commission applied all the interconnection and unbundling provisions of the Act to the Bells' broadband services.[243]

C. The Commission should reestablish the distinction between connectivity and content abandoned in the *Cable Modem Order*.

Despite having concluded in its early analyses that broadband Internet access service offered by a facilities-based provider constituted two separate services (a telecommunications service and an information service or suite of information services), the Commission reversed this conclusion in the *Cable Modem Order* when it decided that cable modem service was a unitary information service. Commission action reconsidering the *Cable Modem Order* would better effect the traditional distinction between basic or telecommunications services and enhanced or information services.

The *Cable Modem Order* represented a departure from the Commission's larger theory regarding the kinds of services which should be regulated: Historically, the Commission had regulated those services that functioned as bottlenecks, either because they were true

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[242] *Advanced Services Order*; *see also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, Third Report and Order, 14 FCC Rcd. 20912 (1999) (*Line Sharing Order*).

[243] *Advanced Services Order* at ¶ 32 ("Pursuant to the Act and our implementing orders, incumbent LECs are required to (1) provide interconnection for advanced services; and (2) provide access to unbundled network elements, including conditioned loops capable of transmitting high-speed digital signals, used by the incumbent LEC to provide advanced services. We also note that under the plain terms of the Act, incumbent LECs have an obligation to offer for resale, pursuant to section 251(c)(4), all advanced services that they generally provide to subscribers who are not telecommunications carriers. Finally, for the reasons discussed below, we conclude that incumbent LECs have an obligation under the statute and our implementing rules to offer collocation arrangements that reduce unnecessary costs and delays for competitors and that optimize the amount of space available for collocation.").

monopolies, like AT&T, or they were functional monopolies because they retained control over some essential commodity, from the perspective of the consumer.[244] By contrast, where consumers could exercise choice between a variety of services in a highly competitive market with low barriers to entry, the Commission has declined to regulate.[245] Updating this rationale to deal with today's technology, two conclusions seem obvious: (1) On one hand, broadband Internet connectivity is the first kind of service, because a consumer will have at most one Internet service provider in his home at any given time, and switching costs are significant; and (2) content and applications that ride over that transmission, such as e-mail, web browsers, and websites, are the second kind of service, because barriers to entering the software and content markets are significantly lower; consumers can pick and choose among them freely; and purchasing one content or applications service doesn't limit a consumer's ability to purchase or use other content or applications.

The *Cable Modem Order* also departed from Congress's functional approach to categorizing communications and information services. For most of its history, the cable industry received vastly different regulatory treatment than the wireline telecommunications industry because cable historically offered a one-way communications technology similar to over-the-air broadcasting. But by 1999, there were 1.4 million cable modem lines in the United

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[244] *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79–252, First Report and Order, 85 F.C.C.2d 1, ¶ 59 (1980).

[245] *See Second Computer Inquiry* at ¶¶ 127-132; *see also Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Tentative Decision of the Commission*, Docket No. 16979, Tentative Decision of the Commission, 28 F.C.C.2d 291, ¶ 20 (1970) ("[T]here is ample evidence that data processing services of all kinds are becoming available in larger volume and that there are no natural or economic barriers to free entry into the market for these services.").

States.[246] Clearly, these systems offered two-way communications, and nothing in the Act suggested that they should be treated differently simply because the transmission medium was packet-switched rather than circuit-switched or because data was transmitted over cable facilities rather than over traditional telephone networks. In fact, the 1996 Act defines a telecommunications service as the offering of telecommunications "*regardless of the facilities used*."[247] Thus, the 1996 Act clearly demonstrates an awareness of convergence — it recognized that phone services might be offered over the cable plant, and that someday traditional telephone companies might offer one-way video communications.[248] As a result, the Act focuses on the nature of the service at issue and suggests that like services should be treated alike.[249] By reversing the 2002, 2005, and 2007 classification orders, FCC action to reestablish its authority over broadband would be faithful to both the Commission's historical approach to regulation and the legislative intent motivating the 1996 Telecommunications Act.[250]

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[246] *See* Federal Communications Commission Wireline Competition Bureau, *High-Speed Services for Internet Access as of June 30, 2000* Table 1 (2000), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1000.pdf.

[247] 47 U.S.C. § 153(46).

[248] *See, e.g.*, *Matter of Telecommunications Policy Reform*: *Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 104th Cong. 2 (1995) (testimony of Decker Anstrom, President of the National Cable Television Association) ("Already several leading cable companies are building state-of-the-art communications facilities that deliver voice, video and data over the same wire. Put simply, if this committee wants to bring competition to the local phone monopoly, we are it. We are the other wire.").

[249] *See, e.g.*, H.R. REP. 104-458, at 169 (1995) (conference report on the 1996 Telecommunications Act) ("The conference agreement adopts the House provisions with modifications. . . . . This amendment is not intended to affect Federal or State regulation of telecommunications service offered through cable system facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service.").

[250] It is true that the Supreme Court upheld the FCC's determination to classify broadband Internet service as an integrated information service in *Brand X*, 545 U.S. 967 (2005). But the Court held only that the definitions contained in the 1996 Act were ambiguous, and that as a result, the Court would defer to the expert judgment of the agency in determining how to regulate broadband. *Id.* at 1003. Thus, if the agency decides that circumstances warrant

D. Title II classification would provide broadband network operators, content and applications providers, and consumers with bounded and coherent theory regarding the scope of the Commission's authority.

Because the Title II approach outlined here would classify only broadband Internet connectivity as a telecommunications service, the provisions of Title II of the Communications Act would apply only to that transmission service. The content and applications that run over broadband transmission would continue to be classified as information services and would remain largely unregulated, as they are today.

By distinguishing connectivity from content, this approach will provide certainty to both kinds of service providers. Like services will be treated alike, and the FCC will eliminate the need to shoehorn regulations imposed on our communications infrastructure into a framework designed for websites and applications. An approach that recognizes the distinct markets, technologies, and purposes of these services should provide greater clarity for all parties. By providing substantive guidance regarding the precise policies in the broadband space (the applicable provisions of Title II) and to whom they will be applied (only telecommunications carriers), a Title II regime imposes clearer boundaries on the Commission. Indeed, many parties of diverse stripes have expressed qualms about the ancillary jurisdiction doctrine precisely because it does not rely on bright-line rules created by statute.[251]

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revisiting its earlier classification, it is free to pursue that inquiry and reverse its earlier decision. *Id.* at 981. We discuss this issue in greater detail in section 4, *infra*.

[251] Brief of Earthlink at 13, *Brand X*, 545 U.S. at 967 (No. 04-277) ("[S]ince the FCC claims that it has broad and unguided discretion to regulate 'information service providers' as it sees fit under Title I of the Act, the result of its construction . . . is to give the FCC broad discretion to regulate without regard the requirements of Title II."); *Brand X*, 545 U.S. at 1013 (Scalia, J., dissenting) ("This is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions."); *Comcast* Transcript at 46 (question of Judge David B. Sentelle); Posting of Corinne McSherry to Deeplinks Blog, http://www.eff.org/deeplinks/archive (Oct. 21, 2009) (expressing Electronic

Distinguishing between content and connectivity also allows the FCC and FTC to work together to protect consumers in the Internet ecosystem. Classifying broadband Internet connectivity as a telecommunications service would definitively reestablish the FCC's authority to protect consumers in their use of broadband transmission. On the other hand, the Federal Trade Commission would retain authority to police unfair, deceptive, or anticompetitive actions in the market for content and applications.[252] This approach will provide the two agencies with distinct spheres of authority and will provide consumers with sufficient protection in their use of both content and connectivity.[253]

Arguments that classifying broadband transmission as a telecommunications service would lead to greater regulation of all information services hold no water.[254] In particular, the argument that a telecommunications service would be hiding inside every information service plainly misses the mark. Proponents of this argument misunderstand or mischaracterize the Supreme Court's treatment of this issue in *Brand X*. In *Brand X*, the Supreme Court addressed the respondents' contention that "the Communications Act unambiguously classifies as

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Frontier Foundation's concerns regarding the potentially unbounded nature of the ancillary jurisdiction doctrine).

[252] *See* 15 U.S.C. § 45(a); *see also id.* § 45(a)(2) (exemption common carriers from FTC jurisdiction.

[253] For example, in a Title-II framework, the privacy obligations for broadband service providers would be set by rule at the FCC, whereas the FTC would oversee protecting consumers in their use of websites and e-mail. So the FCC would oversee practices such as deep-packet inspection, whereas the FTC would regulate notice-and-choice practices used by companies like Google and Facebook. Of course, the work of each agency will likely be informed by the other.

[254] *See, e.g.*, Letter from Kyle E. McSlarrow, National Cable and Telecommunications Association, et al., to Julius Genachowski, Chairman, FCC, *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52, at 2, 6 (Apr. 29, 2010); Letter from Letter from Kyle E. McSlarrow, National Cable and Telecommunications Association, et al., to Julius Genachowski, Chairman, FCC, *National Broadband Plan for Our Future*, GN Docket No. 09-51; *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52, at 10-11 (Feb. 22, 2010).

telecommunications carriers *all* entities that use telecommunications inputs to provide information service."[255] The Court rejected that argument, noting that "this argument would subject to mandatory common-carrier regulation all information-service providers that use telecommunications as an input to provide information service[s] to the public."[256] Opponents of Title-II classification have hailed this determination by the Supreme Court as support for their proposition that classifying broadband transmission as a telecommunications service would also subject all information service providers to Title-II regulation. But this analysis elides the key distinction between the respondents' argument in *Brand X* and the Title-II proposal advanced here: Neither Free Press nor the Commission proposes that *all* entities that use telecommunications inputs be classified as telecommunications carriers. Rather, limited Title-II classification would affect only those entities who in fact offer data transmission service to the public (i.e. those offering a distinct telecommunications service not inextricably linked from information services); it would not affect those entities (for example, applications and content providers) that merely use data transmission as a means to offer their services to the public. The distinction between the proposition advanced by the respondents in *Brand X* and the policy proposal advanced here highlights the logical fallacy of the incumbents' argument: if one subcategory of offerings is moved from the information-services classification to a telecommunications-service classification, it does not follow that *all* information services will now necessarily be termed telecommunications services. The average American consumer understands the difference between Facebook and Verizon; the expert agency charged with making broadband policy surely can do the same.

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[255] *Brand X*, 545 U.S. at 994 (emphasis added).

[256] *Id.*

Opponents of Title-II classification argue that content providers like Hulu and content delivery and caching services like Akamai would be subject to Title II regulation after the FCC adopts a Title II framework for broadband Internet connectivity. These arguments also deliberately confuse the issue, trading on a fear of excessive regulation rather than common sense.

For example, Hulu offers selected video content via broadband. The technology required to create and display online video images necessarily requires "generating," "storing," "transforming," and "processing" information; as a result, Hulu is a quintessential information service.[257] Moreover, Hulu does not offer data transmission: like users of the information service at issue in the FCC's *Pulverphone Order*, Hulu users "must have an existing broadband [connection] as [Hulu] does not offer any transmission service or transmission capability."[258] Because "the heart of 'telecommunications' is transmission,"[259] it is simply preposterous to contend that classifying our two-way IP-based communications infrastructure as a telecommunications service would mandate the same regulatory treatment of Hulu.

The same arguments apply with equal force to content delivery networks. Content delivery networks and caching services "afford access to particular stored content."[260] Because these businesses use *data storage* techniques, not network management, to deliver content more quickly, they, too, are quintessential information services. Nor do they offer data transmission itself (a prerequisite for a determination that they are telecommunications services). For

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[257] 47 U.S.C. § 153(20).

[258] *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd. 3307, ¶ 5 (2004) (*Pulverphone Order*).

[259] *Id.* at ¶ 9.

[260] *Broadband Authority NOI* at ¶ 107.

example, Akamai's annual report highlights that its continued success is dependent upon procuring transmission capacity from third-party telecommunications network providers.[261]

Nor does the mere fact that both Hulu's and Akamai's servers must connect to the Internet to enable users to access their servers transform their services into telecommunications services. In *Pulverphone*, the Commission recognized that "the fact that Pulver's server is connected to the Internet via some form of transmission is not in and of itself . . . relevant to the definition of telecommunications."[262] Information service providers need not fear that a move to Title II will automatically lead to greater regulation in all parts of the Internet ecosystem.

E. Classifying broadband Internet connectivity as a telecommunications service should not diminish investment.

Opponents of the Commission's proposed Title-II classification have repeatedly stated that this reestablishing of legal authority coupled with heavy forbearance will nonetheless have a large negative impact on network investment. But the realities of the broadband marketplace and the relationship between FCC oversight and investment are far more complex than incumbent sloganeering portrays. As we discuss below, regulation is a minor factor influencing network investment, and the history of Title II shows companies making massive increases in investment and employment while subjected to much heavier regulations than those contemplated here. But history need not serve as our only guide: today, the high-capacity enterprise broadband market lives under the Title II regime, and competition and investment still manage to thrive.

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[261] *Akamai Technologies, Inc.*, *2009 Annual Report* 13 (2009), *available at* http://www.akamai.com/dl/investors/akamai_annual_report_09.pdf.

[262] *Pulverphone Order* at ¶ 9.

(1) A variety of factors affect network investment.

The broadband network service market does not naturally function like an atomistic market. The business is very capital-intensive; it requires significant sunk costs and exhibits economies of scale, scope and density.

Building networks requires substantial upfront investments, and decisions regarding these investments are driven by factors that influence the value of the return on investment (ROI) as well as by underlying market structure realities. These factors are themselves in turn driven by other considerations — some interrelated — making overall investment decision-making a complex process that depends on the specifics of a given market at a given time.

