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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

EX PARTE OR LATE FILED

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

*Ex Parte* Submission  
WT Docket No. 96-198

Dear Ms. Salas:

Please find attached a copy of a paper entitled, "Ancillary Jurisdiction and Section 255." This analysis is submitted on behalf of the Cellular Telecommunications Industry Association for consideration in the rule making involving the implementation of Section 255.

Copies of this letter and the accompanying attachment are being submitted in accordance with Section 1.1206.(b) of the Commission's Rules, 47 C.F.R. § 1.1206(b).

Sincerely,



Philip L. Verveer  
Jennifer A. Donaldson

cc: Chairman William Kennard  
Commissioner Susan Ness  
Commissioner Harold Furchtgott-Roth

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# CTIA

Building The Wireless Future

Cellular Telecommunications Industry Association

**Brian F. Fontes**

Senior Vice President for  
Policy and Administration

July 7, 1999

The Honorable William E. Kennard  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.E., 8<sup>th</sup> Floor  
Washington, D.C. 20054

**Re: Implementation of Section 255 of the  
Telecommunications Act of 1996  
WT Docket No. 96-198**

Dear Chairman Kennard:

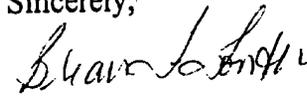
This letter is to follow up on our meeting of June 22, 1999, in which the Cellular Telecommunications Industry Association ("CTIA") met with you and your staff to express CTIA's grave concerns about the direction in which the Commission plans to expand the scope of Section 255 to include certain "information" and "enhanced" services, *i.e.*, voice mail, interactive menus, and Internet telephony. Apparently, some consideration has been given to whether such expansion can be accomplished pursuant to the doctrine of ancillary jurisdiction or by declaring the services to be "adjunct to basic" and therefore "telecommunications services." Attached is a well-documented, legal analysis of the appropriate use and limits of the doctrine of ancillary jurisdiction and the reclassification of services as "adjunct to basic." CTIA submits this document in its efforts to assist the Commission in its deliberations on this matter.

As you know, CTIA strongly supports accessibility, and will continue to work with the Commission and the appropriate consumer organizations to ensure that wireless telecommunications services and equipment are accessible and usable by individuals with disabilities, if readily achievable. While CTIA has demonstrated its on-going support and commitment to accessibility, it does not and cannot support the improper use of ancillary jurisdiction or redefining of information services as adjunct to basic telecommunications services as a means to achieve the Commission's goal.

CTIA, again, strongly urges the Commission to consider adopting a Further Notice in order to provide an opportunity to supplement the record on this specific issue, particularly when there is very little, if any, evidence in the record to support the proposed action and when the likelihood of a judicial challenge is great.

Thank you for the opportunity to work with the Commission on implementing Section 255, and CTIA looks forward to the July 14<sup>th</sup> Open Meeting. If you should need additional information, please do not hesitate to contact me at (202) 736-3215.

Sincerely,



Brian F. Fontes

Attachment (1)

cc: Kathy Brown  
Christopher Wright  
Tom Sugrue  
Ellen Blackler  
Elizabeth Lyle

## ANCILLARY JURISDICTION AND SECTION 255

### I. INTRODUCTION

Section 255 of the Telecommunications Act of 1996 requires manufacturers of telecommunications equipment or customer premises equipment ("CPE") and providers of telecommunications services -- where readily achievable -- to ensure access to such equipment and services by persons with disabilities.<sup>1</sup> In recent months, several parties have asked the Commission to expand the scope of Section 255's telecommunications access obligations to include "information" and "enhanced" services.<sup>2</sup> Some consideration apparently has been given to whether this could be accomplished pursuant to the doctrine of ancillary jurisdiction or by declaring the services to be "adjunct to basic" and therefore "telecommunications services."

As a legal matter, the doctrine of ancillary jurisdiction does not enable the Commission to exercise jurisdiction over all enhanced services in an effort to regulate them under Section 255. Moreover, Congress' codification of the definition of "information services" limits the Commission's discretionary powers to redefine significantly the line between basic and enhanced services.

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<sup>1</sup> 47 U.S.C. § 255(a), (b).

