STATEMENT OF COMMISSIONER
ROBERT M. McDOWELL

RE: *Preserving the Open Internet*, *et al*., Report and Order (Dec. 21, 2010)

Thank you, Mr. Chairman. And thank you for your solicitousness throughout this proceeding. In the spirit of the holidays, with good will toward all, I will present a condensed version of a more in-depth statement, the entirety of which I respectfully request be included in this Report and Order.

At the outset, I would like to thank the selfless and tireless work of all of the career public servants here at the Commission who have worked long hours on this project. Although I strongly disagree with this Order, all of us should recognize and appreciate that you have spent time away from your families as you have worked through weekends, the holidays of Thanksgiving and Chanukah, as well as deep into the Christmas season. Such hours take their toll on family life, and I thank you for the sacrifices made by you and your loved ones.

For those who might be tuning in to the FCC for the first time, please know that over 90 percent of our actions are not only bipartisan, but unanimous. I challenge anyone to find another policy making body in Washington with a more consistent record of consensus. We agree that the Internet is, and should remain, open and freedom enhancing. It is, and always has been so, under existing law. Beyond that, we disagree. The contrasts between our perspectives could not be sharper. My colleagues and I will deliver our statements and cast our votes. Then I am confident that we will move on to other issues where we can find common ground once again. I look forward to working on public policy that is more positive and constructive for American economic growth and consumer choice.

William Shakespeare taught us in *The Tempest*, "What's past is prologue." That time-tested axiom applies to today's Commission action. In 2008, the FCC tried to reach beyond its legal authority to regulate the Internet, and it was slapped back by an appellate court only eight short months ago. Today, the Commission is choosing to ignore the recent past as it attempts the same act. In so doing, the FCC is not only defying a court, but it is circumventing the will of a large, bipartisan majority of Congress as well. More than 300 Members have warned the agency against exceeding its legal authority. The FCC is not Congress. We cannot make laws. Legislating is the sole domain of the directly *elected* representatives of the American people. Yet the majority is determined to ignore the growing chorus of voices emanating from Capitol Hill in what appears to some as an obsessive quest to regulate at all costs. Some are saying that, instead of acting as a "cop on the beat," the FCC looks more like a regulatory vigilante. Moreover, the agency is further angering Congress by ignoring increasing calls for a cessation of its actions and choosing, instead, to move ahead just as Members leave town. As a result, the FCC has provocatively charted a collision course with the legislative branch.

Furthermore, on the night of Friday, December 10, just two business days before the public would be prohibited by law from communicating further with us about this proceeding, the Commission dumped nearly 2,000 pages of documents into the record. As if that weren't enough, the FCC unloaded an additional 1,000 pages into the record less than 24 hours before the end of the public comment period. All of these extreme measures, defying the D.C. Circuit, Congress, and undermining the public comment process, have been deployed to deliver on a misguided campaign promise.

Not only is today the winter solstice, the darkest day of the year, but it marks one of the darkest days in recent FCC history. I am disappointed in these "ends-justify-the-means" tactics and the doubts they have created about this agency. The FCC is capable of better. Today is not its finest hour.

Using these new rules as a weapon, politically favored companies will be able to pressure three political appointees to regulate their rivals to gain competitive advantages. Litigation will supplant innovation. Instead of investing in tomorrow's technologies, precious capital will be diverted to pay lawyers' fees. The era of Internet regulatory arbitrage has dawned.

And to say that today's rules don't regulate the Internet is like saying that regulating highway on-ramps, off-ramps, and its pavement doesn't equate to regulating the highways themselves.

What had been bottom-up, non-governmental, and grassroots based Internet governance will become politicized. Today, the United States is abandoning the long-standing bipartisan and international consensus to insulate the Internet from state meddling in favor of a preference for top-down control by unelected political appointees, three of whom will decide what constitutes "reasonable" behavior. Through its actions, the majority is inviting countries around the globe to do the same thing. "Reasonable" is a subjective term. Not only is it perhaps the most litigated word in American history, its definition varies radically from country to country. The precedent has now been set for the Internet to be subjected to state interpretations of "reasonable" by governments of all stripes. In fact, at the United Nations just last Wednesday, a renewed effort by representatives from countries such as China and Saudi Arabia is calling for what one press account says is, "an international body made up of Government representatives that would attempt to create global standards for policing the internet."[1] By not just sanctioning, but *encouraging* more state intrusion into the Internet's affairs, the majority is fueling a global Internet regulatory pandemic. Internet freedom will not be enhanced, it will suffer.

My dissent is based on four primary concerns:

1) Nothing is broken in the Internet access market that needs fixing;

[1] John Hilvert, *UN Mulls Internet Regulation Options*, ITNEWS, Dec. 17, 2010, http://www.itnews.com.au/News/242051,un-mulls-internet-regulation-options.aspx.

2) The FCC does not have the legal authority to issue these rules;

3) The proposed rules are likely to cause irreparable harm; and

4) Existing law and Internet governance structures provide ample consumer protection in the event a systemic market failure occurs.

Before I go further, however, I apologize if my statement does not address some important issues raised by the Order, but we received the current draft at 11:42 p.m. last night and my team is still combing through it.

I. Nothing Is Broken in the Internet Access Market That Needs Fixing.

All levels of the Internet supply chain are thriving due to robust competition and low market entry barriers. The Internet has flourished because it was privatized in 1994.[2] Since then, it has migrated further away from government control. Its success was the result of bottom-up collaboration, not top-down regulation. No one needs permission to start a website or navigate the Web freely. To suggest otherwise is nothing short of fear mongering.

Myriad suppliers of Internet related devices, applications, online services and connectivity are driving productivity and job growth in our country. About eighty percent of Americans own a personal computer.[3] Most are connected to the Internet. In the meantime, the Internet is going mobile. By this time next year, consumers will see more smartphones in the U.S. market than feature phones.[4] In addition to countless applications used on PCs, growth in the number of mobile applications available to consumers has gone from nearly zero in 2007 to half a million just three years later.[5] Mobile app downloads are growing at an annual rate of 92 percent, with an estimated 50 billion applications expected to be downloaded in 2012.[6]

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[2] And at this juncture, I need to dispel a pervasive myth that broadband was once regulated like a phone company. The FCC's 2002 cable modem order did not move broadband from Title II. It formalized an effort to insulate broadband from antiquated regulations, like those adopted today, that started under then-FCC Chairman Bill Kennard. Furthermore, after the Supreme Court's *Brand X* decision, all of the FCC votes to classify broadband technologies as information services were bipartisan. A more thorough history is attached to this dissent as "Attachment A".

[3] *See* Aaron Smith, Pew Internet & American Life Project, *Americans and their gadgets* (Oct. 14, 2010) at 2, 5, 9 (76 percent of Americans own either a desktop or laptop computer; 4 percent of Americans have "tablet computers").

[4] Roger Entner, Nielsenwire, *Smartphones to Overtake Feature Phones in U.S. by 2011* (Mar. 26, 2010).

[5] *See* Distimo, GigaOm, Softpedia (links at: http://www.distimo.com/appstores/stores/index/country:226; http://gigaom.com/2010/10/25/android-market-clears-100000-apps-milestone/; and http://news.softpedia.com/news/4-000-Apps-in-Windows-Phone-Marketplace-171764.shtml).

[6] *See* Chetan Sharma, *Sizing Up the Global Mobile Apps Market* (2010) at 3, 9.

Fixed and mobile broadband Internet access is the fastest penetrating disruptive technology in history. In 2003, only 15 percent of Americans had access to broadband. Just seven years later, 95 percent do.[7] Eight announced national broadband providers are building out facilities in addition to the construction work of scores more local and regional providers. More competition is on the way as providers light up recently auctioned spectrum. Furthermore, the Commission's work to make unlicensed use of the television "white spaces" available to consumers will create even more competition and consumer choice.

In short, competition, investment, innovation, productivity, and job growth are healthy and dynamic in the Internet sector thanks to bipartisan, deregulatory policies that have spanned four decades. The Internet has blossomed under *current law*.

Policies that promote abundance and competition, rather than the rationing and unintended consequences that come with regulation, are the best antidotes to the potential anticompetitive behavior feared by the rules' proponents. But don't take my word for it. Every time the government has examined the broadband market, its experts have concluded that no evidence of concentrations or abuses of market power exists. The Federal Trade Commission (FTC), one of the premier antitrust authorities in government, not only concluded that the broadband market was competitive, but it also warned that regulators should be "wary" of network management rules because of the unknown "net effects … on consumers."[8] The FTC rendered that unanimous and bipartisan conclusion in 2007. As I discussed earlier, the broadband market has become only more competitive since then.

More recently, the Department of Justice's Antitrust Division reached a similar conclusion when it filed comments with us earlier this year.[9] While it sounded optimistic regarding the prospects for broadband competition, it also warned against the temptation to regulate "to avoid stifling the infrastructure investments needed to expand broadband access."[10]

Disturbingly, the Commission is taking its radical step today without conducting even a rudimentary market analysis. Perhaps that is because a market study would not support the Order's predetermined conclusion.

II. The FCC Does Not Have the Legal Authority to Issue These Rules.

Time does not allow me to refute all of the legal arguments in the Order used to justify its claim of authority to regulate the Internet. I have included a more thorough

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[7] Federal Communications Commission, *Connecting America: The National Broadband Plan* at 20 (rel. Mar. 16, 2010) (*National Broadband Plan*).

[8] Federal Trade Commission, Internet Access Task Force, Broadband Connectivity Competition Policy FTC Staff Report (rel. June 27, 2007) at 157.

[9] *See Ex Parte* Submission of the U.S. Dept. of Justice, GN Docket No. 09-51 (dated Jan. 4, 2010).

[10] *Id.* at 28.

analysis in the supplemental section of this statement, however. Nonetheless, I will touch on a few of the legal arguments endorsed by the majority.

Overall, the Order is designed to circumvent the D.C. Circuit's *Comcast* decision,[11] but this new effort will fail in court as well. The Order makes a first-time claim that somehow, through the *de*regulatory bent of Section 706, in 1996 Congress gave the Commission *direct* authority to regulate the Internet. The Order admits that its rationale requires the Commission to reverse its longstanding interpretation that this section conveys no additional authority beyond what is already provided elsewhere in the Act.[12] This new conclusion, however, is suddenly convenient for the majority while it grasps for a foundation for its predetermined outcome. Instead of "*remov*[*ing*] barriers to infrastructure investment," as Section 706 encourages, the Order fashions a legal fiction to construct *additional* barriers. This move is arbitrary and capricious and is not supported by the evidence in the record or a change of law.[13] The Commission's gamesmanship with Section 706 throughout the year is reminiscent of what was attempted with the contortions of the so-called "70/70 rule" three years ago. I objected to such factual and legal manipulations then, and I object to them now.

Furthermore, the Order desperately scours the Act to find a tether to moor its alleged Title I ancillary authority. As expected, the Order's legal analysis ignores the fundamental teaching of the *Comcast* case: Titles II, III, and VI of the Communications Act give the FCC the power to regulate specific, recognized classes of electronic communications services, which consist of common carriage telephony, broadcasting and other licensed wireless services, and multichannel video programming services.[14]

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[11] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

[12] Order, ¶ 123, n. 467.

[13] While it is true that an agency may reverse its position, "the agency must show that there are good reasons." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Moreover, while *Fox* held that "[t]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," the Court noted that "[s]ometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interest that must be taken into account." *Id.* (internal citations omitted).