First, expectations about demand are important. If a market is expected to grow, businesses have a strong incentive to invest in capacity to meet increased demand, in order to increase revenues, though in less competitive markets this pressure may be mitigated. The overall high-speed Internet market is growing, with the wireless data sector poised for substantial future growth. However, even within the wireline sector, there is considerable potential for growth in "next-generation" high-speed Internet services — those that can deliver speeds well above 10 megabits per second (Mbps). Companies deploying higher-end service tiers have experienced substantial growth in these faster (and more expensive) offerings.[263]

Second, in high-tech industries, supply costs are particularly important for investment decisions. If the cost to serve a customer declines, the potential return on

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[263] *See, e.g.*, Comments of Free Press, *Inquiry Concerning the Deployment 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 of 1996, as Amended by the Broadband Data Improvement Act,* WC Docket No. 09-137; *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 48-51 (Sept. 4, 2009); *see also* John Horrigan, *Home Broadband Adoption 2009* 23 (Pew Internet & American Life Project 2009).

investment increases, giving a firm the incentive to increase investment. In the ISP sector, overall capital equipment costs and operating costs continue to decline. For cable operators, the relatively inexpensive cost of DOCSIS 3.0 upgrades, coupled with the strong potential growth for faster services, creates an incentive to invest. Wireless carriers are also seeing rapidly declining costs, with the per-bit carriage costs dropping by half in the last year alone.[264] For Incumbent Local Exchange Carriers (ILECs), deploying faster fiber-to-the-home (ftth) or short-loop DSL services requires a relatively higher level of upfront investment (compared to cable or wireless carriers' upgrade path), but the potential cost savings from copper retirement, coupled with new revenue streams from Internet-delivered TV, also creates a strong incentive to invest.

Third, competition drives investment and innovation more than any other factor. In markets where technological change is relatively swift and competition is healthy, firms have a strong incentive to invest in order to keep up with or get ahead of their competitors. The current high-speed ISP market is characterized by swift technological change, but the overall level of competition is suboptimal.[265] As a result, regulators must be vigilant to ensure that the lack of competition and the presence of market power do not spill over from the broadband provider market into the adjacent content, application, and device markets. Permitting broadband providers to discriminate against content, applications or devices will create incentives for them to profit from artificial scarcity by delaying or avoiding network investments — and will in turn reduce investment in the adjacent content, application, and device sectors.

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[264] *See* John Stankey, President and CEO, AT&T Operations, AT&T, Inc, Fourth Quarter 2009 Earnings Call Transcript, Seeking Alpha (Jan. 30, 2010) ("[I]f you kind of look at where we sit today versus a year ago, it is costing me half of as much to move that bid today than it was a year ago and I will tell you, we are actively working that.").

[265] *See* discussion in section 4.B, *infra*.

Fourth, factors like interest rates and corporate taxes also influence investment decisions. Interest rates directly impact the cost of borrowing money, and they also impact the opportunity cost of using profits to finance investment. As interest rates decline, firms view capital investment more favorably. Likewise, firms pay taxes based on their profits. If the corporate tax rate is reduced, or if investment tax-allowances are increased, then firms have a greater incentive to invest. In recent years, the federal government has made changes to tax law, such as allowing accelerated depreciation, that reduce the overall tax burden of broadband service providers.

Finally, general economic confidence plays a big role in how firms allocate capital. Business confidence in the economy directly impacts investment. Strong GDP growth and constrained inflation usually result in robust capital investment. Conversely, an economic downturn, even if it disproportionately impacts certain sectors, can lead to uncertainty about growth and demand and thus deter investment. In the communications sector, where services are increasingly viewed as necessities, firms may indeed be "recession-proof," but still limit investment during periods of overall economic turmoil. Investment in the communications sector declined sharply following the 2001 recession, and has marginally declined during the current recession (see Figure 1 below). Thus, many factors beyond mere regulation affect the investment calculations of broadband network operators.

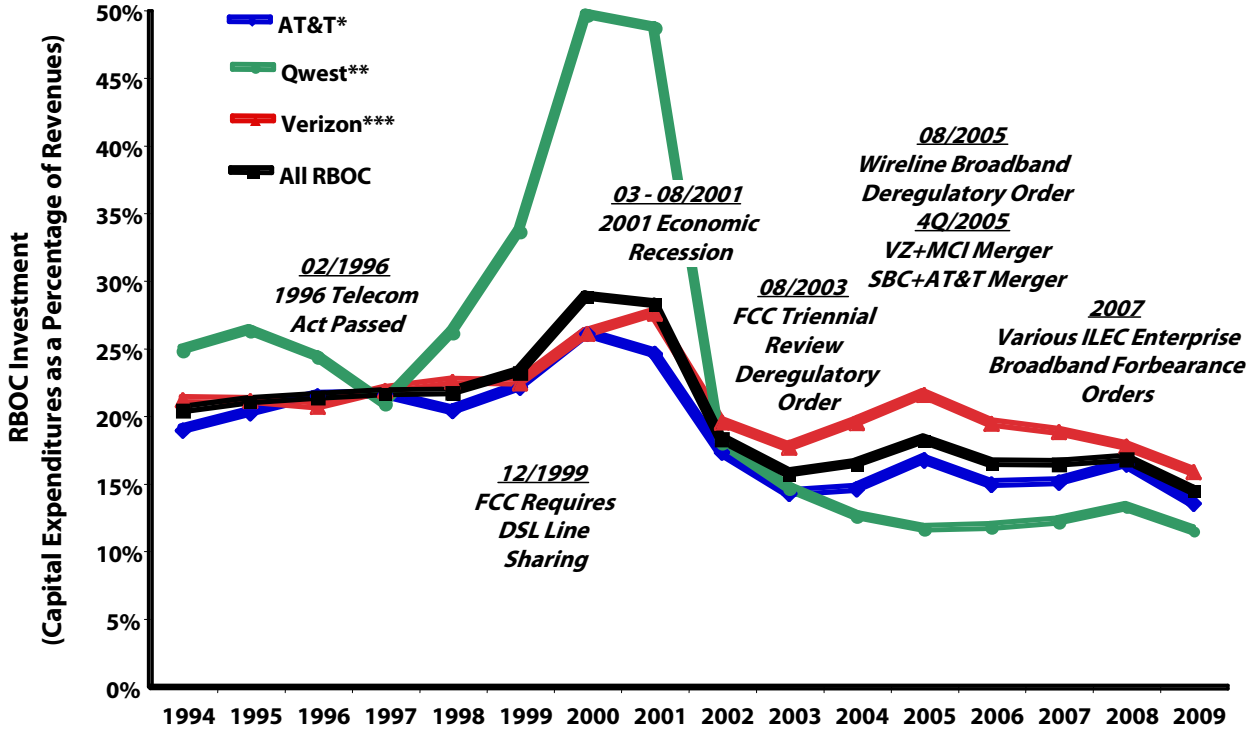
(2) Evidence from the past thirteen years suggests that a Title-II framework does not in any way deter investment.

To paint the impact of regulations or regulatory authority on investment decisions as automatically negative is wildly oversimplified and inaccurate. During the period of 1996 to 2010, the telecommunications sector saw the imposition of substantial regulation followed by equally substantial deregulation. In examining investment patterns over these years, we see that

regulation might have actually encouraged investment — and that deregulation and consolidation might have decreased investment.

In 1994, two years before the 1996 Telecommunications Act was passed, the combined gross capital investment of the Regional Bell Operating Companies (RBOCs) was 20 percent of revenues. Immediately following the passage of the 1996 Act, RBOC investment as a percentage of revenues grew despite substantial regulations at the wholesale and retail levels. By 2001, RBOC investment as a percentage of revenues reached 28 percent (see Figure 1). Investment continued to rise throughout the year 2000 even though the dot-com bubble burst in March of that year. In 2001, despite a six-month recession, RBOC investment held steady. It was not until 2002, when the FCC began dismantling the 1996 Act's regulations, that relative investment declined sharply, reaching a low of 15.7 percent in 2003. Investment rose slightly in 2004 and 2005, but then declined and held flat following the FCC's subsequent complete deregulation of residential broadband and its approval of a series of massive mergers (see Figure 1).

Figure 1:
RBOC Capital Investment as a Percentage of Revenues 1994-2009



*Source: Company annual reports. * Data for AT&T incorporates all the data from the company's predecessor ILEC RBOCs (Southwestern Bell, SBC, PacTel, SNET, BellSouth and Ameritech, as well as their wireless subsidiaries, which from 2000-2006 were subsumed under the Cingular/AT&T Mobility banner). Data prior to 2006 does not include AT&T Corp (ATTC) information, as this company was a CLEC prior to the merger with SBC. ** Data for Qwest prior to 2000 is for US West, but excludes prior information for Qwest, which operated as a CLEC prior to the 2000 takeover of US West. *** Data for Verizon incorporates all the data from the company's predecessor ILEC RBOCs (Bell Atlantic, NYNEX and GTE, as well as Verizon Wireless). Data prior to 2006 does not include MCI/WorldCom information, as this company was a CLEC prior to the merger with Verizon.*

In short, these data suggest that ISP investment decisions are not driven simply by regulation or the lack thereof. In fact, it appears that regulation, especially if designed to promote competition, can stimulate investment. Under the full weight of Title II, telecommunications companies invested substantially because the market for investment was ripe and newly introduced regulatory-mandated competition further stimulated investment and innovation. There is simply no evidence to suggest that a limited Title-II classification designed to preserve the pre-*Comcast* status quo will negatively impact network investment in any manner

whatsoever.[266] Indeed, the historical evidence as well as the current realities of the enterprise broadband market directly contradicts this claim.

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[266] Incumbent broadband providers and their proxies also often claim that a Title-II classification opens the door to unassailable network neutrality rules, which they claim will deter investment. But in order for this to be true, the rules will have to substantially impact a network operator's potential return on investment. No opponent of Title-II classification has provided a concrete example of how network neutrality will lower ROI.

The "pay-for-play" business models first discussed in 2005 have been shown to be unrealistic, and even some major network neutrality opponents have dropped this unlikely scenario from their anti-network neutrality talking points. Pay-for-play never really made much sense as an investment strategy, as these models only work in situations where congestion is the norm. In other words, once an ISP establishes a system of prioritizing certain content in exchange for payment (and thereby degrading for non-payment all other content), the ISP would have every incentive not to invest in increased capacity, for fear of reducing congestion and eliminating the very feature that made content providers willing to pony up for prioritized delivery.

Certainly some ISPs' opposition to network neutrality is rooted in profitability concerns — but these concerns have more to do with reducing competition than they do with investment. For example, AT&T's contractual obligations to Apple to block 3G VoIP applications are rooted in AT&T's desire to reduce competition in the mobile voice market. But with reduced competition comes reduced investment incentives. Endorsement of network neutrality by wireless companies such as Clearwire and Cellular South demonstrates the nakedness of AT&T's investment argument, and reveals the company's underlying motivation to reduce competition.

Fortunately, we have the benefit of the results from a natural experiment implementing Net Neutrality rules on AT&T itself. In the final days of 2006, the FCC approved the merger of AT&T and BellSouth only after the company agreed to operate a neutral network (by adhering to the four principles of the FCC's Internet Policy Statement as well as a fifth principle of nondiscrimination) for two years following the transaction. A review of AT&T's investments over those two years shows quite clearly that a strict network neutrality rule did not in any way deter investment. In 2006 — prior to agreeing to the five network neutrality principles — AT&T and all its then-current and future subsidiaries (i.e., the full post-2006 company, which includes SBC, BellSouth, Cingular — or AT&T Mobility — and ATTC) made $18.45 billion in gross capital expenditure investments. After two years of operating under a strict network neutrality regime, the company's gross capital expenditures rose to $20.34 billion. In terms of capital expenditures as a percentage of revenues, AT&T's investment increased from 14.8 percent in 2006 to 16.4 percent in 2008. Looking at all the major broadband network operators' investments during the 2006-2008 period, we see that AT&T under network neutrality rules had higher levels of relative investment growth than many other companies, with relative investment levels by Verizon, Comcast and Time Warner Cable actually declining during this period. *See* Comments of Free Press, *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52, at 23-27 (Jan. 14, 2010).

(3) The Third Way proposal laid out in the Notice of Inquiry proposes to do no more than restore the pre-Comcast status quo and does not alter market fundamentals.

The FCC's proposed Third Way proposal merely ensures that the Commission has the legal authority that investors and markets already presumed it had prior to the *Comcast v. FCC* decision. Nothing about reversing the Bush-era FCC classification decisions changes the underlying fundamentals in the broadband market: This is a growing market with declining cost structures. The overall high-speed Internet access market is expanding, with the wireless data sector poised for substantial future growth. If a market is expected to grow, businesses have a strong incentive to invest in capacity to meet increased demand, in order to increase revenues. Similarly, in the broadband service provider sector, overall capital equipment costs and operating costs continue to decline. If the cost to serve a customer declines, the potential return on investment increases, giving a firm the incentive to increase investment.

The rhetoric about Title-II classification discouraging investment is just a general reflection of the common but misguided belief that any and all regulation discourages investment. According to this theory, regulation will perpetuate uncertainty and will reduce potential return on investment, thereby reducing the incentive to invest. But all regulation is not created equal. Some regulation is heavy-handed, designed to control retail prices in a monopoly market, while other regulation can be much lighter, providing basic rules of the road that ensure healthier competition in an otherwise concentrated market. The FCC has proposed adopting a Title II classification merely to ensure it can adopt policies such as expanding the Universal Service Fund to broadband and requiring better consumer disclosure of service quality and pricing. These objectives are the lightest of regulatory touches.