<sup>2</sup> See Ex Parte Submission, "Implementation of Section 255 of the Telecommunications Act of 1996: A Practical Approach to Defining Telecommunications Services," filed by the Alexander Graham Bell Association, American Council of the Blind, American Foundation for the Blind, American Society for Deaf Children, American Speech-Language-Hearing Association, Gallaudet University, League for the Hard of Hearing, National Association of the Deaf, Self Help for Hard of Hearing People, Inc., Telecommunications for the Deaf, Inc., United Cerebral Palsy Associations, and World Institute on Disability, in WT Docket No. 96-198 (filed Feb. 5, 1999) ("Feb. 5 Ex Parte").

There are important issues that require full consideration on the record prior to any attempt by the Commission to bring a new set of services and providers under a particular regulatory regime. It is necessary to gain a better understanding of the extent of the problem that persons with disabilities have in accessing enhanced or information services such as voice mail, interactive menus, Internet telephony, and products such as software -- prior to any final determinations regarding jurisdiction and the purposes to which it would be exercised. Blanket assertions that "a narrow interpretation of Section 255 [to exclude information and enhanced services] would result in the denial of access by individuals with disabilities to a number of key telecommunications services"<sup>3</sup> does not quantify the scope and breadth of the problem posed by a lack of access nor does it address the possible costs<sup>4</sup> of overcoming the problem. Without more, the Commission has little basis in the record to expand upon Congress' clear intention by regulating enhanced and information services for purposes of Section 255. Nor, as a matter of policy, should it do so without carefully considering the possible negative consequences associated with such action, including the inevitable unintended consequences for dynamism in the information services business.

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<sup>3</sup> Feb. 5 Ex Parte at 1. Similarly, the Commission should seek to quantify the extent that deaf and hard of hearing people "are unable to complete telephone calls that use interactive voice responses and audiotext information services" and how persons with disabilities are excluded from accessing voice mail when the intended party is unavailable. Id. at 6.

<sup>4</sup> The costs need to be measured in standard monetary terms. But they also need to be measured in terms of the consequences of deviating from a fundamental policy against regulating enhanced and information services widely regarded as very beneficial. See Section III.C. infra.

**II. TO FALL WITHIN ANCILLARY JURISDICTION, THE ACTIVITY MUST BE COVERED BY SECTION 2(a) OF THE COMMUNICATIONS ACT.**

**A. Ancillary Jurisdiction Is Real Jurisdiction.**

Under the doctrine of ancillary jurisdiction, the Commission may exercise jurisdiction over new forms of communications. Properly understood, the doctrine requires the existence of genuine jurisdiction over communications by wire or communications by radio as set forth in Sections 1 and 2(a) of the Communications Act of 1934, as amended.<sup>5</sup> Ancillary jurisdiction is not a device that permits the Commission to reach beyond the personal and subject matter jurisdiction found in the statute. It is real, not penumbral, jurisdiction. It is sometimes misunderstood to permit the assertion of jurisdiction over entities and activities that impinge upon or otherwise affect regulated enterprises or regulatory goals, *i.e.*, activities in the neighborhood of communications by wire or radio. That type of misunderstanding appears to underlie the proposal here. In this case, the Commission cannot exercise ancillary jurisdiction over enhanced or information services, unless the particular services could be considered communications by wire or radio.

Moreover, ancillary jurisdiction does not provide the Commission with blanket authority to regulate all aspects of a particular communications service and/or provider or to employ any regulatory device that might seem efficacious. In essence, ancillary jurisdiction is a principle of limitation. Where ancillary jurisdiction is involved, the Commission may only regulate something over which it has actual jurisdiction in circumstances where specific statutory instructions are lacking and do so by reference to analogous provisions in the Communications Act.

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<sup>5</sup> 47 U.S.C. §§ 151, 152(a).

**B. To Exercise Ancillary Jurisdiction, The Commission Must Ensure That The Activity Involved Is Communications By Radio Or By Wire And That Its Regulation Is Reasonably Ancillary To The Effective Performance Of Its Duties.**

The Communications Act of 1934 grants the Commission plenary authority over interstate wire and radio communications. Section 1 vests the Commission with the duty to regulate "interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . .".<sup>6</sup> Section 2(a), in turn, provides the Commission subject matter and in personam jurisdiction over all interstate and foreign communication by wire and radio, and to all persons engaged within the United States in such communication or such transmission of energy by radio.<sup>7</sup> While the sweeping language of Section 2(a) suggests a comprehensive jurisdictional mandate, and the definitions of "radio communication"<sup>8</sup> and "wire communication"<sup>9</sup> in Section 3 include items and services incidental to

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<sup>6</sup> 47 U.S.C. § 151.