[14] The D.C. Circuit in *Comcast* set forth this framework in very plain English:

> Through the Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended over the decades, 47 U.S.C. § 151 *et seq.*, Congress has given the Commission express and expansive authority to regulate common carrier services, including landline telephony, *id.* § 201 *et seq.* (Title II of the Act); radio transmissions, including broadcast television, radio, and cellular telephony, *id.* § 301 *et seq.* (Title III); and "cable services," including cable television, *id.* § 521 *et seq.* (Title VI). In this case, the Commission does not claim that Congress has given it express authority to regulate Comcast's Internet service. Indeed, in its still-binding 2002 *Cable Modem Order*, the Commission ruled that cable Internet service is neither a "telecommunications service" covered by Title II of the Communications Act nor a "cable service" covered by Title VI. *In re High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802, P 7 (2002), *aff'd Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

600 F.3d at 645.

Despite the desires of some, Congress has *not* established a new title of the Act to police Internet network management, not even implicitly. The absence of statutory authority is perhaps why Members of Congress introduced legislation to give the FCC such powers. In other words, if the Act already gave the Commission the legal tether it seeks, why was legislation needed in the first place? I'm afraid that this leaky ship of an Order is attempting to sail through a regulatory fog without the necessary ballast of factual or legal substance. The courts will easily sink it.

In another act of legal sleight of hand, the Order claims that it does not attempt to classify broadband services as Title II common carrier services. Yet functionally, that is precisely what the majority is attempting to do to Title I information services, Title III licensed wireless services, and Title VI video services by subjecting them to nondiscrimination obligations in the absence of a congressional mandate. What we have before us today is a Title II Order dressed in a threadbare Title I disguise. Thankfully, the courts have seen this bait-and-switch maneuver by the FCC before – and they have struck it down each time.[15]

The Order's expansive grasp for jurisdictional power here is likely to alarm any reviewing court because the effort appears to have no limiting principle.[16] If we were to accept the Order's argument, "it would virtually free the Commission from its congressional tether."[17] "As the [Supreme] Court explained in *Midwest Video II*, 'without reference to the provisions of the Act' expressly granting regulatory authority, 'the Commission's [ancillary] jurisdiction … would be unbounded.'"[18] I am relieved, however, that in the Order, the Commission is explicitly refraining from regulating coffee shops.[19]

In short, if this Order stands, there is no end in sight to the Commission's powers.

I also have concerns regarding the constitutional implications of the Order, especially its trampling on the First and Fifth Amendments. But in the observance of time, those thoughts are contained in my extended written remarks.

III. The Commission's Rules Will Cause Irreparable Harm to Broadband Investment and Consumers.

DOJ's cogent observation from last January regarding the competitive nature of the broadband market raises the important issue of the likely irreparable harm to be brought about by these new rules. In addition to government agencies, investors,

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[15] *See, e.g., id.; FCC v. Midwest Video Corp*, 440 U.S. 689 (1979) (*Midwest II*).

[16] For example, in the *Comcast* case, FCC counsel conceded at oral argument that the ancillary jurisdiction argument there could even encompass rate regulation, if the Commission chose to pursue that path. *Id.* at 655 (referring to Oral Arg. Tr. 58-59).

[17] *Id.*

[18] *Id.* (quoting *Midwest Video II*, 440 U.S. at 706).

[19] Order, ¶ 54.

investment analysts, and broadband companies themselves have told us that network management rules would create uncertainty to the point where crucial investment capital will become harder to find. This point was made over and over again at the FCC's Capital Formation Workshop on October 1, 2009. A diverse gathering of investors and analysts told us that even rules emanating from Title I would create uncertainty. Other evidence suggests that Internet management rules could not only make it difficult for companies to "predict their revenues and cash flow," but a new regime could "have the perverse effect of raising prices to all users" as well.[20]

Additionally, today's Order implies that the FCC has price regulation authority over broadband. In fact, the D.C. Circuit noted in its *Comcast* decision last spring that the Commission's attorneys openly asserted at January's oral argument that "the Commission could someday subject [broadband] service to pervasive rate regulation to ensure that … [a broadband] company provides the service at 'reasonable charges.'"[21] Nothing indicates that the Commission has changed its mind since then. In fact, the Order appears to support both indirect and direct price regulation of broadband services.[22]

Moreover, as lobbying groups accept this Order's invitation to file complaints asking the government to distort the market further the Commission will be under increasing pressure from political interest groups to expand its power and influence over the broadband Internet market. In fact, some of my colleagues today are complaining that the Order doesn't go far enough. Each complaint filed will create more uncertainty as the enforcement process becomes a *de facto* rulemaking circus, just as the Commission attempted in the ill-fated *Comcast/BitTorrent* case.[23] How does this framework create regulatory certainty?[24] Even the European Commission recognized the harm such rules could cause to the capital markets when it decided last month *not* to impose measures similar to these.[25]

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[20] Howard Buskirk, *Investors, Analysts Uneasy About FCC Direction on Net Neutrality*, COMM. DAILY, Oct. 2, 2009, at 2; *see also* National Cable & Telecommunications Association Comments at 19; Verizon and Verizon Wireless Reply Comments at 17–18.

[21] *Comcast,* 600 F.3d at 655 (referring to Oral Arg. Tr. 58-59).

[22] *See, e.g.*, Order, ¶ 78.

[23] *See Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, File No. EB-08-IH-1518, Memorandum Opinion and Order, 23 FCC Rcd. 13,028 (2008) (*Comcast Order*). Comcast and BitTorrent settled their dispute, in the absence of net neutrality rules, four months before the Commission issued its legally flawed order. *See*, *e.g.*, David Kirkpatrick, *Comcast-BitTorrent: The Net's Finally Growing Up*, CNN.COM, Mar. 28, 2008, at http://money.cnn.com/2008/03/27/technology/comcast.fortune/index.htm

[24] Furthermore, as Commissioner Baker has noted, with this Order the Commission is inviting parties to file petitions for declaratory rulings, which will likely result in competitors asking the government to regulate their rivals in advance of market action. I am hard pressed to find a better example of a "mother-may-I" paternalistic industrial policy making apparatus.

[25] Neelie Kroes, Vice President for the Digital Age, European Commission, Net Neutrality – The Way Forward: European Commission and European Parliament Summit on "The Open Internet and Net Neutrality in Europe" (Nov. 11, 2010).

Part of the argument in favor of new rules alleges that "giant corporations" will serve as hostile "gatekeepers" to the Internet. First, in the almost nine years since those fears were first sewn, net regulation lobbyists can point to fewer than a handful of cases of alleged misconduct, out of an infinite number of Internet communications. *All* of those cases were resolved in favor of consumers under *current* law.

More importantly, however, many broadband providers are not large companies. Many are small businesses. Take, for example, LARIAT, a fixed wireless Internet service provider serving rural communities in Wyoming. LARIAT has told the Commission that the imposition of network management rules will impede its ability to obtain investment capital and will limit the company's "ability to deploy new service to currently unserved and underserved areas."[26] Furthermore, LARIAT echoes the views of many others by asserting that, "[t]he imposition of regulations that would drive up costs or hamper innovation would further deter future outside investment in our company and others like it."[27] Additionally, "[t]o mandate overly [burdensome] network management policies would foster lower quality of service, raise operating costs (which in turn would raise prices for all subscribers), and/or create a large backlog of adjudicative proceedings at the Commission (in which it would be prohibitively expensive for *small and competitive ISPs* to participate)".[28] LARIAT also notes that the imposition of net neutrality rules would cause immediate harm such that "[d]ue to immediate deleterious impacts upon investment, these damaging effects would be likely to occur even if the Commission's Order was later invalidated, nullified, or effectively modified by a court challenge or Congressional action."[29] Other small businesses have echoed these concerns.[30]

Less investment. Less innovation. Increased business costs. Increased prices for consumers. Disadvantages to smaller ISPs. Jobs lost. And all of this is in the name of promoting the exact opposite? The evidence in the record simply does not support the majority's outcome driven conclusions.

In short, the Commission's action today runs directly counter to the laudable broadband deployment and adoption goals of the National Broadband Plan. No government has ever succeeded in mandating investment and innovation. And nothing has been holding back Internet investment and innovation, until now.

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[26] LARIAT Comments at 2-3.

[27] *Id.* at 3.

[28] *Id.* at 5 (emphasis added).

[29] Letter from Brett Glass, d/b/a LARIAT, to Julius Genachowski, Chairman, FCC, *et al*., at 2 (Dec. 9, 2010) (LARIAT Dec. 9 Letter).

[30] *See, e.g.,* Letter from Paul Conlin, President, Blaze Broadband, to Marlene H. Dortch, Secretary (Dec. 14, 2010) (Blaze Broadband Dec. 14 Letter).

IV. Existing Law Provides Ample Consumer Protection.

To reiterate, the Order fails to put forth either a factual or legal basis for regulatory intervention. Repeated government economic analyses have reached the same conclusion: no concentrations or abuses of market power exist in the broadband space. If market failure were to occur, however, America's antitrust and consumer protection laws stand at the ready. Both the Department of Justice and the Federal Trade Commission are well equipped to cure any market ills.[31] In fact, the Antitrust Law Section of the American Bar Association agrees.[32] Nowhere does the Order attempt to explain why these laws are insufficient in its quest for more regulation.

Moreover, for several years now, I have been advocating a potentially effective approach that won't get overturned on appeal. In lieu of new rules, which will be tied up in court for years, the FCC could create a new role for itself by partnering with already established, non-governmental Internet governance groups, engineers, consumer groups, academics, economists, antitrust experts, consumer protection agencies, industry associations, and others to spotlight allegations of anticompetitive conduct in the broadband market, and work *together* to resolve them. Since it was privatized, Internet governance has always been based on a foundation of bottom-up collaboration and cooperation rather than top-down regulation. This truly "light touch" approach has created a near-perfect track record of resolving Internet management conflicts without government intervention.

Unfortunately, the majority has not even considered this idea for a moment. But once today's Order is overturned in court, it is still my hope that the FCC will consider and adopt this constructive proposal.

In sum, what's past is indeed prologue. Where we left the saga of the FCC's last net neutrality order before was with a spectacular failure in the appellate courts. Today, the FCC seems determined to make the same mistake instead of learning from it. The

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[31] Section 2 of the Sherman Act, 15 U.S.C. § 2, prohibits conduct that would lead to monopolization. In the event of abuse of market power, this is the main statute that enforcers would use. In the context of potential abuses by broadband Internet access service providers, this statute would forbid: (1) Exclusive dealing – for example, the only way a consumer could obtain streaming video is from a broadband provider's preferred partner site; (2) Refusals to deal (the other side of the exclusive dealing coin) – *i.e.*, if a cable company were to assert that the only way a content delivery network could interconnect with it to stream unaffiliated video content to its customers would be to pay $1 million/port/month, such action could constitute a "constructive" refusal to deal if any other content delivery network could deliver any other traffic for a $1,000/port/month price; and (3) Raising rivals' costs – achieving essentially the same results using different techniques.

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, essentially accomplishes the same curative result, only through the FTC. It generally forbids "unfair competition." This is an effective statute to empower FTC enforcement as long as Internet access service is considered an "information service." The FTC Act explicitly does not apply to "common carriers."

