

**The Federal Communications Commission Has Statutory Authority To Fund  
Universal Broadband Service Initiatives**

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## INTRODUCTION

As the President, Congress, and the Commission have all recognized, universal access to broadband service is a policy goal of the highest order.<sup>1</sup> Every day, broadband becomes more essential for individuals, businesses, governments, schools, and health care providers. Those who lack access to broadband are unable to reap the benefits of the incredible technological advances of the last few decades. Given the pace of technological change and innovation, this “digital divide” will become even more entrenched in coming years unless policymakers act promptly to develop a comprehensive universal access plan for broadband.

An immediate step the Commission can take is to provide funds for universal broadband deployment and subscribership. Elsewhere, AT&T has presented a comprehensive plan for transitioning federal Universal Service Fund initiatives to wireline and wireless broadband services.<sup>2</sup> In this paper, we present an analysis of the Commission’s legal authority to take such an action. For the reasons explained below, the Commission has authority under 47 U.S.C. § 254 and Title I of the Communications Act, 47 U.S.C. § 151 *et seq.*, to fund broadband Internet access deployment and subscribership using universal service.

## DISCUSSION

### THE COMMISSION HAS AUTHORITY UNDER SECTION 254 AND TITLE I TO FUND BROADBAND USING UNIVERSAL SERVICE

#### A. Section 254 Requires the Commission To Advance Broadband Deployment and Subscribership

Universal service has been a cornerstone of federal telecommunications policy since the passage of the Communications Act of 1934 (“Act”). In enacting that statute, Congress instructed the Commission to craft regulations in order “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 communications service with adequate facilities at reasonable charges.” 47 U.S.C. § 151.

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<sup>1</sup> The President has promised to extend broadband access “through the heart of inner cities and rural towns all across America.” Charlie Savage & David Kilpatrick, *Technology’s Fingerprints on the Stimulus Package*, N.Y. Times, at B3 (Feb. 11, 2009), available at <http://www.nytimes.com/2009/02/11/technology/11corporate.html?ref=business>; see also American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 1115, § 6001(k)(2) (to be codified at 47 U.S.C. § 1305) (directing the Commission to “ensure that all people of the United States have access to broadband capability”); Release, *FCC Chairman Genachowski Commends NCTA’s Adoption Plus (A+) Program*, 2009 WL 4323853 (Dec. 1, 2009) (quoting Chairman Genachowski: “Ensuring that all Americans have access to affordable broadband service is a national priority – one that the Commission is actively working on as part of our National Broadband Plan.”).

<sup>2</sup> See Comments of AT&T Inc., *In re High-Cost Universal Service Support*, WC Dkt. No. 05-337, at 19-25 (filed May 8, 2009); Comments of AT&T Inc., *In re High Cost Universal Service Support*, WC Dkt. No. 05-337 (filed Apr. 17, 2008).

The Telecommunications Act of 1996 (“1996 Act”), moreover, expressly charges the Commission to use federal universal service programs to promote modern communications technologies, including broadband technologies. In Section 254(a), Congress directed the Commission to initiate and complete a universal service program consistent with the goals established by Congress. *See id.* § 254(a); *Universal Service Report and Order*, 12 FCC Rcd 8766, ¶ 437, *aff’d*, *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (“*TOPUC I*”). And in Section 254(b), Congress listed six principles that “shall” serve as the basis “for the preservation and advancement of universal service.” The second principle – which provides that “[a]ccess to advanced telecommunications *and information services* should be provided in all regions of the Nation,” 47 U.S.C. § 254(b)(2) (emphasis added) – states in no uncertain terms that Congress’s universal service objectives are not limited to traditional telephone service, but include advanced communications services and information services as well. The third principle underscores this point: “Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including . . . advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas.” *Id.* § 254(b)(3).