<sup>7</sup> 47 U.S.C. § 152(a) ("The provisions of this act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio . . .").

<sup>8</sup> 47 U.S.C. § 153(33) ("The term 'radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission").

<sup>9</sup> 47 U.S.C. § 153(52) ("The term 'wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission").

such communication, the Commission's power is not unlimited. As noted, a service must first qualify as communication by wire or radio before the Commission's ancillary jurisdiction may even attach.

As the courts have emphasized, Congress recognized its inability to predict developments in the dynamic sphere of communications and consequently provided the Commission with significant discretion and authority to regulate within the scope of its expertise.<sup>10</sup> Restrictions on the Commission's ability to address new issues or problems concerning interstate radio and wire communication would impair the realization of the Commission's mandate to safeguard and to promote the public interest. The Commission's scope of authority extends beyond matters expressly mentioned in the Communications Act.<sup>11</sup> Congress' experience in dynamic regulation led it to adopt an approach in which it "define[d] broad areas for regulation and . . . establishe[d]

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<sup>10</sup> See, e.g., F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)("Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."); see also National Broadcasting Co. v. U.S., 319 U.S. 190, 218-19 (1943)("True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. . . . [T]he Act gave the Commission not niggardly but expansive powers."); see also Philadelphia Television Broadcasting Co. v. F.C.C., 359 F.2d 282, 284 (D.C. Cir. 1966)("Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry").

<sup>11</sup> See, e.g., National Broadcasting Co., 319 U.S. at 219 ("While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency").

standards for judgment adequately related to their application to the problems to be solved."<sup>12</sup> While these areas are large,<sup>13</sup> they are not all-encompassing. They cannot include enhanced or information services that cannot also be considered communications by wire or radio.

Over the years, particularly in cases involving cable television, the Supreme Court and the circuit courts have defined and refined the ancillary jurisdiction doctrine. In United States v. Southwestern Cable Co., the Supreme Court first discussed the parameters of the Commission's ancillary jurisdiction, considering the issue of whether the Commission had the authority to regulate cable television systems under the Communications Act.<sup>14</sup> While the Court acknowledged that nothing in the Act confers on the Commission explicit authority to regulate cable television, it reasoned that "[n]othing in the language of § 152(a) . . . limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions."<sup>15</sup>

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<sup>12</sup> Id. at 219-20.

<sup>13</sup> The Communications Act also contains several additional provisions which confer general regulatory authority on the Commission. Section 4(i) allows the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Similarly, Section 303(r) grants the Commission the power to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . ." 47 U.S.C. § 303(r). The Communications Act comprises "a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest." Philadelphia Television Broadcasting, 359 F.2d at 284.

<sup>14</sup> 392 U.S. 157 (1968).

<sup>15</sup> Id. at 172.

Citing the broad language of Section 2(a), *i.e.*, communications by wire and communications by radio, the Court determined that if left unregulated, cable television would impair the Commission's abilities to carry out its responsibilities with respect to broadcasting.<sup>16</sup> The Court held that the Commission was permitted to regulate cable television systems to the extent that such regulation was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."<sup>17</sup>

Over the next decade, the courts addressed the doctrine repeatedly. In *U.S. v. Midwest Video Corp.*,<sup>18</sup> the Court, in a plurality opinion, noted that the authority upheld in *Southwestern* was the authority to not only protect Commission regulation of broadcasting, but also to "promote the objectives for which the Commission had been assigned jurisdiction over broadcasting."<sup>19</sup> Accordingly, the Court agreed that because the Commission's rule was designed to further long-established regulatory and policy goals in broadcasting, it was "reasonably ancillary to the Commission's jurisdiction over broadcast services," and therefore a valid exercise of Commission authority.<sup>20</sup>

In *Midwest II*,<sup>21</sup> the Court found that the Commission had exceeded the limits of its ancillary jurisdiction by imposing common carrier obligations on cable services.<sup>22</sup> The Court

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<sup>16</sup> Id. at 175-76.