(4) The leading broadband providers and telecommunications sector analysts recognize that a limited Title II classification will not affect investment.

While their lobbyists are stirring up investment scares on Capitol Hill, many of the carriers themselves tell investors a different story. Landell Hobbs, Time Warner Cable's Chief Operating Officer, recently stated on an investor call that Title-II classification as proposed by the FCC "is a light regulatory touch. . . . [The FCC's] focus is really to put them in a position where they can execute around their [N]ational [B]roadband [P]lan, not to rate regulate or crush investment in our sector. That's not at all what we believe. So . . . yes, we will continue to invest[.]"[267] Vonya B. McCann, Sprint's Senior Vice President of Government Affairs, agreed, stating, "Sprint commends the FCC for the cautious approach it is taking toward this complex subject. The FCC can and should foster similar growth in broadband by focusing its energies on protecting consumers by promoting competition and placing checks and balances on providers with market power."[268] And at the 2010 Cable Show, Comcast CEO Brian Roberts speaking in response to questions about the FCC's Third Way proposal stated that "the government is not a big worry," and that he expects the industry to continue to invest and innovate.[269] Windstream Corp. CEO Jeff Gardner recently argued that there has been "a bit of an overreaction" to the Third Way proposal and that he did not "think that there [was] tremendous financial risk out there with respect to [the Third Way]."[270] And the Wall Street Journal reported that Verizon

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[267] *See* JP Morgan Global Technology, Media and Telecom Conference: Time Warner Cable, Inc. Management Discussion (May 19, 2010).

[268] Press Release, Sprint Nextel Corp., Statement on the Federal Communications Commission's Proposed Broadband Framework (May 6, 2010), available at http://finance.yahoo.com/news/Sprint-Statement-on-Federal-bw-1270126185.html?x=0&.v=1.

[269] Michelle Ow, *Top MSOs Weigh In on Reclassification*, SNL FINANCIAL, May 12, 2010.

[270] Tim Doyle, *Windstream CEO: USF Reform Fine, Title II Fight an "Overreaction,"* SNL FINANCIAL, May 19, 2010.

Wireless Chief Executive Lowell McAdam recently emphasized that the company has no plans to slow investment in its wireless broadband network as a result of the FCC's move.[271]

This reaction mirrors those of many Wall Street investment analysts, who have greeted the Commission's Title-II proposal with a shrug. Responding to the apparent overreaction to the announcement seen in cable stocks, Merrill Lynch released an investor note stating that "the FCC's 'Third Way' reclassification largely keeps the status quo intact . . . . [W]e see no transformative change in our [c]able thesis, creating a buying opportunity on market fear over the specter of regulation. . . . [A]ny Third Way regulation will have no impact on [c]able growth."[272] A Morgan Stanley research report issued on June 17, 2010 asserts that the issue should not impact investment, stating, "We believe that most actions being considered are unlikely to impact industry financials in the near- term. Also, today's NOI supports our view that the FCC seeks to use Title II to restore its former regulatory authority around net neutrality and not to seek more onerous regulation (e.g. price regulation, wholesaling)." The report also highlights the importance of the proposal to the timely implementation of the National Broadband Plan, stating, "The 'third way' option could focus jurisdictional challenges into a single court challenge, providing a more clear timeline toward resolution, which is attractive to the FCC as it implements the NBP."[273]

New entrants — whose relative investment levels are highest and most risky — have also been positively sanguine about Title-II classification. Philip Falcone, Chief Executive Officer of

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[271] Niraj Sheth, *Verizon in Talks to License 4G Spectrum to Rural Carriers*, *Wall Street Journal*, May 13, 2010, http://online.wsj.com/article/SB10001424052748703339304575240200909761376.html.

[272] Jessica Reif Cohen, *FCC Decision Centered on Net Neutrality; Not Overreaching*, BofA Merrill Lynch Research (May 6, 2010).

[273] *Cable/Sat & Telecom: No Surprises As FCC Begins Broadband Reg. Review*, Morgan Stanley Research Reports (June 17, 2010).

Harbinger Capital Partners (the fund behind a new nationwide wireless broadband network) said, "I understand that there has been a fair amount of debate about the regulatory framework that the FCC has chosen for broadband Internet services. . . . I have made a substantial investment in what I expect will be a major new broadband wireless network in the United States. In that respect, I can say that the FCC's broadband policies continue to actively encourage Harbinger's and others' multi-billion dollar investment in broadband innovation. It's a truism that investment goes where it is welcome and this FCC, under Chairman Genachowski's leadership, has gotten it right."[274] Similarly, twelve CEOs of competitive local exchange carriers and independent Internet service providers, including companies like tw telecom and XO Communications, issued a joint statement supporting the FCC's Third Way proposal.[275]

Taken as a whole, these reactions by analysts and the broadband companies themselves highlight the reality that limited Title-II classification is nothing more than a moderate action designed to preserve the status quo and ensure the FCC has the appropriate authority to facilitate further investment and innovation in the Internet ecosystem.

(5) Recent "studies" that purport to demonstrate Title II's harm to investment amount to nothing more than blatant propaganda.

Several recent papers from coin-operated think tanks deliberately confuse and obfuscate the policy debate around Title-II classification. For example, one recent paper from industry-

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[274] Press Release, Harbinger Capital Partners, Statement on the Federal Communications Commission's Broadband Policies (June 17, 2010), *available at* http://www.forbes.com/feeds/prnewswire/2010/06/17/prnewswire201006170900PR_NEWS_USPR_____NY22520.html.

[275] The letter stated in part: "We add our collective voice to those supporting the Third Way and commend the FCC for showing the kind of innovative thinking and leadership critical in a broadband world." *See* Press Release, Broadband Providers Support FCC Proposal (June 15, 2010), *available at* http://finance.yahoo.com/news/Broadband-Providers-Support-prnews-1006720670.html?x=0&.v=1.

funded Entropy Economics slams the Third Way as being bad for the economy based on the conclusion that adopting net neutrality rules will have a major negative impact on jobs and GDP.[276] This conclusion in turn depends on the authors' observation that this net neutrality policy will dramatically reduce investment in broadband networks. But the authors provide *no* empirical evidence for this critical assumption — they simply assert that Net Neutrality will harm investment and assume the harm will be massive because this policy will prevent network operators from charging content providers additional fees for differentiated qualities of service. The paper's main hook for the figures on the "harm" associated with Title-II classification is the authors' interpretation of the "cost" of openness conditions placed on the C-Block 700MHz license in comparison to the B-Block licenses. But this interpretation ignores the basic fact that the C-Block's auction geography was vastly larger than the B-Blocks, leading to a smaller pool of bidders and consequently lower total aggregated revenues. Even beyond this obvious explanation, the Entropy Economics study ignores the now well-understood reality that the entire "pay-for-play" pricing scheme contemplated by carriers in a non-net neutral world depends upon carriers failing to invest in their networks in order to make congestion the norm and quality-of-service offerings valuable. The Entropy Economics study has it completely backward: net neutrality *encourages* investment by discouraging carriers from profiting from artificial scarcity.

Similarly, a recent paper from the industry-funded (and often flip-flopping)[277] Phoenix Center claims speciously to prove harms resulting from Title-II classification using empirical

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[276] Charles M. Davidson & Bret T. Swanson, *Net Neutrality, Investment & Jobs: Assessing the Potential Impacts of the FCC's Proposed Net Neutrality Rules on the Broadband Ecosystem* (2010).

[277] Prior to 2005, the Phoenix Center produced empirical research supporting the use of open access and network neutrality policies — but after one of its major benefactors merged with an incumbent local exchange carrier, the Center's research started to reach dramatically different

data.[278] But the Commission should not be fooled: the data are merely an analysis of the change in stock prices of the major broadband providers on the date the Third Way proposal was first announced. While many of the major broadband providers stocks did dip on the date of the announcement (a date when the Greek financial meltdown and an automated trading error sent the overall market careening downward), many analysts viewed investor reaction to the announcement as an overreaction. Since then, the stocks of the major broadband providers have performed well; indeed, most have outperformed the major indices.[279] Nevertheless, we caution

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conclusions. One of the authors of the current anti-Title II paper and other anti-net neutrality papers actually wrote (while running the Phoenix Center in 2004) an article in CNET News titled "Net Neutrality: Now More than Ever." *See* Posting of Derek Turner to Save The Internet, www.savetheinternet.com (October 30, 2009); *see also* Lawrence Spiwak, *Net Neutrality: Now More Than Ever*, CNET News, July 27, 2004.

[278] George S. Ford, Ph.D., Lawrence J. Spiwak, Esq. *The Broadband Credibility Gap* (Phoenix Center Policy Paper #40, 2010), *available at* http://www.phoenix-center.org/pcpp/PCPP40Final.pdf.

[279] Between the day before Chairman Genachowski's Third Way announcement and July 8, 2010, the Dow Jones Industrial Average was down 6.7 percent and the Nasdaq was down 9.5 percent. Meanwhile, AT&T's shares were down 4.7 percent, Verizon's were down 6.6 percent, and Qwest's were down just 0.5 percent. The cable operators have followed a slightly different trend. Comcast shares were down 9.6 percent, and Time Warner Cable's were up 0.7 percent. However, events that preceded the Chairman's announcement shed light on these changes in cable stock prices. A week prior to the announcement, Comcast and Time Warner Cable announced their first quarter results. The financial figures were well-received by Wall Street, who saw cable operators clearly emerging as the dominant high-speed Internet providers even while they reduced investment. *See, e.g.*, Kelly Riddell, *Comcast, Time Warner Cable Rise on Internet Potential*, *Bloomberg* (Apr. 29, 2010). Both Comcast and Time Warner Cable saw their stock prices rise more than 5 percent over the subsequent days. Wall Street had realized that "in almost 60 percent of the U.S., cable operators have no competition or compete only against the phone companies' older, slower DSL technology, making the cable companies the only option for those who want to surf the Web at high speed." *Id.* Looking at the cable operators' market value prior to this bump (April 27, 2010), we see that as of July 8, 2010, Comcast was down 3.4 percent and Time Warner Cable was up 3.9 percent. Investor overreaction came primarily from the mistaken belief that the Commission was proposing broadband rate-regulation, which would prevent cable operators from fully exploiting their emerging monopoly. *See e.g.*, Kelly Riddell, *Cable Operator Stocks Plunge as FCC Goes 'Nuclear'*, *Bloomberg* (May 6, 2010). Cable operators have since quelled investor fear of such an occurrence, and their stock prices relative to

the Commission placing any weight on the fluctuation of the stock markets, especially as a barometer for future investment. In fact, it is a truism that whenever a broadband provider announces plans to decrease capital investments, stocks rise, and when they announce plans to invest, stocks decline.[280]

The Commission should ignore these and other industry-funded studies that contain no useful information. These works simply assume bad outcomes based on no evidence and then dress these assumptions up in scary-sounding headlines. [281] Relying on such pseudo-empirical propaganda is no recipe for successful policymaking by an agency that is rightly focused on data-driven analysis.

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the overall market reflect this correction. *See, e.g.*, Michelle Ow, *Top MSOs weigh in on reclassification*, SNL KAGAN, May 13, 2010.

[280] "Fearful that the telecommunications crash of the early 2000s will repeat itself, many on Wall Street respond with great skepticism to the increased capital spending needed for these capacity upgrades. For example, 'Comcast shares fell more than 3 percent on Feb. 1 when the company gave a higher than expected outlook of $5.7 billion on capital spend for 2007.'" Comments of AT&T, *Broadband Industry Practices*, GN Docket No. 07-52, at 38 (June 15, 2007).

[281] For example, the Entropy paper concludes, based on nothing, that limited Title-II classification will cost the telecommunications sector 500,000 jobs. According to the Bureau of Labor Statistics, the entire U.S. telecommunications sector consisted of just over 980,000 jobs. *See* May 2009 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 517000 – Telecommunications, http://www.bls.gov/oes/current/naics3_517000.htm (last visited July 13, 2010). As such, Entropy's conclusion is risible on its face: Entropy essentially claims that a change in statutory interpretation designed to preserve the status quo will somehow lead to such economic disruption that half the workers in this fast-growing recession-proof sector will lose their jobs as a result of the policy change. The Commission should certainly be mindful of the impact of all its policies, but it has to reject nonsensical claims such as those in the headline-generating but substantively hollow Entropy paper.

(6) A modest Title-II classification will not affect job growth or retention in the broadband provider sector.

Some opponents of the FCC's proposed Title-II classification charge that this light-touch regulatory regime will somehow result in broadband providers reducing their work forces, [282] but these claims, too, are unfounded. These opponents argue that the FCC's reestablishment of its regulatory authority over broadband will reduce ISP investment, causing providers to hire less and fire more. Neither theory nor empirical evidence supports these claims.

First, the notion that Title II hurts investment misunderstands market fundamentals and basic theories of investment. Thus, the Title II-hurts-jobs argument is equally baseless.

Second, many of these job-loss arguments stem from a belief that the classification shift will lead to policies like net neutrality, which they allege will prevent ISPs from creating new discrimination-based revenue streams. They claim that if ISPs are allowed to earn revenues from discriminatory practices, they will hire and invest more in their networks. But this theory, too, is flawed because net neutrality would encourage investing by prohibiting practices that allow network operators to monetize scarcity.[283]

Moreover, we need not rely on theory to see what the likely outcome of higher revenues will be on telecommunications sector investment or employment. As we discussed above, broadband industry revenues have been consistently increasing, yet investment is flat or declining. The same is true for employment, in an even more dramatic fashion.