See also, 15 U.S.C. §13(a), *et seq.*

[32] ABA Comment on Federal Trade Commission Workshop: Broadband Connectivity Competition Policy, 195 Project No. V070000 (2007).

only illness apparent from this Order is regulatory hubris. Fortunately, cures for this malady are obtainable in court. For all of the foregoing reasons, I respectfully dissent.

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Extended Legal Analysis:
The Commission Lacks Authority to Impose Network Management Mandates on Broadband Networks.

The Order is designed to circumvent the effect of the D.C. Circuit's *Comcast* decision,[33] but that effort will fail. Careful consideration of the Order shows that its legal analysis ignores the fundamental teaching of *Comcast*: Titles II, III, and VI of the Communications Act regulate specific, recognized classes of electronic communications services, which consist of common carriage telephony, broadcasting and other licensed wireless services, and multichannel video programming services.[34] Despite any policy desires to the contrary, Congress has not yet established a new title of the Act to govern some or all parts of the Internet – which includes the operation, or "management," of the networks that support the Internet's functioning as a new and highly complex communications platform for diverse and interactive data, voice, and video services. Until such time as lawmakers may act, the Commission has no power to regulate Internet network management.

As detailed below, the provisions of existing law upon which the Order relies afford the Commission neither direct nor ancillary authority here. The tortured logic needed to support the Order's conclusion requires that the agency either reverse its own interpretation of its statutorily granted express powers or rely on sweeping pronunciations of ancillary authority that lack any "congressional tether" to specific provisions of the Act.[35] Either path will fail in court.

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[33] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

[34] The D.C. Circuit in *Comcast* set forth this framework in very plain English:

> Through the Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended over the decades, 47 U.S.C. § 151 *et seq.*, Congress has given the Commission express and expansive authority to regulate common carrier services, including landline telephony, *id.* § 201 *et seq.* (Title II of the Act); radio transmissions, including broadcast television, radio, and cellular telephony, *id.* § 301 *et seq.* (Title III); and "cable services," including cable television, *id.* § 521 *et seq.* (Title VI). In this case, the Commission does not claim that Congress has given it express authority to regulate Comcast's Internet service. Indeed, in its still-binding 2002 *Cable Modem Order*, the Commission ruled that cable Internet service is neither a "telecommunications service" covered by Title II of the Communications Act nor a "cable service" covered by Title VI. *In re High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802, P 7 (2002), *aff'd Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

600 F.3d at 645.

[35] *Id.* at 655.

Instead, the judicial panel that ends up reviewing the inevitable challenges is highly likely to recognize this effort for what it is. While ostensibly eschewing reclassification of broadband networks as Title II platforms, the Order imposes the most basic of all common carriage mandates: nondiscrimination, albeit with a vague "we'll know it when we see it" caveat for "reasonable" network management. This may be only a pale version of common carriage (at least for now), but it is still quite discernible even to the untrained eye.

A. Reversal of the Commission's Interpretation of Section 706 Cannot Provide Direct Authority for Network Management Rules.

Less than one year ago, the Commission in attempting to defend its *Comcast/BitTorrent* decision at the D.C. Circuit "[a]cknowledged that it has no express statutory authority over [an Internet service provider's network management] practices."[36] The Commission was right then, and the Order is wrong now. Congress has never contemplated, much less enacted, a regulatory scheme for broadband network management, notwithstanding the significant revision of the Communications Act undertaken through the Telecommunications Act of 1996 (1996 Act).[37] It is an exercise in legal fiction to contend otherwise.

Any analysis of an arguable basis for the Commission's power to act in this area must begin with the recognition that broadband Internet access service remains an unregulated "information service" under Title I of the Communications Act.[38] Overtly, the Order does not purport to change this legal classification.[39] Yet a reviewing court will look beyond the Order's characterization of the Commission's action to scrutinize what the new codified rules – and the directives and warnings set forth in the text – actually do.[40] Dispassionate analysis will lead to the conclusion that the Order attempts

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[36] *Id.* at 644.

[37] The scattered references to the Internet and advanced services in a few provisions of the 1996 Act, *see, e.g.*, 47 U.S.C. §§ 230, 254, do not constitute a congressional effort to systemically regulate the management of the new medium. A better reading of the 1996 Act in this regard is that Congress recognized that the emergence of the Internet meant that something new, exciting, and yet still amorphous was coming. Rather than act prematurely by establishing a detailed new regulatory scheme for the Net, Congress chose to leave the Net unregulated at that time.

[38] *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4,798 (2002) (*Cable Modem Declaratory Ruling*); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14,853 (2005) (*Wireline Broadband Order*); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd. 5,901 (2007) (*Wireless Broadband Order*).

[39] Order, ¶¶ 123-24.

[40] *See, e.g.*, *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) ("in the context of reviewing a decision ... courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information.").

to relegate this type of information service to common carriage by effectively applying major Title II obligations to it. The Title I disguise will not be convincing.

The threadbare nature of the disguise becomes clear with scrutiny of the Order's claims for a legal basis for the new regulations. The Order's only serious effort to assert direct authority is based on Section 706.[41] The Order glosses over the key point that no language within Section 706 – or anywhere else in the Act, for that matter – bestows the FCC with explicit authority to regulate Internet network management. Rather, Section 706's explicit focus is on "deployment" and "availability" of broadband network facilities.[42] So what precisely is the nexus between Section 706's focus on broadband deployment and availability and the Order's focus on network management once the facilities *have been* deployed and the service *is* available? The Order seems to imply that Section 706 somehow provides the Commission with network management authority because if the government lacks such power, some American might have less access to the Internet. This rationale is contrary to the provision's language and illogical on its face. Imposing new regulations on network providers in the business of deploying broadband[43] will have the opposite effect of what Section 706 seeks to do. Instead, the imposition of network management rules will likely depress investment in deployment of broadband throughout our nation.[44] This outcome will prove true not simply for the large providers tracked by Wall Street analysts but for the small businesses that supply vital and competitive broadband options to consumers in many locales across the nation.[45]

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[41] To the degree that the Order suggests that other sections in the Act provide it with direct authority to impose new Internet network management rules, such arguments are not legally sustainable. For the reasons set forth in Section B of this extended legal analysis, *infra*, the claimed bases for extending even ancillary authority are unconvincing, which renders contentions about direct authority untenable.

[42] 47 U.S.C. §§ 1302 (a), (b).

[43] The National Broadband Plan even noted that, "[d]ue in large part to private investment and market-driven innovation, broadband in America has improved considerably in the last decade." Federal Communications Commission, *Connecting America: The National Broadband Plan* at 3 (rel. Mar. 16, 2010) (*National Broadband Plan*). Note that during this same time period of investment, no network management rules existed.

[44] The Commission has been warned about this consequence many times in the recent past. For example, during the Commission's October 2009 Capital Formation Workshop, several investment professionals raised red flags about a Title I approach to Internet regulation. Trade press accounts reported Chris King, an analyst at Stifel Nicolaus, as saying that "[w]hen you look at the telecom sector or cable sector, one of the things that scares them to death is net neutrality.... Any regulation that would limit severely [Verizon's and AT&T's] ability to control their own networks to manage traffic of their own networks could certainly have a negative role in their levels of investment going forward." Howard Buskirk, *Investors, Analysts Uneasy About FCC Direction on Net Neutrality*, COMM. DAILY, Oct. 2, 2009, at 1. Similarly, Tom Aust, a senior analyst at GE Asset Management, stated that regulatory risk is "ultimately unknowable because it's so broad and it can be so quick. For a company it means that they can't predict their revenues and cash flows as well, near or long term." *Id.* at 2.

[45] Network management regulations will affect the investment outlook for transmission providers large and small. In the latter category, Brett Glass, the sole proprietor of LARIAT, a wireless Internet service provider in Wyoming, has filed comments expressing concern that the imposition of network management rules will impede his ability to obtain investment and will limit his "ability to deploy new service to currently unserved and underserved areas." LARIAT Comments at 2–3. He stated that "[t]he imposition

A closer reading of the statutory text bears out this assessment. Turning specifically to the language of Section 706(a), the provision opens with a policy pronouncement that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[46] As *Comcast* already has pointed out, "under Supreme Court and D.C. Circuit case law statements of policy, by themselves, do not create 'statutorily mandated responsibilities.'"[47] Rather, "[p]olicy statements are just that – statements of policy. They are not delegations of regulatory authority."[48] The same holds true for congressional statements of policy, such as the opening of Section 706, as it does for any agency's policy pronouncements.

The Order makes a strenuous effort to argue that Section 706 is not limited to deregulatory actions, a herculean task taken on because the Order rests nearly all of its heavy weight on this thin foundation.[49] Section 706 does refer to one specific regulatory

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of regulations that would drive up costs or hamper innovation would further deter future outside investment in our company and others like it." *Id*. at 3. Specifically, he argues that "[t]o mandate overly [burdensome] network management policies would foster lower quality of service, raise operating costs (which in turn would raise prices for all subscribers), and/or create a large backlog of adjudicative proceedings at the Commission (in which it would be prohibitively expensive for small and competitive ISPs to participate). *Id*. at 5. "Due to immediate deleterious impacts upon investment, these damaging effects would be likely to occur even if the Commission's Order was later invalidated, nullified, or effectively modified by a court challenge or Congressional action." Letter from Brett Glass, d/b/a LARIAT, to Julius Genachowski, Chairman, FCC, *et al*., at 2 (Dec. 9, 2010) (Glass Dec. 9 Letter). *See also* Letter from Paul Conlin, President, Blaze Broadband, to Marlene H. Dortch, Secretary (Dec. 14, 2010) (Blaze Broadband Dec. 14 Letter).

[46] 47 U.S.C. § 1302(a).

[47] *Comcast,* 600 F.3d at 644.

[48] *Id.* at 654.

[49] In support of its jurisdictional arguments, the Order cites to language in *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009). In that case, the D.C. Circuit does, in fact, state that "[t]he general and generous phrasing of § 706 means that the FCC possesses significant albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband – a statutory reality that assumes great importance when parties implore courts to overrule FCC decisions on this topic." *Ad Hoc Telecomms.,* 572 F.3d at 906–07. But, there are several reasons why that statement in *Ad Hoc Telecomms.* cannot be used for the proposition that Section 706 provides the FCC with the authority to impose network management rules. First, it is notable that the petitioners in *Ad Hoc Telecomms.* were challenging one of the FCC's forbearance decisions. As such, the FCC was not relying on Section 706 authority *alone* in that case, it was also relying on it's forbearance authority which is specifically delegated to the FCC pursuant to Section 10. The D.C. Circuit made this point in *Comcast,* when it rejected the FCC's use of *Ad Hoc Telecomms.* for its Section 706 authority arguments. *Comcast*, 600 F.3d at 659 ("In [*Ad Hoc Telecomms.*], however, we cited section 706 merely to support the Commission's choice between regulatory approaches clearly within its *statutory authority under other sections of the Act*.") (emphasis added). Second, the text of Section 706(a) actually lists "regulatory forbearance" as an example of one of the tools that the FCC may employ in order to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 47 U.S.C. § 1302(a). By contrast, network management regulations are not listed in Section 706 or anywhere else in the Act. Finally, as the D.C. Court reiterated in *Comcast,* 600 F.3d at 659, the central issue that it focused on in *Ad Hoc Telecomms.* was not jurisdictional; rather it was whether the FCC's underlying forbearance decision had been arbitrary and capricious, specifically "when and how much" can the FCC forbear from Title II obligations. *Ad Hoc*

provision – price cap regulation.[50] Readers should keep in mind, however, that at the time Section 706 was enacted, 1996, price cap regulation of incumbent local exchange carriers was considered to be *deregulatory* when compared to the legacy alternative: rate-of-return regulation. The provision's remaining language is even more broad and deregulatory. For instance, the end of section 706(a) states that the FCC should explore "*other* regulating methods that *remove barriers to infrastructure investment*."[51] Additionally, its counterpart subsection, Section 706(b), states that if the FCC's annual inquiry determines that advanced telecommunications is not "being deployed to all Americans in a reasonable and timely fashion" the FCC shall take action to "*remove[e] barriers to infrastructure investment* and ... promot[e] competition in the telecommunications market."[52] As discussed above, the Order's actions will have the opposite effect.