<sup>17</sup> Id. at 178.

<sup>18</sup> 406 U.S. 649 (1972), reh'g denied, 409 U.S. 898 (1972) ("Midwest I").

<sup>19</sup> Id. at 667.

<sup>20</sup> Id. at 669.

<sup>21</sup> *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689 (1979) ("Midwest II").

observed that while Section 3(h) directly prohibited the Commission from treating broadcasters as common carriers, it did not "explicitly limit the regulation of cable systems."<sup>23</sup> Citing Midwest I, the Court emphasized that "without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under § 2(a) would be unbounded."<sup>24</sup> Congress had not delegated to the Commission "unrestrained authority."<sup>25</sup>

In Capital Cities Cable, Inc. v. Crisp,<sup>26</sup> the Court affirmed its earlier pronouncements on ancillary jurisdiction,<sup>27</sup> including the indispensability of a finding of jurisdiction pursuant to section 2(a).<sup>28</sup>

In NARUC v. F.C.C.,<sup>29</sup> the D.C. Circuit held that ancillary jurisdiction "is really incidental to, and contingent upon, specifically delegated powers under the Act."<sup>30</sup> The court found that "each and every assertion of jurisdiction . . . must be independently justified as reasonably ancillary to the Commission's power over broadcasting."<sup>31</sup>

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<sup>22</sup> Id. at 695-96.

<sup>23</sup> Id. at 702, 706.

<sup>24</sup> Id. at 706.

<sup>25</sup> Id.

<sup>26</sup> 467 U.S. 691 (1984).

<sup>27</sup> Id. at 699-700.

<sup>28</sup> Id. (citing Southwestern, 392 U.S. at 177-78).

<sup>29</sup> 533 F.2d 601 (D.C. Cir. 1976).

<sup>30</sup> Id. at 612.

<sup>31</sup> Id.

In GTE Service Corp. v. F.C.C.,<sup>32</sup> the Second Circuit considered the Commission's ancillary jurisdiction over the data processing industry.<sup>33</sup> The court upheld the Commission's rules regulating common carriers' entry into the data processing service market.<sup>34</sup> Comparing the data processing regulations to regulation of cable in Southwestern, the court held that:

even absent explicit reference in the statute, the expansive power of the Commission . . . includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service.<sup>35</sup>

Accordingly, the court refused to limit the Commission's jurisdiction where Congress had not explicitly done so, and where the Commission acted for the purpose of its mandated goal to ensure "adequate public communications service."<sup>36</sup>

The court, though, struck Commission rules that were targeted at the unregulated data processing affiliate as opposed to the carrier. Because these rules were "for data processing" which was beyond the Commission's jurisdictional "charge and [those] which the Commission itself. . . decline[d] to regulate," the court held that the Commission's actions were not authorized

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<sup>32</sup> 474 F.2d 724 (2nd Cir. 1973).

<sup>33</sup> The Commission's rules set out the circumstances and conditions under which common carriers could offer data processing services to other entities. Id. at 726. The Commission created these rules primarily due to concerns that a common carrier's provision of data processing services (a type of service admittedly not within the Commission's regulatory jurisdiction) would allow it to discriminate against other services in favor of its own, cross subsidize, improperly price common carrier services, and otherwise engage in anticompetitive activities. Id. at 729.

<sup>34</sup> Id. at 730.

<sup>35</sup> Id. at 731.

<sup>36</sup> Id. at 731, n.9.

under the Communications Act, and not adequately related to the Commission's regulatory goals under Title II.<sup>37</sup>

These cases demonstrate that there are several significant hurdles that must be overcome prior to the lawful exercise of ancillary jurisdiction. As explained below, the Commission's prior refusals to regulate enhanced services acknowledged and respected these limitations.