As we see in Figure 2, during the era of competition and full Title II regulation (1996-2002), the revenues of the RBOCs rose along with employment levels. As the tech bubble burst

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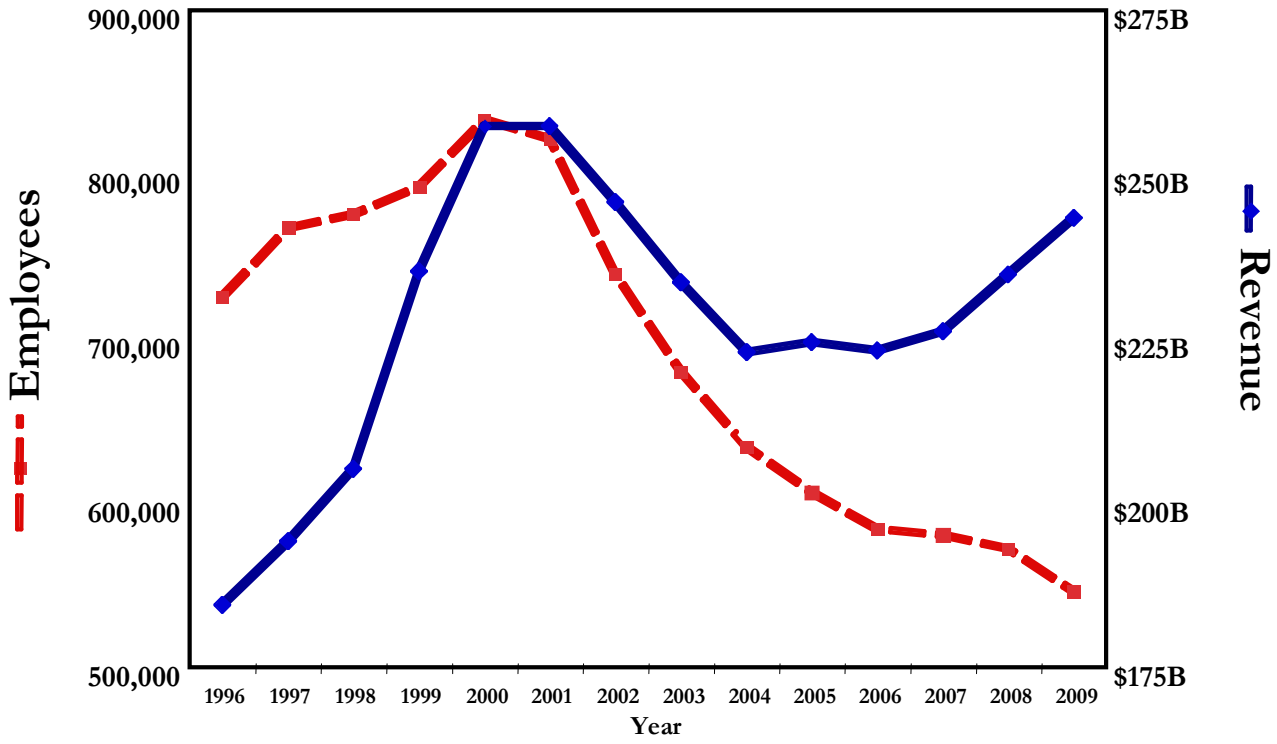
[282] *See, e.g.*, Letter from Rep. Gene Green, et. al., to Julius Genachowski, Chairman, FCC (May 24, 2010) ("[W]e urge you not to move forward with a proposal that undermines critically important investment in broadband and the jobs that come with it.").

[283] *See, e.g.*, Comments of Free Press, *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, 07-58, at 12-34 (Jan. 14, 2009).

and the 2001 economic recession set in (alongside the new era of deregulation and consolidation), revenues declined from a high of near $260 billion in 2001 to a low of $223 billion in 2004. Beyond this point, telecommunications revenues rebounded sharply, rising to $243 billion for 2009 — where they were prior to the bubble-years of 2000-2001. But while revenues have risen, employment levels have continued to fall precipitously. AT&T, Qwest, and Verizon collectively employ fewer than 550,000 full-time workers, and that figure is expected to drop even further in 2010. Revenues are up about 10 percent from the bottom, while jobs are down 14 percent since revenues began to recover. From 1996 through 2009, revenues for the industry were up 32 percent while jobs dropped by 25 percent. In short, the pro-competition era created jobs, and the pro-consolidation era destroyed them.

Thus, there is no reason, either theoretical or practical, to assume any connection between broadband industry hiring practices and the presence of firm FCC oversight authority under Title II of the Communications Act. The historical data show that employment and revenues in the telecommunications sector were highest when the industry was subject to the full weight of Title II regulations. The reestablishment of authority by the Commission to promote universal service and preserve the open Internet will not in any way impact the incumbents' incentives either enlarge or shrink their work forces.

Figure 2:
Telecomm Employment vs. Revenues
(Data Includes All ILEC + CLEC Business Segments For AT&T, Verizon & Qwest)



Source: SEC filings; For this chart, all of the prior businesses that comprise AT&T, Qwest and Verizon were included in order to ensure comparability across all periods (i.e., the pre-merger data is pro forma, reflecting all pre-merger CLEC businesses).

4. The FCC retains discretion to revisit the classification of broadband Internet service, and Supreme Court precedent supports a move to Title II.

A. *Brand X* definitively held that the language of the Communications Act confers discretion on the agency, and *Brand X* and *Fox Television Stations v. FCC* make clear that the Commission can and must revisit the classification decision as needed.

In 2005, the Supreme Court reviewed the Bush FCC's decision to classify cable modem service as an information service. Relying on *Chevron U.S.A. v. Natural Resources Defense Council*, the Court deferred to the agency's construction of the statutory definition of

"telecommunications service" without adopting it on the merits.[284] In holding that the term "offer" "admit[s]" of two or more reasonable ordinary usages," the Court held that the FCC acted within its discretion to conclude that cable modem service "offered" an integrated information service, rather than distinct telecommunications and information services.[285] Deference permeates the language of the opinion.[286] Indeed, the Justices carefully distinguished the question before them — whether the agency adopted a reasonable construction of the statute — from the premise adopted by the Ninth Circuit in the opinion under review — that the FCC failed to adopt the "*best* reading" of the statute.[287] *Brand X* gives the FCC ample latitude to interpret the terms relevant to classification: "offer" and "telecommunications service."

When taken together, *Brand X* and a later case, *Fox Television Stations v. FCC*, leave no doubt that the agency can and must periodically reevaluate its 2002 determination. *Brand X* recognized that the classification question presented "technical, complex, and dynamic"

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[284] 545 U.S. at 973-74 (citing *Chevron U.S.A. v. Nat. Res. Defense Council*, 467 U.S. 837 (1984).

[285] *Id.* at 989.

[286] *See, e.g.*, *id.* at 986 (characterizing the agency's decision as a "reasonable policy choice"); *id.* at 989 ("offering" can reasonably be read to mean a "stand-alone" offering of telecommunications); *id.* at 992 ("We also do not share the dissent's certainty that cable modem service is so obviously like pizza delivery service and the combination of dog leashes and dogs *that the Commission could not reasonably have thought otherwise*.") (emphasis added); *id.* at 992 ("[T]he statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission, not by warring analogies."); *id.* at 1003 ("The Commission is in a far better position to address these questions than we are. *Nothing* in the Communications Act or the Administrative Procedure Act makes unlawful the Commission's use of its expert policy judgment to resolve these difficult questions.") (emphasis added); *id.* at 1003 (Breyer, J., concurring) ("I join the Court's opinion because I believe that the Federal Communications Commission's decision falls within the scope of its statutorily delegated authority-though perhaps just barely.").

[287] *Id.* at 984.

issues.[288] It specifically rejected an argument that the 2002 order should be vacated because the order represented a departure from past practice. The Court held in ambiguous terms:

> [C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . *must* consider varying interpretations and the wisdom of its policy on a continuing basis.[289]

Fox affirms the conclusion that changes in agency policy receive the same deference accorded to an initial policy determination.[290] It explains that in revisiting a prior policy, "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."[291] To the extent that they are relevant, an agency should also take into account changed circumstances and possible reliance interests.[292] But so long as an agency's decision adequately explains its reasons, a change will not be invalidated as arbitrary and capricious.[293] Neither administrative law nor common sense bind the agency to its 2002 determination.

B. Regardless of whether the Commission classified broadband Internet service as an integrated information service, changed circumstances demonstrate that the FCC must revisit the classification of broadband Internet connectivity.

The FCC's potential decision to classify broadband Internet connectivity as a telecommunications service finds particular support in *Fox*'s discussion of changed

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[288] *Id.* at 1002.

[289] *Id.* at 981 (internal quotation marks and citations omitted, ellipsis in original, emphasis added).

[290] *Fox Television Stations, Inc. v. FCC*, 129 S. Ct. 1800, 1810 (2009).

[291] *Id.* at 1811.

[292] *Id.*

[293] *See id.*; *Brand X*, 545 U.S. at 980.

circumstances. The decision emphasizes that alterations in the factual landscape — what Justice Kennedy terms "the forces at work in a dynamic society" — provide ample reason for an agency to reconsider past policies.[294] Here, the Commission's 2002 conclusions no longer reflect the marketplace realities of 2010.

(1) The 2002, 2005, and 2007 classification orders rested on factual determinations regarding the nature of broadband Internet service offerings and predictions regarding competition in the market for broadband Internet connectivity.

The Commission's orders addressing cable modem service, DSL service, and wireless service share two key factual findings. First, the Commission concluded that the average user experiences broadband Internet service as a functionally integrated information service with no telecommunications service component.[295] The Commission found that the data transmission component of the service is typically accompanied by other services, including e-mail, newsgroups, webpage creation, and DNS services.[296] Focusing on these latter services, the Commission reasoned that when the consumer buys Internet access service, he purchases the ability to "run a variety of applications,"[297] not connectivity to the Internet. Indeed, the Commission posited that "subscribers to broadband Internet services 'usually d[id] not need to

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[294] *Fox Television Stations*, 129 S. Ct. at 1811; *id.* at 1822-23 (Kennedy, J., concurring); *see also Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A]n agency must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'"). The Commission could conceivably reconsider the classification orders based solely on a revision of its interpretation of the word "offer" in the definition of telecommunications service. *See Ad Hoc Shrimp Trade Action Comm v. United States*, 596 F.3d 1365, 1372 (Fed. Cir. 2010) (affirming a change in policy at the Department of Commerce based on the department's explanation that its new interpretation better conformed with "the language of the statute and [its] legislative history."). But given the changes in the marketplace, the FCC should also address these changes as they unequivocally demonstrate that broadband Internet service providers offering a discrete telecommunications service.

[295] *Cable Modem Order* at ¶ 39; *Wireline Broadband Order* at ¶ 14; *Wireless Broadband Order* at ¶¶ 7, 8, 26.

[296] *Cable Modem Order* at ¶¶ 36-38.

[297] *Id.* at ¶ 36.

contract separately for separately' for 'discrete services or applications' such as e-mail."[298] The Commission first made these factual findings in 2002, when it issued the *Cable Modem Order*. Subsequent orders did not revisit these conclusions or rely on new evidence.[299] In sum, in 2002, the FCC concluded that broadband Internet access is an information service, and it has not reexamined the state of the market since then. Indeed, the record on which the Cable Modem Order rested was largely developed in late 2000.[300]

Second, the FCC also predicted that classifying broadband Internet access as an integrated information service would promote both inter- and intramodal competition.

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[298] *Broadband Authority NOI* at ¶ 55 (citing *Cable Modem Order* at ¶ 11) (alteration in original).

[299] *Wireline Broadband Order* at ¶¶ 5, 12-17 & nn.32, 36-44, 104; *Wireless Broadband Order* at ¶¶ 25-26 & n.68, 31 (citing only the *Cable Modem Order* in support of its finding that wireless broadband access service is an integrated information service and noting, without citation, that an end user does not pay for "a distinct transmission service"). The *Wireline Broadband Order* did also cite isolated filings from some of the biggest broadband providers — SBC, Qwest, and Verizon. Wireline Broadband Order at ¶ 105 n.327. But each of these filings contained legal argument based on statutory definitions and prior Commission decisions. They did not develop new facts. *See* Comments of SBC Communications, Inc., *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33; *Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings — Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20; *1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements*, CC Docket No. 98-10, at 16-18 (May 3, 2002); Comments of Qwest Communications Int'l, Inc., *Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33; *Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings — Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20; *1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements*, CC Docket No. 98-10, at 6-8 (May 3, 2002); Reply Comments of Verizon, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33; *Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings — Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20; *1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements*, CC Docket No. 98-10, at 6-8 (July 1, 2002).

[300] *See Inquiry Concerning High Speed Access to the Internet over Cable and Other Facilities*, 15 FCC Rcd. 19730 (2000) (extending reply comment deadline to January 10, 2001); *see also Broadband Authority NOI* at ¶ 15.

Intermodal competition is competition between various types of broadband providers, such as telephone, cable, wireless, and other companies. Intramodal competition consists of competition within the same type of infrastructure. The *Cable Modem Order* touched on this rationale only generally, holding that the declaratory ruling would "promote competition in the provision of broadband capabilities, ensuring that public demands and needs can be met."[301] In the *Wireline Broadband Order*, the Commission developed this idea further. Imagining the future of the broadband Internet access services, the *Wireline Broadband Order* predicted that cable and DSL would compete head-to-head in most markets and that additional competition would emerge from other platforms such as satellite, and broadband over power line.[302] The same order posited that market for wholesale broadband transmission offered by facilities-based providers would flourish, allowing more entities to enter the market for retail connectivity service.[303] The FCC similarly described the *Wireless Broadband Order* as "pro-competitive."[304]

(2) In 2010, broadband Internet service providers offer and consumers value a connectivity service distinct from content and applications.

