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

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

NOTICE OF INQUIRY

Adopted: June 17, 2010 **Released: June 17, 2010**

By the Commission: Chairman Genachowski and Commissioners Copps and Clyburn issuing separate statements; Commissioners McDowell and Baker dissenting and issuing separate statements.

Comment Date: July 15, 2010
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1. This Notice begins an open, public process to consider the adequacy of the current legal framework within which the Commission promotes investment and innovation in, and protects consumers of, broadband Internet service.[1] Until a recent decision of the United States Court of Appeals for the

[1] In this Notice we use the term "broadband Internet service" to refer to the bundle of services that facilities-based providers sell to end users in the retail market. This bundle allows end users to connect to the Internet, and often includes other services such as e-mail and online storage. In prior orders we have referred to this bundle as "broadband Internet access service." We use the term "wired," as in "wired broadband Internet service," to distinguish platforms such as digital subscriber line (DSL), fiber, cable modem, and broadband over power lines (continued….)

District of Columbia Circuit,[2] there was a settled approach to facilities-based broadband Internet service, which combined minimal regulation with meaningful Commission oversight. The *Comcast* opinion, however, held that the Commission went too far when it relied on its "ancillary authority" to enjoin a cable operator from secretly degrading its customers' lawful Internet traffic. *Comcast* appears to undermine prior understandings about the Commission's ability under the current framework to provide consumers basic protections when they use today's broadband Internet services. Moreover, the current legal classification of broadband Internet service is based on a record that was gathered a decade ago. Congress, meanwhile, has reaffirmed the Commission's vital role with respect to broadband, and the Commission has developed a National Broadband Plan recommending specific agency actions to encourage deployment and adoption.[3]

2. These developments lead us to seek comment on our legal framework for broadband Internet service. In addition to seeking original suggestions from commenters, we ask questions about three specific approaches. First addressing the wired service offered by telephone and cable companies and other providers, we seek comment on whether our "information service" classification of broadband Internet service remains adequate to support effective performance of the Commission's responsibilities. We then ask for comment on the legal and practical consequences of classifying Internet connectivity service as a "telecommunications service" to which all the requirements of Title II of the Communications Act would apply. Finally, we identify and invite comment on a third way under which the Commission would: (i) reaffirm that Internet information services should remain generally unregulated; (ii) identify the Internet connectivity service that is offered as part of wired broadband Internet service (and only this connectivity service) as a telecommunications service; and (iii) forbear under section 10 of the Communications Act[4] from applying all provisions of Title II other than the small number that are needed to implement the fundamental universal service, competition and small business opportunity, and consumer protection policies that have received broad support. We seek comment on the same issues as they relate to terrestrial wireless and satellite broadband Internet services, as well as on other factual and legal issues specific to these wireless services that bear on their appropriate classification. We further seek comment on discrete issues, including the states' proper role with respect to broadband Internet service.

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(BPL), from platforms that rely on wireless connections to provide Internet connectivity and other services in the last mile. We refer to the service that may constitute a telecommunications service as "Internet connectivity service" or "broadband Internet connectivity service." As discussed below, Internet connectivity service allows users to communicate with others who have Internet connections, send and receive content, and run applications online. For administrative simplicity we incorporate the same distinction between broadband and narrowband that the Commission applied in the classification orders we revisit here. That is, services with over 200 kbps capability in at least one direction will be considered "broadband" for the particular purposes of these Notices. *See, e.g., 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 14853, 14860 n.15 (2005) (*Wireline Broadband Report and Order* and *Broadband Consumer Protection Notice*), *aff'd sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

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

[3] *See* American Recovery and Reinvestment Act of 2009 § 6001, 47 U.S.C. § 1305(k)(2)(A), (D) (2010). The Plan contains dozens of recommendations to fulfill the congressional aims articulated in the Recovery Act, including specific proposals to increase access and affordability; maximize utilization of broadband Internet services; and enhance public safety, consumer welfare and education throughout the United States. Roughly half of the Plan's recommendations are directed to the Commission itself. Federal Communications Commission, *FCC Sends National Broadband Plan to Congress* (March 16, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296880A1.pdf.

[4] 47 U.S.C. § 160.

I. INTRODUCTION

3. This Commission exists "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications."[5] During more than 75 years of technological progress—from the time of tube radios and telephone switchboards to the modern era of converged digital services—the Commission has promoted innovation and investment in new communications services and protected and empowered the businesses and consumers who depend on them.

4. We have held to our pro-competition and pro-consumer mission in the Internet Age. Indeed, for at least the last decade the Commission has taken a consistent approach to Internet services—one that industry has endorsed and Congress and the United States Supreme Court have approved. This approach consists of three elements:

i. The Commission generally does not regulate Internet content and applications;

ii. Access to an Internet service provider via a dial-up connection is subject to the regulatory rules for telephone service; and

iii. For the broadband Internet services that most consumers now use to reach the Internet, the Commission has refrained from regulation when possible, but has the authority to step in when necessary to protect consumers and fair competition.

5. The first element of our consistent approach, preserving the Internet's capacity to enable a free and open forum for innovation, speech, education, and job creation, finds expression in (among other provisions) section 230 of the Communications Act, which states Congress's conclusion that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."[6]

6. The second element, oversight of dial-up access to the Internet under the common carriage framework of Title II of the Communications Act, is a facet of traditional telephone regulation.[7] Although Internet users increasingly depend on broadband communications connections for Internet access, approximately 5.6 million American households still use a dial-up telephone connection.[8]

7. The third element of the framework, restrained oversight of broadband Internet service, was expressed clearly on September 23, 2005, for example, when the Commission released two companion decisions. The first "establishe[d] a minimal regulatory environment for wireline broadband Internet access services."[9] It reclassified telephone companies' broadband Internet service offerings as indivisible "information services" subject only to potential regulation under Title I of the

[5] 47 U.S.C. § 151.

[6] 47 U.S.C. § 230(a)(4). Section 230 also supports the third element of the historical framework.

[7] *See Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13101, para. 91 n.209 (2009) (*Open Internet NPRM*).

[8] Nat'l Telecomms. & Info. Admin. (NTIA), U.S. Dep't of Commerce, *Digital Nation: 21st Century America's Progress Toward Universal Broadband Internet Access*, 4-5 (2010) (*Digital Nation*).

[9] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14855, para. 1.

Communications Act and the doctrine of ancillary authority.[10] In that decision, the Commission articulated its belief that "the predicates for ancillary jurisdiction are likely satisfied for any consumer protection, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers."[11] The second decision that day adopted principles for an open Internet, again expressing confidence that the Commission had the "jurisdiction necessary to ensure that providers of telecommunications for Internet access . . . are operated in a neutral manner."[12] Earlier this year, the Commission unanimously reaffirmed in a *Joint Statement on Broadband* that "[e]very American should have a meaningful opportunity to benefit from the broadband communications era," and that "[w]orking to make sure that America has world-leading high-speed broadband networks—both wired and wireless—lies at the very core of the FCC's mission in the 21st Century."[13] Together, these and other agency decisions show the Commission's commitment to restrained oversight of broadband Internet service, and its equally strong resolve to ensure universal service and protect consumers and fair competition in this area when necessary.

8. Before the *Comcast* case, most stakeholders—including major communications service providers—shared the Commission's view that the information service classification allowed the Commission to exercise jurisdiction over broadband Internet services when required.[14] But the D.C. Circuit concluded that the Commission lacked authority to prohibit practices of a major cable modem Internet service provider that involved secret interruption of lawful Internet transmissions, which the Commission found were unjustified and discriminatory and denied users the ability to access the Internet content and applications of their choice.[15] Today, in the wake of the *Comcast* decision, the Commission

[10] "Ancillary authority" refers to the Commission's discretion under the statutory provisions that establish the agency (Title I of the Communications Act) to adopt measures that are "reasonably ancillary to the effective performance of the Commission's various responsibilities." *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1962).

[11] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14914, para. 109.

[12] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986, 14988, para. 4 (2005) (*Internet Policy Statement*).

[13] *Joint Statement on Broadband*, FCC 10-42, GN Docket No. 10-66, paras. 1, 3 (rel. Mar. 16, 2010) (*Joint Statement on Broadband*).

[14] *See, e.g.*, Letter from Jeffry Brueggeman, General Attorney for SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 02-33, 01-337, 95-20, 98-10; CS Docket No. 02-52; GN Docket No. 00-185, attach. at 22 (filed July 31, 2003) ("By regulating broadband Internet access services under Title I instead of Title II, the Commission will give itself the flexibility to allow market forces, not regulation, to shape broadband offerings, while at the same time retaining jurisdiction to intercede at some later point if necessary to protect consumers."); Reply Comments of National Association of Broadcasters, CC Docket Nos. 02-33, 95-20, 98-10, at 3 (July 1, 2002) ("[R]egardless of the regulatory label placed on wireline broadband Internet access services, the Commission has the flexibility to adopt the safeguards necessary to guarantee that consumers have access to the offerings of competing service and content providers." (citations omitted)); Comments of Verizon, CC Docket Nos. 02-33, 95-20, 98-10, at 42 (May 3, 2002) ("Nor should classification of broadband under Title I lead to any erosion of the consumer protection provisions of the Communications Act."); Comments of Cox Communications, GN Docket No. 00-185, at 27 (Dec. 1, 2000) ("[A] Title I classification ensures that the Commission has ample ability and authority to implement rules to correct any market failures or other policy concerns about cable data services that might develop in the future."); *see also Communications, Consumer's Choice, and Broadband Deployment Act of 2006: Hearing on S. 2686 Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. (May 18, 2006) (testimony of Steve Largent, President and CEO, CTIA - The Wireless Association®, at 3) ("The industry agrees with FCC Chairman Martin that the FCC already has the jurisdiction and ability to address any problems in this area . . . .").

[15] *See Comcast*, 600 F.3d at 651-60.

faces serious questions about the legal framework that will best enable it to carry out, with respect to broadband Internet service, the purposes for which Congress established the agency. Meanwhile, Congress has highlighted the importance of broadband networks and Internet-based content and services for economic growth and development and has directed the Commission to develop policies to address concerns about the pace of deployment, adoption, and utilization of broadband Internet services in the United States.[16]

9. *Comcast* makes unavoidable the question whether the Commission's current legal approach is adequate to implement Congress's directives. In this Notice, we seek comment on the best way for the Commission to fulfill its statutory mission with respect to broadband Internet service in light of the legal and factual circumstances that exist today. We do so while standing ready to serve as a resource to Congress as it considers additional legislation in this area.[17]

10. We emphasize that the purpose of this proceeding is to ensure that the Commission can act within the scope of its delegated authority to implement Congress's directives with regard to the broadband communications networks used for Internet access. These networks are within the Commission's subject-matter jurisdiction over communication by wire and radio and historically have been supervised by the Commission.[18] We do not suggest regulating Internet applications, much less the content of Internet communications. We also will not address in this proceeding other Internet facilities or services that currently are lightly regulated or unregulated, such as the Internet backbone, content delivery networks (CDNs), over-the-top video services, or voice-over-Internet-Protocol (VoIP) telephony services. Our questions instead are directed toward addressing broadband Internet service in a way that is consistent with the Communications Act, reduces uncertainty that may chill investment and innovation if allowed to continue, and accomplishes Congress's pro-consumer, pro-competition goals for broadband.

II. DISCUSSION

A. Background

11. The Commission has long sought to ensure that communications networks support a robust marketplace for computer services operated over publicly accessible networks, from the early database lookup services to today's social networking sites. To provide context for the later discussion of the Commission's options for a suitable framework for broadband Internet service, we briefly describe this historical backdrop.

1. The Commission's Classification Decisions

12. In 1966, the Commission initiated its *Computer Inquiries* "to ascertain whether the services and facilities offered by common carriers are compatible with the present and anticipated communications requirements of computer users."[19] In *Computer I*, the Commission required "maximum

[16] *See infra* para. 25.

[17] *See* Letter from Rep. Henry A. Waxman, Chairman, House Committee on Energy and Commerce, and Sen. John D. Rockefeller, IV, Chairman, Senate Committee on Commerce, Science, and Transportation to Julius Genachowski, Chairman, FCC (May 5, 2010) ("[I]n the near term, we want the agency to use all of its existing authority to protect consumers and pursue the broad objectives of the National Broadband Plan. . . . In the long term, if there is a need to rewrite the law to provide consumers, the Commission, and industry with a new framework for telecommunications policy, we are committed as Committee Chairmen to doing so."). Commenters may wish to address how the Commission should proceed on these issues in light of Congressional developments.

[18] *See Comcast*, 600 F.3d at 646-47.

[19] *Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm. Servs.*, Docket No. 16979, Notice of Inquiry, 7 F.C.C. 2d 11, 11-12, para. 2 (1966) (*Computer I Notice of Inquiry*) (subsequent history omitted).

separation" between large carriers that offered data transmission services subject to common carrier requirements and their affiliates that sold data processing services.[20] Refining this approach, in *Computer II* and *Computer III* the Commission required facilities-based providers of "enhanced services" to separate out and offer on a common carrier basis the "basic service" transmission component underlying their enhanced services.[21]

13. In the Telecommunications Act of 1996, Congress built upon the *Computer Inquiries* by codifying the Commission's distinction between "telecommunications services" used to transmit information (akin to offerings of "basic services") and "information services" that run over the network (akin to "enhanced services").[22] In a 1998 report to Congress, the Commission attempted to indicate how it might apply the new law in the Internet context. Approximately 98 percent of households with Internet connections then used traditional telephone service to "dial-up" their Internet access service provider, which was typically a separate entity from their telephone company.[23] In the report to Congress—widely known as the "*Stevens Report*," after Senator Ted Stevens—the Commission stated that Internet access service as it was then being provided was an "information service."[24] The *Stevens Report* declined to

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[20] *Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm. Servs.*, Docket No. 16979, Final Decision and Order, 28 F.C.C. 2d 267, 270, para. 12, 275, para. 24 (1971) (*Computer I Final Decision*), *aff'd sub nom. GTE Servs. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 F.C.C. 2d 293 (1972).

[21] *Amendment of Section 64.702 of the Comm'n's Rules & Regs, Second Computer Inquiry*, Final Decision, 77 F.C.C. 2d 384, 417-35, paras. 86-132, 461-75, paras. 201-31 (1980) (*Computer II Final Decision*), *aff'd sub nom. Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *Amendment of Section 64.702 of the Comm'n's Rules & Regs.* (*Third Computer Inquiry*), CC Docket No. 85-229, Phase I, Report and Order, 104 F.C.C. 2d 958, para. 4 (1986) (*Computer III Phase I Order*) (subsequent history omitted).

[22] Telecommunications Act of 1996, Pub. L. No. 104-104, § 3(a)(2), 110 Stat. 56, 58-60 (1996), *codified at* 47 U.S.C. § 153(20) ("The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."), § 153(43) ("The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."), § 153(46) ("The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.").

[23] *See Inquiry Concerning the Deployment of Advanced Telecommunications Services to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2446, para. 91 (1999); Ind. Anal. & Tech. Div., Wireline Comp. Bur., *Trends in Telephone Service*, 2-10, chart 2.10, 16-3, tbl. 16.1 (Aug. 2008).

[24] *Federal-State Joint Board on Universal Servic*e, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11536, para. 73 (1998) (*Stevens Report*). In a 1997 Report and Order, the Commission had previously concluded that "[w]hen a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's service offering. . . . [I]nformation services are not inherently telecommunications services." *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 9180, para. 789 (1997) (subsequent history and citations omitted). The Commission followed that precedent, without further analysis, in a Report and Order concerning pole attachment rates, to conclude that a cable operator providing Internet service over a facility that also provides cable television service is not a telecommunications carrier. The Commission found it unnecessary at that time to make a decision regarding the best classification of such services. *Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-151, 13 FCC Rcd 6777, 6794-96, (continued….)

address whether entities that provided Internet connectivity over their own network facilities were offering a separate telecommunications component.[25] The courts, rather than the Commission, first answered that question.

14. In 2000 the United States Court of Appeals for the Ninth Circuit held that cable modem Internet service is a telecommunications service to the extent that the cable operator "provides its subscribers Internet transmission over its cable broadband facility" and an information service to the extent the operator acts as a "conventional [Internet Service Provider (ISP)]."[26] At the time, the Commission's *Computer Inquiry* rules required telephone companies to offer their digital subscriber line (DSL) transmission services as telecommunications services.[27] The Ninth Circuit's decision thus put cable companies' broadband transmission service on a regulatory par with DSL transmission service.

15. In 2002, the Commission exercised its authority to interpret the Act and disagreed with the Ninth Circuit. Addressing the classification of cable modem service, the Commission observed that "[t]he Communications Act does not clearly indicate how cable modem service should be classified or regulated."[28] Based on a factual record that had been compiled largely in 2000,[29] the Commission's *Cable Modem Declaratory Ruling* described cable modem service as "typically includ[ing] many and sometimes all of the functions made available through dial-up Internet access service, including content,

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paras. 33-34 (1998) (subsequent history omitted). *See also Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 338 (2002) (noting that "the FCC . . . has reiterated that it has not yet categorized Internet service").

[25] *Stevens Report*, 13 FCC Rcd at 11530, para. 60 ("[T]he matter is more complicated when it comes to offerings by facilities-based providers."), 11535 n.140 ("We express no view in this Report on the applicability of this analysis to cable operators providing Internet access service."), 11540, para. 81 ("In essential aspect, Internet access providers look like other enhanced—or information—service providers. Internet access providers, typically, own no telecommunications facilities."); *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 4798, 4824, para. 41 (2002) (*Cable Modem Declaratory Ruling*) ("The [*Stevens Report*] did not decide the statutory classification issue in those cases where an ISP provides an information service over its own transmission facilities."), *aff'd sub nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*); *Appropriate Framework for Broadband Access to Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3027-28, paras. 14-16 (2002) ("[In the *Stevens Report*, t]he Commission recognized . . . that its analysis focused on ISPs as entities procuring inputs from telecommunications service providers. Thus, classifying Internet access as an information service in this context left open significant questions regarding the treatment of Internet (and information) service providers that own their own transmission facilities and that engage in data transport over those facilities to provide an information service. In addition, the Commission did not explicitly address the regulatory classification of wireline broadband Internet access services." (citation omitted)).

[26] *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-79 (9th Cir. 2000); *but see Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275-78 (11th Cir. 2000) (holding that Internet service is neither a cable service nor a telecommunications service), *rev'd sub nom. Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002); *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000) (concluding that cable modem service is a cable service), *aff'd on other grounds*, 257 F.3d 356 (4th Cir. 2001).

[27] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24030-31, paras. 36-37 (1998); *see generally Wireline Broadband Report and Order*, 20 FCC Rcd at 14867-75, paras. 23-40.

[28] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4819, para. 32.

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

e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet, including access to the World Wide Web."[30] The Commission noted that cable modem providers often consolidated these functions "so that subscribers usually do not need to contract separately with another Internet access provider to obtain discrete services or applications, such as an e-mail account or connectivity to the Internet, including access to the World Wide Web."[31]

16. The Commission identified a portion of the cable modem service it called "Internet connectivity," which it described as establishing a physical connection to the Internet and interconnecting with the Internet backbone, and sometimes including protocol conversion, Internet Protocol (IP) address number assignment, domain name resolution through a domain name system (DNS), network security, caching, network monitoring, capacity engineering and management, fault management, and troubleshooting.[32] The *Ruling* also noted that "[n]etwork monitoring, capacity engineering and management, fault management, and troubleshooting are Internet access service functions that are generally performed at an ISP or cable operator's Network Operations Center (NOC) or back office and serve to provide a steady and accurate flow of information between the cable system to which the subscriber is connected and the Internet."[33] The Commission distinguished these functions from "Internet applications [also] provided through cable modem services," including "e-mail, access to online newsgroups, and creating or obtaining and aggregating content," "home pages," and "the ability to create a personal web page."[34]

17. The Commission found that cable modem service was "an offering . . . which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications."[35] The Commission further concluded that, "as it [was] currently offered,"[36] cable modem service as a whole met the statutory definition of "information service" because its components were best viewed as a "single, integrated service that enables the subscriber to utilize Internet access service," with a telecommunications component that was "not . . . separable from the data processing capabilities of the service."[37] The Commission thus concluded that cable modem service "does not include an offering of telecommunications service to subscribers."[38]

18. When the United States Supreme Court considered the *Cable Modem Declaratory Ruling* in the *Brand X* case,[39] all parties agreed that cable modem service either *is* or *includes* an information

[30] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4804, para. 10 (footnotes omitted).

[31] *Id.* at 4806, para. 11 (footnotes omitted). The Commission defined cable modem service as "a service that uses cable system facilities to provide residential subscribers with high-speed Internet access, as well as many applications or functions that can be used with high-speed Internet access." *Id.* at 4818-19, para. 31.