Moreover, the Order's new interpretation of Section 706(a) is self serving and outcome determinative. The Order admits that its rationale requires reversing the Commission's longstanding interpretation of that subsection as conveying no authority beyond that already provided elsewhere in the Act.[53] This arbitrary and capricious move is not supported by evidence in the record or a change in law.[54] The Order offers the excuse that "[i]n the particular proceedings prior to *Comcast*, setting out the understanding of Section 706(a) that we articulate in this Order would not meaningfully have increased the authority that we understood the Commission already to possess."[55]

Telecomms., 572 F.3d at 904. Moreover, the court was very clear in noting that such authority was "not unfettered." *Id.* at 907.

[50] On that note, the Order even highlights the fact that "706(a) expressly contemplates the use of regulatory methods such as price regulation." *See* Order, n. 467. This aside is an unsettling foreshadow of how these rules could be used to regulate broadband rates in the future, through either *ad hoc* enforcement cases or declaratory rulings.

[51] 47 U.S.C. § 1302(a) (emphasis added). This focus on infrastructure investment makes sense in light of Congress' express concern that broadband facilities quickly reach "elementary and secondary schools and classrooms," *id*., which in 1996 may have lacked the economic appeal of business and residential districts as early targets for infrastructure upgrades.

[52] 47 U.S.C. § 1302(b).

[53] Order, ¶ 123, n. 467.

[54] While it is true that an agency may reverse its position, "the agency must show that there are good reasons." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Moreover, while *Fox* held that "[t]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," the Court noted that "[s]ometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interest that must be taken into account." *Id.* (internal citations omitted). This warning is thrown into sharp focus by the billions of dollars invested in broadband infrastructure since the Commission first began enunciating its decisions against Title II classification of broadband Internet networks. *See, e.g.,* AT&T Comments at 19; Verizon Comments at 22.

[55] *See* Order, ¶ 123; *see also Comcast Corp. v. FCC*, 600 F.3d 642, 658 (D.C. Cir. 2010) (noting that "[i]n an earlier, still binding order, however, the Commission ruled that section 706 'does not constitute an independent grant of authority.'" (quoting *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability,* CC Docket No. 98-147, Memorandum Opinion and Order, 13 FCC Rcd. 24,012, 24,047 ¶ 77 (1988)).

In other words, apparently, the agency's confused understanding of the limits of its ancillary authority meant that the Commission then did not have to rest on Section 706(a) in order to overreach by "pursu[ing] a stand-alone policy objective" not moored to "a specifically delegated power."[56]

The Order's reliance on Section 706(b) as providing a statutory foundation for network management regulations is similarly flawed. That subsection requires that the FCC determine on an annual basis whether "advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion."[57] Congress then further directed the Commission, if the agency's determination were negative, to "take immediate action to accelerate deployment of such capability by *removing barriers to infrastructure investment* and by promoting competition in the telecommunications market" (emphasis added).[58]

To justify its use of this trigger, the Order points to the fact that approximately six months ago, the Commission on a divided 3-2 vote issued a report finding – for the first time in history – that "broadband deployment to all Americans is not reasonable and timely."[59] This determination, in conflict with all previous reports dating back to 1999, was both perplexing and unsettling. It ignored the impressive strides the nation has made in developing and deploying broadband infrastructure and services since issuance of the first 706 Report. Amazingly enough, the most recent 706 Report managed to find failure even while pointing to data (first made public in the National Broadband Plan) showing that "95% of the U.S. population lives in housing units with access to terrestrial, fixed broadband infrastructure capable of supporting actual download speeds of at least 4 Mbps."[60] In fact, only 15 percent of Americans had access to residential broadband services in 2003.[61] Only seven years later, 95 percent enjoyed access, making broadband the fastest penetrating disruptive technology in history.[62] At the time that I dissented from the 706 Report, I expressed concern that its findings could be a pretext for justifying additional regulation, rather than "removing barriers to infrastructure investment."[63] Unfortunately, this Order reveals that my fears were well founded.

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

[57] 47 U.S.C. § 1302(b).

[58] *Id.*

[59] *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,* GN Docket No. 09-137, Sixth Broadband Deployment Report, 25 FCC Rcd. 9,556, 9,558 ¶¶ 2–3 (2010). Commissioner Baker and I dissented from the July 2010 adoption of the latest Section 706 Report.

[60] *National Broadband Plan* at 20.

[61] *See* John Horrigan, Pew Internet and American Life Project, *Home Broadband Adoption 2009*, 11 (2009).

[62] *National Broadband Plan* at 20.

[63] 47 U.S.C. § 1302(b).

One is left to wonder where this assertion of power, if left unchecked, may lead next.[64] As for the Order itself, the short-term path is clear: It will be challenged in court. Once there, the Commission must struggle with the fact that the empirical evidence in this docket demonstrates "no relationship whatever" between the plain meaning of Section 706 and the network management rules being adopted.[65]

B. Efforts to Advance New Arguments for Exercising Ancillary Authority Will Not Survive Court Review.

In spite of the D.C. Circuit's decision in *Comcast*, the Order attempts to continue to assert ancillary authority as another basis for its imposition of network management rules. To bolster the Commission's case this time, the Order points to some provisions of the Act that it failed to cite the first time around. Its arguments for new and putatively better bases for network management rules fall victim largely to the same weaknesses the court identified before.

Efforts to defend a valid exercise of the agency's ancillary powers are subject to a two-part test – and the "central issue," as the D.C. Circuit already has explained, is whether the Commission can satisfy the second prong of the test.[66] Under it, "[t]he Commission may exercise this 'ancillary' authority only if it demonstrates that its action ... is 'reasonably ancillary to the ... effective performance of its statutorily mandated responsibilities.'"[67]

Those "statutorily mandated responsibilities" must be concrete and readily identifiable. As the Supreme Court instructed in *NARUC II* and the D.C. Circuit reiterated in *Comcast*, "the Commission's ancillary authority 'is really incidental to, and contingent upon, *specifically delegated powers under the Act*.'"[68] For the ancillary authority arguments to prevail here, the Order must identify specific subsections within Title II, III or VI that provide the ancillary hook, and then show how the Commission's assertion of power will advance the regulated services directly subject to those particular

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[64] If the Commission is successful with this assertion of authority, the agency could use Section 706 as an essentially unfettered mandate to impose not only new regulations but to pick winners and losers – all without any grant of authority from Congress to intervene in the marketplace in such a comprehensive manner. In fact, this Order has already done so. For example, it decides that these new network management rules will apply to broadband Internet service providers but not to edge providers. *See* Order, ¶ 52. The Order makes an interesting attempt to justify this line-drawing. It rationalizes, *inter alia,* that because the new regulatory scheme is putatively an outgrowth of the Commission's *Internet Policy Statement*, which was not aimed at edge providers, the Order's new mandates should not apply to those entities either. This argument is irrationally selective at best and arbitrary and capricious at worst. If the Commission's *Internet Policy Statement* was the "template" for the rules, why isn't the substance of the rules the same as the previous principles? In particular, why does the Order add nondiscrimination to the regulations when that concept was never part of the previous principles?

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

[66] *Id.* at 647.

[67] *Id.* at 644 (citing *Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005).

[68] *Id.* at 653 (emphasis in original) (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976) (*NARUC II*)).

provisions. Existing court precedent shows that sweeping generalizations are not sufficient.[69] Nor may the general framework of one title of the Act – such as common carriage obligations – be grafted upon services subject to another title that does not include the same obligations.[70] And long descriptions of services delivered via broadband networks do not substitute for hard legal analysis.[71]

Moreover, arguments must be advanced on "a case-by-case basis" for each specific assertion of jurisdiction.[72] *Comcast* explains that the Commission must "independently justif[y]" any action resting on ancillary authority by demonstrating in each and every instance how the action at issue advances the services actually regulated by specific provisions of the Act.[73] The D.C. Circuit apparently was concerned about the Commission's ability to grasp this point, for the opinion makes it repeatedly.[74] In doing

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[69] *Compare* Order, ¶ 135 (opining that Open Internet rules for wireless services are supported by Title III of the Communications Act pursuant to the Commission's authority "to protect the public interest through spectrum licensing") *with Comcast*, 600 F.3d at 651 ("each and every assertion of jurisdiction ... must be *independently justified* as reasonably ancillary to the Commission's power") (emphasis in original).

[70] *See Comcast*, 600 F.3d. at 653 (discussing how the *NARUC II* court "found it 'difficult to see how any action which the Commission might take concerning *two-way cable* communications could have as its primary impact the furtherance of any *broadcast* purpose.'") (emphasis added); *id* at 654 (discussing the *Midwest Video II* court's recognition that the Communications Act bars common carrier regulation of broadcasting and therefore rejecting the imposition of public access obligations on cable because the rules would "relegate[ ] cable systems ... to common-carrier status.").

[71] The fact that some regulated services may be mixed on the same transmission platform with unregulated traffic does not afford the Commission scope to impose legal obligations on all data streams being distributed via that system. For example, the D.C. Circuit also has rejected other past Commission efforts to extend its ancillary reach over all services offered via a transmission platform merely because the platform provider uses it to provide one type of regulated service along with other services not subject to the same regulatory framework. *See id.* at 653 (citing *NARUC II*, 533 F.2d at 615–16, that overturned a series of Commission orders that preempted state regulation of non-video uses of cable systems, including precursors to modern cable modem service); *NARUC II*, 533 F.2d at 616 ("[T]he point-to-point communications ... involve one computer talking to another...."). The Order appears to be silent on this issue.

[72] *Comcast*, 600 F.3d at 651. As the Comcast decision explained, although "the Commission's ancillary authority may allow it to impose some kinds of obligations on cable Internet providers," it does not follow that the agency may claim "plenary authority over such providers." *Id.* at 650. To do so, would "run[ ] afoul" of the Supreme Court precedent set forth in *Southwestern Cable* and *Midwest Video I*." *Id. See also id.* ("Nothing in *Midwest Video I* even hints that *Southwestern Cable*'s recognition of ancillary authority over one aspect of cable television meant that the Commission had plenary authority over all aspects of cable.").

[73] *Id.* at 651. It follows that the potential for years of litigation over individual enforcement cases is high, thereby leading to a period of prolonged uncertainty that likely will discourage further investment in broadband infrastructure, contrary to the directives of Sec. 706.