As set forth above, the Commission's prior orders rested on the assumption that consumers experienced Internet access as the ability to "run a variety of applications," *integrated with the ISP physical provision of connectivity*, including e-mail, surfing the web, accessing newsgroups, creating web pages, storing data, caching, and running Domain Name Service.[305]

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[301] *Cable Modem Order* at ¶ 6.

[302] *Wireline Broadband Order* at ¶¶ 3, 56; *see also id.* at ¶ 58 ("[E]merging broadband platforms exert competitive pressure even though they currently have relatively few subscribers compared with cable modem service and DSL-based Internet access service.").

[303] *Cable Modem Order* at ¶ 19.

[304] *Wireless Broadband Order* at ¶ 4 (describing Commission action in classifying wireless broadband access as "pro-competitive").

[305] *Cable Modem Order* at ¶ 38.

That is, the Commission found that no separate market existed for simple access to the network. That conclusion no longer holds.

First, providers,[306] consumers,[307] and Congress[308] focus on the two primary aspects of connectivity: speed and price. Broadband providers' promotional offers, in particular, focus overwhelmingly on speed and price.[309] For example, Comcast claims that "the fastest fast is here," while Time Warner Cable announces that "power is blazing-fast access."[310] Likewise, Verizon recently advertised "a high-speed offer that's moving fast," and an AT&T advertisement for netbook Internet access has the tagline "Fast. Small."[311] Broadband providers characterize

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[306] *See, e.g.*, Comments of Verizon and Verizon Wireless, In the Matter of *Consumer Information and Disclosure, Truth-in-Billing and Billing Format, IP-Enabled Services*, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, at Exhibit 12 (October 14, 2009).

[307] *See, e.g.*, *Broadband Adoption and Use* at 5; Comcast Corp., First Quarter 2010 Earnings Call Transcript (Apr. 28, 2010) ("Our HSI customer mix also remains strong as we continue to add more than 2 1/2 times as many higher-tier customers than those on the economy level service.").

[308] The Broadband Data Improvement Act focused heavily on broadband speed and price. For instance, Congress directed the Small Business Administration Office of Advocacy to "conduct a study evaluating the impact of broadband speed and price on small businesses." *See* Broadband Data Improvement Act, Pub. L. No. 110-385 §§ 103(b), 104, 105, 122 Stat. 4096 (2008). The Commission, too, characterizes the non-connectivity offerings associated with broadband Internet services as "the variety of optional features associated with [connectivity] services." *See, e.g.*, *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 9691, ¶ 38 (2008).

[309] Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation and Public Knowledge, *Consumer Information and Disclosure,* CG Docket No. 09-158; *Truth-in-Billing and Billing Format*, CC Docket No. 98-170; *IP-Enabled Services*, WC Docket No. 04-36, at Exhibits 1-7 (Oct. 13, 2009) (*Public Interest Groups' Truth-in-Billing Comments*).

[310] *Id.* at Exhibits 1, 3.

[311] *Id.* at Exhibits 4, 5.

additional services as "valuable extras"[312] to the extent that they are mentioned at all.[313] The Commission has historically relied on the way services are marketed as one indication that the service being offered is a transmission service.[314]

Indeed, a seemingly endless stream of evidence from providers themselves illustrates this distinction between connectivity and add-on services. For instance, in detailing their broadband service to the Commission, Time Warner Cable only provided details about maximum speed and price.[315] Comcast and Verizon both offer speed comparison pages on their websites.[316] They do not present similar pages for the "valuable extras." Comcast has created an entire marketing campaign around the speed of their service.[317] Indeed, Comcast even relegates its add-on services to a distinct business unit:[318] while high-speed Internet service falls within the cable

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[312] *See e.g.*, *id.* at Exhibits 1 and 2; Broadband Internet: Home and Residential Internet Service Provider (ISP), http://www.comcast.com/Corporate/Learn/HighSpeedInternet/broadband-internet.html (last visited July 10, 2010).

[313] *See e.g.*, *Public Interest Groups' Truth-in-Billing Comments* at Exhibits 3 and 4 (Oct. 13, 2009).

[314] *Prepaid Calling Card Order* at ¶ 13 ("Menu-driven calling cards . . . are marketed to consumers, in large part, as a transmission service. . . . For example, 'the packaging materials, in-store signage and point-of-purchase materials for AT&T's prepaid cards all explain that the cards enable the user to make telephone calls.'").

[315] Letter from Matthew A. Brill, Latham and Watkins, Counsel for Time Warner Cable Inc., to Marlene Dortch, Secretary, FCC, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 3 (Oct. 29, 2009).

[316] *See* Comcast High-Speed Internet: Speed Comparison, http://www.comcast.com/Corporate/Learn/HighSpeedInternet/speedcomparison.html (last visited July 10, 2010); Verizon FiOS Internet: Features and Services, http://www22.verizon.com/residential/fiosinternet#features (last visited July 10, 2010).

[317] *See, e.g.*, Comcast PowerBoost commercial, http://www.youtube.com/watch?v=aJcKn3plwIU (last visited July 10, 2010); Comcast High Speed Internet — We Got A Real Talker Over Here, http://www.youtube.com/watch?v=8Mp1wkrpW9M (last visited July 10, 2010).

[318] Comcast Corp., *Form 10-K – Annual Report 2009* 44 (2010) (*Comcast Annual Report*), *available at* http://www.comcast.com/2009annualreview/pdf/27501_034_Comcast_BMK1.pdf.

segment, email and data storage fall within Comcast's interactive media division.[319] Comcast notes that their "cable segment generates revenue by providing network service to Comcast Interactive Media."[320] The bottom line is these additional services, like email and data storage, are things you can do with your connection, but they are not integrated with the connection itself.

Consumers can and do seek out third-party providers for the types of services that the Commission historically considered integrated with data transmission. For example, by comparing broadband providers' e-mail users alongside their broadband subscribers, it becomes clear that the two services are hardly an integrated offering (see Figure 3). Rather, a closer review illustrates that email is simply an add-on offering, and some but not all broadband subscribers use their ISP's e-mail service. For instance, while Comcast has seen its broadband subscribers grow by about 2.5 million since 2007, its e-mail users have declined. Similarly, in 2009 AT&T had 15.5 million broadband subscribers and only 2.7 million unique e-mail visitors.[321]

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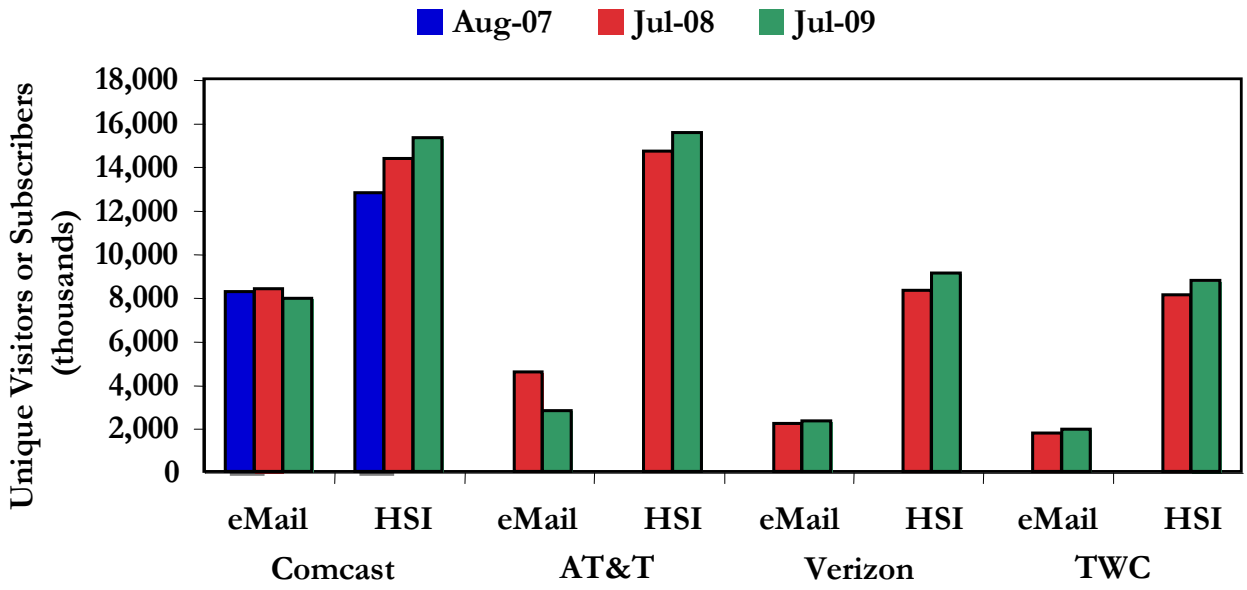
[319] Comcast Interactive Media includes Comcast.net, which offers email and data storage. *See id.*; *see also* Comcast.net: News, Sports, Video, TV Listings, Email, and More!, www.comcast.net (last visited July 10, 2010), Comcast.net Online Storage, http://www.comcast.net/storage/ (last visited July 10, 2010).

[320] *Id.* at 69.

[321] If these services were integrated, you would expect that unique visitors would far outnumber subscribers because providers typically offer numerous email addresses for each member of a household. For example, AT&T offers subscribers 11 separate email accounts. *See* AT&T DSL Plans, http://www.att.com/gen/general?pid=11575 (last visited July 10, 2010).

Figure 3:
Comparison of Email Users and High-Speed Internet (HSI) Subscribers
For Largest U.S. ISPs



Source: Comscore Media Matrix; Subscriber figures come from providers 2nd quarter reports (Comcast's 2007 subscriber count is thus from June 30, 2007, not August).

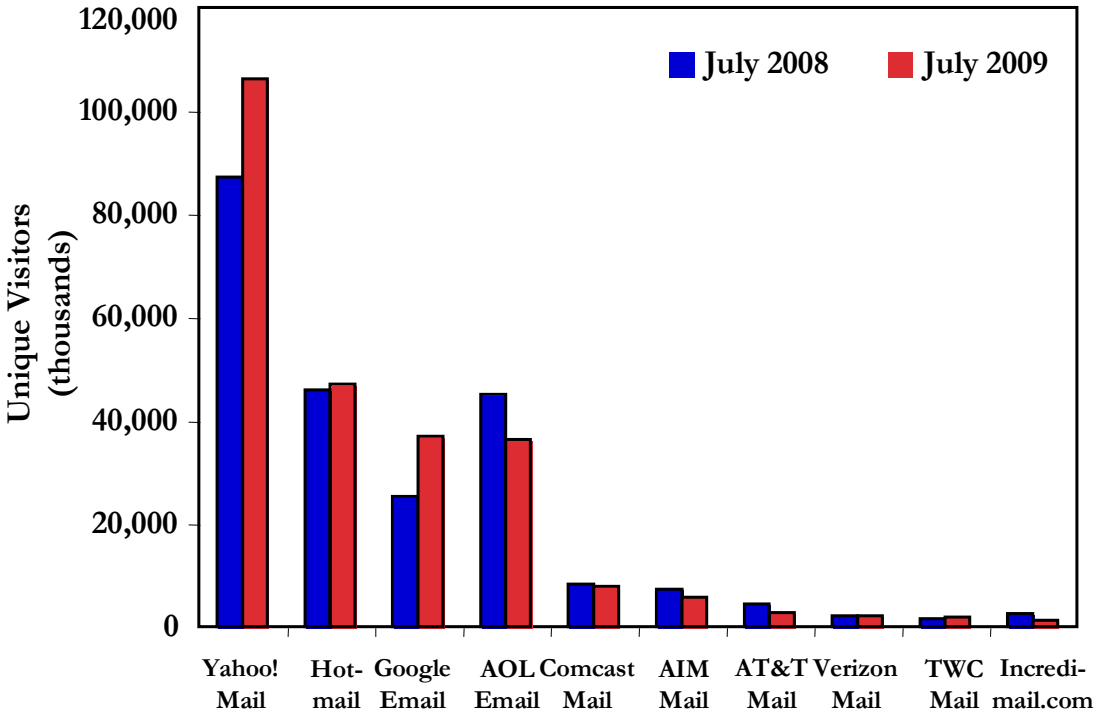
Clearly, consumers need not rely on their broadband provider for e-mail services. Time Warner Cable itself has previously noted, "consumers can choose from a plethora of free e-mail services that are not tied to any particular Internet access provider."[322] The provider noted further that "[m]ost significantly, consumers can buy their own domain names at nominal cost, without any need to rely on commercial e-mail providers for addresses."[323]

Furthermore, despite maintaining millions of customers, broadband providers are not even the leading email providers. Third-party Internet companies are (see Figure 4).

[322] Opposition of Time Warner Inc., *Email Address Portability*, RM Docket No. 11391, at 5 (Oct. 26, 2007).

[323] *Id.* at 3-4.

Figure 4:
Largest Email Providers



Source: Comscore Media Matrix

Indeed, the quality of e-mail services offered by broadband providers pales in comparison to the offerings of web-based companies. For instance, while Time Warner Cable offers a mere 100 MB of email storage, Gmail offers 7,474 MB and Yahoo!, an unlimited amount.[324] In fact, some broadband providers rely on these Internet companies to provide their customers with email. In the case of AT&T, Yahoo! "powers" the service.[325] Frontier Communications has a similar arrangement.[326]

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[324] *See* RoadRunner Webmail, http://help.rr.com/HMSFaqs/Mail_Welcome_405.aspx (last visited July 10, 2010); Welcome to Gmail, http://mail.google.com/ (last visited July 10, 2010); Posting of Michael to TechCrunch, www.techcrunch.com (Mar. 27, 2007).