These principles are not just aspirational. Section 254(b) provides that universal service policies “shall” be based on the enumerated principles. “This language indicates a mandatory duty on the FCC.” *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001). The Commission may discount one of the listed principles in Section 254(b) only if there is a “direct conflict” with another principle or statutory obligation. *See id.* at 1199-200.<sup>3</sup> Under Section 254(a) and (b), in short, the Commission is duty-bound to put in place a universal service program that furthers “[a]ccess to advanced telecommunications and information services . . . in all regions of the Nation,” and that enables consumers in rural areas of the country to obtain “access to telecommunications and information services, including . . . advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas.” In today’s world, “advanced telecommunications and information services” *is* broadband Internet access. The Commission simply cannot fulfill its statutory duty under Section 254(a) and (b) without putting in place a comprehensive program to fund broadband Internet access.

To be sure, there is tension between that understanding and the text of Section 254(c)(1), which states that “[u]niversal service is an evolving level of *telecommunications services* that the Commission shall establish periodically under this section.” 47 U.S.C. § 254(c)(1) (emphasis

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<sup>3</sup> There is no conflict between universal broadband service and the other four principles listed in Section 254(b). Those principles include: access to quality services at just and reasonable rates; “equitable and nondiscriminatory” contributions to the universal service fund; “specific, predictable and sufficient” universal service support mechanisms; and access to advanced telecommunications services for schools, health care providers, and libraries. 47 U.S.C. § 254(b)(1), (4)-(6). There is also no conflict between universal broadband service and the competitive neutrality principle that the Commission adopted pursuant to its authority under Section 254(b)(7). *Universal Service Report and Order* ¶ 47.

added). Retail broadband Internet access service is an “information service,” not a “telecommunications service” as defined in 47 U.S.C. § 153(46). *See National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 987 (2005). Thus, assuming the term “telecommunications service” refers to the defined term in Section 153(46),<sup>4</sup> if the Commission reads Section 254(c)(1) to define the scope of supportable services under Section 254, it would exclude retail broadband Internet access service. But the statute need not be read that way. Other evidence in the statutory text makes clear that Congress did not intend to disable the Commission from using universal service to support information services. In particular, as noted above, Section 254(b) *requires* the Commission to use universal service to promote access to “advanced telecommunications and information services,” which it cannot do unless it supports broadband Internet access. In addition, Section 254(c) itself rejects a static focus on legacy technologies, referring instead to an “*evolving* level of telecommunications services that the Commission shall establish periodically under this section.” 47 U.S.C. § 254(c)(1) (emphasis added), and expressly authorizing the Joint Board and the Commission to “modif[y] . . . the definition of the services that are supported by Federal universal support mechanisms,” *id.* § 254(c)(2).

This latter point is particularly relevant here. Section 254(c)(2)’s invitation to “modif[y]” the “definition” of universal service refers not to the “telecommunications services” that are to be supported (as in Section 254(c)(1)), but rather to the “services” that are to be supported. As the Commission explained in connection with Section 254(h), “the varying use of the terms ‘telecommunications services’ and ‘services’ . . . suggests that the terms were used consciously to signify different meanings.” *Universal Service Report and Order* ¶ 439. And, just as the Commission concluded that the use of the broader term “services” in Section 254(h)(1)(B) authorized the Commission to support *non*-telecommunications services despite the fact that Section 254(h) itself is titled “*Telecommunications Services for Certain Providers*,” *see id.* (emphasis added), so too does Congress’s use of that same broad term in Section 254(c)(2) authorize the Commission to “modif[y] . . . the definition” of universal service to include *non*-telecommunications services, despite the fact that Section 254(c)(1) refers to “telecommunications services.”

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<sup>4</sup> *But cf. Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 276 (D.C. Cir. 2009) (“it is not impermissible under *Chevron* for an agency to interpret an imprecise term differently in two separate sections of a statute which have different purposes”) (internal quotation marks omitted); *American Council on Educ. v. FCC*, 451 F.3d 226, 232 (D.C. Cir. 2006) (upholding the Commission’s different interpretations of “information service” under the 1996 Act and Communications Assistance for Law Enforcement Act, even though the two definitions were “virtually identical”); *see also Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2515 (2009) (“[T]he statutory definition of ‘political subdivision’ in §14(c)(2) does not apply to every use of the term ‘political subdivision’ in the Act”); *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 764 (1949) (courts should not “pervert the process of interpretation by mechanically applying definitions in unintended contexts”); *Weaver v. United States Info. Agency*, 87 F.3d 1429, 1437 (D.C. Cir. 1996) (“Identical words may have different meanings where . . . the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different.”) (internal quotation marks omitted).