[32] *Id.* at 4809-11, paras. 16-17 (citations omitted).

[33] *Id.* at 4810-11, para. 17 (citations omitted).

[34] *Id.* at 4811, para. 18 (citation omitted).

[35] *Id.* at 4822, para. 38.

[36] *Id.* at 4802, para. 7.

[37] *Id.* at 4823, paras. 38-39.

[38] *Id.* at 4832, para. 39.

(continued….)

service.[40] The Court therefore focused, in pertinent part, on whether the Commission permissibly interpreted the Communications Act in concluding that cable modem service providers offer only an information service, rather than a separate telecommunications service and information service.[41] The Court's opinion reaffirms that courts must defer to the implementing agency's reasonable interpretation of an ambiguous statute. Justice Thomas, writing for the six-Justice majority, recited that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts."[42] Furthermore, "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis."[43]

19. Turning specifically to the Communications Act, Justice Thomas wrote: "[T]he statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission."[44] "The questions the Commission resolved in the order under review," Justice Thomas summed up, "involve a subject matter [that] is technical, complex, and dynamic. The Commission is in a far better position to address these questions than we are."[45] Justice Breyer concurred with Justice Thomas, stating that he "believe[d] that the Federal Communications Commission's decision falls within the scope of its statutorily delegated authority," although "perhaps just barely."[46]

20. In dissent, Justice Scalia, joined by Justices Souter and Ginsburg, expressed the view that the Commission had adopted "an implausible reading of the statute[,] . . . thus exceed[ing] the authority given it by Congress."[47] Justice Scalia reasoned that "the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on offer—especially when seen from the perspective of the consumer or end user."[48]

21. After the Supreme Court affirmed the Commission's authority to classify cable modem service, the Commission eliminated the resulting regulatory asymmetry between cable companies and other broadband Internet service providers by issuing follow-on orders that extended the information service classification to broadband Internet services offered over DSL and other wireline facilities,[49] power lines,[50] and wireless facilities.[51] The Commission nevertheless allowed these providers, at their

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[39] *See Brand X*, 545 U.S. 967.

[40] *See id.* at 987.

[41] *See id.* at 986-87.

[42] *Id.* at 980 (discussing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

[43] *Id.* at 981 (quoting *Chevron*).

[44] *Id.* at 991.

[45] *Id.* at 1002-03 (internal citation and quotation marks omitted).

[46] *Id.* at 1003 (Breyer, J., concurring).

[47] *Id.* at 1005 (Scalia, J., dissenting).

[48] *Id.* at 1008.

[49] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14863-65, paras. 14-17, 14909-12, paras. 103-06.

[50] *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over*

(continued….)

own discretion, to offer the broadband transmission component of their Internet service as a separate telecommunications service.[52] Exercising that flexibility, providers—including more than 840 incumbent local telephone companies[53]—currently offer broadband transmission as a telecommunications service expressly separate from their Internet information service.[54]

2. The Commission's Established Policy Goals

22. In the 1996 Act, Congress made clear its desire that the Commission promote the widespread availability of affordable Internet connectivity services, directing the Commission to adopt universal service mechanisms to ensure that "[a]ccess to advanced telecommunications and information services . . . [is] provided in all regions of the Nation."[55] Congress also instructed the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[56] The Commission's classification decisions in the *Cable Modem Declaratory Ruling* and the later follow-on orders were intended to support the policy goal of encouraging widespread deployment of broadband.[57] The Commission's hypothesis was that classifying all of broadband Internet

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Power Line Internet Access Service as an Information Service, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13281-82, paras. 1-2 (2006) (*BPL-Enabled Broadband Order*).

[51] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5909-110, paras. 19-26, 5912-14, paras. 29-33 (2007) (*Wireless Broadband Order*).

[52] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14858, para. 5, 14900-03, paras. 89-95, 14909-10, para. 103; *BPL-Enabled Broadband Order*, 21 FCC Rcd at 13289, para. 15; *Wireless Broadband Order*, 22 FCC Rcd at 5913-14, para. 33. In the 2005 order, the Commission also eliminated the *Computer Inquiry* requirements for wireline broadband Internet service. *Wireline Broadband Report and Order*, 20 FCC Rcd at 14875-98, paras. 41-85.

[53] Of those, approximately 800 incumbent local exchange carriers participate in the National Exchange Carrier Association, Inc. (NECA) DSL Access Service Tariff. National Exchange Carrier Association, Tariff F.C.C. No. 5, pages 17-80 to 17-87.3, Section 17.6 (NECA DSL Tariff). NECA is a non-profit association that files tariffs on behalf of typically smaller rate-of-return carriers so those carriers do not have to file individual tariffs. *See, e.g.*, 47 C.F.R. §§ 69.601, 69.603. Through that voluntary tariff, NECA members offer retail end users and wholesale Internet service providers a DSL access service that "enables data traffic generated by a customer-provided modem to be transported to a DSL Access Service Connection Point using the Telephone Company's local exchange service facilities." NECA DSL Tariff at page 8-1, Section 8.1.1.

[54] *See* Comments of Organization for the Promotion and Advancement of Small Telecommunications Companies, GN Docket No. 09-51, at 30-31 (June 8, 2009) ("[A]ll RoR[rate of return]-regulated carriers (which encompasses most rural ILECs) offer broadband transmission on a stand-alone Title II common carrier basis. This means that they are required to offer that transmission at specified, non-discriminatory rates, terms, and conditions, including to non-facilities based Internet service providers (ISPs)." (citation omitted)).

[55] 47 U.S.C. § 254(b)(2).

[56] Telecommunications Act of 1996 § 706, *codified as amended at* 47 U.S.C. § 1302.

[57] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4801, para. 4 ("[C]onsistent with statutory mandates, the Commission's primary policy goal is to 'encourage the ubiquitous availability of broadband to all Americans.'") (citing 47 U.S.C. § 157 nt (section 706)); *Wireline Broadband Report and Order*, 20 FCC Rcd at 14855, para. 1, 14865, para. 17, 14894-96, paras. 77-79; *BPL-Enabled Broadband Order*, 21 FCC Rcd at 13281-82, para. 2, 13287, para. 10; *Wireless Broadband Order*, 22 FCC Rcd at 5902, para. 2, 5911, para. 27.

service as an information service, outside the scope of any specific regulatory duty in the Act, would help achieve Congress's aims.[58]

23. At the same time, the Commission acted with the express understanding that its information service classifications would not impair the agency's ability to protect the public interest. For example, when the Commission permitted telephone companies to offer broadband Internet service as solely an information service, it emphasized that this new classification would not remove the agency's "ample" Title I authority to accomplish policy objectives related to consumer protection, network reliability, and national security.[59] The *Wireline Broadband Report and Order* thus was accompanied by a *Broadband Consumer Protection Notice*, in which the Commission sought comment on "a framework that ensures that consumer protection needs are met by *all* providers of broadband Internet access service, regardless of the underlying technology."[60] The Commission stressed that its ancillary jurisdiction was "ample to accomplish the consumer protection goals we identify."[61] The Commission similarly referenced the *Broadband Consumer Protection Notice* when it extended the information service classification to broadband Internet services offered over power lines[62] and wireless facilities.[63]

24. On the same day it adopted the *Wireline Broadband Report and Order* and *Broadband Consumer Protection Notice*, moreover, the Commission unanimously adopted the *Internet Policy Statement*.[64] In this *Statement*, the Commission articulated four principles "[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet," and to "foster creation adoption and use of Internet broadband content, applications, services and attachments, and to insure consumers benefit from the innovation that comes from competition."[65] The principles are:

- consumers are entitled to access the lawful Internet content of their choice;
- consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;
- consumers are entitled to connect their choice of legal devices that do not harm the network; and
- consumers are entitled to competition among network providers, application and service providers, and content providers.[66]

[58] *See, e.g., Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4801, para. 4; *Wireline Broadband Report and Order*, 20 FCC Rcd at 14856, para. 3 ("We are confident that the regulatory regime we adopt in this Order will promote the availability of competitive broadband Internet access services to consumers, via multiple platforms, while ensuring adequate incentives are in place to encourage the deployment and innovation of broadband platforms consistent with our obligations and mandates under the Act.").

[59] *See Wireline Broadband Report and Order*, 20 FCC Rcd at 14914, para. 109, 14930, para. 146

[60] *Id.* at 14929-30, para. 146 (emphasis in original).

[61] *Id.* at 14930, para. 146.

[62] *See BPL-Enabled Broadband* Order, 21 FCC Rcd at 13290-91, para. 16.

[63] *See Wireless Broadband Order*, 22 FCC Rcd at 5925, para. 70.

[64] *Internet Policy Statement*, 20 FCC Rcd 14986.

[65] *Id.* at 14988, paras. 4-5.

[66] *Id.* at 14988, para. 4. All principles are subject to reasonable network management. *Id.* at 14988, para. 4 n.15.

The Commission expressed confidence that it had the "jurisdiction necessary to ensure that providers of telecommunications for Internet access . . . are operated in a neutral manner."[67]

3. Legal Developments

25. Recent legislative and judicial developments suggest a need to revisit the Commission's approach to broadband Internet service. Since 2008, Congress has passed three significant pieces of legislation that reflect its strong interest in ubiquitous deployment of high speed broadband communications networks and bear on the Commission's policy goals for broadband: the 2008 Farm Bill directing the Chairman to submit to Congress "a comprehensive rural broadband strategy," including recommendations for the rapid buildout of broadband in rural areas and for how federal resources can "best . . . overcome obstacles that impede broadband deployment";[68] the Broadband Data Improvement Act, to improve data collection and "promote the deployment of affordable broadband services to all parts of the Nation";[69] and the Recovery Act, which, among other things, appropriated up to $7.2 billion to evaluate, develop, and expand access to and use of broadband services,[70] and required the Commission to develop the National Broadband Plan to ensure that every American has "access to broadband capability and . . . establish benchmarks for meeting that goal."[71] In the Recovery Act, Congress further directed the Commission to produce a "detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public," and a "plan for [the] use of broadband structure and services" to advance national goals such as public safety, consumer welfare, and education.[72] These three pieces of legislation, passed within a span of nine months, make clear that the Commission must retain its focus on implementing broadband policies that encourage investment, innovation, and competition, and promote the interests of consumers.

26. Even more recently, the D.C. Circuit's rejection of the Commission's attempt to address a broadband Internet service provider's unreasonable traffic disruption practices has cast a shadow over the Commission's prior understanding of its authority over broadband Internet services. In late 2007, the Commission received a complaint alleging that Comcast was blocking peer-to-peer traffic in violation of the *Internet Policy Statement*. In 2008, the Commission granted the complaint and directed Comcast to disclose specific information about its network management practices to the Commission, submit a compliance plan detailing how it would transition away from unreasonable network management practices, and disclose to the public the network management practices it intends to use going forward.[73] Comcast challenged that decision in the D.C. Circuit, arguing (among other things) that the Commission

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[67] *Id.* at 14988, para. 4. Twice since, the Commission has sought comment on the need to expand on the *Internet Policy Statement*. *See Broadband Industry Practices*, WC Docket No. 07-52, Notice of Inquiry, 22 FCC Rcd 7894 (2007); *Open Internet NPRM*, 24 FCC Rcd 13064.

[68] Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 6112, 122 Stat. 923, 1966 (2008) (2008 Farm Bill). Acting Chairman Copps transmitted the report to Congress on May 22, 2009. *See Rural Broadband Report Published in the FCC Record*, GN Docket No. 09-29, Public Notice, 24 FCC Rcd 12791 (2009).

[69] Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (codified at 47 U.S.C. § 1301 *et seq.*).

[70] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

[71] 47 U.S.C. § 1305(k)(2).

[72] *Id.* § 1305(k)(2)(B), (D).

[73] *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices et al.*, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008) (*Comcast Order*), *vacated sub nom. Comcast*, 600 F.3d 642.

lacks authority to prohibit a broadband Internet service provider from engaging in discriminatory practices that violate the four principles the Commission announced in 2005.[74]

27. On April 6, 2010, the D.C. Circuit granted Comcast's petition for review and vacated the Commission's enforcement decision, holding that the Commission had "failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility.'"[75] The Commission had argued that ending Comcast's secret practices was ancillary to the statutory objectives Congress established for the Commission in sections 1 and 230(b) of the Act. The court rejected that argument on the ground that those sections are merely statements of policy by Congress—as opposed to grants of regulatory authority—and thus were not sufficient to support Commission action against Comcast.[76] The court also rejected the Commission's position that various other statutory provisions supported ancillary authority. As to section 706 of the Telecommunications Act of 1996, the court noted that the agency had previously interpreted section 706 as not constituting a grant of authority and held that the Commission was bound by that interpretation for purposes of the case.[77] The court also rejected the agency's reliance on sections 201, 256, 257, and 623 of the Communications Act.[78]

B. Approaches to Classification

28. In light of the legislative and judicial developments described above, we seek comment on whether our existing legal framework adequately supports the Commission's previously stated policy goals for broadband. First, we ask whether the current information service classification of broadband Internet service can still support effective performance of the Commission's core responsibilities. Second, we ask for comment on the legal and practical consequences of classifying the Internet connectivity component of broadband Internet service as a "telecommunications service" to which the full weight of Title II requirements would apply, and whether such a classification would accurately reflect the current market facts. Finally, we identify and invite comment on a third way, under which the Commission would classify the Internet connectivity portion of broadband Internet service as a telecommunications service but would simultaneously forbear, using the section 10 authority Congress delegated to us,[79] from all but a small handful of provisions necessary for effective implementation of universal service, competition and small business opportunity, and consumer protection policies.

29. The Commission has frequently expressed its commitment to protecting consumers and promoting innovation, investment, and competition in the broadband context.[80] We reaffirm that commitment here and ask commenters to address—in general terms, as well as in response to the specific questions posed below—which of the three alternative regulatory frameworks for broadband Internet service (or what other framework) will best position the Commission to advance these fundamental goals. We note that because the broadband Internet service classification questions posed in this part II.B involve an interpretation of the Communications Act, the notice and comment procedures we follow here

[74] *See* Brief for Comcast Corp. at 41-54, *Comcast*, 600 F.3d 642.

[75] *Comcast*, 600 F.3d at 661 (quoting *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

[76] *Id.* at 651-58.

[77] *Id.* at 658-60.

[78] *Id.* at 660-61.

[79] 47 U.S.C. § 160.

[80] *See, e.g., Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4801-02, paras. 4-6; *Wireline Broadband Report and Order*, 20 FCC Rcd at 14855, para. 1, 14929-30, para. 146.

are not required under the Administrative Procedure Act.[81] In order to provide the greatest possible opportunity for public comment, however, we are soliciting initial and reply comments via the traditional filing mechanisms, as well as input through our recently expanded online participation tools.[82]

1. Continued Information Service Classification and Reliance on Ancillary Authority

30. In this part, we seek comment on maintaining the current classification of wired broadband Internet service as a unitary information service. Under this approach, we would rely primarily on our ancillary authority to implement the Commission's broadband policies. We seek comment on whether our ancillary authority continues to provide an adequate legal foundation. Throughout the last decade, the Commission has stated its consistent understanding that Title I provided the Commission adequate authority to support effective performance of its core responsibilities.[83] Commissioners, including the two former Chairmen who urged the information service approach,[84] as well as cable and telephone companies and other interested parties,[85] individually expressed this understanding. In *Brand X*, the Supreme Court appeared to confirm this widely held view, stating that "the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction."[86] The *Comcast* decision, however, causes us to reexamine our ability to rely on Title I as the legal basis for implementing broadband policies.

31. Some have suggested that although the D.C. Circuit rejected the Commission's theory of ancillary authority in *Comcast*, the Commission can still accomplish many of its most important broadband-related goals without changing its classification of broadband Internet service as a unitary information service. We seek comment on the overall scope of the Commission's authority regarding broadband Internet service in the wake of the *Comcast* decision. Below we identify and seek comment on several particular concerns.

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[81] *See* 5 U.S.C. § 553(b) (notice and comment requirements "do[] not apply" to "interpretive rules"); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (change in interpretation of statute does not require notice and comment procedures).

[82] *See infra* para. 114.

[83] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4840-42, paras. 73-79; *Broadband Consumer Protection Notice*, 20 FCC Rcd at 14929-30, para. 146; *Internet Policy Statement*, 20 FCC Rcd at 14987-88, para. 4.

[84] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4867 (Sep. Stmt. of Chmn. Powell) ("The Commission is not left powerless to protect the public interest by classifying cable modem service as an information service. Congress invested the Commission with ample authority under Title I."); *Wireline Broadband Report and Order*, 20 FCC Rcd at 14977-78 (Stmt. of Comm'r Abernathy) ("When the Commission first issued its tentative conclusion that [wireline broadband Internet] services were outside the scope of Title II, I emphasized my commitment to preserving any specific regulatory requirements that are necessary for the furtherance of critical policy objectives. In June, the *Brand X* majority made clear that the Commission retains the prerogative to exercise its Title I 'ancillary jurisdiction' to do just that."); *id.* at 14981 (Stmt. of Comm'r Copps, concurring) ("[T]he Commission's ancillary authority can accommodate our work on homeland security, universal service, disabilities access, competition, and Internet discrimination protections—and more."); Hearing on the Future of the Internet Before the S. Comm. on Commerce, Science and Transportation, 110th Cong. (April 22, 2008) (written stmt. of the Hon. Kevin J. Martin, Chairman, FCC, at 3) ("As the expert communications agency, it was appropriate for the Commission to adopt, and it is the Commission's role to enforce, this Internet Policy Statement. In fact, the Supreme Court in its *Brand X* decision specifically recognized the Commission's ancillary authority to impose regulations as necessary to protect broadband internet access.").

[85] *See supra* note 14.

[86] *Brand X*, 545 U.S. at 996.

a. Universal Service

32. Can the Commission reform its universal service program to support broadband Internet service by asserting direct authority under section 254, combined with ancillary authority under Title I? AT&T, for example, observes that section 254 provides that "[a]ccess to advanced telecommunications *and information services* should be provided in all regions of the nation," and that the Commission's universal service programs "shall" be based on this and other enumerated principles.[87] AT&T notes that the Commission's information service classification for broadband Internet service creates "tension" with "the text of Section 254(c)(1), which states that '[u]niversal service is an evolving level of *telecommunications services* that the Commission shall establish periodically under this section.'"[88] But, AT&T suggests, "[o]ther evidence in the statutory text makes clear that Congress did not intend to disable the Commission from using universal service to support information services."[89] For example,

- "Section 254(b) *requires* the Commission to use universal service to promote access to 'advanced telecommunications and information services,'"
- "Section 254(c) . . . [refers] to an '*evolving* level of telecommunications services that the Commission shall establish periodically under this section[,]'" and
- Section 254(c)(2) "expressly authoriz[es] the Joint Board and the Commission to 'modif[y] . . . the definition of the *services* that are supported by Federal universal support mechanisms.'"[90] The reference to "services" in section 254(c)(2) may suggest that Congress intended universal service policies to support information services, even though the definition of universal service in section 254(c)(1) is explicitly limited to "telecommunications services."[91]

AT&T explains that section 254 "contains competing directives," but asserts that "the schizophrenic nature of Section 254 is simply another example of the many ways in which the 1996 Act is not a 'model of clarity.'"[92]

33. We seek comment on whether we may interpret section 254 to give the Commission authority to provide universal service support for broadband Internet service if that service is classified as a unitary information service. Could we provide support to information service providers consistent with section 254(e), which says that "only an eligible telecommunications carrier designated under section

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[87] *See* Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-47, 09-137, WC Docket Nos. 05-337, 03-109, attachment at 2 (Jan. 29, 2010) (*AT&T USF White Paper*) (quoting and citing 47 U.S.C. § 254(b)(2) (emphasis added)); Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-137, WC Docket Nos. 05-337, 03-109 (April 12, 2010) (*AT&T USF/Comcast Letter*).

[88] *AT&T USF White Paper* at 2-3 (quoting 47 U.S.C. § 254(c)(1) (emphasis added)).

[89] *Id.*

[90] *Id.* at 3 (quoting 47 U.S.C. §§ 254(c)(1), (c)(2) (emphasis added)).

[91] *Id.* (emphasis added to quoted statutory provisions). *See also* Letter from Brita D. Strandberg, Counsel to Vonage Holdings Corp., to Marlene Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137, at 5 (Jan. 27, 2010) ("It would be contrary to the express will of Congress to view section 254(c)(1)'s use of the term 'telecommunications service' in this context as somehow overriding the remainder of section 254, limiting the services eligible for support to old technologies, prohibiting support for advanced services commonly available to consumers in urban areas.").