[325] *See* Welcome to att.net, http://att.yahoo.com/mail (last visited July 10, 2010).

[326] *See* Frontier Homepage Powered by Yahoo!, http://frontier.my.yahoo.com/ (last visited July 10, 2010).

Nor is data storage integrated with connectivity. For example, Comcast outsources its data storage offerings to an existing online data storage entity, one that does not offer Internet connectivity to end users.[327] Furthermore, the same "free" offering that is available to Comcast's customers is available to anyone directly from the partner data storage firm.[328] For larger storage options, Comcast charges $99.99 per year for 200 GB, while the partner firm offers an unlimited amount of storage for $54.45 per year.[329] Time Warner Cable's data storage offering is also far inferior to the free online storage services readily available at no cost online.[330] Not only are these services clearly separate from the underlying connectivity, they offer consumers few incentives to use them given their general inferiority.

As set forth above, caching entails storing popular content geographically closer to consumers in order to reduce the time in which it takes to access that content, but it, too, offers a service that is separate from transmission. First, caching is by no means essential to offering connectivity. Broadband providers long operated without any caching capability. The service arose in order to reduce the costs of associated with transmitting content and decreasing the time in which it took content to appear on a computer screen.

Caching can take place in numerous parts of the network. For instance, most browsers cache Web pages in order to quicken the surfing experience. Similarly, many content owners purchase access to or own servers located closer to consumers' homes for the same reason. These

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[327] *See, e.g.*, Stacey Higginbotham, *Comcast Gives the Gift of Storage: Does Anyone Want That?*, *GigaOm*, Feb. 18, 2010, http://gigaom.com/2010/02/18/comcast-gives-the-gift-of-storage-does-anyone-want-that/.

[328] *See* MozyHome, https://mozy.com/home (last visited July 10, 2010).

[329] *Id.*

[330] *See* Road Runner Safe Storage, https://safestorage.rr.com/ (last visited July 10, 2010); Adrive.com: Compare our Storage and Back-up Plans, http://www.adrive.com/plans (last visited July 10, 2010); Hassle free back up for $5/Month Unlimited, https://secure.backblaze.com/buy.htm (last visited July 10, 2010).

are known as content delivery networks (CDNs). Content providers have a host of choices for these services.[331] Broadband providers have only recently entered the business of selling these services to content providers including by partnering with existing CDNs.[332] During the Commission's open Internet proceeding, CDN providers explained the clear difference between themselves and an entity offering last-mile connectivity.[333] The fact that carriers have chosen to integrate vertically and enter the caching market does not mean that offerings like caching subsume the offering of connectivity.

Nor does domain name system resolution service (DNS service) constitute an information service that is inextricably intertwined with connectivity. In the *Cable Modem Order*, the Commission recognized that DNS service constituted an aspect of "Internet connectivity" that facilitates the routing of traffic over the network,[334] but nevertheless characterized it as an information service under the Act that was inextricably linked with the transmission service offered by broadband Internet service providers.[335] But DNS service clearly does not meet the definition of information service. Under the Act, an information service consists of a capability for storing, transforming, processing, or retrieving information, but it "does not does not include any use of any such capability *for the management, control, or operation of a*

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[331] *See, e.g.*, Contentinople: Guide to Content Delivery Networks, http://www.contentinople.com/proddir/dir_list.asp?dir_id=8 (last visited July 10, 2010).

[332] Ryan Lawler, *Verizon, Velocix Team on CDN Express Lane*, *Contentinople* (Nov. 18, 2008), http://www.contentinople.com/author.asp?section_id=450&doc_id=168086.

[333] *See e.g.*, Reply Comments of Akamai Technologies, Inc., *Preserving the Open Internet,* GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52, at 7-10 (Apr. 26, 2010).

[334] *Cable Modem Order* at ¶ 17 & n.74.

[335] *Id.* at ¶ 38.

telecommunications system or the management of a telecommunications service."[336] DNS service is essentially a directory service: when a user types a website address into a browser (for example, skype.com), the user's DNS service converts that name into the corresponding IP address so that the browser can effectively query the Skype site. As such, it cannot be characterized as an information service because it provides routing information that facilitates the operation and management of the network. Rather, an intellectually honest treatment of DNS service in a Title-II world acknowledges that the service itself is neither a telecommunications service nor an information service, but a broadband Internet connectivity provider may not use DNS service to frustrate or violate the provider's Title-II obligations.

And even if DNS were considered an information service, it is clearly *functionally* separable from a provider's connectivity service.[337] A user could, in theory, input IP addresses directly, forgoing the need for DNS entirely. And a robust market for third-party DNS service also exists: customers are free to utilize the DNS services of a variety of entities.[338] A free service is even available to determine the DNS server that is fastest for a specific user.[339] As a result, DNS cannot be used as an example of an information service that is supposedly inextricably intertwined with data transmission.

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[336] 47 U.S.C. § 153(20).

[337] DNS is an "application-layer protocol that allows host [computers] to query [a] distributed database." JAMES KUROSE & KEITH ROSS, COMPUTER NETWORKING: A TOP-DOWN APPROACH (4th ed. 2008). The application layer is the highest layer in the TCP/IP reference model used by the Internet Engineering Task Force. *See* BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 84 (2010). IP data transport happens at the Internet layer, a layer below the application layer, and it does not rely on higher layer protocols. This would violate the layering principle on which the Internet's architecture is based. *Id.* at 85-86, 88-90.

[338] *See e.g.*, DNS Jumper 1.03, Softpedia, July 12, 2010, http://www.softpedia.com/get/Internet/Other-Internet-Related/Dns-Jumper.shtml (last visited July 14, 2010) (A free program that allows users to choose between 32 different DNS servers).

[339] *See* Google Code Nambench, http://code.google.com/p/namebench/ (last visited July 10, 2010).

Similarly, the Commission must now reject its persistent reliance on the notion that broadband Internet access providers offered their subscribers access to newsgroups.[340] Many major Internet access service providers no long offer this service at all, in part because demand for newsgroup service has declined significantly in the last few years.[341]

Finally, the increasingly common practice of relying on cloud computing illustrates conceptually the fundamental separation of connectivity services from information services that use telecommunications. Cloud computing is Internet-based computation whereby networked machines not in the possession of end-users perform the actions requested. This circumstance mirrors the Commission's set-up that gave rise to the *Computer Inquiries*: dumb remote terminals request information processing that takes place in a third location and is transmitted over basic communications infrastructure.[342] A recent Pew Research survey of "technology stakeholders and critics" found that more than 70 percent believed that by 2020 "most people will access software applications online and share and access information through the use of remote server networks, rather than depending primarily on tools and information housed on

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[340] *Cable Modem Order* at ¶¶ 10 n.33, 18, 37, 38; *Wireline Broadband Order* at ¶¶ 9, 14; *BPL Order* at ¶ 9; *Wireless Broadband Order* at ¶¶ 7, 25.

[341] *See, e.g.*, *Announcements: IMPORTANT – Verizon Newsgroup Service to Be Discontinued*, https://www.verizon.net/central/vzc.portal?_nfpb=true&_pageLabel=vzc_help_announcement&id=newsgroups_discontinue (last visited Mar. 26, 2010); *Comcast.net Newsgroups Discontinued*, http://www.comcast.net/newsgroups (last visited Mar. 26, 2010); Cade Metz*, AT&T Jettisons the Last of its Usenet*, *The Register* (June 9, 2009), http://www.theregister.co.uk/2009/06/09/att_kills_usenet/ (last visited Mar. 26, 2010); Janko Roettgers, *ISPs Shut Down Usenet to Save Children — and Cash*, NewTeeVee (June 11, 2008), http://newteevee.com/2008/06/11/isps-shut-down-usenet-to-save-children-and-cash/ (last visited Mar. 26, 2010) (citing Time Warner Cable's statement that it discontinued the service due to "low subscriber usage").

[342] *See* Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 FED. COMM. L.J. 167, 170-71 (2003).

their individual, personal computers."[343] An IDC market survey predicts that spending on cloud computing will rise from $17 billion in 2009 to $44 billion in 2013.[344] Indeed, a member of the Commission's National Broadband Plan team noted that "there's a general agreement that cloud computing has tremendous potential."[345] Such an occurrence would only further separate connectivity and applications.

Lastly, it is worth noting that "the entire point of an IP-based network is that it need not provide any of the additional functions listed by the FCC (e.g., mail services, hosting web pages) in order to be useful *as an ISP*. It can simply provide 'transmission, between or among points specified by the user, of information of the user's choice, without change in the form or content' — in other words, 'telecommunications.'"[346] In 2010, broadband providers unequivocally "offer[] telecommunications to the public" because their connectivity service retains the character of a distinct offering with its own values and functions. Those functions and that value exist regardless of whether a broadband service provider also offers "a variety of applications."[347]

(3) The Commission's predictions regarding increased competition in the market for broadband Internet connectivity did not pan out.

The Commission must also revisit its predictions regarding competition.

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[343] Janna Quitney Anderson & Lee Raine, *The Future of Cloud Computing* 2 (Pew Internet and American Life Project 2010), http://pewinternet.org/~/media//Files/Reports/2010/PIP_Future_of_the_Internet_cloud_computing.pdf.

[344] Kevin Fogarty, *Cloud Computing: Today's Four Favorite Flavors Explained*, *NetworkWorld* (July 8, 2010), http://www.networkworld.com/news/2010/070810-cloud-computing-todays-four-favorite.html.

[345] Emily Long, *FCC: Agencies Need Common Cloud Computing Vision*, *NextGov* (Mar. 22, 2010), http://www.nextgov.com/nextgov/ng_20100322_8811.php.

[346] Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 900 (2009).

[347] *Cable Modem Order* at ¶ 36.

The FCC's own findings indicate that substantial competition has not emerged in the market, and the outlook for competition is likely to get worse in the coming years.

- In the National Broadband Plan, the Commission found that "[g]iven that approximately 96 percent of the population has at most two wireline providers, there are reasons to be concerned about wireline broadband competition in the United States. Whether sufficient competition exists is unclear and, even if such competition presently exists, it is surely fragile."[348] In 2005, when the Commission issued the *Wireline Broadband Order*, the combined fixed-residential broadband market-share of phone and cable incumbents was 97 percent.[349]
- The plan also concluded that the offerings of non-wireline providers, such as satellite and fixed wireless providers, "tend to be either more expensive or offer a lower range of speeds than today's wireline offerings."[350] In particular, the plan concludes that wireless broadband (whether fixed or mobile) is not an effective substitute for high-speed wireline service, and "may not be an effective substitute in the foreseeable future."[351]
- The FCC also found that rural and low-income consumers are more likely than average to live in monopoly markets.[352]

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[348] *National Broadband Plan* at 37; s*ee also Ex Parte* Submission of the Department of Justice, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 13-14 (Jan. 4, 2010).

[349] Free Press, CHANGING MEDIA: PUBLIC INTEREST POLICIES FOR THE DIGITAL AGE 72-73 (2009).

[350] *National Broadband Plan* at 37; *see also id.* at 39 (noting that mobile broadband users receive download speeds ranging from hundreds of kilobits per second to one megabit per second).

[351] *Id.* at 41; *see also Dismantling Digital Deregulation* at figs. 22-23.

[352] *Id.* at 37.

- The Plan's predictions regarding service at the fastest speeds provide the most pessimistic assessments of current and future competition: The Commission predicts that within a few years, only 15 percent of households will be served by two providers of very high speed connections.[353] All other Americans will have at most one option if they wish to subscribe to the fastest speed-tiers.[354]

The FCC's conclusions regarding intermodal competition were flawed from the start and few new facilities-based providers have entered the market.[355] What evangelists for platform competition fail to grasp is that the simple desire for platform competition does not erase the substantial fixed and sunk costs of building a network. New entrants may be able to justify those costs in some limited instances, but only once they have built the foundations of a successful business. And even then, the barriers to widespread platform competition are still immense, and we should not expect all areas to see multiple facilities-based providers. If entry is going to occur, it will first occur in the market segments where the average revenues per user (ARPU) are very high. This means new entrants will target large business ("enterprise") customers. And this is largely where competitive deployments have occurred, albeit in a very limited fashion.[356] There have been essentially no non-incumbent deployments of next-generation services to residential areas. This lack of competitive market-wide fiber deployment should come as no surprise, given not only the economic barriers, but also the practical

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[353] *Id.* at 42.

[354] *Id.* The FCC should find these statistics particularly troubling because the National Broadband Plan suggests that greater competition spurs faster deployment of high-speed networks. *Id.* at 38.

[355] *See, e.g.*, *Wireline Broadband Order* at ¶ 3.

[356] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES (2006).

constraints such as getting a local government to agree to let the streets be torn up to bury new cables.[357] Indeed, the FCC recognized these constraints when it issued an order foreclosing competitive access to fiber optic lines.[358]

Although not addressed by the *National Broadband Plan*, the moribund state of the non-facilities-based provider market further demonstrates the lack of competition in the broadband service provider market. The FCC used to have a policy to ensure non-facilities based providers had reasonably priced access to copper lines. As a result, in 1998, more than 90 percent of the U.S. population could reach seven or more ISPs.[359] Indeed, that same year the

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[357] If we suspend disbelief and accept the Commission's logic that dismantling existing regulations would create greater incentives for competitors to deploy their own facilities, then the only two companies that might have had a plausible chance to make this happen were MCI and the old AT&T. But just three months after dealing a major blow to competition in the *Wireline Broadband Order* — and on the same day, no less — the Commission allowed SBC to merge with AT&T and approved Verizon's acquisition of MCI. *See SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd. 18290 (2005) (*SBC/AT&T Order*); *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket Memorandum Opinion and Order, 20 FCC Rcd. 18433 (2005) (*Verizon/MCI Order*). Thus the two largest Baby Bells acquired the two largest CLECs, smothering any real possibility of facilities-based competition.