[74] *See, e.g., id.* at 651, 653. For example, the court untangled the Commission's arguments about the implications of language in *Brand X* for the agency's assertion of authority over Internet network management by explaining that:

> [n]othing in *Brand X*, however, suggests that the Court was abandoning the fundamental approach to ancillary authority set forth in *Southwestern Cable*, *Midwest Video I*, and *Midwest Video II*. Accordingly, the Commission cannot justify regulating the network management practices of cable Internet providers simply by citing *Brand X's* recognition

so, the court directed the Commission to more closely study the agency's failures in *NARUC II* and *Midwest Video II* to comprehend the limits of its ancillary reach.[75]

The Order's claim of ancillary jurisdiction is not convincing with respect to Title II because, *inter alia*, it invokes only Section 201 in support of its nondiscrimination mandate.[76] Yet in a glaring omission, Section 201 does not reference nondiscrimination – that concept is under the purview of Section 202, which appears not to be invoked in the Order.[77] (By this omission, it appears that the Order may be attempting an end run around the most explicit Title II mandates because of other considerations.) Nor are the arguments successful with respect to the Title III and VI provisions cited in the Order because those statutory mandates address services that are not subject to common

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> that it may have ancillary authority to require such providers to unbundle the components of their services. These are altogether different regulatory requirements. *Brand X* no more dictates the result of this case than *Southwestern Cable* dictated the results of *Midwest Video I*, *NARUC II*, and *Midwest Video II*. The Commission's exercise of ancillary authority over Comcast's network management practices must, *to repeat*, "be independently justified." (emphasis added) (internal citation omitted).

[75] *Id.* at 653–54.

[76] It is curious that in reciting several provisions of Title II as potential bases for ancillary jurisdiction, the Order avoids the most obvious one: Section 202(a), which explicitly authorizes the nondiscrimination mandate imposed on Title II common carriers. This oversight is especially curious given the Order's reliance on the statutory canon of "the specific trumps the general" in revising the agency's interpretation of Section 706. *See* Order, ¶¶ 119-25 (distinguishing *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. 24,012 (1998) (*Advanced Services Order*) as limited only to the determination that the general provisions of Section 706 did not control the specific forbearance provisions of Section 10). That canon would seem to apply here as well, given that Section 202(a) certainly is more specific about nondiscrimination than is Section 706. Perhaps reliance on Section 202(a) as a basis for ancillary authority was omitted here in order to avoid reopening divisions over potential Title II reclassification? Of course, any effort to classify broadband Internet access as a common carrier service would confront a different set of serious legal and policy problems, see, *e.g.*, *Cable Modem Declaratory Ruling*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4,798 (2002); *Wireline Broadband Order*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14,853 (2005); *Wireless Broadband Order*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd. 5,901 (2007), but violation of this basic canon of statutory construction would not be among them.

[77] Section 202(a)'s prohibition against "unjust or unreasonable discrimination" carries with it decades of agency and court interpretation which is much different from the Order's "nondiscrimination" mandate. For instance, the Order questions the reasonableness of tiered pricing and paid prioritization. Under the case history of Section 202, tiered pricing and concepts similar to paid prioritization are not presumed to constitute "unjust or unreasonable discrimination." *See*, *e.g.*, *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984) ("But when there is a neutral, rational basis underlying apparently disparate charges, the rates need not be unlawful. For instance, when charges are grounded in relative use, a single rate can produce a wide variety of charges for a single service, depending on the amount of the service used. Yet there is no discrimination among customers, since each pays equally according to the volume of service used."); *Competitive Telecomm. Ass'n v. FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993) ("By its nature, § 202(a) is not concerned with the price differentials between qualitatively different services or service packages. In other words, so far as 'unreasonable discrimination' is concerned, an apple does not have to be priced the same as an orange.'").

carriage-style nondiscrimination obligations absent explicit application of statutory directives.[78]

In addition, the Order's expansive grasp for jurisdictional power here is likely to alarm any reviewing court because the effort appears to have no limiting principle.[79] The D.C. Circuit's warning in *Comcast* against one form of overreaching – the misreading of policy statements as blanket extensions of power – applies here as well:

> Not only is this argument flatly inconsistent with *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II*, but if accepted it would virtually free the Commission from its congressional tether. As the Court explained in *Midwest Video II*, "without reference to the provisions of the Act" expressly granting regulatory authority, "the Commission's [ancillary] jurisdiction ... would be unbounded." Indeed, Commission counsel told us at oral argument that just as the Order seeks to make Comcast's Internet service more "rapid" and "efficient," the Commission could someday subject Comcast's Internet service to pervasive rate regulation to ensure that the company provides the service at "reasonable charges." *Were we to accept that theory of ancillary authority, we see no reason why the Commission would have to stop there, for we can think of few examples of regulations that apply to Title II common carrier services, Title III broadcast services, or Title VI cable services that the Commission, relying on the broad policies articulated in section 230(b) and section 1, would be unable to impose upon Internet service providers*. If in *Midwest Video I* the Commission "strain[ed] the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts," and if in *NARUC II* and *Midwest Video II* it exceeded those limits, then here it seeks to shatter them entirely.[80]

Some of the Order's most noteworthy flaws are addressed below.

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[78] *See*, *e.g.*, 47 U.S.C. § 153(11); *FCC v. Midwest Video Corp*, 440 U.S. 689, 705 (1979) (*Midwest II*) (construing the statute to prohibit treating broadcasters – and, by extension, cable operators – as common carriers). *See also infra* pp. 21-25. With respect to those Title III services that are subject to some common carriage regulation, mobile voice service providers bear obligations pursuant to explicit provisions of Title II of the Act, including but not limited to the provision of automatic voice roaming (Sections 201 and 202); maintainance of privacy of customer information, including call location information explicitly (Section 222); interconnection directly or indirectly with the facilities and equipment of other telecommunications carriers (Section 251); contribution to universal service subsidies (Section 254); and obligation to ensure that service is accessible to and usable by persons with disabilities (Section 255).

[79] For example, in the *Comcast* case, the FCC counsel conceded at oral argument that the ancillary jurisdiction argument there could even encompass rate regulation, if the Commission chose to pursue that path. *Comcast*, 600 F.3d at 655.

[80] *Id.* at 655 (emphasis added).

1. The Order's patchwork citation of Title II provisions does not provide the necessary support for extending common carriage obligations to broadband Internet access providers.

Comcast instructs the Commission that the invocation of any Title II citation as a basis for ancillary jurisdiction must be shown to be "integral to telephone communication."[81] The Order's efforts to meet this legal requirement are thin and unconvincing – and in some instances downright perplexing. For example, it points to Section 201 in arguing that it provides the Commission with "express and expansive authority"[82] to ensure that the "charges [and] practices in connection with"[83] telecommunications services are "just and reasonable".[84] The Order contends that the use of interconnected VoIP services via broadband is becoming a substitute service for traditional telephone service and therefore certain broadband service providers might have an incentive to block VoIP calls originating on competitors' networks. The Order then stretches Section 201's language concerning "charges" and "practices" to try to bolster the claim that it provides a sufficient nexus for ancillary jurisdiction over potential behavior by nonregulated service providers that conceptually would best be characterized as "discrimination."[85] There are at least two obvious weaknesses in this rationale. First, the Order ignores the D.C. Circuit's instruction that the Commission has "expansive authority" only when it is "regulating common carrier services, including landline telephony."[86] Yet broadband Internet access providers are not common carriers and the Order purposely avoids declaring them to be so. Second, the Order seems to pretend that the plain meaning of Section 201's text is synonymous with that of Section 202, which does address "discrimination" but is not directly invoked here.

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[81] *Id.* at 657–58 (discussing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 425 (D.C. Cir. 1989) (*NARUC III*) and noting that "the Commission had emphasized that '[o]ur prior preemption decisions have generally been limited to activities that are closely related to the provision of services and which affect the provision of interstate services.' The term 'services' referred to 'common carrier communication services' within the scope of the Commission's Title II jurisdiction. 'In short,' the Commission explained, 'the interstate telephone network will not function as efficiently as possible without the preemptive detariffing of inside wiring installation and maintenance.' The Commission's pre-emption of state regulation of inside wiring was thus ancillary to its regulation of interstate phone service, precisely the kind of link to express delegated authority that is absent in this case." (quoting *Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket No. 79-105, Memorandum Opinion and Order, 1 FCC Rcd. 1,190, 1,192, ¶ 17 (1986)).

[82] Order, ¶ 127 (quoting *Comcast,* 600 F.3d at 645).

[83] 47 U.S.C. § 201(b).

[84] *Id.*

[85] The term "discrimination" in the context of communications networks is not a synonym for "anticompetitive behavior." While the word "discriminate" has carried negative connotations, network engineers consider it "network management" – because in the real world the Internet is able to function only if engineers may discriminate among different types of traffic. For example, in order to ensure a consumer can view online video without distortion or interruption, certain bits need to be given priority over other bits, such as individual emails. This type of activity is not necessarily anticompetitive.

[86] *Comcast*, 600 F.3d at 645 (citing to Section 201).

The Order's reliance on Section 251(a)(1) is flawed for similar reasons. That provision imposes a duty on telecommunications carriers "to interconnect directly or indirectly with the facilities of other telecommunications carriers."[87] The Order notes that an increasing number of customers use VoIP services and posits that if a broadband Internet service provider were to block certain calls via VoIP, it would ultimately harm users of the public switched telephone network. All policy aspirations aside, this jurisdictional argument fails as a legal matter. As the Order admits, VoIP services have never been classified as "telecommunications services," *i.e.*, common carriage services, under Title II of the Act.[88] Therefore, as a corollary matter, broadband Internet service providers are not "telecommunications carriers" – or at least the Commission has never declared them to be so. The effect of the Order is to do indirectly what the Commission is reluctant to do explicitly.

2. The language of Title III and VI provisions cannot be wrenched out of context to impose common carriage obligations on non-common carriage services.

The Order makes a rather breathtaking attempt to find a basis for ancillary authority to impose nondiscrimination and other common carriage mandates in statutory schemes that since their inception have been distinguished from common carriage. This effort, too, will fail in court, for it flouts Supreme Court precedent on valid exercises of ancillary authority, as reviewed in detail in *Comcast*. If the "derivative nature of ancillary jurisdiction"[89] has any objectively discernible boundaries, it must bar the Commission from taking obligations explicitly set forth in one statutory scheme established in the Act – such as the nondiscrimination mandates of Title II – and grafting them into different statutory schemes set forth in other sections of Act, such as Title III and Title VI, that either directly or indirectly *eschew* such obligations. Here, the Act itself explicitly distinguishes between broadcasting and common carriage.[90] And the Supreme Court long ago drew the line between Title VI video services and Title II-style mandates by forbidding the Commission to "relegate[] cable systems ... to common-carrier status".[91]

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[87] 47 U.S.C. 251(a)(1).

[88] *See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 27 FCC Rcd. 22,404 ¶¶ 14, 20–22 (2004).

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

[90] 47 U.S.C. § 153(11).