[92] *AT&T USF White Paper* at 5 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999)).

214(e) shall be eligible to receive specific Federal universal service support,"[93] and 214(e), which sets forth the framework for designating "telecommunications carrier[s] . . . eligible to receive universal service support"?[94]

34. AT&T posits that even after the *Comcast* decision, the Commission could bolster its reliance on section 254 by also relying on several other provisions of the Act.[95] First, the "necessary and proper clause" in section 4(i) of the Act allows the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[96] Second, the Act makes clear that the Commission's "core statutory mission" is to "make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges."[97] Third, the text of 254, as described above, suggests that Congress intended the Commission to support universal broadband Internet service.[98] Finally, the policy directive in section 706 of the 1996 Act instructs the Commission to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.[99] AT&T contends that section 706's directive supports the view that section 254 provides authority for supporting broadband Internet services with monies from the Universal Service Fund.[100] We seek comment on AT&T's analysis.

35. The National Cable and Telecommunications Association (NCTA) has put forward a similar legal theory rooted in section 254(h)(2) of the Communications Act.[101] That section gives the Commission authority "to enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries."[102] NCTA contends that because "the use of broadband in the home has become a critical component of the American education system . . . it is entirely reasonable to read the statutory directive to support Internet access for classrooms to include support for residential broadband service to households where it is reasonably likely that such service would be used for educational purposes."[103] Could the Commission interpret section 254(h)(2) to permit this type of support for broadband Internet service? Is

[93] 47 U.S.C. § 254(e).

[94] *Id.* § 214(e).

[95] *AT&T USF White Paper* at 5-13; *AT&T USF/Comcast Letter*.

[96] 47 U.S.C. § 154(i).

[97] 47 U.S.C. § 151.

[98] *AT&T USF White Paper* at 6-7.

[99] 47 U.S.C. § 1302.

[100] *AT&T USF/Comcast Letter* at 2.

[101] *See* Letter from Kyle McSlarrow, President & CEO, National Cable & Telecommunications Association, to Julius Genachowski, Chairman, FCC, GN Docket Nos. 09-51, 09-191, WC Docket No. 07-52 (March 1, 2010) (*NCTA USF Letter*).

[102] 47 U.S.C. § 254(h)(2).

[103] *NCTA USF Letter* at 2. On May 20, 2010, the Commission adopted a Notice of Proposed Rulemaking that proposes "to revise our rules to allow schools with residential areas on their grounds to receive E-rate funding for priority one and priority two services in those residential areas in circumstances where the students do not have access to comparable schooling or training if they were to reside at home." *Schools and Libraries Universal Service Support Mechanism*; *A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Notice of Proposed Rulemaking, FCC 10-83, para. 57 (rel. May 20, 2010).

this approach a permissible extension of the Commission's existing E-Rate program?[104] Would this approach enable the Commission to provide support for broadband Internet service only to households with school-aged children, or could the Commission provide support for adult education as well?

36. Another legal theory for promoting broadband deployment under the Commission's current classification of broadband Internet service rests directly on section 706 of the 1996 Act. Section 706(a) states that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[105] Section 706(c) defines "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."[106] The D.C. Circuit rejected section 706(a) as a basis for the Commission's *Comcast* order because "[i]n an earlier, still-binding order . . . the Commission ruled that section 706 'does not constitute an independent grant of authority,'"[107] and "agencies 'may not . . . depart from a prior policy *sub silentio*.'"[108] We seek comment on whether the Commission should revisit and change its conclusion that section 706(a) is not an independent grant of authority.[109] What findings would be necessary to reverse that interpretation? If the Commission were to find that section 706(a) is an independent grant of authority, would that subsection, read in conjunction with sections 4(i) and 254, provide a firm basis for the Commission to provide universal service support for broadband Internet services?

37. Some parties have suggested that the Commission could rely on section 706(b) as a source of authority to support broadband Internet service with Universal Service Fund money.[110] That section provides that:

> [t]he Commission shall . . . annually . . . initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans . . . . In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by

[104] *See NCTA USF Letter* attachment at 4 (citing *Schools and Libraries Universal Service Support Mechanism*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 02-6, 18 FCC Rcd 9202, 9207, para. 15 (2003)).

[105] 47 U.S.C. § 1302(a).

[106] 47 U.S.C. § 1302(d).

[107] *Comcast*, 600 F.3d at 658 (quoting *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 FCC Rcd 24012, 24047, para. 77 (1998)).

[108] *Id.* at 659 (quoting *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)).

[109] *But see* Reply Comments of Verizon & Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52, at 86 (April 26, 2010) ("Even apart from [the Commission's] prior conclusion, because 706(a) on its face is merely a general statement of policy, '. . . the Commission is seeking to use its ancillary authority to pursue a stand-alone policy objective, rather than to support its exercise of a specifically delegated power.'" (quoting *Comcast*, 600 F.3d at 659)).

[110] *See* Reply Comments of Verizon & Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52, at 89-90 (April 26, 2010); Letter from Jonathan E. Nuechterlein, Counsel for AT&T, Inc., to Marlene Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-191, WC Docket No. 07-52 (April 14, 2010).

promoting competition in the telecommunications market.[111]

We seek comment on whether we could interpret section 706(b) as an independent grant of authority. Specifically, we ask whether Congress's direction that the Commission take "immediate action" if it makes a negative determination about the state of broadband deployment authorizes the Commission to provide universal service support to spur that deployment. Would any such support be contingent on continued negative findings in the annual broadband availability inquiry? Under section 706(b), would universal service programs have to be tailored to particular geographic areas where deployment is lagging, or could the Commission implement the program on a national basis? Would the Commission be limited to direct support for deployment, or could the Commission interpret section 706(b) also to support broadband Internet services to low-income populations, such as is the case with our support for voice services in the Lifeline and Link Up programs?

38. For each of these legal theories, the Commission seeks comment on the administrative record that would be needed to successfully defend against a legal challenge to implementation of the theory. Would adopting these theories be consistent with the federal Anti-Deficiency Act and Miscellaneous Receipts Act?[112] What other issues should the Commission consider in evaluating these legal theories? Are there other legal frameworks that would allow us to promote universal service in the broadband context without revisiting our classification decisions?

b. Privacy

39. The Commission has long supported protecting the privacy of users of broadband Internet services. In 2005, the Commission emphasized in the *Wireline Broadband Report and Order* that "[c]onsumers' privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on [telephone] services."[113] The Commission believed at the time that it had jurisdiction to enforce privacy requirements, and "note[d] that long before Congress enacted section 222 of the Act," which requires providers of telecommunications services to protect confidential information, "the Commission had recognized the need for privacy requirements associated with the provision of enhanced services."[114] In 2007, the Commission extended the privacy protections of section 222 to interconnected VoIP services without resolving whether interconnected VoIP services are telecommunications services or information services.[115] More recently, the National Broadband Plan recommended that the Commission work with the Federal Trade Commission (FTC) to protect

[111] 47 U.S.C. § 1302(b).

[112] The Anti-Deficiency Act prohibits the Commission from making or authorizing an expenditure or obligation that exceeds the amount available for it in an appropriation or fund. *See* 31 U.S.C. § 1341. Congress enacted the original Miscellaneous Receipts Act in 1849 to ensure that federal monies are deposited into the United States Treasury, from which they may be removed only pursuant to the congressional appropriation process. *See* 31 U.S.C. § 3302(b).

[113] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14930, para. 148.

[114] *Id.* at 14930, para. 146, 14931, para. 149.

[115] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6954-57, paras. 54-59 (2007) (concluding that CPNI obligations are reasonably ancillary to the Commission's statutory responsibilities under sections 1, 222 and 706), *aff'd sub nom. Nat'l Cable & Telecom. Ass'n v. FCC*, 555 F.3d 996 (D.C. Cir. 2009).

consumers' privacy in the broadband context.[116] Indeed, we fully intend that our efforts with regard to privacy complement those of the FTC. We seek comment on the best approach for ensuring privacy for broadband Internet service users under the Commission's current information service classification, and any legal obstacles to protecting privacy that may exist if the Commission retains that classification.

c. Access for Individuals with Disabilities

40. Section 255 requires telecommunications service providers and equipment manufacturers to make their services and equipment accessible to individuals with disabilities, unless not readily achievable.[117] Section 251(a)(2) requires telecommunications carriers "not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255."[118] In the 2005 *Wireline Broadband Report and Order*, the Commission committed to exercise its authority "to ensure achievement of important policy goals of section 255" in the broadband context.[119] In 2007, the Commission exercised its ancillary authority to extend section 255 to interconnected VoIP providers,[120] and in 1999 the Commission similarly relied on ancillary authority to extend disability-related requirements to voicemail and interactive menu services.[121] More recently, a unanimous Commission stated its belief that disabilities should not stand in the way of Americans' "opportunity to benefit from the broadband communications era."[122] The Commission has also

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[116] FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN at 55-57 (NATIONAL BROADBAND PLAN); *see also* Comments of Electronic Privacy Information Center, GN Docket No. 09-51, at 3 (June 8, 2009) ("[T]he Commission should exercise its ancillary jurisdiction to ensure that the national broadband plan includes robust privacy safeguards, lest consumers' critical broadband privacy interests go unaddressed.").

[117] 47 U.S.C. § 255.

[118] *Id.* § 251(a)(2).

[119] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14921, para. 123.

[120] *IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275, 11286-89, paras. 21-24 (2007) (concluding that disability access regulations for interconnected VoIP are reasonably ancillary to the Commission's statutory responsibilities under sections 1 and 255) (subsequent history omitted). The Commission also exercised ancillary authority to extend section 225 telecommunications relay service obligations under the Commission's rules to providers of interconnected VoIP. *See id.* at 11291, para. 32.

[121] *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*; *Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6461, para. 106 (1999) (*Section 255 Order*) ("Where, as here, we have subject matter jurisdiction over the services and equipment involved, and the record demonstrates that implementation of the statute will be thwarted absent use of our ancillary jurisdiction, our assertion of jurisdiction is warranted. Our authority should be evaluated against the backdrop of an expressed congressional policy favoring accessibility for persons with disabilities.").

[122] *Joint Statement on Broadband* at 1; *see also* Comments of Rehabilitation Engineering Research Center on Telecommunications Access, GN Docket Nos. 09-47, 09-51, 09-137, at 11 (Oct. 6, 2009) ("In order to ensure that individuals who use hearing aids and cochlear implants are not left out again, it is critical for the FCC to use its ancillary jurisdiction to carry over the protections now afforded under existing [Hearing Aid Compatibility] laws to handsets used with broadband communication technologies.").

announced its intent to consider how "[t]o better enable Americans with disabilities to experience the benefits of broadband."[123] We seek comment on the best legal approaches to extending disability-related protections to broadband Internet service users under the Commission's current information service classification. Could we exercise ancillary authority to ensure access for people with disabilities? Could the Commission rely on the mandate in section 706(a) to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to *all* Americans,"[124] or the similar directive in section 706(b)?[125]

d. Public Safety and Homeland Security

41. As noted above, Congress created the Commission, in part, "for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications."[126] *Comcast* did not address questions of national defense, public safety, homeland security, or national security. Are there bases for asserting ancillary authority over broadband Internet service providers for purposes of advancing such vital and clearly enumerated Congressional purposes? Could the Commission use its ancillary authority as a legal foundation for protecting cyber security and other public safety initiatives, such as 911 emergency and public warning and alerting services, with respect to broadband Internet service? Specifically, could the Commission rely on provisions in Title I either alone or in combination with provisions in Title II or Title III to support these public safety purposes, as well as data reporting and/or network reliability and resiliency standards with respect to broadband Internet services? As noted below, Title III contains several provisions that enable the Commission to impose on spectrum licensees obligations that are in the public interest.[127] With the convergence of the various modes of communications networks, many broadband Internet services incorporate wireline and wireless elements. What would be the effect if the Commission employed its Title III authority to achieve public safety goals with respect to wireless elements of such converged services? Could the Commission also regulate wireline elements of such services through its Title III and Title I authority because of the wireless elements incorporated into these services, or in the interests of ensuring regulatory parity and predictability? Could the Commission rely on the mandate in section 706(a) to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"[128] to ensure the security, reliability and resiliency of wired broadband Internet services, or to advance other public safety and homeland security initiatives?

e. Addressing Harmful Practices by Internet Service Providers

42. Although the D.C. Circuit rejected the legal theory the Commission relied on to address Comcast's interference with its customers' peer-to-peer transmissions, some have suggested that other theories of ancillary authority could support Commission action to protect against harmful practices of this sort. For example, one commentator has proposed that the Commission assert ancillary authority pursuant to sections 251(a) and 256 of the Act, which address interconnection by telecommunications

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[123] Federal Communications Commission, *Broadband Action Agenda* at 3, 4-5 (April 8, 2010), *available at* http://www.broadband.gov/plan/national-broadband-plan-action-agenda.pdf.

[124] 47 U.S.C. § 1302(a) (emphasis added).

[125] *See id.* 1302(b).

[126] *Id.* § 151.

[127] *See infra* part II.D.

[128] *See* 47 U.S.C. § 1302(a).

carriers.[129] Although these provisions apply specifically to telecommunications carriers, the proposal asserts that they are not explicitly limited to the telecommunications services provided by such carriers.[130]

43. Section 251(a) requires each carrier "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[131] Reading section 251(a) as limited to telecommunication services, it has been suggested, "would make [the Commission's] rules promoting interconnection irrelevant" as the major carriers move increasingly toward providing services over broadband Internet networks.[132] Likewise, "[i]n a world where traditional public telecommunications networks and newer Internet-data-transmission networks are pervasively interconnected," it has been asserted, "it makes no sense to preclude the FCC's interoperability efforts [pursuant to section 256] from affecting information services."[133]

44. We seek comment on this reasoning. What factual findings would the Commission have to make to support reliance on sections 251(a) and/or 256 with respect to broadband Internet service? Would those facts support exercise of authority sufficient to implement the Commission's broadband policies in full, or in part? Under this approach, could the Commission address conduct by broadband Internet service providers that are not also telecommunications carriers? Does reliance on sections 251(a) and 256 limit Commission authority to protect competition and consumers to only those networks that are interconnected with the public telephone network? If so, what are the practical implications of this limitation? What is the significance of the *Comcast* decision, which held that "[t]he Commission's attempt to tether its assertion of ancillary authority to section 256" was flawed in that context because section 256 states that "[n]othing in this section shall be construed as expanding or limiting any authority that the Commission" otherwise has under law?[134] What else should the Commission consider as it evaluates the significance of sections 251(a) and 256 in this proceeding?

45. Section 202(a) of the Communications Act makes it

> unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.[135]

It has been suggested that "[i]f network operators are allowed the option of offering broadband Internet access services on a completely unregulated basis, that option could enable them to end run Section 202(a)" as carriers move toward providing services over broadband Internet networks, "and render that

[129] Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535, 571-98 (2010).

[130] *Id.*

[131] 47 U.S.C. § 251(a)(1).

[132] Werbach, *supra* note 129, at 589.

[133] Werbach, *supra* note 129, at 591 (citation omitted). *See* 47 U.S.C. § 256. The 2005 *Wireline Broadband Report and Order* stated that section 256 "affords the Commission adequate authority to continue overseeing broadband interconnectivity and reliability issues, regardless of the legal classification of wireline broadband Internet access service." *Wireline Broadband Report and Order*, 20 FCC Rcd at 14919, para. 120.

[134] *Comcast*, 600 F.3d at 659; 47 U.S.C. § 256(c).

[135] 47 U.S.C. § 202(a).

provision a dead letter."[136] We seek comment on the factual and legal assumptions underlying this argument, and whether this reasoning provides the Commission authority to address practices of broadband Internet service providers that endanger competition or consumer welfare.

46. As the Commission argued to the D.C. Circuit in the *Comcast* case, section 706(a) might also provide a basis for prohibiting harmful practices of Internet service providers. As noted above, the D.C. Circuit gave no weight to section 706(a) because the Commission had determined in a prior order that section 706(a) is not an independent grant of authority. We seek comment on the best reading of section 706(a). We also seek comment on whether section 706(b) could provide a legal foundation for rules addressing harmful practices by Internet service providers. If so, could the Commission adopt such rules on a national basis, or would it have to tailor its rules to particular geographic areas?[137] Would its rules depend on continued negative determinations in the annual broadband availability report?

47. The *Comcast* opinion also rejected arguments that other provisions of Titles II, III, and VI of the Communications Act supported the Commission's action against Comcast because Internet-enabled communications services that depend on broadband Internet service—such as VoIP and Internet video services—may affect the regulated operations of telephony common carriers, broadcasters, and cable operators. The court did not address the merits of these theories, but rather rejected them because they were not sufficiently articulated in the underlying Commission order.[138] Could such theories provide sufficient support for the Commission to address harmful practices of Internet service providers? What type of factual record would be required to support such theories? If the Commission relied on these theories, could it prohibit behavior—such as the covert blocking of online gaming or e-commerce services, perhaps—that does not obviously affect services clearly addressed by Titles II, III, or VI? Could the Commission rely on sections 624 or 629 of the Act to establish broadband policy related to cable modem service?[139]

48. We also invite comment on whether the portions of section 214(a) addressing discontinuance, reduction, and impairment of service provide a potential basis for an assertion of ancillary authority regarding harmful Internet service provider practices. That provision mandates that a common

[136] Reply Comments of Center for Democracy & Technology, GN Docket No. 09-191, WC Docket No. 07-52, at 12 (April 26, 2010).

[137] *See* Reply Comments of Verizon & Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52, at 86 (April 26, 2010) ("While [706(b)] may well provide authority for universal service support for broadband deployment, it does not provide a statutory basis for the sweeping [open Internet] rules proposed here – which are not targeted to particular geographic areas or particular customers that lack advanced telecommunications capabilities and, far from accelerating infrastructure deployment, would deter infrastructure investment.").

[138] *Comcast*, 600 F.3d at 660-61 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943)).

[139] *See, e.g.*, 47 U.S.C. § 544(e) ("Within one year after October 5, 1992, the Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality. The Commission shall update such standards periodically to reflect improvements in technology."), § 549(a) ("The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.").

carrier may not "impair service to a community" without prior Commission approval.[140] Impairment, in the section 214(a) context, refers to both "the adequacy" and "quality" of the service provided.[141]

49. Are there other statutory provisions that could support the Commission's exercise of ancillary authority in this area? Do any statutory provisions preclude such action if the Commission retains its information service classification?[142]

50. Other harmful practices by broadband Internet service providers may involve a failure to disclose practices to consumers.[143] For instance, one problem identified by the Commission in the *Comcast* case was Comcast's failure to identify to customers its practice of degrading peer-to-peer traffic.[144] If the Commission maintains its information services framework for broadband Internet services, will it have sufficient authority to address these concerns?

f. Other Approaches to Oversight

51. Finally, we ask for public input on whether there are other approaches to fulfilling our role for broadband Internet services that would provide meaningful oversight consistent with maintaining robust incentives for innovation and investment. For instance, in a number of proceedings commenters have suggested that the Commission should pursue policies based on standards set by third parties and enforced by the Commission. In the Open Internet proceeding, Verizon and Google suggest that the Commission could create technical advisory groups "comprised of a range of stakeholders with technical expertise" to develop best practices, resolve disputes, issue advisory opinions, and coordinate with standards-setting bodies.[145] Although Verizon and Google "may not necessarily agree on which federal

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[140] 47 U.S.C. § 214(a).

[141] *See id.* ("[N]othing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.").

[142] *See, e.g.*, Reply Comments of AT&T, GN Docket No. 09-191, WC Docket No. 07-52, at 141 (April 26, 2010) ("[T]he more intrusive aspects of the proposed rules would contradict specific provisions of the Communications Act no matter what the source of the Commission's jurisdictional authority. . . . *First*, Section 3(44) bars the Commission from regulating an entity as a common carrier when it is providing information services, yet the broad 'nondiscrimination' requirement proposed in the NPRM would do just that." (citations omitted)); Reply Comments of Verizon & Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52, at 82 (April 26, 2010) ("As an initial matter, a regulation by definition cannot be ancillary to the Commission's authority if it is *inconsistent* with the Act. . . . Here, the proposed rules would be squarely contrary to the Act to the extent they would impose the equivalent of core common carriage obligations (or worse) on information services.").

