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August 2, 2005

**Via Electronic Filing**

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 02-52; GN Docket No. 00-185; CC Docket Nos. 02-33, 95-20 & 98-10
Notice of *Ex Parte* Submission

Dear Ms. Dortch:

Amazon.com, along with other leading Internet content providers such as Yahoo!, eBay, Google, Interactive Corp. and others have advocated that the Commission exercise its jurisdiction to impose non-impairment requirements on broadband network operators. In December 2002, we submitted a memorandum analyzing the Commission's jurisdiction and concluding that the Commission had authority to adopt a non-impairment requirement. The attached memorandum provides an update of that analysis, and addresses recent Commission decisions in the *E911/VoIP* and *Madison River* matters and the Supreme Court's statement in *Brand X* that further establish Commission authority. This memorandum also demonstrates that the D.C. Circuit decision in *American Library* is inapposite because broadband services plainly involve communication by wire, and thus fall squarely within the Commission's Title I authority.

Please direct any questions to the undersigned.

Sincerely,

Jonathan D. Blake
*Counsel to Amazon.com*

Attachment

cc: Ms. Jessica Rosenworcel
Ms. Michelle Carey
Mr. Scott Bergmann
Mr. Russ Hanser
Mr. Daniel Gonzalez

# ANALYSIS OF THE FCC'S JURISDICTION TO ADOPT ENFORCEABLE PROTECTIONS TO PRESERVE UNFETTERED CONSUMER ACCESS TO INTERNET SERVICES

This memorandum assesses the authority of the Federal Communications Commission ("Commission") to adopt enforceable protections to ensure that broadband service providers, including cable operators and ILECs, and ISPs, do not anticompetitively impair consumer access to the information, products, and services made available on the Internet by myriad independent websites.[1] A number of commenters, including Amazon.com, Professor Larry Lessig and the Coalition of Broadband Users and Innovators, have proposed a rule or policy that would be applicable to all broadband platform providers that would preserve consumers' continuing access to the range of choices they have come to expect from sites made available to them through the Internet (sometimes referred to as "net neutrality"). This analysis shows, as supported by the Supreme Court in *National Cable and Television Ass'n v. Brand X Internet Serv.*, that the Commission has the requisite authority to adopt enforceable protections to preserve and promote net neutrality.[2] Moreover, the D.C. Circuit's recent decision in *American Library Association v. FCC* is inapposite where, as here, the proposed safeguards implicate a service communicated by wire and where the proposed safeguards are consonant with specific statutory provisions.[3]

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[1] An earlier version of this analysis was filed on behalf of Amazon.com in CS Docket No. 02-52, GN Docket No. 00-185, and CC Docket Nos. 02-33, 95-20 and 98-10. See Appendix A, attached to Letter from Paul E. Misener to Marlene H. Dortch (Dec.2, 2002).

[2] *See* 125 S. Ct. 2688 (2005).

[3] *See American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).

## I. THE FCC POSSESSES ANCILLARY JURISDICTION SUFFICIENT TO ADOPT NON-IMPAIRMENT/NONDISCRIMINATION REQUIREMENTS ON BROADBAND SERVICE PROVIDERS.

*Applicable Title I provisions* – The Commission has determined that cable modem service is an interstate information service and has tentatively concluded that wireline broadband service is as well.[4] In Title I of the Communications Act, Congress granted the Commission broad ancillary jurisdiction to regulate interstate communications, including new technologies as they evolve. The source of the Commission's authority is located in various provisions of Title I. In Section 1 of the Act, Congress established the Commission 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."[5] Section 2 gives the Commission authority over "all persons engaged within the United States in providing

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[4] *See In re* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-77, ¶ 33 (2002) ("*Cable Modem Notice*"); *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, *Notice of Proposed Rulemaking*, FCC 02-42, ¶ 16 (2002) ("*Wireline Broadband Notice*"). In making this determination the Commission found that cable modem service was not a "telecommunications service" subject to Title II regulation, *Cable Modem Notice* ¶ 33, a decision recently affirmed by the Supreme Court in *Brand X*. Although the Commission has not addressed how it would classify broadband services delivered over other platforms, such as wireless or satellite, it has indicated an interest in adopting technology-neutral broadband policies and could well decide that these, too, are information services. *See Cable Modem Notice* ¶ 6 ("We strive to develop an analytical approach that is, to the extent possible, consistent across multiple platforms."); *Wireline Broadband Notice* ¶ 6; Roger Golden & Marc Berger, *Broadband and the Current Debate in Washington*, Broadband Networking News, May 7, 2002 ("The FCC has consistently stated that broadband regulations (if any) must not be drafted in terms of a specific technology and must not favor any current (or future) providers of broadband services or applications.").