[91] *See Comcast*, 600 F.3d at 654 (citing *Midwest Video II*, 440 U.S. 689, 700–01) (Commission could not "relegate[ ] cable systems ... to common-carrier status"). Although the *Midwest Video II* case predated congressional enactment of cable regulation, none of the statutory amendments of the Communications Act since that time – the 1984 Cable Act, the Cable Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996 – have imposed any form of Title II-style nondiscrimination mandates on the multichannel video services regulated pursuant to Title VI. To the contrary, the court has recognized that by its nature MVPD service involves a degree of editorial discretion that places it outside the Title II orbit. *See*, *e.g.*, *Denver Area Educ. Telecomm. Consortium, Inc., v. FCC*, 518 U.S. 727 (1996) (*DAETC*)

The Order's effort to search high and low through provisions of the Communications Act to find hooks for ancillary jurisdiction may be at its most risible in the broadcasting context. The attempt here seems hardly serious, given that the legal discussion is limited to a one-paragraph discussion that cites to no specific section within Title III.[92] Rather, it stands its ground on the observation that TV and radio broadcasters now distribute content through their own websites – coupled with the hypothetical contention that some possible future "self-interested" act by broadband providers could potentially have a negative effect on the emerging business models that may provide important support for the broadcast of local news and other programming.[93]

This is far from the kind of tight ancillary nexus that the Supreme Court upheld in *Southwestern Cable* and *Midwest Video I*,[94] and it is even more attenuated than the jurisdictional stretch that the Court rejected in *Midwest Video II*.[95] One wonders how far this new theory for an ancillary reach could possibly extend. Many broadcasters for years have benefitted through the sales of tapes and DVDs of their programming marketed through paper catalogs. Does the rationale here mean that the Commission has power to regulate the management of that communications platform, too?

The equally generalized Title III arguments based on "spectrum licensing" apparently are intended to support jurisdiction over the many point-to-point wireless services that are not point-to-multipoint broadcasting. They, too, appear off-point.[96] For example, the Order's recitation of a long array of Title III provisions (*e.g.*, maintenance of control over radio transmissions in the U.S., imposition of conditions on the use of spectrum) seems misplaced. If this overview is intended to serve as analysis, it contains a

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(upholding § 10(a) of the 1992 Cable Act, which permitted cable operators to restrict indecency on leased access channels).

[92] Order, ¶ 130.

[93] *Id*.

[94] *United States v. Southwestern Cable*, 392 U.S. 157 (1968) (upholding a limit on cable operators' importation of out-of-market broadcast signals); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*) (plurality opinion upholding FCC rule requiring cable provision of local origination programming); *id.* at 676 (Burger, C.J., concurring) ("Candor requires acknowledgment, for me, at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts."). With respect to the local origination programming mandate at issue in *Midwest Video I*, the Commission reportedly "stepped back from its position during the course of the ... litigation" by "suspend[ing] the ... rule and never reinstat[ing] it." T. BARRON CARTER, JULIET L. DEE & HARVEY L. ZUCKMAN, MASS COMMUNICATIONS LAW 522–23 (West Group 2000).

[95] *Midwest Video II*, 440 U.S. at 694–95 (rejecting rules mandating cable provision of public access channels, which the FCC claimed were justified by "longstanding communications regulatory objectives" to "increas[e] outlets for local self-expression and augment[ ] the public's choice of programs").

[96] One therefore must wonder whether by this argument the Order seeks to pave the way for future regulation of mobile broadband Internet services. The Order has taken great pains to explain that today's treatment of mobile broadband Internet access service providers is in consumers' best interest. History suggests that the Order may merely be postponing the inevitable. In fact, the new rule (Section 8.7) need only be amended by omitting one word: "fixed." The Commission will be poised to do just that when it reviews the new regulations in two years.

logical flaw: Most of the rules adopted today are not being applied – yet – to mobile broadband Internet access service.[97] Certainly the Commission need not depend on the full sweep of Title III authority to impose the "transparency" rule; it need only act in our pending "Truth-in-Billing" docket.[98] Similarly, with regard to the "no blocking" rule, the Order need only rest on the provisions of Title III discussed in the *700 MHz Second Report and Order*, where this rule was originally adopted.[99]

With respect to the asserted Title VI bases for ancillary jurisdiction, the Order actually does point to three specific provisions, but none provides a firm foundation for extending the Commission's authority to encompass Internet network management. The Order first cites Section 628, which is designed to promote competition among the multichannel video programming distributors (MVPDs) regulated under Title VI, such as cable operators and satellite TV providers. The best-known elements of this provision authorize our program access rules, but the Commission recently has strayed – over my dissent – beyond the plain meaning of the statutory language to read away explicit constraints on our power in this area.[100] Apparently the Commission is about to make a bad habit of doing this.

Of course, Section 628 does not explicitly refer to the Internet, much less the management of its operation. The Congressional framers of the Cable Consumer Protection and Competition Act of 1992, of which Section 628 was a part, were concerned about, and specifically referenced, video services regulated under Title VI.[101] Yet the Order employs a general statutory reference to "unfair methods of competition or unfair or deceptive acts or practices" as a hook for a broad exercise of ancillary jurisdiction over an unregulated network of networks.[102] This time the theory rests

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[97] Taking the Order at its apparent word that it is not (yet) applying all new mandates on wireless broadband Internet service providers, it must be that the Order invokes the Commission's Title III licensing authority to impose the rules on fixed broadband Internet access service providers – that is, cable service providers, common carriers, or both. If so, this is curious on its face because these services are regulated under Titles VI and II, respectively, and as a legal matter the Commission does not "license" either cable service providers or common carriers.

[98] *See Truth-in-Billing and Billing Format*, CC Docket No. 98-170, Notice of Inquiry, 24 FCC Rcd. 11,380 (rel Aug. 28, 2009) (*Aug. 2009 Truth-in-Billing NOI*).

[99] *See* Service *Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, Report & Order, 22 FCC Rcd 15289 (2007).

[100] *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, First Report and Order, 25 FCC Rcd. 746 (2010) (*Terrestrial Loophole Order*); *id*. at 822 (McDowell, Comm'r dissenting) ("Section 628 refers to 'satellite'-delivered programming 36 times throughout the length of the provision, including 14 references in the subsections most at issue here. The plain language of Section 628 bars the FCC from establishing rules governing disputes involving terrestrially delivered programming, whether we like that outcome or not."). This FCC decision currently is under challenge before the D.C. Circuit. *See Cablevision Systems Corporation v. FCC*, No. 10-1062 (D.C. Cir. filed March 15, 2010).

[101] *See* 47 U.S.C. § 522(13) (defining "multichannel video programming distributor"). Some of the transmission systems used by such distributors, such as satellites, also are regulated under Title III.

[102] Order, ¶ 132 (citing 47 U.S.C. § 548(b)).

largely on the contention that, absent network management regulation, network providers might improperly interfere with the delivery of "over the top" (OTT) video programming that may compete for viewer attention with the platform providers' own MVPD services.[103] The Order cites to no actual instances of such behavior, however, nor does it grapple with the implications of the market forces that are driving MVPDs in the opposite direction – to add Internet connectivity to their multichannel video offerings.[104]

The second Title VI provision upon which the Order stakes a claim for ancillary jurisdiction is Section 616, which regulates the terms of program carriage agreements.[105] The specific text and statutory design of this provision make plain that it addresses independently produced content carried by contract as part of a transmission platform provider's Title VI MVPD service, and not a situation in which there is no privity of contract and the service is Internet access. The Order attempts to make much of Section 616's rather broad definition "video programming vendor" without grappling with the incongruities created when one tries to shove the provision's explicit directives about carriage contract terms into the Internet context.[106] In fact, the application of Section 616

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[103] The D.C. Circuit has upheld the Commission's reliance on Section 628(b) to help drive the provision of competitive Title VI multichannel video programming services into apartment buildings and similar "multi-dwelling unit" developments, *see Nat'l Cable & Telcoms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009), but the policy thrust of that case unquestionably concerned Title VI video services. As the Order acknowledges, it is an open question as to whether OTT video providers might someday be made subject to Title VI, with all of the attendant legal rights and obligations that come with that classification. Order at n. 495. But it is misleading in suggesting that the regulatory classification of OTT video providers has been pending only since 2007. *Id*. On the contrary, it has been pending before the Commission since at least 2004 in the IP Enabled Services docket, WCB Docket 04-36, and the agency has consistently avoided answering the question ever since. While I do not prejudge the outcome of that issue, I question the selective invocation of sections of Title VI here as a basis for ancillary jurisdiction. Such overreaching seems to operate as a way of prolonging our avoidance of an increasingly important, albeit complex, matter.

[104] *See*, *e.g.*, Letter from William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC, at 1 (Oct. 1, 2010) (DIRECTV Oct. 1 *Ex Parte* Letter) (outlining the wealth of innovative devices currently available in the market, including AppleTV, Boxee, and Roku); Adam Satariano & Andy Fixmer, *ESPN to Web Simulcast, Make Pay TV Online Gatekeeper*, BLOOMBERG, Oct. 15, 2010, at http://www.bloomberg.com/news/2010-10-15/espn-to-stream-channels-to-time-warner-cable-users-to-combat-web-rivals.html (explaining ESPN's plan to begin streaming its sports channels online to Time Warner Cable Inc. customers as part of the pay-TV industry's strategy to fend off Internet competitors); Walter S. Mossberg, *Google TV: No Need To Tune In Just Yet*, WALL ST. J., Nov. 18, 2010, at D1 (comparing Google TV technology to its rivals Apple TV and Roku); Louis Trager, *Netflix Plans Rapid World Spread of Streaming Service*, COMM. DAILY, Nov. 19, 2010, at 7 (examining Netflix's plans to offer a streaming-only service in competition with Hulu Plus, as well as its plans for expansion worldwide).

[105] 47 U.S.C. § 536.

[106] For example, Section 616(a)(1) bars cable operators from linking carriage to the acquisition of a financial interest in the independent programmers' channel – a restraint borrowed from antitrust principles that is readily understandable in the context of a traditional cable system with a limited amount of so-called "linear channel" space. The construct does not conform easily to the Internet setting, which is characterized by a considerably more flexible network architecture that allows end users to make the content choices – and which affords them access to literally millions of choices that do not resemble "video programming" as it is defined in Title VI, *see* 47 U.S.C. §522(20), including but not limited to simple, text-heavy websites, video shorts and all manner of personalized exchanges of data.

here is only comprehensible if one conceives of it as a new flavor of common carriage, with all the key contract terms supplied by statute.[107] Such a reading, however, would be in considerable conflict with the rationale of *Midwest Video II,*[108] as the D.C. Circuit in *Comcast* already has noted.[109]

The last Title VI provision that the Order cites as an ancillary jurisdictional hook is Section 629, which is designed to promote competitive choices among "navigation devices" used with multichannel video programming systems. As with the other Title VI provisions it employs, the Order assumes away the explicit terms and context of this statutory mandate, which centers on devices used in connection with proprietary "multichannel video programming systems," not the network of separately owned networks that make up the Internet. Moreover, invoking Section 629 here makes no sense as a policy matter. The marketplace for Internet "navigation devices" already is wide open, and it has been much touted as the paradigm toward which devices used with proprietary MVPD systems should aspire.[110]

In short, the Order's efforts to find a solid grounding for exercising ancillary power here – and thereby imposing sweeping new common carriage-style obligations on an unregulated service – strain credulity. Policy concerns cannot overcome the limits of the agency's current statutory authority. The Commission should heed the closing admonition of *Comcast*:

> [N]otwithstanding the "difficult regulatory problem of rapid technological change" posed by the communications industry, "the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer ... Commission authority." Because the Commission has failed to

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[107] The federal government first involved itself in setting basic rates, terms, and conditions in the context of service agreements between railroads and their customers, but at least one historian (and former FCC commissioner) traced the "'ancient law' of common carriers" back to the development of stage coaches and canal boats. *See* GLEN O. ROBINSON, "THE FEDERAL COMMUNICATIONS ACT: AN ESSAY ON ORIGINS AND REGULATORY PURPOSE," IN A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, 26 (Max D. Paglin, ed. 1989) (noting that a 19th Century Supreme Court case identified the concept emerging as far back as the reign of William and Mary).