[143] *See* Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, at 5 (Feb. 8, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf ("Fourth, consumers should receive meaningful information regarding their service plans. Simply put, such information is necessary to ensure that the market is working. Providers have every right to offer a variety of service tiers with varying bandwidth and feature options. Consumers need to know about these choices as well as whether and how their service plans protect them against spam, spyware and other potential invasions of privacy."); *Wireline Broadband Report and Order*, 20 FCC Rcd at 14933, para. 153 ("We seek comment on whether we should exercise our Title I authority to impose requirements on broadband Internet access service providers that are similar to our truth-in-billing requirements or are otherwise geared toward reducing slamming, cramming, or other types of telecommunications-related fraud. For example, during 2005, the Commission's Consumer and Governmental Affairs Bureau has received complaints about the billing practices of broadband Internet access services providers.").

[144] *Comcast Order*, 23 FCC Rcd at 13028, para. 1 ("Comcast's failure to disclose the company's practice to its customers has compounded the harm."), 13058-59, paras. 52-53.

[145] Joint Comments of Google & Verizon, GN Docket No. 09-191, WC Docket No. 07-52, at 4-7 (Jan. 14, 2010).

agency does or should have authority over these matters," they "do recognize as a policy matter that there should be some backstop role for federal authorities to prevent harm to competition and consumers if or when bad actors emerge anywhere in the Internet space, and . . . agree that involvement should occur only where necessary on a case-by-case base basis."[146] Commenters in other proceedings have suggested similar approaches.[147] We ask commenters to address whether the Commission should pursue a regime in which one or more third parties play a major role in setting standards and best practices relative to maintaining our policy goals for broadband Internet service. Pursuant to what authority could the Commission create a third party advisory group? What authority could the Commission delegate to such a third party or third parties? Would it be appropriate for other federal governmental entities, such as the FTC, to have a role in such an approach? Would the Commission have sufficient ancillary authority under its information service framework to serve as a backstop if the third party is unable to resolve a dispute or implement a necessary policy?

2. Application of All Title II Provisions

52. Title II of the Communications Act provides the Commission express authority to implement, for telecommunications services, rules furthering universal service, privacy, access for persons with disabilities, and basic consumer protection, among other federal policies. We seek comment on whether the legal and policy developments discussed above and the facts of today's broadband marketplace suggest a need to classify Internet connectivity as a telecommunications service, so as to trigger this clear authority. We also ask whether that approach would be consistent with our goals of promoting innovation and investment in broadband, or would result in overregulation of a service that has undergone rapid and generally beneficial development under our deregulatory approach.

a. Current Facts in the Broadband Marketplace

53. In the *Cable Modem Declaratory Ruling*, the Commission observed that "the cable modem service business is still nascent, and the shape of broadband deployment is not yet clear,"[148] and nearly a decade has passed since the Commission examined the facts surrounding broadband Internet service in the *Cable Modem Declaratory Ruling*. In this part we therefore ask whether or not the facts of today's broadband marketplace support a conclusion that providers now offer Internet connectivity as a separate telecommunications service.[149] In addition to the specific questions we ask below, we seek comment on what facts are most relevant to this inquiry. The Commission has explained that because the Act defines "telecommunications service" as "'the *offering* of telecommunications for a fee directly *to the*

[146] *Id.* at 6.

[147] *See, e.g.*, Comments of Verizon & Verizon Wireless, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, at 3-5 (Oct. 13, 2009) ("[P]roviders must have the flexibility necessary to tailor their communications with consumers in response to changing customer needs. Thus, the appropriate model for meeting consumers' needs in today's competitive communications marketplace is to rely upon providers' strong incentives to satisfy consumers, supplemented by voluntary industry guidelines to promote the use of 'best practices' . . . ."); Comments of National Cable & Telecommunications Association, GN Docket Nos. 09-47, 09-51, 09-137, at 5 (Jan. 22, 2010) ("Since consumer concerns vary and new services and technologies must respond in these unique contexts, [the government] should rely on competitive market forces, existing safeguards and industry self-regulation to protect consumers' privacy interests rather than further regulatory mandates."); Reply Comments of AT&T, Inc., CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, at 24-25 (Oct. 28, 2009) ("To be sure, some commenters question the value of a voluntary code, on the basis that such codes lack teeth. But AT&T has recommended that there be some mechanism to enforce providers' commitment to the proposed consumer disclosure and protection framework." (citations omitted)).

[148] *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4843-44, para. 83.

[149] We seek comment separately in part II.D on terrestrial wireless and satellite services.

public[,]' . . . whether a telecommunications service is being provided turns on what the entity is 'offering . . . to the public,' and customers' understanding of that service."[150] Similarly, in *Brand X*, the majority opinion noted that "[i]t is common usage to describe what a company 'offers' to a consumer as what the consumer perceives to be the integrated finished product."[151] The *Brand X* dissent asserted that "[t]he relevant question is whether the individual components in a package being offered still possess sufficient identity to be described as separate objects of the offer, or whether they have been so changed by their combination with the other components that it is no longer reasonable to describe them in that way."[152] The *Brand X* majority opinion and the dissent examined consumers' understanding of the services, analogies to other services, and technical characteristics of the services being provided. What factors should the Commission consider in order to assess the proper classification of broadband Internet connectivity service?

54. *Status of Current Offerings*. Is wired broadband Internet service (or any telecommunications component thereof) held out "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public," for instance through a tariff such as the NECA DSL Access Service Tariff[153] or through facilities-based Internet service providers' public websites?[154] If so, we seek specific examples of such offerings. If not, does the Commission have legal authority to compel the offering of a broadband Internet telecommunications service that is not currently offered? If legal authority exists, would it be appropriate for the Commission to exercise such authority? Are there First Amendment constraints on the Commission's ability to compel the offering of such a service? Would such a compulsion raise any concerns under the Takings Clause of the Fifth Amendment?

55. *Services Offered Today*. When the Commission gathered the record for its classification orders,[155] broadband Internet service was offered with various services—such as e-mail, newsgroups, and the ability to create and maintain a web page—that we described as "Internet applications."[156] The Commission understood that subscribers to broadband Internet services "usually d[id] not need to contract

[150] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14910, para. 104 (quoting 47 U.S.C. § 153(46)) (citing *Brand X*, 545 U.S. at 989-90).

[151] *Brand X*, 545 U.S. at 970.

[152] *Id.* at 1006-07 (Scalia, J., dissenting).

[153] *See supra* note 53.

[154] 47 U.S.C. § 153(46). A provider is engaged in common carriage if it "make[s] capacity available to the public indifferently"; it can be compelled to offer a common carriage service if "the public interest requires common carrier operation of the proposed facility." *Cable & Wireless PLC*, Memorandum Opinion and Order, 12 FCC Rcd 8516, 8522, paras. 14-15 (1997); *see also U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002) ("[C]ommon carrier status turns on: (1) whether the carrier 'holds himself out to serve indifferently all potential users'; and (2) whether the carrier allows 'customers to transmit intelligence of their own design and choosing.'" (citation omitted)); *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("*NARUC II*"); *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("*NARUC I*"). Whether a provider has made a common carriage offering "must be determined on a case-by-case basis." *Bright House Networks, LLC, et al. v. Verizon California, Inc., et al.*, Memorandum Opinion and Order, 23 FCC Rcd 10704, 10717-19, paras. 37-40 (2008) (finding carriers offered common carriage service despite lacking a tariff, website posting, or any other advertisement, because providers self-certified themselves as common carriers, entered into publicly available interconnection agreements, and obtained state certificates of public convenience and necessity), *aff'd sub nom. Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 275-76 (D.C. Cir. 2009).

[155] *See supra* note 29.

[156] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4811, para. 18.

separately" for "discrete services or applications" such as e-mail.[157] We seek comment on whether this remains the case. To what extent are these and other applications and services sold with wired broadband Internet service today? Are providers offering the same applications and services that they did when the Commission began building the record in 2000, or have their offerings changed? Are these applications and services always packaged with Internet connectivity, or can consumers choose not to purchase them? What test(s) should the Commission use to evaluate whether particular features are today integrated with the underlying Internet connectivity?

56. *Consumer Use and Perception.* Next, we seek comment on how consumers use and perceive broadband Internet service. Do customers today perceive that they are receiving one unitary service comprising Internet connectivity as well as features and functionalities, or Internet connectivity as the main service, with additional features and functionalities simultaneously offered and provided?[158] To what extent do consumers continue to rely on the features and applications that are provided as part of their broadband Internet service package, and to what extent have they increased their use of applications and services offered by third party providers? For instance, some users now rely on free e-mail services provided by companies such as Yahoo and Microsoft,[159] social networking sites including Facebook and MySpace,[160] public message boards like those found in the Google Groups service,[161] web portals like Netvibes,[162] web hosting services like Go Daddy,[163] and blog hosting services like TypePad.[164] How does the use of these third party services compare with the use of similar services offered by broadband Internet service providers? To what extent do consumers rely on their Internet service provider or other providers for security features and spam filtering? To what extent do consumers rely on their Internet service provider, as opposed to alternative providers, for content such as news and medical advice? To the extent broadband Internet service providers offer applications to consumers, do consumers view them

[157] *Id.* at 4806, para. 11 (footnotes omitted).

[158] We note that under Commission precedent, services composing a single bundle at the point of sale—for instance, local telephone service packaged with voice mail—can retain distinct identities as separate offerings for classification purposes. *See, e.g., Stevens Report*, 13 FCC Rcd at 11530, para. 60 ("It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail." (citation omitted)); *Regulation of Prepaid Calling Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, 7291, para. 3, 7295 (2006) (finding that menus allowing users to access information did not convert the telecommunications service offered by prepaid calling cards into an information service), *vacated in part sub nom. Qwest Servs. Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007); *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T's Interspan Frame Relay Service Is a Basic Service et al.*, DA 95-2190, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13721, paras. 29-32, 13722-23, paras. 40-46 (1995) (*Frame Relay Order*) (finding that AT&T's InterSpan frame relay service could not avoid *Computer II* and *Computer III* unbundling and tariffing requirements by combining basic and enhanced services).

[159] Yahoo! Inc., Yahoo! Mail, https://login.yahoo.com/config/login_verify2 (last visited June 16, 2010); Microsoft Corp., Windows Live Hotmail, http://mail.live.com (last visited June 16, 2010).

[160] Facebook, Inc., Welcome to Facebook, http://www.facebook.com (last visited June 16, 2010); MySpace.com, MySpace, http://www.myspace.com (last visited June 16, 2010).

[161] Google Inc., Google Groups, http://groups.google.com (last visited June 16, 2010).

[162] Netvibes, Netvibes, http://www.netvibes.com (last visited June 16, 2010).

[163] GoDaddy.com, Domain Names, Web Hosting and SSL Certificates – Go Daddy, http://www.godaddy.com (last visited June 16, 2010).

[164] TypePad.com, Free Blogs, Pro Blogs & Business Blogs | TypePad.com, http://www.typepad.com (last visited June 16, 2010).

as an integrated part of the Internet connectivity offering? To what extent do consumers today use "the high-speed wire always in connection with the information-processing capabilities provided by Internet access"?[165]

57. *Marketing Practices.* We also seek comment on how broadband Internet service providers market their services. What do broadband Internet service providers' marketing practices suggest they are offering to the public? What features do broadband Internet service providers highlight in their advertisements to consumers? How do the companies describe their services? What are the primary dimensions of competition among broadband Internet service providers? Are cable modem and other wired services marketed or understood differently from each other, or in a generally similar way?

58. *Technical and Functional Characteristics*. In addition, to aid our understanding of what carriers offer to consumers, we seek to develop a current record on the technical and functional characteristics of broadband Internet service, and whether those characteristics have changed materially in the last decade. For example, DNS lookup is now offered to consumers on a standalone basis,[166] and web page caching is offered by third party content delivery networks.[167] Web browsers, for example, are often installed separately by users.[168] We ask commenters to describe the technical characteristics of broadband Internet service, including identifying those functions that are essential for web browsing and other basic consumer Internet activities. What are the necessary components of web browsing? How is caching provided to end users, and how have caching services changed over time? How do routing functions and DNS directory lookup enable users to access information online?

59. In classifying services, the Commission has taken into account the purpose of the feature or service at issue. For example, some features and services that meet the literal definition of "enhanced service," but do not alter the fundamental character of the associated basic transmission service, are "adjunct-to-basic" and are treated as basic (*i.e.*, telecommunications) services even though they go beyond mere transmission.[169] Do any of the features and functionalities offered by broadband Internet service providers have relevant similarities to or differences from those that resemble an information service but are treated differently under Commission precedent? Similarly, which, if any, of the "Internet

[165] *See Brand X*, 545 U.S. at 990 (concluding that "the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering," because a "consumer uses the high-speed wire always in connection with the information processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access").

[166] *See, e.g.*, Google Inc., Google Public DNS, http://code.google.com/speed/public-dns (last visited June 16, 2010); OpenDNS, OpenDNS > Solutions > Household, http://www.opendns.com/solutions/household (last visited June 16, 2010) ("Join the millions who've already unbundled their DNS service from their ISP's Internet connection.").

[167] *See, e.g.*, Akamai, Facts & Figures, http://www.akamai.com/html/about/facts_figures.html (last visited June 16, 2010) ("Akamai delivers daily Web traffic greater than a Tier-1 ISP, at times reaching more than 2 Terabits per second.").

[168] To give one example, the Firefox browser is provided for free by Mozilla, which estimates that it has 100 million users in North America. Mozilla, Firefox web browser, http://www.mozilla.com/en-US/firefox/firefox.html (last visited June 16, 2010); Mozilla's Q1 2010 Metrics Report at 3, *available at* https://wiki.mozilla.org/images/e/ed/Analyst_report_Q1_2010.pdf; *see also* Google, Inc., Google Chrome, http://www.google.com/chrome (last visited June 16, 2010).

[169] *See generally Computer II Final Decision*, 77 F.C.C. 2d at 421, para. 98; *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826, 4831, para. 16 (2005) (*Calling Card Order and NPRM*), *aff'd sub nom. AT&T v. FCC*, 454 F.3d 329 (D.C. Cir. 2006).

connectivity" functions listed in the *Cable Modem Declaratory Ruling* fall within the management exceptions to the information services category, and why?[170]

60. Some have suggested that the Commission should take account of the different network "layers" that compose the Internet.[171] Are distinctions between the functional "layers" that compose the Internet relevant and useful for classifying broadband Internet service? For example, the Commission could distinguish between physical, logical, and content and application layers, and identify some of those layers as elements of a telecommunications service and others as elements of an information service. (As discussed above, the Commission historically has distinguished between Internet connectivity functions and Internet applications.[172]) If the Commission adopted this approach, which of the services offered by wired broadband Internet service providers should be included in each category? Are the boundaries of each layer sufficiently clear that such an approach would be workable in practice? Would such an approach have implications for services other than broadband Internet service?

61. *Competition.* We also seek comment on the level of competition among broadband Internet service providers. The Commission adopted the unitary information service classification for broadband Internet services in part "to encourage facilities-based competition."[173] The Commission envisioned competition among cable operators, telephone companies, satellite providers, terrestrial wireless providers, and broadband-over-powerline (BPL) providers.[174] Has the market for broadband Internet services developed as expected, and, if not, what is the significance for this proceeding of the market's actual development?

62. Are there other relevant facts or circumstances that bear on the Commission's application of the statutory definition of "telecommunications service" to wired broadband Internet service?

b. Defining the Telecommunications Service

63. If the Commission were to classify a service provided as part of the broadband Internet service bundle as a telecommunications service, it would be necessary to define what is being so classified. Here we ask commenters to propose approaches to defining the telecommunications service offered as part of wired broadband Internet service, assuming that the Commission finds a separate telecommunications service is being offered today, or must be offered.

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[170] 47 U.S.C. § 153(20) ("The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, *but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service*." (emphasis added)).

[171] *See, e.g.*, Douglas Sicker & Joshua Mindel, *Refinements of a Layered Model for Telecommunications Policy*, 1 J. TELECOMM. & HIGH TECH L. 69, 86-88 (2002); Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 FED. COMM. L.J. 207 (2003); Scott Jordan, *A Layered Network Approach to Net Neutrality*, 1 INT'L J. COMM. 427, 443 (2007). *But see* John T. Nakahata, *Broadband Regulation at the Demise of the 1934 Act*, 12 COMMLAW CONSPECTUS 169, 173 (2004) ("[T]he difficulty with immediately implementing a layered approach—whatever its merit—is that the Communications Act itself is not layered. Instead, as has been discussed, it is comprised of service and technology-based silos.").

[172] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4809-11, paras. 17-18, 4822, para. 38.

[173] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4840, para. 73; *see also Wireline Broadband Report and Order*, 20 FCC Rcd at 14902, para. 91.

[174] *See Wireline Broadband Report and Order*, 20 FCC Rcd at 14856, para. 3 & n.7, 14880-81, para. 50.

64. We have previously defined "Internet connectivity" to include the functions that "enable [broadband Internet service subscribers] to transmit data communications to and from the rest of the Internet."[175] Identifying a telecommunications service at a similarly high level—for instance, as the service that provides Internet connectivity—may be appropriate for this proceeding if a telecommunications service is classified. Is this approach or some other mechanism appropriate to give the Internet service provider latitude to define its own telecommunications service? For instance, would it be desirable for the Commission to identify only bare minimum characteristics of an Internet connectivity service? Or is it necessary for the Commission to define the functionality, elements, or endpoints of Internet connectivity service? What are the pros and cons of these and other approaches? Would use of the term "Internet connectivity service" in this context be unduly confusing because the Commission has previously defined that term to include the function of "operating or interconnecting with Internet backbone facilities" in order to "enable cable modem service subscribers to transmit data communications to and from the rest of the Internet"?[176]

65. Commenters should also identify the particular aspects of broadband Internet service that do and do not constitute "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[177] Does the catalog of Internet connectivity functions provided in the *Cable Modem Declaratory Ruling* include all the functions an end user would need from its broadband Internet service provider in order to use the Internet?[178] Are there other connectivity functions the Commission should consider? Can the Commission draw guidance from other attempts to define the functionality of an Internet connectivity service, such as the definition in NECA's DSL Access Service Tariff?[179]

c. Consequences of Classifying Internet Connectivity as a Telecommunications Service

66. If we were to classify Internet connectivity service as a telecommunications service and take no further action, that service would be subject to all requirements of Title II that apply to telecommunications service or common carrier service. If the Commission chose, it could provide support for Internet connectivity services through the Universal Service Fund under section 254. Under

[175] *Id.* at 4809, para. 17.

[176] *See id.* (citations omitted); *see also infra* paras. 107-108.

[177] 47 U.S.C. § 153(43).

[178] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4809-11, paras. 17-18 ("Internet connectivity functions enable cable modem service subscribers to transmit data communications to and from the rest of the Internet. At the most basic level, these functions include establishing a physical connection between the cable system and the Internet by operating or interconnecting with Internet backbone facilities. In addition, these functions may include protocol conversion, IP address number assignment, domain name resolution through a domain name system (DNS), network security, and caching. Network monitoring, capacity engineering and management, fault management, and troubleshooting are Internet access service functions that are generally performed at an ISP or cable operator's Network Operations Center (NOC) or back office and serve to provide a steady and accurate flow of information between the cable system to which the subscriber is connected and the Internet. . . . Complementing the Internet access functions are Internet applications provided through cable modem service." (citations omitted)).

[179] In its tariff, NECA offers a DSL data telecommunications service to end user and Internet service provider customers. The service "enables data traffic generated by a customer-provided modem to be transported to a DSL Access Service Connection Point using the Telephone Company's local exchange service facilities." NECA DSL Tariff, page 8-1, Section 8.1.1. The Access Service Connection Point is a point designated by the telephone company that "aggregates ADSL Access Service and/or wireline broadband Internet transmission service data traffic from and to suitably equipped Telephone Company Serving Wire Centers." *Id.*

section 222, the Commission could ensure that consumers of Internet connectivity enjoy protections for their private information. Consumers with disabilities would see greater accessibility of broadband services and equipment under section 255. And the Commission could protect consumers and fair competition through application of sections 201, 202, and 208. Would application of all Title II requirements to the wired broadband Internet connectivity service be consistent with the approach to broadband Internet service described in part II.A.2, above? We seek comment on whether these benefits to classifying Internet connectivity as a telecommunications service would outweigh the costs of doing so, including the application of numerous regulatory provisions that the Commission, in its information service classification orders, determined should not apply.[180] Are there any elements of our framework that the Commission could not pursue if it adopted a Title II classification? Under Title II classification what role, if any, might be played by third party standard setting bodies?[181]

3. Telecommunications Service Classification and Forbearance

67. In addition to the traditional information service and telecommunications service approaches discussed above, we identify and seek comment on a third option for establishing a suitable legal foundation for broadband Internet and Internet connectivity services. This third way would involve classifying wired broadband Internet connectivity as a telecommunications service (as suggested above), but simultaneously forbearing from applying most requirements of Title II to that connectivity service, save for a small number of provisions.