[358] In 2004, the Commission wrote, "The barriers to entry impeding competitive deployment of loops are substantial: The costs of the loops themselves, as well as costs associated with accessing right-of-ways and obtaining building access do not generally vary with demand. As we found in the Triennial Review Order, the costs of loop deployment vary due to factors such as regional differences in costs of construction; the length of the fiber lateral that competitor must construct from the splice point on the relevant ring to the customer location; and the availability of reasonable access to rights-of-way." *See Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd. 2533, ¶ 152 (2003) (*Triennial Review Order on Remand*).

[359] *See* Shane M. Greenstein, *The Economic Geography of Internet Infrastructure in the United States*, *in* HANDBOOK OF TELECOMMUNICATIONS ECONOMICS 286, 310 (Sumit K. Majumdar et al. eds., 2005).

FCC noted that there were "more than 4,000 providers of Internet access."[360] By 2000, the Congressional Research Service found there were 6,000 ISPs in the United States.[361]

Redefining broadband as an "information service" completely destroyed Congress's vision of a competitive marketplace. By declaring that all wireline broadband Internet access services[362] were information services, the FCC completely removed incumbents' obligations to provide wholesale DSL to competitors under Section 251(c)(4).[363] It was an immediate blow to third-party ISPs like Earthlink that relied on reasonable wholesale rates to provide competitive and attractively priced DSL services to millions of customers. The decision ensured that U.S. consumers would be at the mercy of a duopoly market.

These figures have declined precipitously since the removal of the Commission's rules. Despite plenty of confidence that market forces would continue to ensure unaffiliated ISPs gained reasonable access to incumbent networks, [364] such agreements are virtually non-existent.

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[360] *Inquiry Concerning the Deployment 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 of 1996*, Notice of Inquiry, CC Docket No. 98-146, 13 FCC Rcd. 15280, ¶ 37 (1998).

[361] *See* Lenard G. Kruger & Angele A. Gilroy, Congressional Research Service, *Broadband Internet Access: Background and Issues* (May 18, 2001).

[362] "Wireline broadband" in the context of this order encompassed Internet *access services* (and their underlying transmission components) provided over existing or future telephone company network facilities. It did not matter whether the underlying component was provided over copper loops, hybrid copper-fiber loops, fiber-to-the-curb (fttc) or fiber-to-the-premises (fttp) loops. However, in the *Triennial Review Order* and *Orders on Remand*, fttp, fttc and hybrid loops were already relieved of Section 251(c)(3) unbundling obligations. *Triennial Review Order on Remand* at ¶ 152.

[363] The Commission in the 1998 *Advanced Services Order* ruled that "under the plain terms of the Act, incumbent LECs have an obligation to offer for resale, pursuant to section 251(c)(4), all advanced services that they generally provide to subscribers who are not telecommunications carriers."

[364] *See, e.g.*, Federal Communications Commission, *Broadband Today: A Staff Report to William E. Kennard, Chairman, Federal Communications Commission* 34 (1999), *available at*

Leichtman Research recently listed the subscriber counts for the largest broadband providers. Collectively, these providers represent 93 percent of all subscribers.[365] Of the at least 19 companies listed, not a single one is a non-facilities-based provider.[366] In fact, only approximately 1 percent of residential subscribers rely on a non-facilities-based offering.[367]

Individual examples also demonstrate that incumbents have created circumstances where it is uneconomical to either offer or subscribe to non-facilities-based service. A comparison between Earthlink's resold Time Warner services and the offerings of Time Warner itself reveals the flaw in the FCC's thinking that these wholesale agreements would be on reasonable terms or promote competition. As Figure 5 shows, Earthlink's offerings are in no way competitive with Time Warner's. Earthlink does not offer the highest speed tier (15 Mbps), and their highest tier costs consumers nearly $30 more than if they bought it directly from Time Warner Cable. And casual Internet users shopping for a bargain have no reason to choose Earthlink, as the lowest-price tier is nearly 20 percent cheaper if purchased directly from Time Warner.

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http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf; Letter from A. Renee Callahan, Counsel for Comcast Corp. to Marlene Dortch, Secretary, Federal Communications Commission, *Applications for Consent to the Transfer of Control of Licenses From Comcast Corporation and AT&T Corp. to AT&T Comcast Corporation,* MB Docket No. 02-70, at 19 (July 2, 2002); *Wireline Broadband Order* at ¶¶ 74-75 (predicting that facilities-based providers would compete actively with non-facilities-based providers; s*ee also* Letter from Marvin Ammori, General Counsel, Free Press to Marlene H. Dortch, Secretary, FCC, *Broadband Industry Practices*, WC Docket No. 07-52, at 13-15 (July 17, 2008).

[365] Press Release, Leichtman Research Group, 1.4 Million Add Broadband in the First Quarter of 2010 (May 12, 2010).

[366] *Id.*

[367] *Dismantling Digital Deregulation* at 21.

Figure 5:

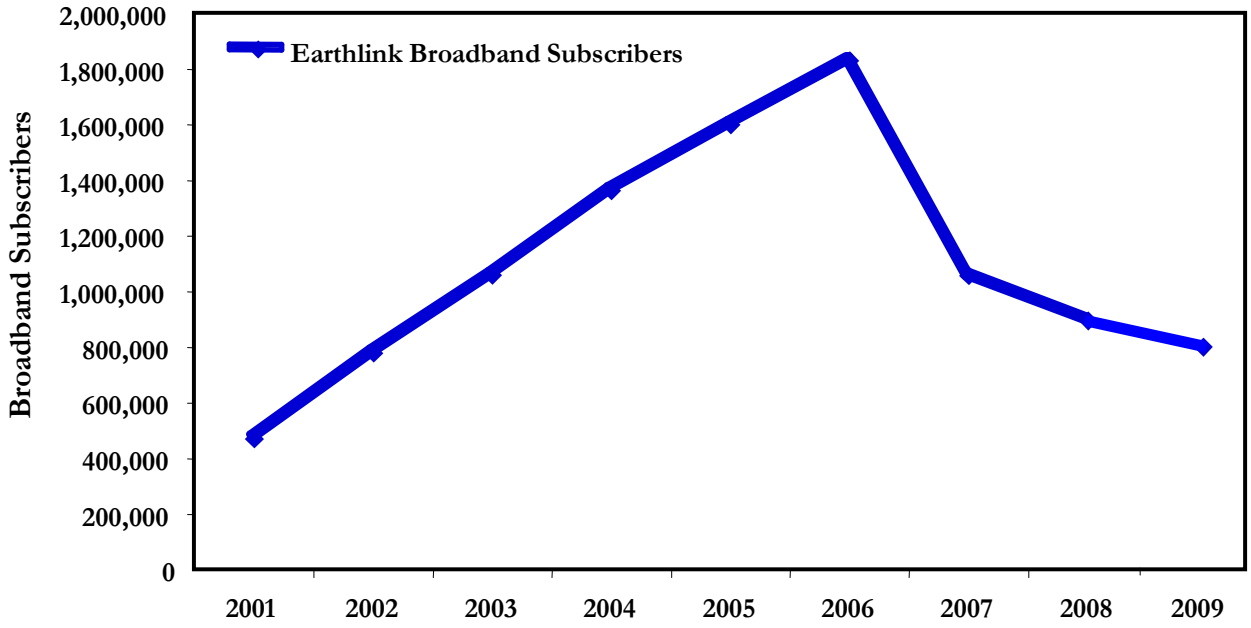
Earthlink on Time Warner Cable

Service Package	Earthlink on TWC (standard monthly price)	TWC (standard monthly price)
768kbps Standalone	$29.95	$24.95
3Mbps Standalone	Not Offered	$29.95
7Mbps Standalone	$41.95	Not Offered
Earthlink Branded Standalone 7Mbps sold on TWC Website	N/A	$46.95
10Mbps Standalone	$72.95	$46.95
10Mbps Bundled with Digital Cable	Not Offered	$39.95
15Mbps Standalone	Not Offered	$49.90

Source: Time Warner Cable published offerings for North Carolina as of April 2009

Indeed, examining Earthlink's success over time highlights the flaws in the Commission's decision. From 2001 to 2006 it saw a steady, cumulative 260 percent increase in the number of retail broadband customers (served on lines obtained at wholesale). But between 2006 and 2007 (when the *Wireline Broadband Order* transition period was complete), the company lost nearly half of its broadband customers (see Figure 6). Earthlink, however, is a standout exception — many ISPs simply went out of business after the 2002-2005 orders.

Figure 6:
The Decline of Earthlink Following the *Wireline Broadband Order*



Source: Earthlink Annual SEC 10-K filings

By contrast, consumers in other countries have access to numerous non-facilities-based broadband providers. In fact, "28 of the 30 OECD markets have adopted unbundling as a way to introduce competition into broadband markets."[368] In many cases, it has worked. For instance, unlike the United States, the incumbent cable and telephone companies in the United Kingdom have less than a 50 percent share of the broadband market. Competitive carriers that utilize network elements from BT (the U.K. incumbent telecom carrier) control more than half the U.K. market.[369] While a resident of Washington, D.C. can choose between the phone, cable company and perhaps a cable overbuilder, a London resident has a choice of at least nine different wireline

[368] Organisation for Economic Co-operation and Development, *Broadband Growth and Policies in OECD Countries* 53 (2008).

[369] Ofcom, *The Communications Market 2009* 201 (2009).

broadband providers.[370] A Washington Post journalist recently returned from France to note that he "had eight to 10 choices" of broadband providers there, as compared to "two and a half choices" in the United States.[371] Indeed, the FCC's own study identified this lack of non-facilities-based competition as the primary impediment to a more successful U.S. broadband market.[372] The Economist recently came to a similar conclusion.[373]

Taken together, these findings conclusively demonstrate that the Commission's earlier predictions have not come true. Instead of the robust consumer choice predicted by the three classification orders, American consumers in 2010 face painfully limited options: they have at best two facilities-based options (and likely only one option at the fastest speeds), and no rational choices among non-facilities-based providers.

(4) As proposed here, Title II classification should not implicate the kinds of reliance interests discussed in Fox Television Stations v. FCC.

Any reliance interests implicated by the change in classification should not deter the FCC from revising its legal framework for making broadband policy. In *Fox*, the Supreme Court noted that an agency's rational explanation for a change in its policy should address any relevant "serious reliance interests".[374] Though the Court did not say that the existence of serious reliance interests precludes agency change, it suggests that the FCC should consider such interests in revisiting the classification decision. Three separate reasons support this conclusion.

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[370] Figured derived from Broadband Providers Comparison for UK ADSL, Cable and Satellite. *See* http://www.broadbandchecker.co.uk/ (last visited July 10, 2010).

[371] Posting of Joel Dreyfuss to PostPartisan: Quick Takes by the [Washington] Post's Opinion Writers, http://voices.washingtonpost.com/postpartisan/ (Apr. 15, 2010, 1:58 PM ET).

[372] *Berkman Center Study* at 13-14.

[373] *Pipe dream – Not what asked for*, THE ECONOMIST, Mar. 18, 2010.

[374] *Fox Television Stations*, 129 S. Ct. at 1811.

First, broadband network operators must have and should have realized that the 2002 decision and subsequent decisions were not necessarily permanent. The Supreme Court has recognized that the subject is "technical, complex, and dynamic" and that the agency can and must review the classification decision periodically.[375] The Commission, too, has long recognized that "the [classification] question may not always be straightforward."[376] And Supreme Court precedent should have disabused providers of any notion that the "forces of change . . . always or necessarily point in the direction of deregulation."[377]

Second, no one has suggested that the Title II classification will apply retroactively. The Commission has expressed no intention impose new liability, seek fines, or impose fees based on past acts taken in good faith reliance on the prior regulatory structure.[378] As a result, all actors in the broadband marketplace will have ample advance warning before the new structure goes into effect.

Third, the Commission has proposed that the classification would be accompanied by "simultaneous" forbearance such that broadband providers would never be subject to the full complement of Title II rules.[379] Though framed tentatively, the Commission has indicated in its Notice of Inquiry that it "could delay the effective date of a classification (or classification and forbearance) decision for 180 days after release, or another suitable period. . . . [C]ertain provisions of Title II . . . could be phased-in on an even longer timetable."[380] And as a practical

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[375] *Brand X*, 545 U.S. at 981, 1002-03.

[376] *Stevens Report* at ¶ 60.

[377] *Motor Vehicle Mfrs. Ass'n of the United States*, 463 U.S. at 42.

[378] *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974); *cf. Fox Television Stations*, 129 S. Ct. at 1812.

[379] *Broadband Authority NOI* at ¶ 28.

[380] *Id.* at ¶ 100.

matter, the Commission will have to adopt some new rules to interpret relevant provisions of Title II for the broadband space, and the Commission will launch a notice-and-comment proceeding for each of those rules. For all these reasons, a move to classify broadband Internet connectivity as a Title II service does not implicate "serious reliance interests."[381]

5. The Commission's other options will, at a minimum, stall the national broadband agenda, and some could compromise it irreparably.

Each of the Commission's remaining options fails to deliver on our collective broadband goals: they are either fraught with delay or risk or both.

A. The Commission could simply await further legislation clarifying its authority over broadband networks, but this effort may take years, and Congress has emphasized that any efforts in that body must be complementary to the Commission's efforts.