The Commission acknowledged in the Second Computer Inquiry that "any service or activity in which communications is a component" should not *a priori* come under the jurisdiction of Section 2(a).<sup>38</sup> Rather, the "question of whether a specific activity is 'communications' is a mixed question of fact and law, and thus one which . . . is most appropriately left for a case-by-case determination when the necessary facts are before" the Commission.<sup>39</sup> For this reason, the Commission refused at that time to "resolve in the abstract questions of whether any enhanced services, while clearly not within [its] Title II jurisdiction, may be otherwise within" its jurisdiction under Section 2(a).<sup>40</sup>

According to the Commission's explanation in the Second Computer Inquiry, ancillary jurisdiction required a three-prong analysis: (1) a threshold Section 2(a) finding that the matter involved communications by wire or radio; (2) a determination whether the proposed exercise of

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<sup>37</sup> Id. at 733.

<sup>38</sup> Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Memorandum Opinion and Order, 84 FCC 2d 50, ¶ 121 (1980) ("Computer II Recon. Order").

<sup>39</sup> Id.

<sup>40</sup> Id.

jurisdiction "would serve a relevant statutory purpose," and (3) a judgment "whether there [wa]s an adequate factual predicate shown for the proposed agency action."<sup>41</sup> The Commission noted:

assertion of Commission jurisdiction, and determinations of the limits of our ancillary jurisdiction, require a more pragmatic response; such issues must be dealt with in a specific, factual, and individualized context. Whether a given activity falls within or outside Section 2(a) of the Act is a factual determination which cannot be divorced from the concrete matter in dispute or from consideration of the relevant statutory purpose to be served by any assertion of jurisdiction. Moreover, assuming the statutory jurisdictional nexus exists, the exercise of such jurisdiction through specific agency action must be predicated on the need to satisfy an overall statutory purpose or objective.<sup>42</sup>

It is clear that under the courts' and the Commission's conception of ancillary jurisdiction, the Commission has not compiled a record in this proceeding that would permit it to establish a regulatory regime for voice mail, interactive menus, Internet telephony, or other services falling within the enhanced or information services category.

**C. The Commission Is Unable Categorically To Assert Ancillary Jurisdiction Over Enhanced Services.**

There may well be certain enhanced services that qualify as communications by wire or radio. The Commission, however, has not established such a link -- nor has it tried to do so, particularly based on the evidence, or lack thereof, in the record. If the enhanced service at issue is not a telecommunications service, but nevertheless communications by wire or radio, the Commission may or may not have ancillary jurisdiction over it. The extent of the Commission's jurisdiction is limited by reference to analogous substantive provisions in the Communications Act. In the enhanced services category only those actions by the Commission reasonably ancillary

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<sup>41</sup> Id. at ¶ 123 (citing Southwestern Cable, Midwest I, and Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 36, 40-43 (D.C. Cir. 1977)).

<sup>42</sup> Id. at ¶ 124.

to the statutory purposes and regulatory means found in Title II are likely to withstand judicial scrutiny.

Congress has established clear limitations on the Commission's jurisdictional authority. The Commission has no discretion to exercise its ancillary jurisdiction and regulate in the "void" when it has no underlying jurisdiction under Section 2(a), and/or Congress has removed any room for discretionary interpretation, *i.e.*, filled the void.

**D. Congress Has Limited The Commission's Ability Simply To Re-Define Telecommunications Services And Equipment To Include Enhanced Services And Software.**

Certain parties have requested the Commission to exercise its authority to reclassify certain enhanced or information services as "basic" and "adjunct to basic."<sup>43</sup> The Commission's ability to reclassify these services is limited by the passage of the Telecommunications Act of 1996.

The terminology used by Congress in enacting Section 255, "telecommunications services" and telecommunications equipment," requires some interpretation by the Commission. They are not wholly unambiguous. With the passage of time and changes in technology, the terms may evolve to a limited extent.

However, there are real and significant limitations on the Commission's discretionary authority. Enhanced services is a Commission-determined concept. The Commission created the category of enhanced services, establishing the distinction between "enhanced" and "basic" communications services.<sup>44</sup> The task of infusing meaning to its classifications was once within the

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<sup>43</sup> Feb. 5 Ex Parte at 5.

<sup>44</sup> Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 FCC 2d 384, ¶ 93 (1980) ("Computer II Order")

sole discretion of the Commission subject only to jurisdictional limits on its authority.<sup>45</sup> In 1996, though, Congress enacted a definition of "information services" which was derived largely from the Commission's definition of enhanced services.<sup>46</sup> As a result, the Commission no longer has completely free reign to re-classify information services as basic or adjunct to basic. Rather, it is subject to certain statutory limitations as a result of Congress' creation of a new category of services. The Commission no longer has the ability on utilitarian grounds to reclassify all or a portion of enhanced services as basic, to the extent that such services are within the four corners of Congress' definition of "information services."