68. Specifically, if the Commission decided, after appropriate analysis, to classify wired broadband Internet connectivity (and no other component of wired broadband Internet service) as a telecommunications service, it could simultaneously forbear from applying all but a handful of core statutory provisions—sections 201, 202, 208, and 254—to the service. Two other provisions that have attracted longstanding and broad support in the broadband context—sections 222 and 255—might also be implemented for the connectivity service, perhaps after the Commission provides guidance in subsequent proceedings as to how they will apply in this context. We seek comment on this third approach, and whether it would constitute a framework for broadband Internet service that is fundamentally consistent with what the Commission, Congress, consumer groups, and industry believed the Commission could pursue under Title I before the *Comcast* decision.

a. Forbearing To Maintain the Deregulatory Status Quo

69. In recognition of the need to tailor the Commission's policies to evolving markets and technologies, Congress gave the Commission in 1996 the authority and responsibility to forbear from applying provisions of the Communications Act when certain criteria are met,[182] and specifically directed the Commission to use this new power to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[183] In typical forbearance proceedings, a petitioner—usually a telecommunications service provider—files a petition seeking relief from a provision of the Act that applies to it. The Commission "shall" grant the requested relief if:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that

[180] *See generally* Remarks of Commissioner Robert M. McDowell, *The Best Broadband Plan for America: First, Do No Harm* (Free State Foundation Keynote), Jan. 29, 2010, at 9-15 (discussing the costs of applying Title II regulations to broadband services).

[181] *See supra* part II.B.1.f.

[182] *See* 47 U.S.C. § 160.

[183] *Id*. § 1302.

telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.[184]

In ordinary forbearance proceedings, therefore, the Commission must make a predictive judgment whether, without enforcement of the provisions or regulations in question, charges and practices will be just and reasonable, consumers will be protected, and the public interest will be served.[185]

70. The forbearance analysis here has a different posture. The Commission would not be responding to a carrier's request to change the legal and regulatory framework that currently applies. Rather, it would be assessing whether to forbear from provisions of the Act that, because of our information service classification, *do not apply* at the time of the analysis.[186] In this situation, could the Commission simply observe the current marketplace for broadband Internet services to determine whether enforcing the currently inapplicable requirements is or is not necessary to ensure that charges and practices are just and reasonable and not unjustly or unreasonably discriminatory, whether application of the requirements is or is not necessary for the protection of consumers, and whether applying the requirements is or is not in the public interest?[187]

b. Identifying the Relevant Telecommunications Service and Telecommunications Carriers

71. In this part of the Notice we assume, solely for purposes of framing the forbearance option, that the Commission has decided to classify the Internet connectivity service underlying broadband Internet service as a telecommunications service. Section 10 provides that "the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services" if certain criteria are met.[188] The relevant "telecommunications service" would be Internet connectivity service as the Commission defines it. The "class of telecommunications carriers" at issue

[184] *Id*. § 160(a). "In making the determination under subsection (a)(3) [that forbearance is in the public interest,] the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." *Id*. § 160(b).

[185] *Id*. § 160(a); *see, e.g.*, *Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, CC Docket No. 96-45, Order, 20 FCC Rcd 15095, 15099, para. 6 n.25 (2005), *modified in part*, 24 FCC Rcd 3375 (2009).

[186] Under section 10, the Commission may forbear on its own motion. *See* 47 U.S.C. § 160(a). If the statutory criteria are met, the Commission is compelled to forbear just as if it were responding to a carrier's petition. *Id*.

[187] 47 U.S.C. § 160(a). Section 10 allows the Commission to consider forbearance from requirements that do not currently apply or may not apply even in the absence of forbearance. *See AT&T Inc. v. FCC*, 452 F.3d 830, 837 (D.C. Cir. 2006) ("We hold . . . that the Commission may not refuse to consider a petition's merits solely because the petition seeks forbearance from uncertain or hypothetical regulatory obligations.").

[188] 47 U.S.C. § 160(a).

would comprise the providers of the Internet connectivity service identified as a telecommunications service.[189]

72. In this proceeding, however, we do not intend to disrupt the status quo for incumbent local exchange carriers or other common carriers that choose to offer their Internet transmission services as telecommunications services.[190] Nor do we propose to alter the status quo with regard to the application of section 254(k) and related cost-allocation rules to these carriers.[191] We therefore seek comment on excepting from forbearance any carrier that elects to be subject to the full range of Title II requirements, and on the mechanism that would be most suitable for a carrier to make such an election.

c. Defining the Geographic Scope for Analysis

73. Section 10 requires the Commission to forbear from unnecessary requirements "in any or some of [carriers'] geographic markets."[192] By its terms section 10 requires no "particular . . . level of geographic rigor," and the Commission has flexibility to adopt an approach suited to the circumstances.[193] The Commission decisions classifying broadband Internet service did not rely on any particular, defined geographic area. Instead, where those decisions evaluated the state of the marketplace, they did so "in view of larger trends."[194] The 2005 *Wireline Broadband Report and Order* granted forbearance on a nationwide basis.[195] The Commission has adopted a similar approach to evaluating the broadband marketplace in other forbearance decisions.[196] Given that backdrop, and the fact that the forbearance discussed here would be designed to maintain a deregulatory status quo for wired broadband Internet service that applies across the nation, the same approach may be warranted here, with the effect that forbearance would be granted or denied on a nationwide basis. We seek comment on this approach. If commenters suggest a more granular geographic market as is sometimes used in other forbearance proceedings, we ask them to address whether such an approach would be legally required.

d. Identifying the Provisions of Title II from Which the Commission Would Forbear

74. The forbearance option contemplates a determination not to apply all but the small number of provisions of Title II that provide a solid legal foundation for the Commission to implement its established broadband policies. In this part, we seek comment on declining to forbear from the three core provisions of Title II—sections 201, 202, and 208. We also seek comment on whether we should decline to forbear from section 254 in order to ensure that the Commission has clear authority to pursue universal service goals for broadband services. And we seek comment on whether we should decline to forbear from two other provisions—sections 222 and 255—that speak to two other broadband issues the

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[189] *See id*. § 153(44).

[190] *See supra* notes 53, 179 (describing the offering in the NECA tariff, pursuant to which approximately 800 incumbent local exchange carriers offer DSL transmission).

[191] *See Wireline Broadband Report and Order*, 20 FCC Rcd at 14927-29, paras. 139-44.

[192] 47 U.S.C. § 160(a).

[193] *EarthLink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006); *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009) (quoting *EarthLink*).

[194] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14880-81, para. 50.

[195] *Id.* at 14901-02, paras. 91-93.

[196] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), et al.*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) (*Section 271 Broadband Forbearance Order*), *aff'd sub nom. EarthLink v. FCC*, 462 F.3d 1.

Commission has believed it can address (customer privacy and access by persons with disabilities). We further seek comment on whether forbearing from any of the remaining provisions of Title II is beyond our forbearance authority or otherwise should be rejected.

75. *Exclusions from Forbearance: Sections 201, 202, and 208.* The Commission has never exercised its authority under section 10 to forbear from these three fundamental provisions of the Act, although it has been asked to do so on many occasions.[197] In addition to being consistent with our precedent, a determination not to forbear from these core provisions would comport with Congress's approach to commercial mobile radio services (CMRS), such as cell phone services. In 1993, CMRS services were still nascent, and Congress specified in a new section 332(c)(1)(A) of the Communications Act that although Title II applies to CMRS, the Commission may forbear from enforcing any provision of the title *other* than sections 201, 202, and 208.[198] After Congress gave the Commission broader forbearance authority in the Telecommunications Act of 1996, the Commission considered a petition to forbear from sections 201 and 202 as applied to certain CMRS services. The Commission rejected that forbearance request, finding that even in a competitive market those provisions are critical to protecting consumers.[199]

76. Applying sections 201 and 202 could provide the Commission direct statutory authority to protect consumers and promote fair competition, yet allow the Commission to avoid burdensome regulation.[200] For example, while CMRS providers are subject to sections 201 and 202, they do not file

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[197] *See, e.g., Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, WC Docket No. 06-125, 23 FCC Rcd 12260, 12292, para. 64 (2008) (*Qwest Enterprise Broadband Forbearance Order*); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(C) from Application of Computer Inquiry & Certain Title II Common-Carriage Requirements*, 22 FCC Rcd 19478, 19508, para 59 (2007), *aff'd sub nom. AD HOC Telecom. Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, et al.*, Memorandum Opinion and Order, WC Docket No. 06-125, 22 FCC Rcd 18705 18737-38, para. 67 (2007) (*AT&T Enterprise Broadband Forbearance Order*), *aff'd sub nom. AD HOC Telecom. Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance of Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16360, para. 128 (2007); *Petition of SBC Communications, Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, 20 FCC Rcd 9361, 9368, para. 17 (2005) (*SBC IP Platform Services Forbearance Order*), *pet. for review granted on other grounds sub nom. AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006); *Personal Communications Industry Association Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16866, para. 18 (1998) (*PCIA Forbearance Order*).

[198] 47 U.S.C. § 332(c)(1)(A).

[199] *See PCIA Forbearance Order*, 13 FCC Rcd at 16865, para. 15 ("[S]ections 201 and 202 lie at the heart of consumer protection under the Act. Congress recognized the core nature of sections 201 and 202 when it excluded them from the scope of the Commission's forbearance authority under section 332(c)(1)(A)."), 16868, para. 23 ("Assuming all relevant product and geographic markets become substantially competitive, moreover, carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner."), 16870, para. 29 ("[W]e are not convinced that any harm caused by sections 201 and 202, to competition or otherwise, outweighs the public interest benefits of these provisions.").

[200] After the *Comcast* decision, a number of broadband service providers expressed their acceptance of the basic standards articulated in sections 201 and 202, and enforced under section 208. *See, e.g.*, Reply Comments of Comcast Corp., GN Docket No. 09-191, WC Docket No. 07-52, at 26 (April 26, 2010) ("[T]he Commission should (continued….)

tariffs because the Commission forbore from section 203.[201] We seek comment on these issues as well as how to address in any forbearance analysis the existing agency rules that have been promulgated under sections 201 and 202.[202]

77. In addition, we seek comment on not forbearing from section 208 and the associated procedural rules. Would the enforcement regime that would apply if we enforce only section 208 be sufficient if we decide to forbear from the damages and jurisdictional provisions of sections 206 (carrier liability for damages), 207 (recovery of damages and forum election), and 209 (damages awards)? Would forbearance from these additional provisions render enforcement under section 208 procedurally or substantively deficient, or would section 208 (together with Title V of the Act)[203] provide the Commission adequate authority to identify and address unlawful practices involving broadband Internet service?

78. *Exclusion from Forbearance: Section 254.* Section 254, the statutory foundation of our universal service programs, requires the Commission to promote universal service goals, including "[a]ccess to advanced telecommunications and information services . . . in all regions of the Nation."[204] In March 2010, a unanimous Commission endorsed reform of universal service programs to "encourage targeted investment in broadband infrastructure and emphasize the importance of broadband to the future of these programs."[205] Reforming universal service to encompass broadband is also a keystone of the National Broadband Plan.[206] Our current universal service support programs, including our high-cost program and our low-income programs, address deployment and income-related adoption barriers for voice. The Plan recommends that the Commission provide high-cost and low-income support that

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embrace the strong guidance against an overbroad rule and, instead, develop a standard based on 'unreasonable and anticompetitive discrimination.'"); Reply Comments of Sprint Nextel Corp., GN Docket No. 09-191, WC Docket No. 07-52, at 23 (April 26, 2010) ("The unreasonable discrimination standard contained in Section 202(a) of the Act contains the very flexibility the Commission needs to distinguish desirable from improper discrimination."); Reply Comments of AT&T Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 33-34 (April 26, 2010) ("And no one has seriously suggested that *Section 202* should itself be amended to remove the 'unreasonable' qualifier on the ground that the qualifier is too 'murky' or 'complex.' Seventy-five years of experience have shown that qualifier to be both administrable and indispensable to the sound administration of the nation's telecommunications laws." (emphasis in original)).

[201] *See* 47 C.F.R. § 20.15(c); *Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1480, para. 179 (1994) (subsequent history omitted) (*CMRS Title II Forbearance Order*); *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (affirming Commission's decision that sections 201 and 202 did not prohibit CMRS provider from entering individually negotiated pricing arrangements).

[202] *Compare, e.g., CMRS Title II Forbearance Order*, 9 FCC Rcd at 1475-90, paras. 164-213 (forbearing from numerous provisions of Title II without identifying the accompanying rules) *with Petition of Qwest Communications Int'l Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5236, paras. 56-57 (2007) (identifying the specific rules, promulgated under sections 203 and 214, from which the Commission forbears).

[203] *See, e.g.*, 47 U.S.C. §§ 501, 502 (authority to issue fines); § 503(b) (authority to impose forfeitures); § 504 (procedures regarding forfeitures).

[204] 47 U.S.C. § 254(b)(2).

[205] *Joint Statement on Broadband* at 2.

[206] *See, e.g.*, NATIONAL BROADBAND PLAN at 144.

ensures that all households have the ability to subscribe to a high-quality broadband connection that provides both broadband and voice services.[207]

79. Two subsections of section 254 bear particularly on whether to forbear from this universal service provision. First, section 254(c) defines universal service as "an evolving level of *telecommunications service*."[208] By not forbearing from section 254(c), the Commission would retain clear authority to support the availability and adoption of broadband Internet connectivity service through reformed high-cost and low-income programs in the Universal Service Fund.[209]

80. Second, section 254(d) requires *all* providers of telecommunications service to contribute to the Universal Service Fund on an equitable and nondiscriminatory basis.[210] Should the Commission apply the mandatory contribution requirement to broadband Internet connectivity providers? If so, should we delay implementation of the contribution obligation, through temporary forbearance or other means, until the Commission adopts rules governing specifically how broadband Internet connectivity providers should calculate their contribution consistent with the requirement that all telecommunications carriers "contribute[] on an equitable and nondiscriminatory basis," possibly as part of comprehensive Universal Service Fund reform?[211]

81. If commenters suggest that we should forbear from applying the support provisions of section 254 in the context of broadband Internet connectivity service, we ask them to provide alternative proposals to ensure universal availability of broadband Internet connectivity services, and to assess the legal sustainability of proposed alternatives. If commenters suggest that we forbear from (or delay) applying the mandatory contribution provisions of section 254, what would be the consequences for the Universal Service Fund?[212]

82. *Possible Exclusion from Forbearance: Section 222.* Section 222 of the Communications Act requires providers of telecommunications services to protect their customers' confidential information, as well as proprietary information of other telecommunications service providers and equipment manufacturers.[213] As discussed above, the Commission has supported applying this provision in the broadband context.[214] Section 222 would appear to provide the Commission clear authority to implement appropriate privacy requirements for broadband Internet connectivity. We question, however, whether it would be in the public interest to apply section 222 to broadband Internet connectivity service immediately. It might be more effective for the Commission to interpret the specific provisions of section 222, including the definition of "customer proprietary network information," in the broadband context before requiring broadband Internet connectivity providers to comply. Proceeding otherwise could cause confusion and disparity among broadband Internet connectivity providers, and confusion for consumers.

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[207] *See id.* at 145, 172.

[208] 47 U.S.C. § 254(c) (emphasis added).

[209] *But see supra* paras. 32-38 (noting that major providers have suggested that the Commission has authority under section 254 and Title I to provide universal service support to broadband as an information service).

[210] 47 U.S.C. § 254(d).

[211] *See id.*; NATIONAL BROADBAND PLAN at 140-51

[212] The Commission has statutory authority to assess any provider of interstate telecommunications if that would serve the public interest. *See* 47 U.S.C. § 254(d). Nothing in this Notice should be understood to limit the Commission's ability to exercise this authority during the pendency of this proceeding.

[213] *Id*. § 222.

[214] *See supra* para. 39.

Compliance with section 222 could also be more expensive if the provision took effect immediately, and we later adopted specific rules. On the other hand, most providers are already subject to privacy requirements, at least for other services they provide; their costs of immediate compliance with section 222 may not outweigh the benefit to consumers of quick assurance of their privacy while using broadband Internet connectivity services.[215] In addition, section 631 of the Communications Act requires cable operators to fulfill certain obligations with respect to consumer privacy for cable or "other service[s]" to which a consumer subscribes.[216] The term "other service" includes "any wire or radio communications service provided using any of the facilities of the cable operator that are used in the provision of cable service."[217] How should the obligations of sections 222 and 631 be reconciled for cable operators offering broadband Internet service? More broadly, we seek comment on the application of section 222 to any wired broadband Internet connectivity service that may be classified as a telecommunications service, and on whether the public interest would be served by permitting section 222 to apply in the absence of new implementing rules.[218]

83. One aspect of retaining the information service classification for broadband Internet service (other than for the Internet connectivity telecommunications service that may be offered separately with broadband Internet service) is that it minimizes interference with the FTC's ability to enforce the Federal Trade Commission Act's prohibition of unfair, deceptive, or anticompetitive practices by broadband Internet service providers. Section 5(a)(1) of the FTC Act declares to be unlawful all "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce,"[219] but section 5(a)(2) of the FTC Act restricts the FTC's ability to enforce this

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[215] Section 222 generally applies to "telecommunications carriers." 47 U.S.C. § 222(a). Section 631 of the Communications Act generally applies to "cable operator[s]" in their provision of "cable service or other service," and protects subscribers' "personally identifiable information." *Id.* § 551(a)(1).

[216] 47 U.S.C. § 551.

[217] *Id.* § 551(a)(2)(B). *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations By Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6664-65, paras. 277-79 (2001) (requiring AOL Time Warner to certify that it is and remains in compliance with section 631 of the Act); *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4853-54, paras. 111-12 ("[Section 631] has been interpreted by a court to encompass Internet service provided via a cable system. . . . In light of our determination in the Declaratory Ruling that cable modem service is an information service, we believe that cable modem service would be included in the category of 'other service' for purposes of section 631." (citing *Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(D)*, 157 F. Supp. 2d 286, 291 (S.D.N.Y. 2001) ("This specific definition [in 47 U.S.C. § 551] of 'other service' plainly includes internet service transmitted via a cable system.")).

[218] The Commission has previously forborne temporarily from applying a statutory provision or regulation. In 1994, soon after Congress authorized the Commission to deregulate wireless services, the Commission forbore temporarily from requiring or permitting CMRS providers to file tariffs for interstate access service. *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480, para. 179 (1994). In 1999, the Commission forbore temporarily from enforcing number portability requirements for wireless carriers. *See Cellular Telecommunications Industry Association's Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations, et al.*, WT Docket No. 98- 229, CC Docket No. 95-116, Memorandum Opinion and Order, 14 FCC Rcd 3092, 3103-04, para. 23, 3112-13, paras. 40-42 (1999). And in 2005, the Commission temporarily forbore from carrier eligibility requirements for universal service support, to provide victims of Hurricane Katrina access to wireless phone service. *See Federal-State Joint Board on Universal Service, et al.*, CC Docket Nos. 96-45, 02-6, WC Docket Nos. 02-60, 03-109, Order, 20 FCC Rcd 16883, 16893-94, paras. 19-20 (2005).

[219] 15 U.S.C. § 45(a)(1).

prohibition with respect to common carrier activities.[220] We seek comment on how the Commission might use its authority under section 222 to ensure privacy for users of Internet connectivity without significantly compromising the FTC's ability to address privacy issues involving broadband Internet services and applications.

84. *Possible Exclusion from Forbearance: Section 255*. Section 255 requires telecommunications service providers to make their services accessible to individuals with disabilities, unless not reasonably achievable.[221] As discussed above, the Commission has repeatedly expressed its intent to apply this requirement in the broadband context.[222]

85. We seek comment on the appropriateness of implementing section 255 to ensure that Americans with disabilities have access to broadband Internet connectivity services. As with section 222, might it be appropriate to apply section 255 only after a separate notice-and-comment proceeding that allows detailed consideration of disabilities-access issues in the broadband context? We seek comment on implementation questions and other issues related to the application of section 255.

86. *Scope of Forbearance Generally.* We believe that the six sections we have just discussed—sections 201, 202, 208, 222, 254, and 255—could compose a sufficient set of tools for effecting the established policy approach and implementing the Commission's goals for 21st Century communications. Are there others that should be added to this list? Some provisions of Title II relate directly or indirectly to the effective application and enforcement of the six provisions we have identified. Section 214, for example, deals primarily with "Extension of Lines" yet contains section 214(e), which provides the framework for determining which carriers are eligible to participate in universal service support programs.[223] Similarly, section 251(a)(2) directs telecommunications carriers "not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255,"[224] and section 225 establishes the telecommunications relay services program.[225] Is application of these or any other provisions of Title II required to allow effective implementation and enforcement of the six provisions identified above? If so, should the Commission exempt such provisions from forbearance for administrative reasons, if this third approach to classification is adopted?