Various interested parties have suggested that the Communications Act ought to be revised comprehensively.[382] The last time that happened, in 1996, it took at least five years.[383] The Commission cannot wait five or more years to act on its efforts to close the digital divide, protect consumers, and preserve the open Internet.

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[381] *Fox Television Stations*, 129 S. Ct. at 1811.

[382] *See, e.g.*, Thomas J. Tauke, Executive Vice-President, Public Affairs, Policy, and Communications, Verizon Communications, Prepared Remarks before the New Democrat Network (Mar. 24, 2010), *available at* http://policyblog.verizon.com/BlogPost/714/RemarksVerizonEVPTomTaukeatNewDemocratNetwork.aspx (arguing that "it's time for Congress to take a fresh look at our nation's communications policy framework"); Posting of Jim Cicconi, AT&T Public Policy Blog, http://attpublicpolicy.com/ (Mar. 25, 2010 10:41 AM) ("I've had a chance to read Tom's entire speech, and find myself in agreement with nearly all of it intellectually.").

[383] *See* Telecommunications Act of 1991, H.R. 3515, 102d Cong. (1991).

In recent weeks, the House and Senate Commerce Committees have begun a bipartisan, bicameral process to update communications policy.[384] Nevertheless, both House and Senate members have emphasized that this effort should not be considered a substitute for Commission action.[385] In the words of Senator Jay Rockefeller, Chairman of the Senate Commerce Committee, the agency "should use all of its existing authority to protect consumers and pursue the broad objectives of the broadband plan."[386] Congress can, of course, begin working on an update to the Communications Act, but the prospect of a Congressional fix should not deter the Commission pursuing its important work in the meantime.

B. The Commission should not rely on section 706(a) of the 1996 Telecommunications Act as a grant of statutory authority to make broadband policy because this approach is untested and risky.

Section 706(a) provides that the Commission

> shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that

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[384] *See, e.g.*, Press Release, Jenna Longo, Democratic Deputy Communications Director, Bicameral Bipartisan Telecommunications Update Statement (June 18, 2010), *available at* http://commerce.senate.gov/public/index.cfm?p=PressReleases.

[385] Press Release, Rep. Henry A. Waxman, Chairman Waxman Comments on New FCC Proceeding (June 17, 2010), *available at* http://energycommerce.house.gov/index.php?option=com_content&view=article&id=2047:chairman-waxman-comments-on-new-fcc-proceeding&catid=122:media-advisories&Itemid=55 ("The recently announced Congressional process should in no way hinder or delay the FCC's efforts."). Senator John Kerry, Chairman of the Subcommittee for Communications, Technology, and the Internet, and FCC Chairman Julius Genachowski have also echoed this view. Posting by Gautham Nagesh to Hillicon Valley: The Hill's Technology Blog, http://thehill.com/blogs/hillicon-valley (May 24, 2010 4:49 PM); *Broadband Authority NOI* (statement of Chairman Julius Genachowski).

[386] Press Release, Sen. Jay Rockefeller, Chairman Rockefeller Remarks on Reviewing the National Broadband Plan (Apr. 14, 2010), *available at* http://commerce.senate.gov/public/index.cfm?p=PressReleases.

> promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[387]

If the Commission followed this path, it would likely rely on both section 706(a) and authority ancillary to other provisions of the Communications Act in hopes of further buttressing its legal case. Relying on section 706(a) would require the Commission to revisit a 1998 finding that the section did not constitute an independent grant of authority to make rules regarding broadband.[388]

This approach has significant legal and practical risks. First, because section 706 suggests in general terms that the Commission "encourage" broadband deployment, relying on this section leaves the Commission vulnerable to the claim that section 706 is a mere policy statement that does not delegate any regulatory authority.[389] Second, the Commission's 1998 finding was based purely on its interpretation of the statute and the legislative history.[390] Because any decision by the FCC to reverse its previous statutory interpretation would not involve a determination based on technical or market considerations, such a reversal by the Commission might receive less deference as a practical matter than a fact-based determination would. Indeed, the D.C. Circuit's opinion in the *Comcast* case carefully noted that the court has never "question[ed] the Commission's determination that section 706 does not delegate any regulatory authority."[391] If the Commission were to be successful in defending a new determination that section 706(a) constitutes an independent grant of authority, it faces further issues. Third, the section speaks specifically to the "deployment" of broadband capability, and

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[387] *Id.*

[388] *See Comcast*, 600 F.3d at 658-59 (citing *Advanced Services Order* at ¶ 77).

[389] *Comcast*, 600 F.3d at 654.

[390] *Advanced Services Order* at ¶¶ 69-77.

[391] *Comcast*, 600 F.3d at 659.

therefore subjects policies that drive adoption, preserve the open Internet, and protect consumers to greater litigation risk — particularly if parties challenge those policies on the grounds that they will stifle rather than promote investment. Fourth, reversing the section 706 finding is just a necessary, but by no means sufficient, first step toward enacting broadband policy on this basis of authority. Relying on section 706 will force the Commission to revisit the authority question in every single rulemaking going forward, and each one will have to be justified independently on the grounds that the particular rule at issue will promote broadband deployment. Fifth, because the section does not embrace a limiting principle distinguishing between policies directed at transmission facilities and policies directed at edge services, it creates a less-bounded, more uncertain approach to authority than Title-II classification.

Nor should the Commission rely upon section 706(b) of the Telecommunications Act as a way to move forward with broadband policy. Though section 706(b) likely does provide direct authority for Commission, it places the Commission in an untenable policymaking position. To elaborate, section 706(b) provides that

> the Commission shall . . . initiate [annually] a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.[392]

Unlike many of the provisions discussed in connection with the Commission's Title I authority, section 706(b) commands the Commission directly to "take immediate action" if it

[392] 47 U.S.C. § 1302(b).

finds that advanced telecommunications capability is not being deployed in a reasonable and timely fashion.

But relying on section 706(b) to make broadband policy would embroil the Commission in significant procedural difficulties. The Commission's ability to act under section 706(b) depends completely on making a negative determination in its inquiry.[393] By statute, the FCC must revisit that determination annually. If, in any given year, the Commission adopted a particular policy based on a negative section 706 determination, it could only be assured that the policy would remain in effect for a year. The following year, the Commission would be forced to reevaluate the policy given the conclusions of the following year's report. Introducing litigation into this equation creates further complexities. One could easily imagine a situation in which a rule adopted in 2011, for example, gets challenged and therefore stayed until judicial resolution (in 2013, hypothetically), only to have the negative section 706 finding reversed in the interim such that the 2011 rule never goes into effect at all. These kinds of procedural problems have plagued the Commission in its implementation of its media ownership rules: as a result of a statutorily mandated quadrennial review and associated litigation,[394] the rules in connection with the FCC's 2006 review just went into effect in March, but the Third Circuit will review them this year.[395] Relying on the section 706 determination puts the Commission's broadband

[393] *See id.*

[394] 47 U.S.C. § 303 note.

[395] *See* John Eggerton, *Third Circuit Lifts Stay On Media Ownership Rules*, BROADCASTING & CABLE (Mar. 23, 2010).

policymaking on an even more severe procedural treadmill, and there is little hope that the Commission could make and sustain sound policy based on these constant cycles.[396]

C. Forming a technical advisory group will not, in itself, allow the Commission to pursue its national broadband agenda.

Forming a technical advisory group does not substitute for reestablishing the Commission's authority over broadband networks.[397] First, critical policies like reforming the Universal Service Fund to support broadband cannot be accomplished by even the most august technical advisory group. Other policies, including establishing open Internet rules, truth-in-billing protections, and privacy standards, will have no meaning unless the Commission has the ability to enforce those norms. If the Commission were to deputize industry stakeholders to self-regulate in lieu of reestablishing its authority over broadband Internet connectivity, the result would be a textbook example of regulatory capture. No legal sanctions could be levied on malefactors, and the worst possible punishment for violation would be exclusion from the advisory group. Aggrieved participants or industries would also have no ability to meaningfully appeal a decision by an advisory group, as the courts and Commission would have no role to play.

As a practical matter, establishing a formal technical advisory group seems neither necessary nor especially helpful. The Commission seeks and relies upon public comment in all

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[396] Of course, reliance on section 706(b) also suffers some of the same flaws as reliance on section 706(a): in its emphasis on the goal of deployment, it may limit the Commission's ability to pursue other public interest goals.

[397] *See Broadband Authority NOI* at ¶ 51 (asking whether "other approaches" could "provide meaningful oversight" for broadband Internet connectivity services); *id.* at ¶ 93 (asking for comment on the role of "third party standard setting bodies" to supplement a deregulatory approach to broadband authority). But the proceeding was occasioned by serious doubts over the Commission's ability to use ancillary authority to regulate the network management practices of broadband service providers. Consequently, any assertions that the Commission might "have sufficient ancillary authority under its information service framework" to backstop the functioning of a technical advisory group seem to miss the point. *Id.*

of its proceedings. As with legal, political, or even personal commentary, technical input can be submitted through existing processes, such as *ex parte* filings and comments. An independent advisory group with a range of stakeholders, working together to develop better technical commentary on various proposals or even a set of best practices related to open proceedings, could provide meaningful and valuable input to the Commission even without any formal recognition.

At best, a technical advisory group could identify and develop voluntary standards for industry practices related to network management and other issues. If they are to assist the Commission, they must remain as advisory bodies and must not be empowered to establish official norms or rules governing behavior: authorizing industry stakeholders to develop the substance of their own regulatory policy would not help achieve resolution of complex debates in a matter that furthers the public interest. Input from outside stakeholder negotiations would legally be no more relevant than any other written comment in a proceeding, but such a group would serve as a political vehicle designed to achieve some level of consensus, if such is possible, or at least to identify the true substantive contours of debate. Similarly, such groups should include the broadest possible range of interest groups and should not be forced to come to artificial consensus. In short, an industry self-regulatory group is no substitute for meaningful Commission oversight over broadband networks.

D. The FCC will abdicate its duty to make responsible, sustainable policy choices if it continues relying on ancillary authority to move forward with its broadband agenda.

After *Comcast*, the Commission should not rely on ancillary authority to implement the open Internet rules and the policies contained in the National Broadband Plan. Apart from the individual vulnerabilities associated with each particular policy area highlighted in section 1, *supra*, this approach suffers from significant structural flaws. First, each rulemaking that relies

on ancillary authority — and there will be many — will be litigated individually. The Commission could develop rules to implement its entire Broadband Plan, as well as rules to protect the openness of the Internet, only to see those rules undone one-by-one in litigation over time. This piecemeal process will subject every rule to uncertainty that could last years. Litigation regarding the Commission's authority to adopt policy has often taken at least eighteen months to work its way through the circuit courts, to say nothing of potential petitions for certiorari and Supreme Court review.[398] Rather than litigating one case and definitively resolving questions regarding the Commission's authority, as the FCC would do if it adopted a Title-II framework, continued reliance on ancillary jurisdiction prolongs uncertainty indefinitely. Of course, some rules may be upheld, but the Commission's ability to act in the broadband space will be crippled by the ever-present threat of litigation over authority.

Continued reliance on ancillary authority will also lead to suboptimal policy. The Commission will face distorted incentives in making policy choices: if the Commission wishes to adopt policies regarding broadband Internet connectivity, it must justify those policies as sufficiently related to implementing the operative statutes that govern the technologies over which the Commission currently exercises oversight: telephony, broadcasting, and cable.[399] This is no rational way for the FCC to make policy regarding the most important

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[398] *Compare, e.g.*, *Comcast Order with Comcast*, 600 F.3d at 642 (twenty-one months to complete judicial review in the circuit courts); *Digital Broadcast Content Protection*, MB Docket 02-230, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 23550 (2003) *with Am. Library Ass'n. v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (eighteen months), *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, Report and Order, 15 FCC Rcd. 15230 (2000) *with Motion Picture Ass'n of Am. v. FCC*, 209 F.3d 796 (D.C. Cir. 2002) (more than two years), *Second Computer Inquiry*, 77 F.C.C.2d 384 (F.C.C. 1980) *with CCIA v. FCC*, 693 F.3d 198 (D.C. Cir. 1982) (nineteen months).

[399] *See generally Comcast*; *see also id.* at 656 (holding that ancillary jurisdiction may be exercised "in order to prevent frustration of a regulatory scheme expressly authorized by statute").

communications infrastructure of our time: we ought to adopt policies based on whether they make sense in the context of the broadband market, not because those policies might somehow affect older technologies. In particular, the ancillary authority framework seems especially absurd when one considers that many Americans receive telephone service, cable service, or access to television broadcasting content over an Internet-Protocol-based connection.

In short, each of these options presents either a cumbersome, risky, or delayed resolution to the dilemma currently facing the Commission. By contrast, classifying broadband transmission as a telecommunications service and forbearing extensively from unnecessary regulation, the Commission can put its broadband agenda on solid footing while allowing the Internet ecosystem to flourish. Resolving questions surrounding its authority in a legal sustainable way will allow the FCC to move forward in transforming the National Broadband Plan into reality.

IV. CONCLUSION

A Title-II approach for broadband Internet connectivity provides a sound, legally sufficient, and pragmatic basis for achieving our nation's broadband goals. Perhaps that is why many commenters in the space, including parties as diverse as the Department of Defense and AT&T's principal lobbyist James Cicconi, have supported it over the years.[400] The Commission should neither hesitate nor shirk in reestablishing its authority over broadband networks.

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[400] Comments of the Secretary of Defense, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33; *Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review; Review of Computer II and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10, at 5 (May 3, 2002); Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Marlene Dortch, Secretary, FCC, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*,

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