[108] In *Midwest Video II*, the Supreme Court invalidated FCC rules that would have required cable operators to provide public access channels. The Court reasoned that, in the absence of explicit statutory authority for such mandates, the public access rules amounted to an indirect effort to impose Title II common carriage obligations – and that, in turn, conflicted with the Title III basis for the agency's ancillary jurisdiction claim. *See* 440 U.S. at 699-02.

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

[110] *See Video Device Competition; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 10-91, Notice of Inquiry, 25 FCC Rcd. 4,275 (2010) (*April 2010 Allvid NOI*).

> tie its assertion of ancillary authority over Comcast's Internet service to any "statutorily mandated responsibility," we ... vacate the Order.[111]

The same fate awaits this new rulemaking decision.

C. The Order Will Face Serious Constitutional Challenges.

It is reasonable to assume that broadband Internet service providers will challenge the FCC ruling on constitutional grounds as well.[112] Contrary to the Order's thinly supported assertions, broadband ISPs are speakers for First Amendment purposes – and therefore challenges on that basis should not be so lightly dismissed. There are several reasons for being concerned about legal infirmities here.

First, the Order is too quick to rely on simplistic service labels of the past in brushing off First Amendment arguments. For example, while it ostensibly avoids classifying broadband providers as Title II common carriers, it still indirectly alludes to old case law concerning the speech rights of common carriers by dismissing broadband ISPs as mere "conduits for speech" undeserving of First Amendment consideration.[113]

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[111] *Comcast*, 600 F.3d at 661 (internal citations omitted).

[112] The Order incorrectly asserts that the new network management rules raise no serious questions about a Fifth Amendment taking of an Internet transmission platform provider's property. At the outset, the Order too quickly dismisses the possibility that these rules may constitute a *per se* permanent occupation of broadband networks. Under *Loretto v. Teleprompter Manhattan CATV Corp*., a taking occurs when the government authorizes a "permanent physical occupation" of property "even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the [owner's] use of the rest of his [property]." 458 U.S. 419, 430 (1982). Here, the new regulatory regime effectively authorizes third-party occupation of some portion of a broadband ISP's transmission facilities by constraining the facility owner's ability to decide how to best manage the traffic running over the broadband platform. The new strictures have parallels to the Commission's decision to grant competitive access providers the right to the exclusive use of a portion of local telephone company's central office facilities – an action which the D.C. Circuit held constituted a physical taking. *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

But even assuming *arguendo* that the regulations may not constitute a physical taking, they still trigger serious "regulatory takings" concerns. Today's situation differs from the one at issue in *Cablevision Systems Corp. v FCC*, where the court held that Cablevision had failed "to show that the regulation had an economic impact that interfered with 'distinct investment backed expectations.'" 570 F.3d 83, 98–99 (2d Cir. 2009). Here, many obvious investment-backed expectations are at stake: Network operators have raised, borrowed, and spent billions of dollars to build, maintain, and modernize their broadband plant – based at least in part on the expectation that they would recoup their investment over future years under the deregulatory approach to broadband that the Commission first adopted for cable in 2002 and quickly extended to other types of facilities. Moreover, today's action could result in significant economic hardships for platform providers even if they have no debt load to pay off. For example, the Order announces the government's "expectation" that platform providers will build-out additional capacity for Internet access service before or in tandem with expanding capacity to accommodate specialized services. Order, ¶ 116. Although property owners may not be able to expect existing legal requirements regarding their property to remain *entirely* unchanged, today's vague "expectation" places a notable burden on platform providers – heavy enough, given their legitimate investment-backed expectations since 2002, to amount to a regulatory taking under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

[113] Order, ¶ 146 (citing CWA Reply at 13-14, which cites to *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) and *Time Warner Entertainment, L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996)).

There is good reason today to call into question well-worn conventional wisdom dating from the era of government-sanctioned monopolies about common carriers' freedom of speech, particularly in the context of a competitive marketplace.[114] Indeed, at least two sitting Justices have signaled a willingness to wrestle with the implications of the issue of common carriers' First Amendment protections.[115]

Similarly, the Order offhandedly rejects the analogies drawn to First Amendment precedent concerning cable operators and broadcasters, based only on the unremarkable observation that cable operators and broadcasters exercise a noteworthy degree of editorial control over the content they transmit via their legacy services.[116] In so doing, the Order disregards the fact that at least two federal district courts have concluded that broadband providers, whether they originated as telephone companies or cable companies, have speech rights.[117] Although the Order acknowledges the cases in today's

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[114] The Supreme Court has never directly addressed the First Amendment issues that would be associated with a government compulsion to serve as a common carrier in a marketplace that offers consumers alternatives to a monopoly provider. This is not surprising, for the courts have had no opportunity to pass on the issue; the FCC in the modern era has found that it served the public interest to waive common carrier status on numerous occasions. *See, e.g., In re Australia-Japan Cable (Guam) Limited*, 15 FCC Rcd. 24,057 (2000) (finding that the public interest would be served by allowing a submarine cable operator to offer services on a non-common carrier basis because AJC Guam was unable to exercise market power in light of ample alternative facilities); *In re Tycom Networks Inc., et al*., 15 FCC Rcd, 24,078 (2000) (examining the public interest prong of the *NARUC I* test, and determining that TyCom US and TyCom Pacific lacked sufficient market power given the abundant alternative facilities present). In fact, in the more than 85 reported cases in which the FCC has addressed common carrier waivers in the past 30 years, it has only imposed common carriage on an unwilling carrier once – and in that instance the agency later reversed course and granted the requested non-common carrier status upon receiving the required information that the applicant previously omitted. *In re Applications of Martin Marietta Communications Systems, Inc.; For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service*, 60 Rad. Reg. 2d (P & F) 779 (1986).

[115] The Order is flatly wrong in asserting that "no court has ever *suggested* that regulation of common carriage arrangements triggers First Amendment scrutiny." Order, ¶ 146 (emphasis added). In *Midwest Video II*, the Court stated that the question of whether the imposition of common carriage would violate the First Amendment rights of cable operators was "not frivolous." 440 U.S. 689 (1979), 709 n.19. In *DAETC*, 518 U.S. 727 (1996), the plurality opinion appeared split on, among other things, the constitutional validity of mandated leased access channels. Justice Kennedy reasoned that mandating common carriage would be "functional[ly] equivalent[t]" to designating a public forum and that both government acts therefore should be subject to the same level of First Amendment scrutiny. *Id*. at 798 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Thomas' analysis went even further in questioning the old [dicta] about common carriers' speech rights. *See id*. at 824–26 (Thomas, J., concurring in the judgment in part and dissenting in part) (stating that "Common carriers are private entities and may, consistent with the First Amendment, exercise editorial discretion in the absence of a specific statutory prohibition").

[116] Order, ¶ 142 (citing, *e.g.*, *Turner Broadcast Systems, Inc v. FCC*, 512 U.S. 622, 636 (1994) (*Turner I*)).

[117] *Illinois Bell Telephone Co. v. Village of Itasca*, 503 F. Supp. 2d 928 (N.D. Ill. 2007) (analogizing broadband network providers to cable and DBS providers); *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000) (relying on Supreme Court precedent in *Ex parte Jackson*, 96 U.S. 727, 733 (1878) and *Lovell v. Griffin*, 303 U.S. 444, 452 (1938), the court concluded that the message, as well as the messenger, receives constitutional protection because the transmission function provided by broadband services could not be separated from the content of the speech being transmitted).

Order, it makes no effort to distinguish or challenge them. Instead, the Order simply "disagree[s] with the reasoning of those decisions."[118]

Second, I question the Order's breezy assertion that broadband ISPs perform no editorial function worthy of constitutional recognition. The Order rests the weight of its argument here on the fact that broadband ISPs voluntarily devote the vast majority of their capacity to uses by independent speakers with very little editorial invention by the platform provider beyond "network management practices designed to protect their Internet services against spam and malicious content."[119] But what are acts such as providing quality of service (QoS) management and content filters if not editorial functions?[120]

And the mere act of opening one's platform to a large multiplicity of independent voices does not divest the platform owner of its First Amendment rights.[121] The Order cites no legal precedent for determining how much "editorial discretion" must be exercised before a speaker can merit First Amendment protection. Newspapers provide other speakers access to their print "platforms" in the form of classified and display advertising, letters to the editor, and, more recently, reader comments posted in response to online news stories. Advertising historically has filled 60 percent or more of the space in daily newspapers,[122] and publishers rarely turn away ads in these difficult economic times[123] – though they still may exercise some minor degree of "editorial discretion" to screen out "malicious" content deemed inappropriate for family consumption. Under the Order's rationale, would newspaper publishers therefore be deemed to have relinquished rights to free speech protection?

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[118] Order, n. 553.

[119] Order, ¶ 145.

[120] In addition, the Order's citation to a Copyright Act provision, U.S.C. § 230(c)(1), to support the proposition that broadband providers serve no editorial function, see Order, ¶ 144, ignores the fact that broadband ISPs engage in editorial discretion – as permitted under another provision of the Copyright Act, 17 U.S.C. § 230(c)(2) – to block malicious content and to restrict pornography. *See Batzel v. Smith*, 333 F.3d 1018, 1030 n.14 (9th Cir. 2003) (noting that § 230(c)(2) "encourages good Samaritans by protecting service providers and users from liability for claims arising out of the removal of potentially 'objectionable' material from their services.... This provision insulates service providers from claims premised on the taking down of a customer's posting such as breach of contract or unfair business practices.").

[121] Nor does the availability of alternative venues for speech undercut the platform owner's First Amendment rights to be able to effectively use its own regulated platform for the speech it wishes to disseminate. *See, e.g.*, *Nat'l Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994).

[122] *See, e.g.*, McInnis & Associates, "The Basics of Selling Newspaper Advertising," Newspaper Print and Online ad Sales Training, at http://www.ads-on-line.com/samples/Your_Publication/chapterone2.html (visited 12/7/10). This ratio has remained relatively constant for decades. *See* Robert L. Jones & Roy E. Carter Jr., "Some Procedures for Estimating 'News Hole' in Content Analysis," The Public Opinion Quarterly, Vol. 23, No. 3 (Autumn, 1959), pp. 399-403, pin cite to p. 400 (noting measurements of non-advertising newsholes as low as 30 percent, with an average around 40 percent) (available at http://www.jstor.org/stable/2746391?seq=2) (visited 12/7/10).

[123] Alan Mutter, "Robust ad recovery bypassed newspapers," Reflections of a Newsosaur (Dec. 3, 2010) (available at http://newsosaur.blogspot.com/) (visited 12/7/10).