87. Are there provisions of Title II from which we lack authority to forbear? Section 10(a) directs the Commission to forbear from applying regulations or provisions of the Communications Act to telecommunications carriers or services in those instances where the Commission determines that the particular provision is unnecessary to ensure that carrier "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;" enforcement of such regulation is "not necessary for the protection of consumers;" and forbearance is consistent with the public interest.[226] We ask whether section 10 provides authority to forbear from provisions of the statute that do not directly impose obligations on carriers. For example, section 224 provides the framework for the Commission's regulation of pole attachments, including the rates therefor. Does section 10 provide the Commission authority to forbear from section 224 insofar as it imposes rate-related obligations on the

[220] *See id.* § 45(a)(2).

[221] 47 U.S.C. § 255.

[222] *See supra* para. 40.

[223] 47 U.S.C. § 214(e) (designation of "eligible telecommunications carriers").

[224] *Id.* § 251(a)(2).

[225] *Id.* § 225(c).

[226] *Id*. § 160(a)(1)-(3).

Commission and utilities that own poles, rather than on telecommunications carriers or telecommunications services?[227] Similarly, section 253 permits the Commission to preempt state regulations that prohibit the provision of telecommunications services.[228] Does section 10 provide the Commission authority to forbear from section 253, which does not impose obligations on telecommunications carriers? If the Commission were to forbear from section 253, how would the Commission's general authority to preempt inconsistent state requirements be affected?

88. Congress created the Commission in part "for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communication."[229] Would it be consistent with the Commission's mission with respect to promoting safety of life and property, and consumer protection generally, to forbear from the portions of section 214(a) that address discontinuance, reduction, or impairment of service? Would it be consistent with our mission to forbear from section 214(d), which allows the Commission to require a carrier "to provide itself with adequate facilities for the expeditious and efficient performance of its service";[230] or section 218, which permits the Commission to "inquire into the management of the business of all carriers subject to this Act"?[231] Does section 10 provide authority to forbear from these provisions? Should the Commission exclude them from forbearance so it may proceed with, for example, cybersecurity or data gathering initiatives, or would authority under sections 201 and 202 (or other provisions) be sufficient?[232] How would forbearance from these provisions affect the Commission's ability to promote adequate service to underserved communities?

89. Also with regard to our national defense and homeland security mission, we note that section 229 directs the Commission to implement the provisions of the Communications Assistance for Law Enforcement Act (CALEA).[233] CALEA is a separate statute that requires "telecommunications carriers" to meet certain assistance capability requirements in support of electronic surveillance.[234] The Commission has previously found that CALEA's definition of "telecommunications carrier" is broader than the definition of "telecommunications carrier" in the Communications Act.[235] All service providers

[227] *Id*. § 160(a) ("[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service . . . .").

[228] *Id*. § 253(a), (d) (providing that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" and that the Commission shall preempt such a statute, regulation, or local requirement in certain circumstances).

[229] *Id*. § 151.

[230] *Id*. § 214(d).

[231] *Id*. § 218.

[232] In our recent *Survivability Notice of Inquiry* and *Certification Program Notice of Inquiry*, we sought comment on our authority to act to adopt certain broadband policies. *See Effects on Broadband Communications Networks of Damage to or Failure of Network Equipment or Severe Overload*, PS Docket 10-92, Notice of Inquiry, FCC 10-62, paras. 8-9 (April 21, 2010); *Cyber Security Certification Program*, PS Docket No. 10-93, Notice of Inquiry, FCC 10-63, paras. 10-11 (April 21, 2010). Today's Notice complements, but does not supplant, those two notices.

[233] 47 U.S.C. § 229(a).

[234] Section 101, *et seq.* of CALEA, 47 U.S.C. § 1001, *et seq.*

[235] *Communications Assistance for Law Enforcement Act and Broadband Access and Services,* First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 14993, para. 10 (2005) (*CALEA First Report and Order)*, *pet. for review denied sub nom. Am. Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006) (upholding the Commission's interpretation of CALEA's definition of "telecommunications carrier").

that are "telecommunications carriers" under the Communications Act are also "telecommunications carriers" subject to CALEA,[236] and some providers—including facilities-based broadband Internet access providers—are subject to CALEA even if they are not "telecommunications carriers" as defined in the Communications Act.[237] Specifically, the Commission held in 2005 that "facilities-based providers of any type of broadband Internet access service, including but not limited to wireline, cable modem, satellite, wireless, fixed wireless, and broadband access via powerline are subject to CALEA."[238] Thus, it appears that regardless of whether we maintain the current statutory classification for broadband Internet service or classify Internet connectivity (or some other service) as a telecommunications service, CALEA will continue to apply to these providers. We seek comment on this analysis. In addition, as we do with regard to the sections described just above, we seek comment on whether section 10 would provide authority to forbear from section 229, and on whether forbearance from application of section 229 would be consistent with the purposes for which CALEA was enacted and the public interest.[239] Finally, we emphasize that section 10 does not provide the Commission authority to forbear from provisions of CALEA or any other statute other than the Communications Act.[240]

90. Section 257(c) requires the Commission to make periodic reports to Congress concerning the elimination of previously identified barriers to market entry by entrepreneurs and other small businesses.[241] This obligation applies to "the provision and ownership of telecommunications and information services" and thus applies regardless of the legal classification of broadband Internet service and broadband Internet connectivity service. It thus would appear that none of the three alternative approaches suggested here would affect the Commission's duty to make the mandated reports. Nor, given the importance of lowering barriers to market entry, do we contemplate any circumstance in which it would be sound policy to cease making the reports. We seek comment on these issues and on how best to ensure that the obligation of section 257(c) is preserved in this context.

91. We further seek comment on whether there are provisions of Title II that would require interpretation even after forbearance. For example, would forbearance from section 203 mean that carriers may not file tariffs even if they want to, or just that they are not required to do so?[242] Would the

[236] *Id.* at 14992, para. 9 n.17; *see also Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7114, para. 17 (2000) (all entities previously classified as "common carriers" for purposes of the Communications Act are telecommunications carriers for purposes of CALEA, as are cable operators and electric and other utilities to the extent they offer telecommunications services for hire to the public); *Communications Assistance for Law Enforcement Act and Broadband Access and Services,* Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676, 15695, para. 39 (2004) (noting that CALEA unambiguously applies to all "common carriers offering telecommunications services for sale to the public" as so classified under the Communications Act and that such common carriers are subject to CALEA regardless of the technology they deploy to offer their service, including packet technology).

[237] *CALEA First Report and Order*, 20 FCC Rcd at 14991-15012, paras. 8-45.

[238] *Id.* at 15001, para. 24. A broadband Internet service provider is subject to CALEA with regard to its "switching and transmission" functions, but not with regard to "storage functions of its e-mail service, its web-hosting and DNS lookup functions or any other ISP functionality of its Internet access service." *Id.* at 15008, para. 38.

[239] Section 103(a)(1)-(4) of CALEA, 47 U.S.C. § 1002(a)(1)-(4).

[240] 47 U.S.C. § 160(a) ("[T]he Commission shall forbear from applying any regulation or any provision *of this Act* . . . .") (emphasis added).

[241] *Id.* § 257(c).

[242] *Id.* § 203.

Commission's review of transactions involving providers of broadband Internet connectivity service be affected if the Commission forbore from applying section 214?[243]

92. We also seek comment on whether there are approaches superior or complementary to forbearance that the Commission should consider as means of easing regulatory burdens. For example, in the past the Commission has "streamlined" the statutory procedures that apply to non-dominant carriers,[244] and has granted blanket authority to all carriers under section 214 to provide domestic interstate services and to construct, acquire, or operate any domestic transmission line.[245] Is any similar approach appropriate here?

93. Finally, we seek comment on the role of third party standard setting bodies if the Commission were to adopt one of the deregulatory approaches described here.[246]

e. Application of the Statutory Forbearance Criteria

94. *Charges, Practices, Classifications, and Regulations.* In 2002, when the Commission decided to classify cable modem service as an information service, only 12 percent of American adults had broadband at home.[247] Now nearly two-thirds of American adults use broadband at home.[248] In just the last two years, home broadband use has grown more than 25 percent.[249] The quality and availability of broadband services continue to improve, with cable and telephone companies investing about $20 billion in wireline broadband capital expenditures in 2008 and about $18 billion in 2009.[250] As described in the National Broadband Plan, "[t]op advertised speeds available from broadband providers have increased in the past few years. Additionally, typical advertised download speeds to which consumers subscribe have grown approximately 20% annually for the last 10 years."[251]

95. Still, a number of reported incidents suggest there is a role for the Commission. Comcast's secret disruption of its customers' peer-to-peer communications, which the Commission determined to be unjustified, is one example.[252] There have been recent reports involving: AT&T's

[243] *Id.* § 214.

[244] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*) (subsequent history omitted).

[245] *See Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, CC Docket No. 97-11; AAD File No. 98-43,Report and Order and Second Memorandum Opinion and Order, 14 FCC Rcd 11364, 11372, para. 12 ("[W]ith blanket authority, unlike forbearance, we retain the ability to stop extremely abusive practices against consumers by withdrawing the blanket section 214 authorization that allows the abusive carrier to operate."); 47 C.F.R. § 63.01.

[246] *See supra* part II.B.1.f.

[247] JOHN B. HORRIGAN & LEE RAINIE, THE BROADBAND DIFFERENCE: HOW ONLINE BEHAVIOR CHANGES WITH HIGH-SPEED INTERNET CONNECTIONS, PEW INTERNET & AMERICAN LIFE PROJECT 9 (2002).

[248] John B. Horrigan, *Broadband Adoption and Use in America*, 3 (Fed. Commc'ns Comm'n Omnibus Broadband Initiative, Working Paper No.1, 2010).

[249] NTIA, *Digital Nation, supra* note 8, at 4.

[250] NATIONAL BROADBAND PLAN at 37-38 (citations omitted).

[251] *Id.* at 20, 38 (citations omitted).

[252] *See supra* para. 26.

alleged failure to deliver DSL service at the speeds promised;[253] allegations that although RCN promised subscribers "fast and uncapped" broadband, it delayed or blocked peer-to-peer file transfers without users' knowledge or consent;[254] and Windstream's redirection of subscribers who used the default search function in the Firefox web browser to a Windstream "landing page."[255] Furthermore, legislative developments described above suggest that Congress is not satisfied with the pace of broadband deployment, adoption, and utilization.[256]

96. We seek comment on whether, in light of the current charges, practices, classifications, and regulations of broadband Internet connectivity service providers, it would be consistent with section 10(a)(1) for the Commission to forbear from all provisions of Title II except the six identified provisions. If we found on the record developed in response to this Notice that the marketplace for broadband Internet connectivity services is operating sufficiently well with regard to competition and consumers' interests, then retaining only the authority in sections 201, 202, and 208; reforming universal service under section 254; and continuing to enforce the privacy and access provisions of sections 222 and 255 could be sufficient to address current and foreseeable future concerns.

97. *Protection of Consumers and the Public Interest.* Section 10(b) directs the Commission, in making its public interest analysis, to "consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[257] As discussed above, the goals of any action to classify broadband Internet connectivity as a telecommunications service would include preserving the Commission's ability to step in when necessary to protect consumers and fair competition, while generally refraining from regulation where possible. Further, the Commission has tools to promote competition for broadband Internet services that would be unaffected by the forbearance proposal discussed here.[258] We seek comment on this element of the forbearance test.

f. Maintaining Forbearance Decisions

98. We seek comment on whether, if we forbore from applying those provisions of Title II that go beyond minimally intrusive Commission oversight, that decision would likely endure. Section 10 allows the Commission to revisit a decision to forbear.[259] Normally, to depart from a prior decision, an agency may simply acknowledge that it is doing so and provide a rational explanation for the change, which may or may not need to be more detailed than the explanation for the original decision.[260] The agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than

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[253] *See* Class Action Settlement Agreement and Release and Order Preliminarily Approving Settlement; Conditionally Certifying Settlement Class; Approving Notice; and Setting Date for Final Approval Hearing, *Schmidt v. AT&T*, No. CV 09 688788 (Cuyahoga Cnty., Oh. Ct. Common Pleas Ct.).

[254] *See* Notice of Pendency and Settlement of Class Action at 1, *Sabrina Chin v. RCN Corp.,* No. 1:08-CV-7349 (S.D.N.Y. Apr. 19, 2010).

[255] *See* DSLReports.com, Our Response to Direct Service Concerns, http://www.dslreports.com/forum/r24074065-Our-Response-to-Redirect-Service-Concerns (last visited May 24, 2010).

[256] *See supra* para. 25.

[257] 47 U.S.C. § 160(b).

[258] *See, e.g.*, NATIONAL BROADBAND PLAN, Chs. 4-5 (recommending that additional spectrum be made available); *id*. at pp. 47-49 (recommending that the Commission comprehensively review its wholesale competition policies); *id*. at Ch. 6 (recommending ways that existing infrastructure could be better utilized to facilitate deployment).

[259] *See EarthLink v. FCC*, 462 F.3d at 12.

[260] *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

the reasons for the old one."[261] Section 10, though, requires the Commission to forbear if the statutory criteria are met.[262] Thus, to reverse a forbearance decision, the Commission must find that at least one of the criteria is no longer met with regard to a particular statutory provision. That determination would be subject to judicial review, and the Supreme Court has stated that an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" in instances where, 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 interests that must be taken into account."[263] Reversal of forbearance also might be in arguable tension with section 706(a) of the 1996 Act, which directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, . . . regulatory forbearance."[264] We seek comment on the Commission's authority to reverse a forbearance decision concerning broadband Internet connectivity service. We also seek comment on what provisions, if any, could appropriately be included in a forbearance order to establish a heightened standard for justifying future "unforbearance."

99. If the Commission were to elect the option of classifying Internet connectivity as a telecommunications service but forbearing from most of Title II, then a reviewing court could in theory uphold the classification determination but vacate the accompanying forbearance in whole or in part. In that situation, the Commission could maintain the classification of broadband Internet connectivity service as telecommunications service and allow the relevant provisions of Title II, which the court restored, to apply. We seek comment on any lawful mechanisms that (assuming adoption of the third classification option) could be utilized to address this theoretical situation, even if that means the Commission would not, in the post-litigation situation just described, ultimately maintain the classification of Internet connectivity as a telecommunications service.

C. Effective Dates

100. If the Commission decided to alter its current approach to Internet connectivity service, affected providers might need time to adjust to any new requirements. To reflect this, the Commission could delay the effective date of a classification (or classification and forbearance) decision for 180 days after release, or another suitable period. Moreover, as discussed above, certain provisions of Title II, such as sections 222, 254(d), and 255, could be phased-in on an even longer timetable. We seek comment on the effective date the Commission should adopt for a classification decision under one of the approaches proposed here, or an alternative approach identified by the commenter.

D. Terrestrial Wireless and Satellite Services

101. The Commission currently classifies broadband Internet service solely as an information service regardless of whether it is provided over cable facilities, wireline facilities, wireless facilities, or power lines.[265] At the same time, the Commission has in the past taken a deliberate approach to extending its classification framework. In particular, though the Commission had classified all cable modem and wireline Internet access services as information services by 2005, it was not until 2007 that it

[261] *Id.* (emphasis in original).

[262] 47 U.S.C. § 160(a).

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

[264] 47 U.S.C. § 1302(a).

[265] *See supra* para. 21.

extended that classification to wireless broadband Internet services, even though the first 3G networks went into service in 2003.[266]

102. We seek comment on which of the three legal frameworks specifically discussed in this Notice, or what alternate framework, would best support the Commission's policy goals for wireless broadband. In addition, as the Commission recently noted in the *Open Internet NPRM*, "there are technological, structural, consumer usage, and historical differences between mobile wireless and wireline/cable networks."[267] We seek comment on whether these differences are relevant to the Commission's statutory approach to terrestrial wireless and satellite-based broadband Internet services. Do consumers today view wireless broadband as a substitute for wired services?[268] How are terrestrial wireless and satellite Internet services purchased, provided, and perceived?

103. Several provisions of Title III of the Communications Act provide the Commission authority to impose on spectrum licensees obligations that are in the public interest.[269] For example, section 301 provides the Commission authority to regulate "radio communications" and "transmission of energy by radio."[270] Under section 303, the Commission has the authority to establish operational obligations for licensees that further the goals and requirements of the Act if the obligations are in the "public convenience, interest, or necessity" and not inconsistent with other provisions of law.[271] Section 303 also authorizes the Commission, subject to what the "public interest, convenience, or necessity requires," to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class."[272] Section 307(a) likewise authorizes the issuance of licenses "if public convenience, interest, or necessity will be served thereby."[273] Section 316 provides a similar test for new conditions on existing licenses, authorizing such modifications if "in the judgment of the Commission such action will promote the public interest, convenience, and necessity."[274] On the other hand, Title III provides the Commission no express authority to extend universal service to wireless broadband Internet services. We seek comment on whether these or other technical, market, or legal considerations justify different classification of wireless and wired broadband Internet services. We also seek comment on

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[266] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 05-71, Tenth Report, 20 FCC Rcd 15908, 15952, para. 114 (2005).

[267] *Open Internet NPRM*, 24 FCC Rcd at 13119, para. 159.

[268] *See generally* NATIONAL BROADBAND PLAN at 40-41 (discussing terrestrial wireless).

[269] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, FCC 10-59, para. 66 (rel. Apr. 21, 2010).

[270] *See* 47 U.S.C. § 301. *See also IP-Enabled Services NPRM*, 19 FCC Rcd at 4918.

[271] *See* 47 U.S.C. § 303 (stating that if the "public convenience, interest, or necessity requires" the Commission shall "(r) . . . prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter"); *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992) (Communications Act invests Commission with "enormous discretion" in promulgating licensee obligations that serve the public interest).

[272] 47 U.S.C. § 303(b).

[273] *Id*. § 307(a).

[274] *See* 47 U.S.C. § 316(a); *see also WBEN, Inc. v. United States*, 396 F.2d 601 (2d Cir. 1968); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 18455, 18459, para. 7 (citing 47 U.S.C. §§ 303(r), 309)).

whether our approach to classification of non-facilities-based Internet service providers should be different in the wireless context, or the same as in the wired context.

104. In addition, section 332 sets forth various provisions concerning the regulatory treatment of mobile wireless service. Sections 332(c)(1) and (c)(3), in particular, require that CMRS providers be regulated as common carriers under Title II of the Act.[275] To what extent should section 332 of the Act affect our classification of wireless broadband Internet services? Section 332(c)(1) gives the Commission the authority to specify certain provisions of Title II as inapplicable to CMRS providers. If the Commission were to take the third way described above in the wireless broadband context, could it and should it apply section 332(c)(1) as well as section 10 in its forbearance analysis? We also seek comment on whether the Commission would have reason to apply sections 201 and 202 differently to wireless and wired broadband Internet services.

105. We also ask commenters to address whether, if the Commission were to alter its present approach to broadband Internet service, it would be preferable for the Commission to address wireless services at the same time that it addresses wired services, or whether there are reasons for the Commission to defer a decision on classification of non-wired broadband Internet services (and any associated forbearance if a wireless broadband telecommunications service is identified).

E. Non-Facilities-Based Internet Service Providers

106. In 1998, the Commission addressed non-facilities-based Internet service providers and concluded that they provided only information services.[276] In *Brand X*, Justice Scalia stated in his dissent that non-facilities-based Internet service providers using telephone lines to provide DSL service stand in a different position in the eyes of the consumer than the provider of the physical connection.[277] Some industry members have suggested, however, that providers of Internet connectivity could avoid compliance with consumer protection measures by relying on non-facilities-based affiliates to offer retail broadband Internet service.[278] We seek comment on what policy goals we should have for non-facilities-based Internet service providers, and what legal foundation for non-facilities-based Internet service providers can best support effective implementation of those goals.

F. Internet Backbone Services, Content Delivery Networks, and Other Services

107. The focus of this proceeding is limited to the classification of broadband Internet service. We remain cognizant that, under the Act, all information services are provided "via telecommunications,"[279] and therefore the use of telecommunications does not, on its own, warrant the identification of a separate telecommunications service component. For example, we do not intend to address in this proceeding the classification of information services such as e-mail hosting, web-based content and applications, voicemail, interactive menu services, video conferencing, cloud computing, or

[275] *See Wireless Broadband Order*, 22 FCC Rcd at 5915-20, paras. 37-57 (finding that "mobile wireless broadband Internet access service" does not meet the definition of "commercial mobile service" within the meaning of section 332 of the Act as implemented by the Commission's CMRS rules because such broadband service is not an "interconnected service," as defined in the Act and the Commission's rules).