There also are practical considerations that should discourage attempts to re-define certain enhanced services as basic. As the Commission noted almost 20 years ago:

We appreciate there can be disagreement as to the line we have drawn between basic and enhanced services. Plausible arguments can be tendered for drawing it elsewhere. At the margin, some enhanced services are not dramatically dissimilar

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("A basic transmission service is one that is limited to the common carrier offering of transmission capacity for the movement of information."); *id.* at ¶ 96 ("In offering a basic transmission service . . . a carrier essentially offers a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information."); *id.* at ¶ 97 (an enhanced service "is any offering over the telecommunications network which is more than a basic transmission service . . . [including] computer processing applications [that] are used to act on the content, code, protocol, and other aspects of the subscriber's information . . . subscriber interaction with stored information . . . [and] voice or data storage and retrieval applications. . .").

<sup>45</sup> See, e.g., Computer II Recon. Order at ¶ 112 ("even if we shift somewhat the boundary between Title II regulated services and other service . . . we have acted within our discretion as an administrative agency").

<sup>46</sup> Congress defined an "information service" as "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." 47 U.S.C. § 153(20).

from basic services or dramatically different from communications as defined in [the] Computer I inquiry. But any attempt to draw the line at this margin potentially could subject both the enhanced service providers and us to the prospect of literally hundreds of adjudications over the status of individual service offerings. We have noted the danger that such proceedings could lead to unpredictable or inconsistent regulatory definitions. . . . Such proceedings also could consume a very significant proportion of the resources of this agency.<sup>47</sup>

Furthermore, in interpreting Section 255, the Commission must recognize that Congress' silence has meaning. At the same time that it codified the definition of "information services," it adopted Section 255. Congress could easily have mandated that information services be subject to Section 255, but it did not.<sup>48</sup> In at least one case where Congress chose to grant the Commission discretion in determining which services would be covered under a specific regulatory (and costly) regime, it did so explicitly.<sup>49</sup> That is not the case with Section 255.

### **III. THE COMMISSION SHOULD ISSUE A FURTHER NOTICE TO ADDRESS THE ISSUES SURROUNDING ACCESS TO ENHANCED SERVICES.**

#### **A. The Commission Needs To Conduct A Factual Inquiry Before Exercising Its Ancillary Jurisdiction or Re-Classifying Certain Enhanced Services.**

Any attempt to exercise ancillary jurisdiction over a particular enhanced service or, as an alternative, to re-classify a particular enhanced service as "basic" or "adjunct to basic" requires a factual inquiry. The category "adjunct to basic" was created and has been employed on occasion

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<sup>47</sup> Computer II Recon. Order at ¶ 111.

<sup>48</sup> The fact that Congress codified the definition of information services and enacted Section 255 simultaneously undercuts suggestions that Congress was unaware when enacting Section 255 of the consequences of its decision to limit its application.

<sup>49</sup> See, e.g., 47 U.S.C. § 254(c)(1) (Recognizing the evolving nature of the telecommunications market, Congress granted the Commission limited discretion in determining which telecommunications services should be supported by Federal universal service support mechanisms).

to remedy anomalies stemming from the strict basic/enhanced dichotomy of the Second Computer Inquiry. The Commission described and defined the "adjunct to basic" category in the 1985 NATA Centrex Order.<sup>50</sup> In the Order, the Commission described the category as "exceptional" and "narrow," applicable to "services which facilitate the use of the basic network without changing the nature of basic telephone service."<sup>51</sup> This formulation has been repeated often, along with the admonition that services that involve access to a data base are presumed to be enhanced.<sup>52</sup>

Over time, the Commission has found a variety of network-based services to be adjunct to basic, including speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller I.D., call tracing, call blocking, call return, repeat dialing, call tracking, certain Centrex features,<sup>53</sup> itemized billing, traffic management services, and voice encryption services.<sup>54</sup>

The Commission's assessment of whether a service met the two-pronged NATA Centrex test has always been a particularized and fact-based inquiry, because the regulatory consequences

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<sup>50</sup> North American Telecommunications Association; Petition for Declaratory Ruling Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, 101 FCC 2d 349 (1985), modified on recon., 3 FCC Rcd 4385 (1988). ("NATA Centrex Order").