[5] 47 U.S.C. § 151. The Commission recognized that Section 1 could serve as the basis for exercise of its ancillary jurisdiction in the *Notice of Proposed Rulemaking* in the cable broadband proceeding. *See Cable Modem Notice* ¶ 79. *See also In re* IP-Enabled Services, *Notice of Proposed Rulemaking*, FCC 04-28, ¶ 46 (2004).

such service" and over "all interstate and foreign communication by wire or radio,"[6] which "include[s] all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission."[7] Section 4(i) grants the Commission authority 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."[8] The Commission has relied on one or more of these provisions as the basis for its ancillary authority over interstate communications services.[9] The Act empowers it to follow the same course here.

*Title I precedents* – The FCC's ancillary jurisdiction is well-established and has been interpreted broadly. The *Cable Modem Notice* itself observes that "[f]ederal courts have long recognized the Commission's authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to existing Commission statutory authority."[10] The Supreme Court first upheld the Commission's exercise of its ancillary jurisdiction in *United States v. Southwestern Cable Co.*, concluding that the Commission could regulate emerging cable television service under its ancillary authority, notwithstanding the absence of a specific

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[6] 47 U.S.C. § 152(a).

[7] 47 U.S.C. § 153(52). The Act defines "communication by wire" as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between points of origin and reception of transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." *Id.*

[8] 47 U.S.C. § 154(i).

[9] The Communications Act grants the Commission authority to regulate a range of communications services, including telecommunications services, cable services, and information services. Information services are a subset of communications services that may only be regulated pursuant to the Commission's Title I jurisdiction.

[10] *Cable Modem Notice* ¶ 75.

statutory mandate.[11] In its recent *Brand X* decision, the Supreme Court noted that although "[i]nformation-service providers ... are not subject to mandatory common-carrier regulation under Title II, ... the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications ...."[12] Thus, "the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I jurisdiction."[13] These clear statements from the Supreme Court support Commission authority to adopt enforceable requirements on entities providing services under Title I. The D.C. Circuit has similarly found it "settled beyond peradventure that the Commission may assert jurisdiction under section 152(a) of the Act over activities that are not within the reach of Title II."[14] Exercise of the Commission's ancillary jurisdiction is justified because "the Act was designed to provide the Commission with sufficiently elastic powers to readily accommodate new developments in the field of communications" to address technological advances that Congress could not have been expected to anticipate when drafting statutory language.[15]

The Commission used its ancillary jurisdiction to extend needed regulation to new communications services or previously unregulated facets of communications services. For example, the Commission:

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[11] *See United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[12] *Brand X*, 125 S. Ct. at 2696.

[13] *Id.* at 2708.

[14] *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982).

[15] *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 FCC 2d 384, 432 (1980) ("*Computer II*"); *see also Southwestern Cable*, 392 U.S. at 172 (explaining that "Congress could not in 1934 have foreseen the development of" advanced communications systems and services).

- adopted requirements that particular services available over the telephone network be accessible to persons with disabilities;[16]
- reinstated syndicated exclusivity rules for cable operators;[17]
- regulated customer premises equipment;[18]
- created the universal service fund;[19]
- imposed a multiple access requirement on AOL Time Warner as a condition of approving the merger;[20]
- imposed a nondiscrimination requirement with respect to advanced high-speed Instant Messaging services on AOL Time Warner as a condition of approving the merger;[21]
- extended the over-the-air reception devices regulatory regime to antennas used to transmit or receive fixed wireless signals;[22] and

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[16] *See In re* 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, *Report and Order and Further Notice of Inquiry*, 16 FCC Rcd 6417, 6455 (1999) ("We assert ancillary jurisdiction to extend [Section 255] accessibility requirements to the providers of voicemail and interactive menu service and to the manufacturers of equipment that perform those functions.").