Furthermore, in fulfilling Congress’s mandate (in Section 254(a), (b), and (c)(2)) to identify supported services, the Commission must consider whether such services are “essential to education, public health, or public safety”; are “subscribed to by a substantial majority of residential customers”; are “being deployed in public telecommunications networks”; and “are consistent with the public interest, convenience, and necessity.” *Id.* § 254(c)(1)(A)-(D). Broadband plainly meets each of these criteria. As the Commission has explained: “New, innovative broadband products and applications . . . are fundamentally changing not only the way Americans communicate and work, but also how they are educated and entertained, and care for themselves and each other.” Notice of Inquiry, *In re a National Broadband Plan for Our Future*, 24 FCC Rcd 4342, 4344 (2009). “Especially in otherwise isolated areas, high-speed Internet access puts people in contact with resources that are physically out of reach, improving individual welfare by increasing access to educational, medical, commercial, and professional resources.”<sup>5</sup> The Joint Board therefore has specifically determined that broadband meets the statutory criteria for inclusion in the federal universal service program: “Americans have made a collective judgment that broadband is an important service. . . . [I]t should be eligible for support under Section 254, with the goal of making it available to all.” *In re High-Cost Universal Service*, 22 FCC Rcd 20477, 20491-92 (2007); *see also id.* ¶ 59 (“More than half of the households in the United States currently subscribe, and at least one high speed provider is providing service in 99.6% of the zip codes in the country.”).<sup>6</sup>

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<sup>5</sup> John M. Peha, The Brookings Institution, *Bringing Broadband to Unserved Communities*, at 5 (July 2008), available at [http://www.brookings.edu/~media/Files/rc/papers/2008/07\\_broadband\\_peha/07\\_broadband\\_peha.pdf](http://www.brookings.edu/~media/Files/rc/papers/2008/07_broadband_peha/07_broadband_peha.pdf); *see also* Comments of AT&T, Inc., *In re a National Broadband Plan for Our Future*, GN Dkt. No. 09-51, at iii (filed June 8, 2009) (Broadband “can enable the transportation system to run more smoothly, deliver new efficiencies to the electric grid, expand access to the health-care system while improving its quality, provide new work options that enable us to cut travel and reduce emissions, connect students to expanded educational resources, bring increased effectiveness to government, and otherwise improve the lives of citizens in countless ways that we have only begun to understand.”).

<sup>6</sup> The Commission must act upon Joint Board recommendations within one year. *See* 47 U.S.C. § 254(a)(2). Shortly before the one-year deadline on the 2007 recommendations, the Commission, without explanation, chose “not to implement these recommendations at this time.” *In re High-Cost Universal Service Support*, 24 FCC Rcd 6475, 6492 (2008). The Commission has requested further comment on identical issues. *See* Notice of Inquiry, *In re a National Broadband Plan for Our Future*, 24 FCC Rcd 4342, 4354 (2009) (“[S]hould we make broadband a ‘supported service’ eligible to receive support directly from the High-Cost and Low-Income programs?”); Public Notice, *Role of the Universal Service Fund and Intercarrier Compensation in the National Broadband Plan* (Nov. 13, 2009) (seeking comment on whether to “transition [universal service] funding into a redesigned mechanism that explicitly funds broadband”). The Commission need not, however, await another Joint Board recommendation before acting to direct federal universal service funds to broadband. *See Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 328 n.7 (5th. Cir. 2001) (“The statute requires consultation with the Joint Board for only the initial implementation of § 254’s universal service requirement . . . . Any consultation afterwards is permissive.”).