<sup>51</sup> Id. at ¶ 28.

<sup>52</sup> U S West Communications, Petition for Computer III Waiver, 11 FCC Rcd 1195, ¶¶ 27-28 (1995).

<sup>53</sup> Implementation of Non-Accounting Safeguards, 11 FCC Rcd 21905, ¶ 107, n. 245 (1996) ("Non-Accounting Safeguards").

<sup>54</sup> Telephone Company - Cable Television Cross-Ownership Rules, 7 FCC Rcd 5781, ¶ 59, n. 150 (1992).

of finding a service to be either basic or -- after passage of the 1996 amendments to the Communications Act -- a telecommunications service, are extensive.

The requirement of a careful, individual assessment in the case of voice mail, interactive menus, and Internet telephony in view of the 1996 codification of the definition of "information service"<sup>55</sup> is especially pronounced. The Commission has heretofore identified voice mail as an information service.<sup>56</sup> Even more fundamentally, "the Commission [has] concluded that 'adjunct to basic' services are also covered by the 'telecommunications management exception' to the statutory definition of information services under the 1996 Act."<sup>57</sup>

Taken together, the adjunct to basic precedents and the statutory definition of information service limit the Commission's flexibility to engage in a sweeping declaration that certain activities are telecommunications services because they are adjunct to basic. In this regard, the adjunct to basic concept is similar to the ancillary jurisdiction doctrine. Both require precise predicates.

**B. Prior To Regulating Enhanced Services, The Commission Must Assess The Extent Of The Problem Associated With The Current Lack Of Access To Enhanced Services.**

Several consumer organizations claim that persons with disabilities currently are unable to use telecommunications services, equipment, and CPE, because many enhanced services are not

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<sup>55</sup> 47 U.S.C. § 153(20).

<sup>56</sup> Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 13 FCC Rcd 8061, ¶ 73 (1998).

<sup>57</sup> Barbara Esbin, "Internet Over Cable: Defining the Future in Terms of the Past," OPP Working Paper No. 30, August, 1998, at 52-53 (rel. Sep. 23, 1998) (citing Non-Accounting Safeguards, 11 FCC Rcd. at 21958).

accessible.<sup>58</sup> Although these organizations make assertions, there appears to be no effort or any evidence in the record to date documenting the extent or scope of the access problem.

Such documentation or evidence is a prerequisite under the doctrine of ancillary jurisdiction as well as the adjunct-to-basic jurisprudence. Before the Commission may determine that a particular enhanced service should be regulated under Section 255, it is obligated to verify the analogy. Is the enhanced service truly analogous to the services with which it is being compared? Is the form of regulation of the statutory analogies appropriate for the enhanced service? Are there material complications deriving, for example, from circumstances in which some providers of the enhanced service are subject to the FCC's jurisdiction and others are not? Likewise, the Commission is obligated to undertake the specific review required by the NATA Centrex Order.<sup>59</sup> This requirement largely replicates the standard administrative law considerations: the need for record evidence of a problem requiring a remedy, and a rational link between the problem identified and the solution created. While the Commission has expansive authority to implement comprehensive regulations that are in the public interest, "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."<sup>60</sup> As the Commission has recognized, prior to exercising subject matter jurisdiction, it must establish that its regulation "is directed at protecting or promoting a

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<sup>58</sup> See Feb. 5 Ex Parte.

<sup>59</sup> NATA Centrex at ¶ 16.

<sup>60</sup> Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 36 (D.C. Cir. 1977) (citation omitted) (emphasis added). If the Commission determines that there is a sufficient problem warranting government intervention, there must also be a "rational connection between the facts found and the choice made." Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

statutory purpose. In some instances, that means not regulating at all, especially if a problem does not exist."<sup>61</sup>

**C. The Commission Should Fully Consider The Broader Consequences Of Subjecting Enhanced Services To Regulation.**

In his recent speech before the National Cable Television Association, Chairman Kennard ascribed great value to the Commission's decision not to regulate enhanced services. The Chairman noted that "the best decision government ever made with respect to the Internet was the decision that the Commission made 15 years ago NOT to impose regulation on it."<sup>62</sup>