[276] *Stevens Report*, 13 FCC Rcd at 11539-40, para. 81.

[277] *Brand X*, 545 U.S. at 1009 n.3 (Scalia, J., dissenting).

[278] *See e.g.*, Bob Quinn, *Pickett's Charge Redux*, AT&T Public Policy Blog, May 11, 2010, http://attpublicpolicy.com/government-policy/pickett's-charge-redux/.

[279] 47 U.S.C. § 153(20).

any other offering aside from broadband Internet service.[280] Services that utilize telecommunications to afford access to particular stored content, such as content delivery networks, also are outside the scope of this proceeding.[281] Nor do we intend here to address or disturb our treatment of services that are not sold by facilities-based Internet service providers to end users in the retail market, including, for example, Internet backbone connectivity arrangements. In short, the Commission proposes not to change its treatment of services that fall outside a commonsense definition of broadband Internet service. We seek comment on whether any of the three legal approaches described in this Notice would affect these services directly or indirectly, and how we should factor that into our decision-making about the treatment of broadband Internet service.

108. In a separate proceeding, the Commission has asked for public comment on the treatment of other services (including Internet-Protocol-based voice and subscription video services) that may be provided over the same facilities used to provide broadband Internet service to consumers, but that have not been classified by the Commission.[282] The Commission has described these as "managed" or "specialized" services, and recognized "that these managed or specialized services may differ from broadband Internet services in ways that recommend a different policy approach, and it may be inappropriate to apply the rules proposed here to managed or specialized services."[283] We do not intend to address the classification or treatment of these services in this proceeding. We seek comment on whether any of the three legal approaches identified in this Notice would affect these services directly or indirectly, and how we should factor that into our decision-making about the treatment of Internet connectivity service.

G. State and Local Regulation of Broadband Internet and Internet Connectivity Services

109. We also ask commenters to address the implications for state and local regulation that would arise from the three proposals described above. Under each of the three approaches, what would be the limits on the states' or localities' authority to impose requirements on broadband Internet service and broadband Internet connectivity service?

110. We anticipate that if a state were to impose requirements on broadband Internet connectivity service or broadband Internet service that are contrary to a Commission decision not to apply similar requirements, we would have authority under the Communications Act and the Supremacy Clause of the United States Constitution (Article III, section 2) to preempt those state requirements.[284] In addition, section 10(e) provides that "[a] State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying."[285] We seek

[280] *See generally Section 255 Order*, 16 FCC Rcd at 6457, para. 97 (identifying voicemail and interactive menu offerings as information services), 6461, para. 107 (identifying "e-mail, electronic information services, and web pages" as information services); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Report and Order and Further Notice of Proposed Rulemaking, FCC 09-105, attach. D (Eligible Services List Schools and Libraries Support Mechanism for Funding Year 2010) (rel. Dec. 2, 2009) ("Internet access provides a connection to a vast quantity of information and services, such as electronic mail and the documents and features of the World Wide Web.").

[281] *Compare* 47 U.S.C. § 153(20) (definition of "information service") *with* 47 U.S.C. § 153(43) (definition of "telecommunications").

[282] *Open Internet NPRM*, 24 FCC Rcd at 13116-17, paras. 148-53.

[283] *Id.* at 13116, para. 149.

[284] *See Vonage Preemption Order*, 19 FCC Rcd at 22417, para. 21.

[285] 47 U.S.C. § 160(e).

comment on the application of these provisions in the context of broadband Internet service and broadband Internet connectivity service, the states' role in the broadband marketplace, and how our decision to apply or not apply section 253 could relate to this authority.[286]

H. Related Actions

111. We seek comment on whether there are actions we can and should take outside the proceeding this Notice initiates to implement the established policy approach to broadband Internet service. As one example, the Commission could decline to pursue the "open access" policies for cable modem service on which the Commission sought comment in 2002 when it decided to classify cable modem service as a single information service.[287] We seek comment on terminating the docket initiated by the notice of proposed rulemaking that accompanied the *Cable Modem Declaratory Ruling*, and we invite additional proposals.

III. PROCEDURAL MATTERS

A. Paperwork Reduction Act

112. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 47 U.S.C. § 3506(c)(4).

B. *Ex Parte* Presentations

113. The inquiry this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[288] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required.[289] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.[290]

C. Comment Filing Procedures

114. Interested parties may file comments and reply comments regarding the Notice on or before the dates indicated on the first page of this document. Comments and reply comments may be filed: (1) using the Commission's Electronic Comment Filing System (ECFS), (2) using the Federal Government's eRulemaking Portal, or (3) by filing paper copies. In addition, *ex parte* comments may be filed at any time except during the Sunshine Period. *Ex parte* comments may be filed: (1) using the Commission's Electronic Comment Filing System (ECFS), (2) using the Federal Government's eRulemaking Portal, (3) by filing paper copies, or (4) by posting comments and ideas on the Broadband.gov blog at http://blog.broadband.gov/?categoryId=494971 or on http://broadband.ideascale.com/a/ideafactory.do?discussionID=11271. **All filings related to this Notice should refer to GN Docket No. 10-127. Further, we strongly encourage parties to develop responses to this Notice that adhere to the organization and structure of this Notice.**

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[286] *See supra* para. 87.

[287] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4839-41, paras. 72-74, 4843-47, paras. 83-93.

[288] 47 C.F.R. §§ 1.200 *et seq*.

[289] *See* 47 C.F.R. § 1.1206(b)(2).

[290] *Id.* § 1.1206(b).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.

- Blog Filers: In addition to the usual methods for filing *ex parte* comments, the Commission is allowing *ex parte* comments in this proceeding to be filed by posting comments on http://blog.broadband.gov/?categoryId=494971 and on http://broadband.ideascale.com/a/ideafactory.do?discussionID=11271. Accordingly, persons wishing to examine the record in this proceeding should examine the record on ECFS, http://blog.broadband.gov/?categoryId=494971, and http://broadband.ideascale.com/a/ideafactory.do?discussionID=11271. Although those posting comments on the blog may choose to provide identifying information or may comment anonymously, anonymous comments will not be part of the record in this proceeding and accordingly will not be relied on by the Commission in reaching its conclusions in this rulemaking. The Commission will not rely on anonymous postings in reaching conclusions in this matter because of the difficulty in verifying the accuracy of information in anonymous postings. Should posters provide identifying information, they should be aware that although such information will not be posted on the blog, it will be publicly available for inspection upon request.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

- Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

- Documents in GN Docket No. 10-127 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street S.W., Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

D. Accessible Formats

115. People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

IV. ORDERING CLAUSE

116. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i), 4(j), 10, 218, 303(b), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 160, 218, 303(b), 303(r), and 403, this Notice of Inquiry IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: Framework for Broadband Internet Service, GN Docket No. 10-127

In March, we released our country's first National Broadband Plan, an unprecedented, bold roadmap for America's broadband future. The Commission affirmed unanimously that: "Working to make sure that America has world-leading high-speed broadband networks—both wired and wireless—lies at the very core of the FCC's mission in the 21st Century."

In this increasingly interconnected world, broadband is our most important platform for investment, economic growth, and job creation—and for addressing major national challenges such as education, health care, and public safety.

As the National Broadband Plan recognized, however, America lags behind where it should be on broadband; the rest of the world isn't standing still; and government has a limited but vital role to play in spurring ubiquitous, fast, competitive, and affordable broadband networks available to every American.

In April, the DC Circuit issued a decision in the *Comcast* case that, unfortunately, created uncertainty in an area that had been widely regarded as settled. As our General Counsel has described, while acknowledging the agency's basic authority under the Communications Act to address issues of broadband access policy, the court opinion casts doubt on the particular legal theory the Commission had chosen to rely on for several years to support its efforts in this area. As others have described to me, this unwelcome decision was a curveball.

Last month, I said the Commission would initiate a process to explore and ultimately find a solution and resolve the uncertainty created by the decision. In particular, I said the Commission would consider all appropriate legal theories that would continue the same light-touch approach to broadband access policy that the agency has pursued for the past decade.

Recently, the Chairmen of the key Senate and House Committees—Chairmen Rockefeller, Kerry, Waxman, and Boucher—launched a process to update the Communications Act.

Let me take this opportunity today to say clearly: I fully support this Congressional effort. A limited update of the Communications Act could lock in an effective broadband framework to promote investment and innovation, foster competition, and empower consumers. I commit all available FCC resources to assisting Congress in its consideration of how to improve and clarify our communications laws.

Meanwhile, in view of the court decision, and as the Congressional Chairs have requested, the FCC has an obligation to move forward with an open, constructive public-comment process to ask hard questions, to find a solution, and resolve the uncertainty that has been created. The Congressional and FCC processes are complementary.

It's important to note that the recent court decision did not opine on the initiatives and policies that we have laid out transparently in the National Broadband Plan and elsewhere.

Our pro-investment, pro-innovation, pro-competition, pro-consumer policies remain unchanged and they remain essential for broadband in America. The purpose of the proceeding we launch today is to make sure those policies rest on a solid legal foundation by exploring and addressing the technical, legal

questions the court decision raises.

For example, American businesses and consumers need safe and secure broadband networks, yet the court case raises questions about the right framework for the Commission to help protect against cyber-attacks.

American businesses and consumers need broadband networks that reach every community and every American—rural and urban, regardless of circumstances—yet the court case raises questions about the right framework for the Commission to help bring the benefits of broadband to the tens of millions of Americans and the many schools, libraries, and other anchor institutions that either do not have access to adequate broadband networks or can't afford the service.

American businesses and consumers need broadband networks that will serve as a powerful engine for investment and innovation, yet the court case raises questions about the right framework for the Commission to safeguard the freedom and openness of the Internet, which has fueled extraordinary investment and innovation, vast consumer benefits and choice, which has led to unprecedented opportunities to spread knowledge and facilitate new and diverse voices – and which has for several years been protected by a bipartisan FCC.

These and other issues affected by the court decision—like access by people with disabilities, like privacy—are real issues with real consequences for every American, and the nation's agency with oversight responsibility for communications has a duty to address them.

We do so today in an open and balanced way. The Notice of Inquiry we adopt puts out for comment, even-handedly, several possible solutions to the challenge created by the court case—including a Title I path, a full Title II path, and a middle-ground solution—the Third Way approach that I have previously described. The Notice also solicits new ideas.

The Third Way approach was developed out of a desire to restore the status quo light-touch framework that existed prior to the court case.

It was developed as a potential response to the court decision that would reject the extremes—a response that rejects both the extreme of applying extensive legacy phone regulation to broadband, and also rejects the extreme of eliminating FCC oversight of broadband.

It's not hard to understand why companies subject to an agency's oversight would prefer no oversight at all if they had the chance.

But a system of checks and balances in the communications sector has served our country well for many decades, fostering trillions of dollars of investment in wired and wireless communications networks, and in content, applications, and services—and creating countless jobs and consumer benefits.

And there is no question that we need to pursue a framework and policy initiatives that encourage and unlock massive private investment.

Internationally, the Third Way would enable continued leadership on communications policy and Internet freedom, while doing nothing would leave the U.S. virtually alone in the world in not having tools to protect broadband competition and consumers and preserve Internet freedom and openness.

I suggested the Third Way approach as a reasonable and narrowly tailored path for promoting the massive private investment we need in broadband, and achieving broadly supported policy goals. It is a

preferable alternative to the approach of applying full Title II to broadband, an approach that is unacceptable to me.

While the term "Third Way" may be new to this debate, the model on which it is based is familiar. The Third Way is modeled on the highly successful deregulatory approach that the FCC has used for almost 20 years for mobile voice services: application of a small number of Title II provisions, with broad and reliable forbearance from all other provisions.

The mobile voice experience has shown the wisdom of leaving pricing to competitive markets, as well as the ability of the Commission to forbear from regulation effectively and without backsliding. Industry has repeatedly hailed this framework as having spurred robust investment and innovation.

So it is not surprising that the Third Way has received support from a broad array of businesses and investors, representing many billions of dollars of investment and serving millions of consumers and small and large enterprises.

Supporters—who believe the Third Way is a path to boost robust investment and competition in the U.S.—include major American Internet and technology companies, competitive broadband access providers, rural mobile companies, consumer electronics manufacturers, entertainment companies, successful investors and entrepreneurs, as well as leading consumer groups.

Now, as we move forward, my focus is not on any particular legal mechanism; my desire is simply that we restore the status quo and have a workable light-touch framework for broadband access.

My core focus is on achieving vital national broadband goals to spur investment, innovation and our global competitiveness. In order to do that, we must solve the problem the *Comcast* case created.

I recognize that there are pros and cons to all of the potential solutions that have been raised, and that this isn't an easy issue, or one without complexity. I remain open minded, I welcome the possibility of new ideas.

I'm pleased that the announcement of an FCC process has already catalyzed action among stakeholders. I encourage these consensus-building actions and discussions to find an enforceable framework for broadband policy.

I'm pleased also that this process has produced healthy dialogue inside the Commission staff and among those of us on the bench. There are a number of different views as we begin tackling this issue. I believe firmly and deeply in the benefits of a free marketplace of ideas and its potential to produce the best answers to hard questions, as long as all keep open minds.

I ask only this of all participants in this discussion, inside and outside the Commission: Let's not pretend that the problems with the state of broadband in America don't exist; let's not pretend that the risk of excessive regulation is not real, or, at the other extreme, that the absence of basic protections for competition and consumers is acceptable.

Instead, let's put rhetoric and posturing aside, and work together to solve the problem created by the court case, so that we can rise together to the major 21st century challenges of achieving U.S. world leadership in broadband and innovation, fostering sustainable economic growth and job creation, and bringing the benefits of broadband to all Americans.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Framework for Broadband Internet Service*, GN Docket No. 10-127

Between a few big industry players who never liked the telecommunications law passed by Congress and previous Commissions only too ready to sacrifice the public interest to special interests, consumers find themselves in quite a box. We are on the cusp of perhaps the greatest communications revolution since the printing press, yet we enter this new Digital Age arguably shorn of the ability to offer consumers the most basic of protections—such as insuring their security, safeguarding their privacy, providing them with the benefits of competition and making sure that dynamic new technologies are available to them and are open to the maximum extent possible—without needless gatekeeper control at the on-ramps to the information highway.

For much of the past decade, the FCC took American consumers on a costly and damaging ride, moving broadband Internet connectivity outside the statutory Title II framework that applies to telecommunications carriers. This was a major flip-flop from the historic—and generally successful—approach of requiring non-discrimination in our communications networks. I didn't buy it—and now we know from its *Comcast* decision that the D.C. Circuit Court of Appeals didn't buy it either. In fact, by taking the country on the joyless ride it did, the Commission essentially issued a gilt-edged invitation to the court to rule as it did. Previous Commissions are much more the culprit here than any court. After all, they were relying on an approach that was fundamentally at odds with the purposes set out in the Telecommunications Act of 1996. Anyone who thinks Congress envisioned deploying the new communications technologies and services of the Digital Age without the safeguards that generations of consumers and consumer advocates fought for and won has missed the meaning of the law and the intent of our elected representatives. I cannot believe that Congress ever envisioned that its fundamental statutory requirements could be made obsolete by a new service offering.

Permitting this chaotic stand-off to persist can only leave consumers, innovators and even broadband companies themselves on an uncertain and perilous path. Today, in an effort to right the wrong-headed policies of recent years, we tackle one of the most difficult challenges ever to confront this Commission. I commend Chairman Genachowksi for launching this proceeding and I encourage its speediest possible resolution. Some believe that, to achieve one or more of our goals, the Commission could try—on a case-by-case basis—to make better-articulated Title I arguments that may persuade some court somewhere. Maybe. But case-by-case inevitably becomes court case-by-court case. Down this path would be years and years of dead-end delays, years without the most elemental public interest safeguards for broadband, and years of agency paralysis. It would be death by a thousand cuts. Why rest our case on the weakest part of the law when relying on the directly applicable stronger part of the statute is quicker, easier and, most importantly, consumer-friendlier? More years fighting back a costly and seemingly endless stream of court challenges to every action the Commission takes can only consign the United States to the digital dust as other countries focus on actually building out consumer-friendly advanced telecommunications (*i.e.*, broadband).

How did we get here? It is a sad—and all too familiar—tale where the law was twisted to shamefully promote the interests of a powerful few ahead of the interests of consumers. It began in 2002 with a Notice of Proposed Rulemaking on the classification of broadband services delivered by wireline providers. Then, just one month later and over the strong dissents of Commissioner Adelstein and me, the Commission issued a Declaratory Ruling that moved cable modem services away from any real oversight by classifying them as unregulated "information" services, subject only to the vague ancillary authority of Title I. Not only did that ruling place cable modem services into regulatory never-never land, but it struck at the very heart of this agency's ability to do its job of protecting public safety, promoting

universal service, ensuring disabilities access, fostering competition and safeguarding consumers in a broadband world. In my 2002 dissent, I said that the Commission was taking "a gigantic leap down the road of removing core communications services from the statutory frameworks established by Congress, substituting our own judgment for that of Congress and playing a game of regulatory musical chairs by moving technologies and services from one statutory definition to another." We moved the chairs—but it sure wasn't musical. Throw into this bubbling cauldron of trouble one subsequent agency decision after another to grant big industry players forbearance from their legal requirements to promote competition and consumer choices and you begin to get the picture of how we spent the bulk of the past decade around here.

I, for one, am worried about relying only on the good will of a few powerful companies to achieve this country's broadband hopes and dreams. We see what price can be paid when critical industries operate with unfettered control and without reasonable and meaningful oversight. Look no further than the banking industry's role in precipitating the recent financial meltdown or turn on your TV and watch what is taking place right now in the Gulf of Mexico.

Throughout the course of the Commission's deregulatory binge, we were given repeated assurances that there was no need to worry. Somehow we would find enough jurisdiction under Title I "ancillary authority" to do our job. In truth, and not to be too conspiratorial about it, I rather believe that those who devised this abdication of our oversight responsibilities did so fully aware of what they were doing and who they were really helping. And they pressed on. In 2005, the Commission extended its oversight abdication by reclassifying DSL. The die had been cast by then, Justice Scalia and me to the contrary notwithstanding, and the challenge Commissioner Adelstein and I faced was to rescue what we could from the accident scene. About all we could manage was some—albeit inadequate—commitment that the Commission would have the ability to move forward with certain basic statutory obligations related to homeland security, universal service, disabilities access and competition, if it was wont to do so. It wasn't often wont to do so. More formatively, we were able to win Commission adoption for the historic *Statement of Policy* on Internet openness—something which I had long advocated. We couldn't get all the way there in that *Statement*, but we laid down the markers which I hope the present Commission will extend in the months ahead.

In sum, the Commission had moved its authority and oversight of advanced telecommunications to a part of the statute where those services would have a steep hill to climb to win even the most basic consumer safeguards. But let's be clear here. We still have the original authority the Commission moved away from. It reposes in the statute. It is there for us to use—by sun-up tomorrow, if we choose. It rests on history and precedent. And, soundly argued in court, it puts us on much firmer legal footing to survive the inevitable industry challenges that are coming anyway than does trying to stand our ground on the quicksand of Title I. We need to reclaim our authority.

One other thing is at risk here—something pretty huge. I haven't yet mentioned the National Broadband Plan, the proud achievement of Chairman Genachowski's Broadband Team here at the Commission. The Team worked for nearly a year to provide our country with something it lacked (and almost every other leading industrial country possessed)—a national strategy to encourage the deployment and adoption of high-value, high-speed broadband for every citizen in the land. The *Comcast* decision puts crucial parts of the National Broadband Plan in jeopardy and on hold—potentially squandering the nation's historic opportunity to build this vital infrastructure of the Twenty-first century that will open so many doors for so many people.

We cannot let that happen. Too much is at stake. Our global competitiveness depends on this new telecommunications infrastructure. Broadband is not technology for technology's sake—it is important because it really can be our "Great Enabler." This is technology that intersects with every great

challenge confronting our nation—improving energy efficiency, halting climate degradation, improving healthcare for all our citizens, educating our young (and our old, too), helping individuals with disabilities to realize their full potential, creating new public safety tools for first responders and opening the doors of economic and social opportunity for all. Broadband connectivity is about even more than that. Increasingly our national conversation, our news and information, our knowledge of one another, will depend upon access to the Internet. Each of these challenges I have mentioned has a broadband component as part of its solution. None has a solution without this broadband component. Private enterprise must lead the way with investment and innovation in broadband, to be sure. But only when it is accompanied by visionary public policy and meaningful oversight can we ensure that broadband will get built out to places where business has no incentive to go. We can no longer afford digital divides between haves and have-nots, between those living in big cities and those living in rural areas or on tribal lands, between the able-bodied and persons with disabilities.