In short, read in its entirety, Section 254 contains competing directives: in one respect, it arguably confines the Commission to supporting only “telecommunications services” as that term is defined in Section 153(44), and in other respects it mandates that the Commission construct a universal service program that sweeps more broadly. A reading that isolates and then elevates Section 254(c)(1)’s use of “telecommunications service” over the other statutory evidence unnecessarily gives precedence to one portion of the statute and negates others. Nothing in the text of Section 254 requires that result. On the contrary, the schizophrenic nature of Section 254 is simply another example of the many ways in which the 1996 Act is not a “model of clarity.” *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). And the courts have uniformly held that the Commission has discretion to resolve such tensions in the statutory scheme in a manner consistent with Congress’s goals. *See Akhtar v. Gonzales*, 450 F.3d 587, 595 (5th Cir. 2006) (deferring to agency’s interpretation of a statute that contained conflicting indications of congressional intent); *National Ass’n of Casualty & Surety Agents v. Board of Governors of the Fed. Reserve*, 856 F.2d 282, 289-90 (D.C. Cir. 1988) (deferring to agency’s “permissible reconciliation of the inherent tension of the statute”).

## **B. Title I Complements the Commission’s Authority Under Section 254 To Fund Broadband Internet Access**

The Commission’s authority under Title I complements its authority under Section 254 and removes any possible question regarding the Commission’s authority to use universal service to support broadband Internet access service.

1. As a threshold matter, there can be no dispute that the Commission can fund *some* broadband Internet service providers. Commission precedent does not foreclose broadband Internet access providers from offering broadband “telecommunications services.” On the contrary, the Commission has given providers a choice: they may either (1) offer retail consumers solely an integrated service that inextricably intertwines broadband transmission with Internet access service, or (2) offer a pure broadband transmission service as a “telecommunications service” under Title II, which can be used (by the provider itself or by an unaffiliated retail service provider) as an input to retail service. *See Wireline Broadband Order*, 20 FCC Rcd 14853, ¶¶ 12-17, 86-90 (2005); *see also Wireless Broadband Order*, 22 FCC Rcd 5901, ¶¶ 32-33 (2007); *Broadband over Power Line Order*, 21 FCC Rcd 13281, ¶¶ 12, 15 (2006). Those providers that elect the second option by definition offer a “telecommunications service,” and the Commission unquestionably has authority to use universal service to support that service.

The question, then, is whether the Commission has authority also to support those providers that elect the first option – *i.e.*, that provide broadband transmission only as an integrated component of their retail broadband Internet access service. It does. The Commission is authorized to “perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i). This provision is the “necessary and proper clause” of the Act, *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987) (internal quotation marks omitted), granting the Commission

“sufficient flexibility to adjust itself” to the “rapidly fluctuating” nature of the communications industry, *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968) (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)).

For the Commission to exercise its “ancillary jurisdiction” under Section 4(i), two conditions must be met. See *American Library Ass’n v. FCC*, 406 F.3d 689, 693-94 (D.C. Cir. 2005). First, the subject of the regulation must be covered by the Commission’s general grant of jurisdiction under the Communications Act, which encompasses “all interstate and foreign communications by wire or radio.” 47 U.S.C. § 152(a). Broadband Internet access service self-evidently constitutes “communications by wire or radio” and thus falls within the Commission’s jurisdictional grant. Compare *id.* § 153(52) (defining “wire communication” or “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 the points of origin and reception of such transmission . . .”), with, e.g., *Wireline Broadband Order* ¶ 9 (wireline broadband Internet access service “is a service that uses existing or future wireline facilities of the telephone network” and “always and necessarily combines computer processing, information provision, and computer interactivity with data transport”).

Second, the subject of the regulation must be “reasonably ancillary to the effective performance of the Commission’s various responsibilities.” *Southwestern Cable*, 392 U.S. at 178. Here, that test is plainly met. For one thing, the Commission’s core statutory mission – as expressed in the first sentence of the Act – is “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” 47 U.S.C. § 151. Section 1 thus makes clear that universal service is the Commission’s *raison d’être*. And, as the Commission has already held in the E911 context, where a function lies at the heart of its core statutory mission, that alone is sufficient to establish authority to promulgate rules. See *E-911 Requirements for IP-Enabled Services*, 20 FCC Rcd 10245, ¶¶ 26-35 (2005) (concluding, *inter alia*, that E-911 rules for interconnected VoIP providers were “reasonably ancillary” to the Commission’s statutory duty in Section 1 to “promot[e] safety of life and property”), *aff’d sub nom. Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006). Indeed, on review of that determination, one D.C. Circuit judge took the view that the Commission’s core statutory mission in Section 1 of the Act – coupled, in that case, with Congress’s recognition elsewhere that “enhanced 911 is a high national priority” – was sufficient authority to impose legal obligations *even beyond those that are feasible to implement*. *Nuvio*, 473 F.3d at 310-11 (Kavanaugh, J., concurring) (internal quotation marks omitted). Applied here, that reasoning unquestionably supports the exercise of Commission authority: funding of universal service lies at the heart of the Commission’s core statutory mission, and widespread deployment and subscribership of broadband Internet access is without question a high national priority. The Commission’s jurisdictional analysis could stop here.