These are shared sentiments. Commissioner Ness recently noted that "[t]he growth of the Internet owes much to the Commission's farsighted Computer II decision two decades ago, which fenced off information services from regulation by either the FCC or the state commissions."<sup>63</sup>

Commissioner Powell, addressing a different type of access proposal, indicated that "given the dynamic record of Internet market dynamics, I start with a rule of decision -- a burden of proof, if you will. I am of the view that anyone advocating the extension or intrusion of regulation into such a vibrant market bears a heavy burden of proving that the 'public' will be

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<sup>61</sup> Computer II Order, at ¶ 126 (citing Home Box Office; City of Chicago v. F.P.C., 458 F.2d 731, 742 (D.C. Cir. 1971) ("regulation perfectly reasonable and appropriate in the face of a given problem [is] highly capricious if that problem does not exist")).

<sup>62</sup> "The Road Not Taken: Building a Broadband Future for America," Prepared Remarks of William E. Kennard, Chairman, Federal Communications Commission, before the National Cable Television Association, Chicago Ill., at 4 (Jun. 15, 1999).

<sup>63</sup> "Competition and Deregulation: Pursuing Congress's Vision," Prepared Remarks of Susan Ness, Commissioner, Federal Communications Commission, before the Federal Communications Bar Association, Washington, D.C., at 4 (Jan. 20, 1999).

harm, absent doing so." <sup>64</sup> He added an important note of caution that applies equally to the present situation. "[W]e should carefully assess the costs of regulation, including direct costs, indirect costs and opportunity costs. It is not that difficult to identify a problem and suggest the answer in terms of a general rule or provision of law. In so doing, however, it is easy to ignore the enormous costs and complexities of trying to actually craft and implement rules that are clear, effective and efficient." <sup>65</sup>

As the Commissioners noted, the information services market, of which enhanced services are a part, has achieved explosive growth and innovation. <sup>66</sup> According to recent data compiled by the U.S. Department of Commerce, information technology industries that make electronic commerce ("e-commerce") grow have contributed on an average 35% of the nation's real economic growth in the last several years. <sup>67</sup> There is more e-commerce now than was predicted by 2000. <sup>68</sup>

The Commission should proceed very carefully with respect to a market segment where unregulated competitive forces have created such enormous gains to the economy. If the

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<sup>64</sup> "Remarks," (As Prepared for Delivery) of Michael K. Powell, Commissioner, Federal Communications Commission, before the Federal Communications Bar Association (Chicago Chapter), Chicago, IL., at 7 (Jun. 15, 1999).

<sup>65</sup> Id.

<sup>66</sup> See 47 U.S.C. § 230(a)(1) ("The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.").

<sup>67</sup> U.S. Department of Commerce, The Emerging Digital Economy II, Executive Summary (Jun. 1999).

<sup>68</sup> Id. at 5.

Commission determines to regulate certain information/enhanced services such as voice mail, interactive menus, and perhaps Internet telephony, its decision will have significant repercussions. Selecting which enhanced services are covered by Section 255 today creates a slippery slope on which other enhanced services inevitably are put at risk. If such services are regulated for Section 255 concerns, the temptation to extend regulation for other purposes increases. The Commission can expect an exponential increase in the amount of rent-seeking behavior.<sup>69</sup>

Simply stated, the Commission cannot regulate enhanced services -- even for the worthy purposes set out in Section 255 -- without having to reverse -- at least in part -- a decision it made years ago and that has since been endorsed by Congress.<sup>70</sup>

#### **IV. CONCLUSION**

The Commission lacks the authority to subject enhanced and information services to access obligations under Section 255 simply by a sweeping declaration of ancillary jurisdiction. Before it can take any action to expand upon the literal terms of Section 255, it must assure itself that genuine jurisdiction under Section 2(a) exists, that a statutorily-defined regulatory goal exists, that the regulatory methods to be deployed are appropriate and precedented in the sense of being closely analogous to statutory provisions, and that the approach is not otherwise barred. This requires individualized, fact-based analysis of a type that cannot be undertaken on the basis of the existing record.

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<sup>69</sup> Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself, 347 (1978) ("Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition").

<sup>70</sup> 47 U.S.C. § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").