[17] *See United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989).

[18] *See Computer II*, 77 FCC 2d at 453-54. The Commission recognized that it may exercise its ancillary jurisdiction to assure the nationwide availability of wire communications services at reasonable prices under Section 2 of the Act to protect or promote a statutory purpose. *See id.* at 430-34, 450-57.

[19] *See Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1315 (1988).

[20] *See In re* 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, *Memorandum Opinion and Order*, 16 FCC Rcd 6547, 6569-70 (2001) ("*AOL Time Warner Order*").

[21] *See id.* at 6610.

[22] *See In re* Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report*
(continued...)

- imposed E911 requirements on interconnected VoIP providers.[23]

The common thread in each of these situations is that the Commission exercised authority over subject matter within its general jurisdiction and issues that it had not previously regulated and where the Communications Act did not expressly and specifically authorize the Commission to take action. Thus, when the Commission exercised its ancillary jurisdiction to regulate newly emerging cable television services in the mid-1960s, it did so years before Congress adopted a statute expressly regulating these services. Similarly, although Congress had directed the Commission to make telecommunications equipment accessible to persons with disabilities, the Commission used its ancillary authority to require that equipment and service providers also make available to the disabled newer, more advanced services, such as voice mail and interactive menu services. And although Congress directed the Commission to designate 911 as the universal emergency assistance number for wireless and wireline calls, it was the Commission that recognized that growing usage of VoIP, whose regulatory classification is uncertain, required a quick response utilizing ancillary authority to address a serious problem – one of life and death – if E911 services were not made available to VoIP customers.

Although the D.C. Circuit has determined on two occasions that the Commission lacked ancillary authority to adopt specific rules, neither decision undermines the Commission's ancillary authority to regulate cable modem service. In *American Library Association*, the court's decision turned on the fact that content-protection regulations required devices to give

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*and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57*, 15 FCC Rcd 22983, 23029 (2000) ("*OTARD Extension Order*").

[23] *See In re* IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, *First Report and Order and Notice of Proposed Rulemaking*, FCC 05-116, ¶ 26 (2005) ("*E911/VoIP Order*").

effect to the broadcast flag *after* the broadcast has been completed.[24] Because the Commission's general jurisdiction grant does not encompass regulation of consumer electronics products when they are not engaged in radio or wire transmission, "the regulations rest on no apparent statutory foundation and, thus, appear to be ancillary to nothing."[25] By contrast, the subject matter of proposed broadband regulations "constitute[s] interstate communication by wire or radio, and thus [falls] within the scope of the Commission's general jurisdiction grant under Title I ...."[26] In *Motion Picture Ass'n of America v. FCC*, the court's decision was tied to the fact that the rules regulated program content, thereby implicating First Amendment issues.[27] Because the rules or policies being proposed do not involve regulation of content, the *MPAA* decision would not apply.

<u>*Appropriateness of Title I authority here*</u> – Assertion of the Commission's ancillary jurisdiction over broadband services would be consistent with the precedents established on these other occasions and, in particular, the recent *E911/VoIP Order*. It would be another application of the Commission's "long-standing policy of promoting competition in the delivery of spectrum-based communications services and . . . implement[ing] numerous

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[24] *See American Library Association*, 406 F.3d at 700, 703.

[25] *Id.* at 702.

[26] *Id.*

[27] *See Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002) ("To avoid potential First Amendment issues, the very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content.").

measures to foster entry and ensure availability of competitive choices in the provisioning of such services."[28]

The Supreme Court explained as early as 1943 that "[t]he substantial discretion generally allowed the FCC in determining both what and how it can properly regulate, is often attributed to the highly complex and rapidly expanding nature of communications technology. Because Congress could neither foresee nor easily comprehend the fast-moving developments in the field, 'it gave the Commission not niggardly but expansive powers.'"[29] These powers extend to protecting consumer access to broadband services. They also give the Commission discretion to determine the most appropriate means of ensuring such access, including a rule or rules that prevent impairment of user access to Internet information, products, and services.