Third, it is undisputed that broadband ISPs merit First Amendment protection when using their own platforms to provide multichannel video programming services and similar offerings. The Order acknowledges as much but simply asserts that the new regulations will leave broadband ISPs sufficient room to speak in this fashion[124] – unless, of course, hints elsewhere in the document concerning capacity usage come to pass.[125] So while the Order concedes, as it must, that network management regulation could well be subject to heightened First Amendment review, it disregards the most significant hurdle posed by even the intermediate scrutiny standard.[126] The Order devotes all of its sparse discussion to the first prong of the intermediate scrutiny test, the "substantial" government interest,[127] while wholly failing to address the second and typically most difficult prong for the government to satisfy: demonstrating that the regulatory means chosen does not "burden substantially more speech than is necessary."[128] And what is the burden here? One need look no further than the Order's discussion of specialized services to find it. It announces an "expectation" that network providers will limit their use of their own capacity for speech in order to make room for others – an expectation that may rise to the level of effectively requiring the platform provider to pay extra, in the

[124] Order, ¶¶ 147-48.

[125] Order, ¶¶ 114-16.

[126] Although the Order addresses only intermediate scrutiny, the potential for application of strict scrutiny should not be disregarded completely. Although the Court in *Turner I* declined to apply strict scrutiny to the statutorily mandated must-carry rules, the network management mandates established by today's Order may be distinguishable. For example, while rules governing the act of routing data packets might arguably be content neutral regulations, application of the rules in the real world may effectively dictate antecedent speaker-based and content-based choices about which data packets to carry and how best to present the speech that they embody.

[126] *American Library Ass'n v. Reno*, 33 F.3d 78 (D.C. Cir. 1994).

[127] Under First Amendment jurisprudence, it typically is not difficult for the government to convince a court that the agency's interest is important or substantial. *See, e.g., Carey v. Brown*, 447 U.S. 455, 464–65 (1980) ("even the most legitimate goal may not be advanced in a constitutionally impermissible manner"); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (finding that the state interest was compelling, but the Son of Sam law was not narrowly tailored to advance that objective). But I question whether the Order will survive even this prong of the test because the Commission lacks evidence of a real problem here to be solved. Two examples plus some economic theorizing may be insufficient to demonstrate that the asserted harms to be addressed are, in fact, real and systemic. *See Century Communications Corp. v. FCC*, 835 F.2d 292, 300 (D.C. Cir. 1987) (suggesting that to establish a real harm the Commission has the burden of producing empirical evidence such as studies or surveys). The Commission's most recent Section 706 Report, which – over the dissent of Commissioner Baker and me – reversed course on 11 years' worth of consistent findings that advanced services are being deployed on a timely basis, is no foundation on which this part of the argument can securely rest. *See supra* Section A.

[128] *Turner I*, 512 U.S. at 662.

form of capacity build-outs, before exercising its own right to speak.[129] Such a vague expectation creates a chilling effect of the type that courts are well placed to recognize.[130]

Yet the Order makes *no* effort, as First Amendment precedent requires, to weigh this burden against the putative benefit.[131] Instead, Broadband ISP speakers are left in the dark to grope their way through this regulatory fog. Before speaking via their own broadband platforms, they must either: (1) guess and hope that they have left enough capacity for third party speech, or (2) go hat in hand to the government for pre-clearance of their speech plans.

Finally, it should be noted one of the underlying policy rationales for imposing Internet network management regulations effectively turns the First Amendment on its head. The Founders crafted the Bill of Rights, and the First Amendment in particular, to act as a bulwark against state attempts to trample on the rights of individuals. (Given that they had just won a war against government tyranny, they were wary of recreating the very ills that had sparked the Revolution – and which so many new Americans had sacrificed much to overcome.) More than 200 years later, our daily challenges may be different but the constitutional principles remain the same. The First Amendment begins with the phrase "Congress shall make no law" for a reason. Its restraint on government power ensures that we continue to enjoy all of the vigorous discourse, conversation and debate that we, along with the rest of the world, now think of as quintessentially American.

Conclusion

For the foregoing reasons, I respectfully dissent.

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[129] *See* Order, ¶ 116 ("We fully expect that broadband providers will increase capacity offered for broadband Internet access service if they expand network capacity to accommodate specialized services. We would be concerned if capacity for broadband Internet access service did not keep pace.").

[130] *See Fox v. FCC,* 613 F.3d 317 (2d Cir. 2010) (holding that the FCC's indecency policy "violates the First Amendment because it is unconstitutionally vague, creating a chilling effect").

[131] *See, e.g.*, Order, ¶¶ 148-50.

ATTACHMENT A

Letter of FCC Commissioner Robert M. McDowell to the Hon. Henry A. Waxman, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (May 5, 2010)

Office of Commissioner Robert M. McDowell
Federal Communications Commission
Washington, D.C. 20554

May 5, 2010

The Honorable Henry A. Waxman
Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

Dear Chairman Waxman:

Thank you for the opportunity to testify before you and your colleagues on the Subcommittee on Communications, Technology and the Internet on March 25 regarding the National Broadband Plan.[1] As I testified at the hearing, the Commission has never classified broadband Internet access services as "telecommunications services" under Title II of the Communications Act. In support of that assertion, I respectfully submit to you the instant summary of the history of the regulatory classification of broadband Internet access services.

In the wake of the privatization of the Internet in 1994, Congress overwhelmingly passed the landmark Telecommunications Act of 1996 (1996 Act) and President Clinton signed it into law. Prior to this time, the Commission had never regulated "information services" or "Internet access services" as common carriage under Title II. Instead, such services were classified as "enhanced services" under Title I. To the extent that regulated common carriers offered their own enhanced services, using their own transmission facilities, the FCC required the underlying, local transmission component to be offered on a common carrier basis.[2] No provider of retail information services was ever required to tariff such service. With the 1996 Act, Congress had the opportunity to reverse the Commission and regulate information services, including Internet access services, as traditional common carriers, but chose not to do so. Instead, Congress codified the Commission's existing classification of "enhanced sevices" as "information services" under Title I.

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[1] *Oversight of the Federal Communications Commission: The National Broadband Plan: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the House Comm. on Energy and Commerce,* 111th Cong., 2d Sess. (March 25, 2010).

[2] Some who are advocating that broadband Internet access service should be regulated under Title II cite to the Commission's 1998 *GTEADSL Order* to support their assertion. *See GTE Telephone Operating Cos.,* CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Red. 22,466 (1998) *{GTEADSL Order).* The *GTE ADSL Order,* however, is not on point, because in that order the Commission determined that GTE-ADSL service was an interstate service for the purpose of resolving a tariff question.

Two years after the 1996 Act was signed into law, Congress directed the Commission to report on its interpretation of various parts of the statute, including the definition of "information service."[3] In response, on April 10,1998, under the Clinton-era leadership of Chairman William Kennard, the Commission issued a *Report to Congress* finding that "Internet access services are appropriately classed as information, rather than telecommunications, services."[4] The Commission reasoned as follows:

> The provision of Internet access service ... offers end users *information-service capabilities inextricably intertwined with data transport.* As such, *we conclude that it is appropriately classed as an "information service"*[5]

In reaching this conclusion, the Commission reasoned that treating Internet access services as telecommunications services would lead to "negative policy consequences."[6]

To be clear, the FCC consistently held that any provider of information services could do so pursuant to Title I.[7] No distinction was made in the way that retail providers of Internet access service offered that information service to the public. The only distinction of note was under the Commission's *Computer Inquiry* rules, which required common carriers that were also providing information services to offer the transmission component of the information service as a separate, tariffed telecommunications service. But again, this requirement had no effect on the classification of retail Internet access service as an information service.

In the meantime, during the waning days of the Clinton Administration in 2000, the Commission initiated a Notice of Inquiry (NOI) to examine formalizing the regulatory classification of cable modem services as information services.[8] As a result of the *Cable Modem NOI,* on March 14, 2002, the Commission issued a declaratory ruling

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[3] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119,111 Stat. 2440,2521-2522, § 623.

[4] *Federal-State Board on Universal Service,* CC Docket No. 96-45, Report to Congress, 13 FCC Red. 11501, K 73 (1998) *{Report to Congress).*

[5] *Id.* at 180 (emphasis added).

[6] *Id.* at Tj 82 ("Our findings in this regard are reinforced by the negative policy consequences of a conclusion that Internet access services should be classed as 'telecommunications.'").

[7] As Seth P. Waxman, former Solicitor General under President Clinton, wrote in an April 28,2010 letter to the Commission, "[t]he Commission has *never* classified any form of broadband Internet access as a Title II 'telecommunications service* in whole or in part, and it has classified all forms of that retail service as integrated 'information services' subject only to a light-touch regulatory approach under Title I. These statutory determinations are one reason why the Clinton Administration rejected proposals to impose 'open access' obligations on cable companies when they began providing broadband Internet access in the late 1990s, even though they then held a commanding share of the market. The Internet has thrived under this approach." (Emphasis in the original.)

[8] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* GN Docket No. 00-185, Notice of Inquiry, 15 FCC Red 19287 (2000) *(Cable Modem NOI).*

classifying cable modem service as an information service.[9] In the Commission's *Cable Modem Declaratory Ruling,* it pointed out that "[t]o date … the Commission has declined to determine a regulatory classification for, or to regulate, cable modem service on an industry-wide basis."[10] Only one month earlier, on February 14, 2002, in its Notice of Proposed Rulemaking[11] regarding the classification of broadband Internet access services provided over wireline facilities, the Commission underscored its view that information services integrated with telecommunications services cannot simultaneously be deemed to contain a telecommunications service, even though the combined offering has telecommunications components.

On June 27,2005, the Supreme Court upheld the Commission's determination that cable modem services should be classified as information services.[12] The Court, in upholding the Commission's *Cable Modem Order,* explained the Commission's historical regulatory treatment of "enhanced" or "information" services:

> By contrast to basic service, the Commission decided not to subject providers of enhanced service, *even enhanced service offered **via** transmission wires,* to Title II common-carrier regulation. The Commission explained that it was unwise to subject enhanced service to common-carrier regulation given the "fast-moving, competitive market" in which they were offered.[13]

Subsequent to the Supreme Court upholding the Commission's classification of cable modem service as an information service in its *Brand X*decision, the Commission *without dissent* issued a series of orders classifying all broadband services as information services: wireline (2005)[14], powerline (2006)[1]* and wireless (2007).[16] Consistent with

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

[10] *Id.* at H 2.

[11] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers,* CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Red 3019 (2002) (*Wireline Broadband NPRM).*

[12] *Brand X,* 545 U.S. 967.

[13] *Id.* at 977 (emphasis added, internal citations to the Commission's *Computer Inquiry II* decision omitted).

14 *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; 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; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § I60(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; Consumer Protection in the Broadband Era,* CC Docket Nos. 02-33, 95-20, 98-10,01-337, WC Docket Nos. 04-242,

market developments, to treat similar services alike and to provide certainty to those entities provisioning broadband services, or contemplating doing so. Prior to these rulings, however, such services were never classified as telecommunications services under Title II.

Again, I thank you for providing the opportunity to testify before your Committee and to provide this analysis regarding the regulatory classification of broadband Internet access services. I look forward to working with you and your colleagues as we continue to find ways to encourage broadband deployment and adoption throughout our nation.

Sincerely,

Robert M. McDowell

cc: The Honorable Joe Barton
The Honorable Rick
Boucher The Honorable
Cliff Steams

05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Red 14853 (2005) *{Wireline Broadband Order), affd, Time Warner Telecom, Inc. v. FCC,* 507 F.3d 205 (3d Cir. 2007).

[1J] *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 Red 13281 (2006).

[16] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks,* WT Docket No. 07-53, Declaratory Ruling, 22 FCC Red 5901 (2007).