But there is more. As explained above, Section 254(a) requires the Commission to put in place a comprehensive universal service regime, and, as the Commission has stressed, that provision “does not limit support to telecommunications services.” *Universal Service Report*

*and Order* ¶ 437. At the same time, Section 254(b)(2) and (b)(3) *require* the Commission to use that regime to promote universal access to “advanced telecommunications and information services.” Again, the Tenth Circuit has described those principles as “mandatory.” *Qwest*, 258 F.3d at 1200. In order to “effective[ly] perform[ ]” its statutory obligation to promote universal service in the manner Congress intended – as well as “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,” 47 U.S.C. § 151 – the Commission simply must implement universal service for broadband Internet access. At a minimum, doing so is “reasonably ancillary” to the effective performance of the core statutory mission Congress gave to the Commission – indeed, one might plausibly say that it is not merely “reasonably ancillary,” but rather is “absolutely necessary,” to accomplish that task.

2. All of this is water under the bridge for the Commission, which has *already* relied on its Title I authority to support universal service, in circumstances that directly parallel these. In its initial report and order implementing the 1996 Act’s universal service requirements, the Commission implemented Section 254(h)’s provisions for supporting schools and libraries. As relevant here, the Commission first held that supportable services include services such as Internet access and internal connections, *see Universal Service Report and Order* ¶¶ 436-463, and then, more importantly for purposes of this discussion, it addressed *what providers* were entitled to participate. The relevant statutory text refers only to “telecommunications carriers.” *See* 47 U.S.C. § 254(h)(1)(B) (providing guidelines relating to reimbursement for “telecommunications carrier[s] providing service under” the schools and libraries program). The Commission nevertheless decided “to provide discounts for Internet access and internal connections provided by *non*-telecommunications carriers, which [it did] under the authority of sections 254(h)(2)(A) and 4(i).” *Universal Service Report and Order* ¶ 589 (footnote omitted; emphasis added).<sup>7</sup> The Commission reasoned that “[m]any companies that are not themselves telecommunications carriers will be eligible to provide supported non-telecommunications services” through “subsidiaries or affiliates,” and it explained that, “[g]iven the ways in which non-telecommunications carriers can be reimbursed for providing discounts to eligible schools and libraries . . . , it would create an artificial distinction to exclude those non-telecommunications carriers that do not have telecommunications carrier subsidiaries or affiliates owned or controlled by them.” *Id.* ¶ 590; *see also id.* ¶ 587 (including non-telecommunications carriers in schools and libraries program would further competitive neutrality by “empower[ing] schools and libraries to take the fullest advantage of competition to select the most cost-effective provider of Internet access and internal connections”).

Critically for present purposes, the Fifth Circuit expressly affirmed the Commission’s use of Title I to complement its authority under Section 254. In a particularly relevant passage, the court addressed and rejected the argument that the statute’s express reference to

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<sup>7</sup> Section 254(h)(2)(A) directs the Commission to “establish competitively neutral rules . . . to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries.” 47 U.S.C. § 254(h)(2)(A).

“telecommunications carriers” in Section 254(h)(1)(B) foreclosed the Commission from providing support to *non*-telecommunications carriers. The court explained that “the combination of the FCC’s ‘necessary and proper’ authority under § 154(i) and the limited usefulness of the *expressio unius* doctrine in the administrative context permit the FCC to expand the reach of universal service support to non-telecommunications carriers,” notwithstanding the textual limitations in Section 254 itself. *TOPUC I*, 183 F.3d at 443-44. As the court saw it, the Commission was “not asserting additional jurisdictional authority, but, rather, [wa]s issuing a regulation necessary to fulfill its primary directives.” *Id.* at 444 (internal quotation marks omitted).