The rules and policies that have been submitted in this proceeding, specifically those submitted by Amazon.com, Professor Lessig and the CBUI, are non-intrusive and limited. They have the common feature of ensuring that the current activity of the network operators continue – thus they do not require new steps from network operators as compared to what the network operators claim they are doing today. These proposals, therefore, are a modest exercise of the Commission's Title I powers.

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[28] *In re* Application of EchoStar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee), *Hearing Designation Order*, FCC 02-284, ¶ 87 (rel. Oct. 18, 2002) ("*EchoStar/DirecTV Order*"). As former Chairman Powell explained in the *Cable Modem Notice*: "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. That provision has been invoked consistently by the Commission to guard against public interest harms and anti-competitive results." *Cable Modem Notice*, Separate Statement of Chairman Michael K. Powell 70.

[29] NARUC v. FCC, 525 F.2d 630, 638 n.37 (D.C. Cir. 1976) (quoting *NBC v. United States*, 319 U.S. 190, 219 (1943)).

*Need for action now* –The *Cable Modem Notice* asked whether "the threat that subscriber access to Internet content or services could be blocked or impaired . . . [is] sufficient to justify regulatory intervention at this time,"[30] noting that the Commission was unaware of any allegations that cable operators have denied or impaired access to unaffiliated Internet content. Adoption of a non-impairment standard would be appropriate at this time for two reasons. First, it is well established that the Commission may adopt measures on the basis of the probability that entities will engage in anticompetitive behavior. The Commission has long recognized that "to promote the policies of the Communications Act, [it] may 'plan in advance of foreseeable events instead of waiting to react to them.'"[31] It has been cognizant of "the danger of inaction where the window of opportunity to preserve competition and protect the other policies of the Communications Act may be narrow because the markets are changing rapidly."[32] It has, for example, imposed prophylactic measures in the form of merger conditions when DirecTV and News Corp. merged because the transfer of control substantially increased the probability of discrimination. Proactive steps by the Commission are particularly justified here where an incumbent provider's control of the information pipe enables it to act as a gatekeeper and gives it the ability to materially impair consumer access to information, content, and services available

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[30] *Cable Modem Notice* ¶ 87.

[31] *AOL Time Warner Order*, 16 FCC Rcd at 6611 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)); *In re* Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, *First Report and Order*, 38 FCC 683, 701 (1965); *see also AOL Time Warner Order* at 6603 (imposing an Instant Messaging nondiscrimination condition on the merger of AOL and Time Warner because the transfer of control "*substantially increases the probability* that AOL's dominance in the narrowband text-messaging world will persist in the world of high-speed interactive services") (emphasis added).

[32] *AOL Time Warner Order*, 16 FCC Rcd at 6604.

on the Internet in order to benefit websites with which they will or already have ownership or contractual relationships.[33] Anticipatory regulation is appropriate for broadband as in the case of other nascent technologies and services that the Commission has sought to shield from anti-competitive practices.

Second, there is evidence in this proceeding of broadband providers impairing user access to Internet information, products, and services.[34] These examples were submitted after the observation in the *Cable Modem Notice* that there had not been complaints in this area. Broadband service providers are restricting the types of data subscribers may send and receive, imposing additional charges for sending or receiving particular content, and restricting what equipment may be attached to the network.[35] They are also reserving the right to impose further discriminatory restrictions in the future.[36] These actions indicate broadband service providers' willingness to use their bottleneck control to impair user access to the Internet.[37]

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[33] Where the broadband service provider is affiliated (by ownership, contract, or otherwise), it also has an incentive to engage in discriminatory practices.

[34] *See, e.g.*, Comments of the Center for Digital Democracy, Consumer Federation of America, Media Access Project, Association of Independent Video and Filmmakers, National Alliance of Media Arts and Culture, and the United Church of Christ, Office of Communication, Inc. in CS Docket No. 02-52, at 11-13 (June 17, 2002); Comments of the High Tech Broadband Coalition in CC Docket No. 02-52, at 10-13 (June 17, 2002); Reply Comments of the National Association of Broadcasters in GN Docket No. 00-185 & CS Docket No. 02-52, at 6-16 (Aug. 6, 2002).

[35] *See* HTBC Comments at 10-12.

