

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of |) | |
| |) | |
| Inquiry Concerning High-Speed |) | GN Docket No. 00-185 |
| Access to the Internet Over Cable |) | |
| and Other Facilities |) | |
| |) | |
| Internet Over Cable Declaratory |) | |
| Ruling |) | |
| |) | |
| Appropriate Regulatory Treatment |) | CS Docket No. 02-52 |
| for Broadband Access to the |) | |
| Internet Over Cable Facilities |) | |

COMMENTS OF THE NATIONAL COMMUNICATIONS SYSTEM

The Secretary of Defense, through duly authorized counsel, pursuant to Section 201 of the Federal Property and Administrative Services Act of 1949, 40 USC Section 481, and the memorandum of understanding between the Department of Defense and the General Services Administration dated November 27, 1950, hereby files these comments on behalf of the Manager of the National Communications System (NCS)¹ in his capacity as its Executive Agent.

¹ Executive Order No. 12472, "Assignment of National Security and Emergency Preparedness Telecommunications Functions", April 3, 1984 (49 Fed. Reg. 13471, 1984), established the National Communications System which consists of an administrative structure involving the Executive Agent, the National Security Emergency Preparedness Committee (originally the Committee of Principals, renamed in Executive Order 13231, "Critical Infrastructure Protection in the Information Age"), the Manager, and the telecommunications assets of the Federal organizations represented on the NS/EP Committee. Section 1(e) of EO 12472 designates the Secretary of

Statement of Interest and Position

In paragraph 77 of the NPRM, the Commission, having issued a Declaratory Ruling that concludes cable modem service is an interstate information service, seeks comment on "whether the Commission should exercise its Title I authority here with regard to the provision of cable modem service." The Secretary's comments are in response to this request. They only address national security and emergency preparedness (NS/EP) communications. It is the Secretary's position that the Commission may and should exercise its Title I authority over cable modem service to the extent such authority is needed to promote NS/EP communications.

Current Status of National Security/Emergency Preparedness Communications

Traditional Title II carriers currently provide the government with priority NS/EP communications pursuant to various programs administered by the NCS. These programs are authorized by the Commission's Rules and Regulations. One example is the Telecommunications Service Priority (TSP) System rules set forth in Part 64.401 of the Commission's Rules and Regulations.² Another example is the Priority

Defense as Executive Agent of the NCS. There are 22 Federal agencies represented on the NS/EP Committee.

² "The communications common carrier shall maintain and provision and, if disrupted, restore facilities and services in accordance with the policies and procedures set forth in Appendix A to this part."

Access Service (PAS) set forth in Part 64.402 of the Commission's Rules and Regulations.³ In addition, the Government Emergency Telecommunications Service (GETS), while not provided under Commission rules, was the subject of a letter from the Commission staff in response to an inquiry about potential carrier liability under Section 202(a) of the Act.⁴

In order to remain relevant in the Twenty-First Century, current NCS programs for NS/EP communications services supported by the Commission's Title II regulatory authority must expand and grow with the rapidly evolving and converging telecommunications and information systems infrastructure. This will ultimately involve the development of future NCS programs to ensure priority NS/EP communication services for voice, data, and video over multiple electronic platforms (e.g. wireline, cable, wireless and satellite) utilizing evolving technologies and capabilities, such as the Internet and broadband access. Many of these evolving electronic platforms and/or

³ "Commercial mobile radio service providers that elect to provide priority access service to National Security and Emergency Preparedness personnel shall provide priority access service in accordance with the policies and procedures set forth in Appendix B to this part."

⁴ Letter from James R. Keegan, Chief, Domestic Facilities Branch, Common Carrier Bureau, to Carl W. Smith, National Communications System, August 30, 1995. The letter concluded, "...call-by-call priority is a feature of the federally managed GETS program. Lawful tariffs implementing that service have gone into effect; thus it appears that the request for declaratory ruling filed on November 29, 1993 is moot..."

technologies will not be subject to the Commission's Title II authority.

The Commission's Ancillary Jurisdiction Under Title I As Authority to Require NS/EP Services over Cable Modem Services

To assure the provisioning of NS/EP communications in future NCS programs involving technologies falling outside the scope of Title II of the Communications Act of 1934, the Commission may and should exercise its Title I ancillary jurisdiction. This should include any future NCS program that may require broadband access to the Internet through cable modem services or any other means.⁵

Ancillary jurisdiction may be employed in the Commission's discretion where the Commission (1) has subject matter jurisdiction over the communications at issue under Title I, and (2) its assertion is reasonably required to perform an express statutory obligation. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

⁵ Other means include broadband access to the Internet through wireline facilities, if the Commission rules in its separate proceeding that wireline broadband Internet access services are "information services" under Title I of the Act and not "telecommunications services" under Title II of the Act. See *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking ("Wireline Broadband NPRM") (rel. Feb 15, 2002). See also the Comments of the Secretary of Defense filed in that proceeding.

I. The Commission Has Subject Matter Jurisdiction

Subject matter jurisdiction for NS/EP communications and all other communications by wire or radio flows from three sections in Title I. Section 1 establishes the Commission "(f)or the purposes of regulating interstate and foreign commerce in communications by wire or radio..." Section 2 grants the Commission jurisdiction over "all interstate and foreign communications by wire or radio" and "all persons engaged within the United States in such communication..." Section 3 defines "communication by wire" and "communication by radio" as including "the transmission ... of writing, signs, signals, pictures and sounds of all kinds ... including the instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission".

Based on these three sections, it is evident that the existence of the communication by wire or radio and not the technology employed (e.g. wireline, cable, or otherwise), affords the Commission subject matter jurisdiction. Accordingly, the Commission has subject matter jurisdiction over cable modem services that provide broadband access to the Internet.

II. NS/EP Communications Are Reasonably Required to Perform an Express Statutory Obligation

On numerous occasions the Commission has acknowledged the NS/EP mandate assigned in Title I of the Communications Act. Most recently, it cited Section 1 stating, "The purpose of our PAS Rules is to comply with our statutory mandate "to make available... a rapid, efficient Nation-wide...communication service...for the purpose of national defense, (and) for the purpose of promoting safety of life and property..." The PAS Rules enable CMRS providers to offer PAS to federal, state and local public safety personnel to help meet the Nation's NS/EP needs."⁶ A similar mandate exists for other NS/EP communications, such as cable modem services that provide broadband access to the Internet.

Without the exercise of the Commission's ancillary jurisdiction, the future of effective NS/EP communications is in doubt. Both the Commission's TSP and PAS rules were adopted in part to assure there would be one, nationwide system providing those services. NS/EP interests will not be served by a hodgepodge of potentially conflicting state and local regulations or service offerings selectively chosen by providers. NS/EP interests will also not be served if the Commission's authority supports some but not

⁶ In the Matter of VoiceStream Wireless Corporation Petition for Waiver of Section 64.402 of the Commission's Rules, WT docket No. 01-133, Memorandum Opinion and Order, released April 3, 2002.

all of the NS/EP communications needs in the Next Generation Network.

Conclusion

With cable modem service being classified as an information service, Title I ancillary jurisdiction may and should be used by the Commission to support future NCS programs involving this medium to access the Internet. The Commission's authority under Title I will be essential to assuring the continued availability of NS/EP communications.

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