Since the *Comcast* decision, I have heard opponents of reclassification make a number of self-serving arguments that range from the often-frivolous to the sometimes-nonsensical. For starters, let me be clear. Despite all the spin to the contrary, we are not talking—even remotely—about regulating the Internet. We are talking about meaningful oversight of the infrastructure and services that allow Americans to get to the Internet. This isn't about government regulating the Internet—it's about making sure that consumers, rather than a handful of entrenched incumbents, have maximum control over their access to the Internet.

I have also heard the perplexing contention by some that the Commission cannot move back to Title II classification because there have been no "changed circumstances," which are supposedly needed to justify such a correction. No changed circumstances? Have the mind-bending changes we have seen throughout the country and around the world due to broadband access to the Internet been anything short of revolutionary? I don't think so. The market for broadband technologies and services, and the ways in which we as a people communicate, have undergone seismic changes over just the last decade. Remember that it was not so long ago that many Americans were just getting used to the Internet, and independent Internet service providers like AOL and CompuServe were the names of the game. Since then, it is a few huge access providers that have become the only real broadband game in town. Resellers and competitive local telephone companies have been driven from the field, for the most part. And competition—that wonderful goal of the 1996 Telecommunications Act—reposes more in our hopes and dreams than it does on the bottom line of the monthly phone and cable bills we all get to pay. How can anyone fail to find "changed circumstances" in these revolutionary transformations?

So beware of all the slick PR you hear, and remember that much of it is coming from lavishly-funded corporate interests whose latest idea of a "triple play" is this: (1) slash the FCC's broadband authority; (2) gut the National Broadband Plan; and (3) kill the open Internet.

Today we launch a proceeding to look at the options available to us. Should we continue down our failed Title I path? Should we rely on the full range of Title II requirements and safeguards? Or should we take a "third way" by applying a limited number of fundamental provisions of Title II to Internet access service? I have said before that plain and simple Title II reclassification through a prompt—and by that I meant immediate—declaratory ruling, accompanied by limited, targeted forbearance from certain provisions—would have been the quickest and cleanest way to remove all question marks. Clear rules of the road don't just help consumers—they provide clarity and certainty to business, too. My former boss, the legendary Senator Fritz Hollings, frequently reminded us that "business can't operate with a question mark." Commission policies over the past decade have been replete with question marks for business, for consumers, for all of us.

So let's develop the record through this Notice, as quickly as we can. Let's then analyze the

record, develop final recommendations and vote them out with the sense of urgency that the present situation compels. Let us put an end to a decade of detours and derailment, and ensure, for every American, a communications infrastructure that serves their purposes, protects their interests and vindicates the awesome promise of the Digital Age.

DISSENTING STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: *Framework for Broadband Internet Service*, GN Docket No. 10-127

First, I can't emphasize enough that we all want an open Internet that maximizes consumers' freedom. It is important to remember that an open and freedom-enhancing Internet is what we have today as the result of a decades-old, bipartisan and international consensus that governments should not interfere with Internet network management issues. At the same time, authorities should discourage and punish anti-competitive conduct, and they have the legal means to do so today as they have had for decades.

Before I go further, however, I thank the Chairman for his graciousness and generosity throughout this debate. He has consistently extended his hand in a willingness to discuss the issues. I'd like to underscore that 90 percent of what we accomplish at the FCC is not only bipartisan but unanimous as well. Few governmental institutions can make such a claim. That also means, however, that we disagree on one in 10 proceedings. Disagreement and debate are healthy and necessary components of a functioning democracy. Today's Notice of Inquiry is one of those moments of strong, but respectful, disagreement.

Having said that, I also thank the Chairman, his legal team and the bureau staff for writing a NOI that contains several open-ended questions that provide ample opportunity for public comment.

Nonetheless, I disagree with the premise of this proceeding. Not only is the idea of classifying broadband Internet access as common carriage under Title II unnecessary, already it has caused harm in the marketplace.

As a threshold matter, classifying broadband as a Title II service is not necessary to implement the recommendations of the National Broadband Plan. The *Comcast* decision certainly does not affect our ability to reallocate spectrum, one of the central pillars of the Plan. Nor does the decision undermine our authority to reform our Universal Service program, the other major component of the Plan. In the unlikely event that a court decided against granting us *Chevron* deference in the pursuit of directly supporting broadband with Universal Service distributions, the FCC could tie future subsidies to broadband deployment. This idea was agreed to in principle by a bipartisan group of four Commissioners in late 2008, and I remain optimistic that we could successfully defend such an idea on appeal.

In fact, the *Comcast* decision was quite limited in its scope. The court merely held that Title I does not grant us authority to regulate Internet network management. It reasoned that the Commission could not do so because its ancillary authority over Internet service providers was not tethered to a specific Congressional mandate. In short, if the Commission would like to regulate that activity, it must wait for Congress to change the law. We are not Congress.

As a young attorney 20 years ago, I cut my legal teeth on Title II. Over the decades, an overwhelming consensus emerged among tech companies and policy makers from both parties to insulate new technologies from the application of early 20th Century common carrier regulations. The fundamental Title II rules from the Communications Act of 1934, which the majority seeks to apply to today's broadband sector, are the same regulations adopted in the late 19th Century for the railroad monopolies. In essence, the Commission is seeking to impose 19th Century-style regulations designed for monopolies on competitive, dynamic, and complex 21st Century Internet technologies.

The ideas put forth for comment in today's NOI are not new. In fact, they were discussed and

discarded in an overwhelmingly bipartisan way in the 1990s. Let's look back at a 1998 Commission report under the leadership of Bill Kennard, Chairman during President Clinton's second term:

> Turning specifically to the matter of Internet access, we note that classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it.[291]

Just two years later, then-Chairman Kennard said:

> It just doesn't make sense to apply hundred-year-old regulations meant for copper wires and giant switching stations to the IP networks of today. . . . We now know that decisions once made by governments can be made better and faster by consumers, and we know that markets can move faster than laws.[292]

And here's what the Clinton White House had to say about placing legacy regulations on the Internet:

> We should not assume . . . that the regulatory frameworks established over the past sixty years for telecommunications, radio and television fit the Internet.[293]

The regulatory regime suggested by the majority today is likely to create asymmetries in the market place. For example, investment and innovation at the "edge" of the Internet, specifically devices and applications, are largely unfettered by regulation. This is as it should be. But the proposed new regime will place the heavy thumb of government on the scale of a free market to the point where innovation and investment in the "core" of the 'Net are subjected to the whims of "Mother-May-I" regulators. Although I have a tremendous amount of respect for my colleagues, no one can predict who will occupy these chairs in the future, or how they will act. Or, as Senator Olympia Snowe warned the Commission in a letter earlier this month:

> I am concerned about the long-term implications such classification could have on innovation occurring in all segments of the Internet supply chain and the uncertainty that would prevail, since nothing precludes future Commissioners from retracting the very rules you plan to implement.[294]

Moreover, the agency's dramatic attempt to regulate broadband Internet access services comes at a time when consumers are demanding more convergence between the core and the edge. While

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[291] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11501, ¶ 82 (1998).

[292] Remarks of the Honorable William E. Kennard, Chairman, FCC, *Voice Over Net Conference: Internet Telephony: America Is Waiting* (Sept. 12, 2000).

[293] The White House, *A Framework for Global Electronic Commerce* (July 1, 1997).

[294] Letter from the Honorable Olympia Snowe, United States Senator, to the Honorable Julius Genachowski, Chairman, FCC (June 1, 2010).

consumers and their suppliers in a competitive marketplace have been erasing lines of distinction separating tech business models, the Commission is proposing to up-end market trends and draw artificial legal lines to create new regulatory silos.

Investors and international observers are expressing serious concerns about what the FCC is poised to do. In the past two weeks I have traveled to New York and Europe. I have met with a diverse assortment of investors, market analysts, regulators, business people and academics. At every turn, I was met with confusion and questions regarding the idea of regulating broadband as an old-fashioned phone service. For decades now, the international consensus has been for governments to keep their hands off the Internet and to leave Internet governance decisions to time-tested non-governmental technical groups. Once that precedent is broken, it will become harder to make the case against more nefarious states that are meddling with the Internet in even more extensive ways than are contemplated here. In short, we will have lost the moral high ground. Again, a version of this scenario was foreseen by the Clinton Administration's Secretary of Commerce, William Daley, in 1997:

> [W]e have been working with the private sector to convince other nations of the advantages of a user empowerment approach over cumbersome government regulation of the Internet.[295]

Analysts are counseling a wide variety of investors to withhold badly needed investment capital in fear of regulatory uncertainty and litigation risks. While Title II classification is being advanced in the name of furthering broadband deployment, it may have the unintended consequence of stunting growth in this sector. Or, as written this week on a business website:

> But while it's business as usual now, capital investment will come down if Title II becomes a reality, said Credit Suisse telecom services dir[ector] Jonathan Chaplin. He said the next place companies would look to capture some of the return is costs, which would mean jobs.[296]

In fact, one recent economist's study estimates that a net 1.5 million jobs could be put at risk by a Title II classification.[297]

These thoughts aren't coming just from Wall Street, but from those who represent America's small and disadvantaged businesses as well. Listen to last month's remarks of David Honig of the Minority Media and Telecommunications Council:

> Lender and investor uncertainty stemming from potentially years of litigation over Title II reclassification could make it profoundly difficult for MBEs and new entrants to secure financing. MBEs, especially, continue to experience great difficulty securing access to capital in the

[295] Remarks of the Honorable William M. Daley, Secretary, U.S. Dept. of Commerce, *Internet Online Summit: Focus on the Children* (Dec. 2, 1997).

[296] *Street Talk*, CableFAX, June 14, 2010.

[297] Coleman Bazelon, *The Employment and Economic Impacts of Network Neutrality Regulation: An Empirical Analysis* (Apr. 23, 2010).

broadband space.[298]

Members of Congress also are asking the Commission to abandon the Title II route citing the investment and economic risk that they fear will come with it. Here is a segment of a letter from 74 Democratic House Members:

> The uncertainty this proposal creates will jeopardize jobs and deter needed investment for years to come. The significant regulatory impact of reclassifying broadband service is not something that should be taken lightly and should not be done without additional direction from Congress. We urge you not to move forward with a proposal that undermines critically important investment in broadband and the jobs that come with it.[299]

In fact, a large bipartisan majority of Congress – consisting of at least 291 Members – has weighed in asking the Commission to discard this idea or at least to wait for Congress to act. In other words, a commanding majority of the directly elected representatives of the American people do not want the FCC to try to regulate broadband Internet access as a monopoly phone service.

If my colleagues feel compelled to act, however, I hope that they would keep an open mind about an idea I have proffered for a couple of years now and that would certainly withstand appeal. In the absence of new rules, which already have started to create uncertainty and will be litigated in court for years, let us create a new role for the FCC to spotlight allegations of anti-competitive conduct while working with non-governmental Internet governance groups and consumer protection and antitrust agencies. In each of the small number of cases cited by proponents of network management rules, all were rectified quickly, without new rules. The recently announced technical advisory group could serve as a component of such an endeavor.

Additionally, it is my hope that instead of diverting precious resources towards creating new regulations, we focus on adopting policies that will help create abundance, competition and jobs. For instance, we could recapture the bipartisan and unanimous spirit of 2008 when the Commission approved the concept of unlicensed use of the television white spaces. This effort needs to be reenergized. American consumers will benefit tremendously from the unimaginable applications and devices that will use white spaces. Use of this spectrum also is an antidote to potential anti-competitive conduct by broadband providers as it will inject more competition into the "last mile." For instance, if one last-mile broadband provider were to act in an anti-competitive way, it would risk losing its customer to a white spaces provider. Or, as the Commission unanimously stated in 2008:

> We also anticipate that these new devices will have economic benefits for consumers and businesses by facilitating the development of additional competition in the broadband market.[300]

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[298] Letter from David Honig, Counsel, Minority Media Telecommunications Council, to Marlene H. Dortch, Secretary, FCC (May 7, 2010).

[299] Letter from the Honorable Al Green *et al.*, U.S. House of Representatives, to the Honorable Julius Genachowski, Chairman, FCC (May 24, 2010).

[300] *Unlicensed Operation in the TV Broadcast Bands: Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket No. 02-380, Second Report and Order and Memorandum Opinion and Order, 23 FCC Rcd 16807, ¶ 32 (Nov. 4, 2008); Erratum, 24 FCC Rcd 109 (Jan. 9, 2009).

In sum, the Commission has many avenues it can pursue to further the cause of more broadband deployment and adoption without having to take on the risks associated with a Title II classification. I respectfully ask my colleagues to listen to the growing chorus of a large and bipartisan majority of voices in Congress and consider these different paths in lieu of the course they are embarking upon now. In the meantime, I fundamentally disagree with the premise that has been offered to support this item. As a result, I respectfully dissent.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Framework for Broadband Internet Service*, GN Docket No. 10-127

Thank you Austin, and to your team for your superb work on this item. It is essential that we ask probing questions that enable us to gather the information required to make informed and sensible policy decisions. This Notice of Inquiry sets forth the leading theories about how we can accomplish our shared goals for broadband service in the wake of the D.C. Circuit's *Comcast* decision. It affords all interested parties – industry, public interest groups, public officials, and ordinary Americans – the opportunity to weigh in on the specific legal and policy merits of those proposals. The item succeeds in taking a difficult and combustible topic and presenting it in a way that should produce meaningful and fruitful discourse.

My fear, however, is that there are efforts underway designed to stifle at all costs our ability to engage in reasonable and productive discussion about these pressing issues. Indeed, it appears that we are a long way from a sincere debate on the merits of these proposals. There is, I believe, a great deal of misinformation being disseminated, which is creating misplaced anxiety.

Perhaps most notably, one of the current narratives being put forth is that proceeding with this inquiry – let alone a change in classification – would freeze investment in the networks. This argument, however, is specious. First, notable telecommunications analysts at firms such as Bank of America Merrill Lynch, UBS, and Goldman Sachs have each asserted that the *public* reaction by industry to the Chairman's proposal is overblown. In fact, they believe the current landscape presents a tremendous buying opportunity. As one well-regarded analyst stated:

> [T]he FCC's "Third Way" reclassification largely keeps the status quo intact, with key points being: 1) no rate regulation, 2) no unbundling, to require Cable to share its networks, 3) the forbearance is difficult to overturn, 4) no inconsistent state regulation, [(5)] provides no competitive advantage to DBS or Telco vs. Cable and [(6)] Wireless has a similar "Third Way" reclassification, which has not negatively impacted the business model.[301]

Second, the public relations campaign being waged by some may itself be the catalyst for doubts about investment. There should be no surprise when the all-out effort to spin the Chairman's proposal as one that entails extensive regulation scares off potential investors. If you yell "The sky is falling!" enough times, people will eventually take cover.

Third, as noted earlier, wireless voice communications are currently subject to a nearly identical regulatory regime, and that sector, as you know, has flourished. In fact, as some of my colleagues shared at the agenda meeting last month, the level of investment in the wireless sector has been mind-boggling. Investors and companies have poured billions and billions of dollars into an industry subject to Titles II and III. Massive investment has taken place – and continues to take place – under a parallel paradigm.

But I can understand why powerful companies balk at government oversight. They view any government authority as a threat to their unbridled freedom. Indeed, if it were up to them, we would not enact rules; but rather, rely on "voluntary organizations and forums" made up solely of industry personnel to give us advice on how to serve as a backstop for consumers. I suppose one benefit of this model is that

[301] Pull back is a buying opportunity, Cable/Satellite, Bank of America Merrill Lynch (May 6, 2010) (Jessica Reif Cohen).

I could significantly shorten my workday.

The problem for me, however, is that I truly care about ensuring that everyone has the opportunity to get broadband through our universal service program. I take seriously the threats to our cyber security. I know all too well the challenge the Internet poses to our privacy. I believe strongly that ISP speeds and bills should be transparent. And I am committed to ensuring that people with disabilities have meaningful access to all that broadband has to offer. There is no effort, no matter how well-funded and coordinated, that will undermine my belief in these essential goals.

Today's NOI is a positive step towards fulfilling some key aspects of the National Broadband Plan, among other things. I intend on working closely with those companies, organizations, and individuals who engage seriously and forthrightly with these difficult issues. By working together, I have no doubt that we can produce an outcome that both continues to foster investment and innovation and serves the American people.

Thank you, Mr. Chairman, for showing great leadership and vision. I am pleased to support this inquiry.

DISSENTING STATEMENT OF COMMISSIONER MEREDITH A. BAKER

Re: Framework for Broadband Internet Service, GN Docket No. 10-127

The foundation of a strong national broadband policy is already in place, and we do not need to alter the regulatory classification of broadband Internet access service to achieve the important goals unanimously agreed to in the Joint Statement on Broadband.[302] We have a proven way forward under the existing "information services" classification by lawfully asserting our direct and ancillary authority to address universal service reform, disability access, and other consensus policy goals.[303] I greatly appreciate the Chairman's inclusion of a robust and balanced discussion of how the Commission could proceed based upon the existing classification, and hope this demonstrates a good faith effort to reach a true bipartisan solution.

Unfortunately, I am compelled to dissent because there are significant consequences to even initiating this far-reaching proceeding. Although I generally support building robust public records to bolster the Commission's work and asking questions that lead to a developed analysis of all sides of an issue, this is the rare case where opening a proceeding creates so much regulatory uncertainty that it harms incentives for investment in broadband infrastructure and makes providers and investors alike think twice about moving forward with network investments under this dark regulatory cloud. This outcome can only harm consumers who need better, faster, and more ubiquitous broadband today. For those that suggest the D.C. Circuit forced our hand, I respectfully disagree. Nothing in the recent *Comcast* decision requires the Commission to revisit broadband's classification.

I also have significant concerns that the outcome in this proceeding has been prejudged. The Chairman has publicly endorsed the so-called "Third Way" approach in the days leading up to this Notice, and I cannot support such a conclusion. At the outset, I reject the effort to re-brand a Title II classification with forbearance as a middle ground, it is not. There will be time to address all of the legal and factual infirmities of a Title II approach for broadband, and its adverse impact on capital markets, consumer welfare, and international regulatory norms. Today, I will limit my initial comments to the central question of legal and regulatory predictability. This approach will subject the Internet and consumers to years of litigation and uncertainty. I acknowledge that retaining our Title I framework is not without some legal risk too–no approach is. It is, however, substantially less risky than reclassifying broadband and overturning forty years of Commission precedent codified by Congress, and affirmed by the courts. And, if legal certainty is paramount, only Congress has the ability to provide the Commission with clear jurisdictional footing and direction to move forward to tackle the challenges of the broadband age.

It is also important to view this proceeding in context of other recent statements in which the Commission has conveyed a pessimistic view of competition and market conditions. First, we had the National Broadband Plan that did not conclude that having more that 80 percent of Americans living in markets with more than one provider capable of offering download speeds in excess of 4 Mpbs was a success. Last month, the Commission was silent as to whether a wireless market in which 91.3 percent of Americans can choose from four or more providers is competitive. Then, in releasing consumer survey results this month, the Consumer & Governmental Affairs Bureau's headline was that 80 percent of

[302] *Joint Statement on Broadband,* GN Docket No. 10-66, FCC 10-42 (Mar. 16, 2010).

[303] Remarks of Commissioner Meredith Attwell Baker at Broadband Policy Summit VI, The Proven Way: A Regulatory Approach to Promote the Public Interest by Creating Jobs, Fostering Investment, and Driving Broadband Opportunity (June 10, 2010).

households do not know their broadband speeds. The more important and positive fact to me was that 91 percent of consumers are satisfied with their broadband speed, yet that finding received significantly less attention. The next test will be the section 706 report in which the Commission will have to evaluate whether broadband deployment is timely and reasonable, a finding that has been made in the affirmative in every prior report. Taken as a whole, I have concerns that these statements represent a view that government should try to engineer better results, and a Title II classification would certainly provide a stronger platform from which to take a more intrusive regulatory approach. I recognize that industry alone will not solve every challenge and no commercial market is perfect, but I fear that a more proactive broadband regulatory approach would adversely affect consumers, competition, and investment.

I want to thank the staff for the hard work that went into this item, and I truly appreciate that this *Notice* does not close the door on Title I. I agree with the Chairman that we share many of the same policy goals, and I commit to working with my colleagues constructively on a consensus broadband agenda. Reclassifying and regulating an entire sector of the Internet is not necessary to achieve this. I am hopeful that this proceeding will not divert the agency's or industry's resources and attention away from addressing the core spectrum, broadband adoption, and broadband deployment challenges facing our nation in the months to come.