[36] *See id.* at 12-13.

[37] As Commissioner Copps has stated, "[c]ompanies that control choke-points on the network have a built-in incentive to restrict and control customer use of that network." Remarks of Michael J. Copps, "The Beginning of the End of the Internet? Discrimination, Closed Networks, and the Future of Cyberspace," New America Foundation, Washington D.C., at 4 (Oct. 9, 2003) (*"New America Foundation Remarks"*).

Third, there is additional recent evidence demonstrating the real threat posed by telecommunications or broadband provider impairment of user access to Internet resources, in particular access to nascent and competing VoIP services. The Commission has already been forced to act, in the context of a telephone company, to prevent the exact harms that are threatened in the cable and DSL context. In response to complaints that Madison River Communications was blocking VoIP traffic, the Commission took action and entered into a consent decree in which the company agreed to refrain from blocking VoIP traffic and ensure that blocking would not recur.[38] Reports of VoIP impairment have also involved, among others, a wireless broadband provider that has blocked VoIP services while awaiting roll-out of its own service,[39] and, internationally, the dominant Mexican telephone company that has been subjected to customer complaints that it has blocked access to VoIP provider web sites used to register new customers and perform customer service.[40] Concerns about bottleneck control and impairment of access are therefore far more than speculative. As Commissioner Copps has noted, "[n]ow we face scenarios wherein those with bottleneck control may be able to discriminate against both users and content providers – users and content providers that they don't have commercial

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[38] *See In re* Madison River Communications, LLC, *Order* and *Consent Decree*, File No. EB-05-IH-0110 (Mar. 3, 2005). In issuing the order the Commission invoked, in part, section 4(i) of the Communications Act. Former Chairman Powell explained that "[t]he industry must adhere to certain consumer protection norms if the Internet is to remain an open platform for innovation." Press Release, *FCC Chairman Michael K. Powell Commends Swift Action to Protect Internet Voice Services* (Mar. 3, 2005).

[39] Paul Kapustka, "Clearwire May Block VoIP Competitors," *Advanced IP Pipeline / CMP United Business Media* (Mar. 25, 2005) (available at http://www.advancedippipeline.com/shared/article/printablePipelineArticle.jhtml?articleId=159905772).

[40] Ben Charny, "Mexico Telephone Operator Under VoIP Fire," *CNET News.com* (Apr. 25, 2005) (available at http://news.com.com/2102-7352_3-5681542.html?tag=st.util.print).

relationships with, don't share the same politics with, or just don't want to offer access to for any reason at all .... Some of this is already happening."[41]

For these reasons the Commission is fully justified, using its ancillary authority, to adopt a rule to ensure user access to broadband services. Only through such action is it possible to ensure, as Commissioner Copps states, that "[t]hose with bottleneck control over the transmission facilities that are the on-ramps to the Internet [provide a] guarantee -- not a principle, not a best effort, but a guarantee -- that all comers will be treated equally and that they will not use their power over bottlenecks to discriminate between different content, users or usage."[42]

## II. EXERCISE OF ANCILLARY JURISDICTION IS APPROPRIATE FOR THE FCC TO PERFORM ITS EXPRESS STATUTORY OBLIGATIONS.

The Commission's authority to exercise its ancillary jurisdiction is not, of course, unlimited. Instead, "[t]he principal limitation upon, and guide for, the exercise of these additional powers which Congress has imparted to this agency is that the Commission regulation must be directed at protecting or promoting a statutory purpose."[43] Although the Commission's ability to exercise its ancillary jurisdiction is not limitless, it retains "broad discretion so long as its actions further the legislative purposes for which the Commission was created and are not

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[41] *New America Foundation Remarks* at 5-6.

[42] *Id.* at 8.

[43] *Computer II*, 77 FCC 2d at 433. The first prong of the ancillary jurisdiction test, that the Commission's general jurisdiction grant under Title I cover the regulated subject, is met where, as here, there is "communication by wire." 47 U.S.C. § 152(a). *See American Library Association*, 406 F.3d at 702.

contrary to the basic statutory scheme."[44] In this case the objective is preserving the public's access to Internet-based information, products, and services, free from impairments imposed by discriminatory practices. That objective, in turn, is supported by a number of relevant statutory provisions, several of which the Commission's *Cable Modem Notice* identified as providing adequate basis for its exercising ancillary jurisdiction.[45]

*Section 706 of the Act* – A key statutory objective that supports the Commission's Title I ancillary authority in this instance is Section 706 of the Telecommunications Act of 1996. It charges the Commission with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by . . . regulatory forbearance, measures that promote competition in the local telecommunications market or other regulating methods that remove barriers to infrastructure investment."[46]

The Commission has held that the principal purpose of this provision "is to facilitate the use of advanced services, of which residential high-speed Internet access services are one kind."[47] Thus, in the *E911/VoIP Order*, the Commission determined that Section 706 provided a basis for ancillary jurisdiction to adopt an E911 requirement for interconnected VoIP services. The Commission noted that Internet-based services such as VoIP are commonly

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[44] *In re* Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Decision and Order*, 96 FCC 2d 781, 787 n.15 (1984).

[45] *See Cable Modem Notice* ¶ 79 ("Other statutory grounds might include the goals stated in section 230(b) of the Act, the Title VI goal of assuring 'that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public,' and section 706 of the 1996 Act.") (footnotes omitted).

[46] Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 153 (codified at 47 U.S.C. § 157 nt).

[47] *AOL Time Warner Order*, 16 FCC Rcd at 6569-70.

accessed through broadband facilities, and that "[t]he uniform availability of E911 services may spur consumer demand for interconnected VoIP services, in turn driving demand for broadband connections, and consequently encouraging more broadband investment and deployment consistent with the goals of section 706."[48] The statutory mandate to "encourag[e] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" also provides clear authority for the Commission to protect consumers' ability to access their choice of Internet-based content, services, and applications. Similar to the circumstances identified by the Commission in the *E911/VoIP Order*, the wide availability of Internet-based content that can be accessed by all consumers will encourage demand for broadband service and consequently encourage the goals of deployment and investment expressed by Section 706.[49] Simply put, consumer ability to access advanced services drives deployment. Companies that provide this consumer content and applications will not invest in it without assurances that users will be able to reach their offerings without interference from broadband service providers. The success of broadband Internet access is dependent on users being able to access the products and services they want to reach with their fast connections.

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[48] *E911/VoIP Order*, ¶ 31. Similarly, the Commission determined that Section 706 provided a statutory basis for exercise of its ancillary jurisdiction to extend protections for over-the-air reception devices to antennas used to transmit or receive fixed wireless signals.[48] *OTARD Extension Order*, 15 FCC Rcd at 23030. The Commission also found that Section 706, as well as Section 230, justified imposing a multiple access requirement in the AOL Time Warner merger, since discrimination by the merged entity against unaffiliated ISPs would "thwart the deployment of advanced telecommunications capability to all Americans by limiting choice in the realm of residential high-speed Internet access services and, potentially, by threatening the survival of ISPs unaffiliated with AOL Time Warner as consumers migrate from narrowband to high-speed services."[48] *AOL Time Warner Order*, 16 FCC Rcd at 6570-71.

[49] *See E911/VoIP Order* ¶ 31.

*Section 230 of the Act* – Modest regulation ensuring Internet-consumer choice would also be justified by Sections 230(b)(1), (2) and (3) of the Communications Act. Section 230(b)(1) establishes a national policy of "promot[ing] the continued development of the Internet and other interactive computer services and other interactive media,"[50] and Section 230(b)(2) supports "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services."[51] While Section 230(b)(2) goes on to state that the market for Internet services should be "unfettered by Federal and State regulation,"[52] this does not mean that the Commission is prevented from adopting limited safeguards to preserve *and foster* unfettered consumer choice with respect to Internet sites, which is the characteristic of the Internet that made possible its extraordinary growth and unlocked its unparalleled potential for providing benefits to the public. Thus, a rule or policy protecting net neutrality would not "fetter" the Internet market as prohibited by Section 230(b)(2), no more than the E911/VoIP requirement would; instead, that kind of pro-consumer policy would "promote [the Internet's] continued development." Meanwhile, Section 230(b)(3) sets forth the policy "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services."

Section 230(b)(1) provides a clear jurisdictional reference for the Commission's exercise of its Title I ancillary authority. Adopting a non-impairment principle to ensure that a user's access to the Internet is unfettered "promote[s] the continued development of the Internet

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[50] 47 U.S.C. § 230(b)(1).

[51] 47 U.S.C. § 230(b)(2).

[52] *Id.*

and other interactive computer services and other interactive media." Development of the Internet is driven by the availability to consumers of exciting Internet content and devices, and part of the Internet's core attraction is that the user is empowered to select the material he or she desires. Companies that develop and provide this content would like to expand the menu of innovative content and services available to consumers, but their ability to do so depends in large measure on users' fair and unimpeded access to service offerings. Content providers cannot be expected to make substantial new investments absent assurances that consumers will be able to reach their products without discriminatory interference from broadband service providers.

Section 230(b)(2) also provides jurisdictional support. The non-impairment rules or policies would "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." A free market cannot exist without consumer choice, and the proposed rules would ensure that users are able to reach the Internet information, products, and services of their choice free from discriminatory interference by broadband service providers. It would also enhance the vibrancy and competitiveness of the Internet market. Such a requirement is not fettering, but the opposite, and would advance the statutory goal embodied in Section 230(b)(2) because unfettered access to the Internet cannot exist without such a restriction, a targeted and quite narrow restriction on broadband service providers.[53]

Additionally, the proposed rules or policies would support the national policy, embodied in Section 230(b)(3), of "encourag[ing] the development of technologies which

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[53] The Commission relied upon Section 230(b)(2) in exercising its ancillary jurisdiction in imposing a multiple access requirement on cable operator AOL Time Warner, explaining that it "would imperil the continued existence of a vibrant and competitive free market for the development of the Internet" to give the cable operator "the ability and the incentive to discriminate against unaffiliated ISPs on its own cable platform." *AOL Time Warner Order*, 16 FCC Rcd at 6570.

maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services." Users cannot maximize *their* control over what information they receive via the Internet if their broadband service provider is limiting the Internet information, products, and services they may access. The information that a user receives over the Internet should be within that user's control.[54]

*Title VI of the Act* – Title VI of the Communications Act is another basis for the Commission's exercising ancillary jurisdiction to impose targeted consumer-choice regulations under these circumstances. The purpose of Title VI is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[55] Although Section 521, which is part of Title VI, is specific to services delivered through the cable pipe, which would include cable modem Internet access service, it is also consistent with other, broader provisions of the Act that favor a diversity of voices[56] and that express the government's substantial interest in promoting a diversity of views through multiple technology media.[57] Broadband providers that discriminate with respect to, or block consumers' access to, Internet content, services, and applications would deny consumers access to "the widest possible diversity of information sources" and impede a "diversity of media voices,

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[54] Section 230(b)(3) should not be read to preclude individuals from using filtering or other software that limits access to particular Internet content. When a user installs a filter to, for example, limit access to pornography, it is her decision, not her broadband service provider's, to limit that access.

[55] 47 U.S.C. § 521.

[56] *See* 47 U.S.C. § 257(b).

[57] *See* 47 U.S.C. § 521 nt.

vigorous economic competition, [and] technological advancement."[58] Accordingly, the Commission may carry out its statutory mandate by adopting a rule to prevent impairment to discrimination in the public's access to Internet sites.

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For the reasons described above, the Commission clearly has ancillary jurisdiction under Title I of the Communications Act and other provisions of the Act to adopt enforceable protections to combat impairments to consumer access to Internet sites.

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[58] 47 U.S.C. § 257(b); *see also* Comments of the ACLU in CS Docket No. 02-52, at 2 (June 17, 2002) ("The tremendous growth and success of the Internet is a result of the lack of centralized control over how the network is used. No company, individual, or institution has the power to decide what applications are allowed to run by users at the ends of the network, what kinds of data can be moved through the network, or whose data moves faster."); Reply Comments of the Digital Media Association in CS Docket No. 02-52, at 3 (Aug. 6, 2002) ("If consumer choice of information, applications or devices is limited by broadband providers, the most compelling aspects of the Internet will be harmed, and competition in the greatest information marketplace heretofore seen will be severely diminished.").