The same logic applies here. As explained above, the Commission’s central statutory mission is “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service,” 47 U.S.C. § 151, and Congress has further directed that the Commission “base policies for the . . . advancement of universal service” on the goal of providing “[a]ccess to advanced telecommunications and information services,” *id.* § 254(b)(2). In today’s world, a universal service broadband funding plan that does *not* extend to the broadband Internet access services that most consumers use would have no chance of meeting those objectives. The Commission may, in short, exercise its Title I authority as a complement to its authority under Section 254 in order to meet its statutory mission.

Indeed, if anything, this case presents a more compelling case for the exercise of Title I authority to complement the Commission’s authority under Section 254 than was present in the *Universal Service Report and Order*. In that context, limiting participants in the schools and libraries program to telecommunications carriers would arguably have violated principles of competitive neutrality, but it would not have threatened the success of the program. *See Universal Service Report and Order* ¶ 590 (noting that, even without expanding the program, “[m]any companies that are not themselves telecommunications carriers will be eligible” through various “business arrangements” with telecommunications carriers). Here, by contrast, most residential broadband Internet access service is provided on an integrated basis solely pursuant to Title I, and a Commission program that excluded the providers of that service would therefore be a half-measure at best. If relying on Title I to extend the schools and libraries program to non-telecommunications providers was an appropriate and lawful step “to fulfill [the Commission’s] primary directives” – and the Fifth Circuit squarely held that it was, *see TOPUC I*, 183 F.3d at 444 – then it necessarily follows that it is likewise appropriate and lawful to rely on Title I to the extent necessary to extend broadband funding to broadband Internet access providers that do not offer transmission on a common-carriage basis.<sup>8</sup>

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<sup>8</sup> That is especially so in light of the value of enabling broadband providers to operate only under Title I. “[A]llowing non-common carriage arrangements for wireline broadband transmission” drives efficiencies and consumer welfare by giving providers “the flexibility and freedom to enter into mutually beneficial commercial arrangements with particular ISPs.” *Wireline Broadband Order* ¶ 87.

3. The understanding of the Commission’s Title I authority reflected above is consistent with judicial precedent.

*First*, until 1996, the Act did not specifically address universal service. Yet the Commission, pursuant to its Title I authority, nevertheless constructed comprehensive universal service initiatives. For example, the Commission imposed assessments on interexchange carriers and used these funds to promote universal service: the federal Universal Service Fund provided subsidies to high-cost carriers, the Lifeline Assistance program waived or reduced subscriber line fees for low-income customers, and the Link Up program provided financial assistance to help customers connect to the PSTN. *See MTS and WATS Market Structure*, 51 Fed. Reg. 1371, ¶¶ 6-9 (1986) (Lifeline program); *In re Amendment of Part 67 of the Commission’s Rules*, 96 FCC 2d 781, 792-96 (1984) (Universal Service Fund); *see also In re MTS and WATS Market Structure*, 2 FCC Rcd 2953, ¶ 35 (1987) (“the preservation of universal service is a fundamental goal of this Commission. We believe that this program is an appropriate means to achieve our universal service goal, and will help assure that no group of Americans [is] ‘locked out’ of the information age”). The D.C. Circuit twice held that these pre-1996 Act universal service programs were within the Commission’s Title I authority. Because “universal service is an important FCC objective,” the court of appeals explained, the high-cost Universal Service Fund fell within the Commission’s authority under Sections 151 and 4(i). *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988). Three years later, the D.C. Circuit rejected a challenge to the assessments on interexchange carriers that were used to fund the high-cost Lifeline and Link Up programs. The court of appeals explained that “[u]niversal service assessments fit comfortably within the range of special-purpose levies that are consistent with congressional authority to regulate commerce . . . and Congress has given the FCC a regulatory mandate sufficiently broad to authorize the assessments.” *ALC Communications Corp. v. FCC*, No. 90-1041, 1991 U.S. App. LEXIS 2064, at \*9-\*10 (D.C. Cir. Feb. 8, 1991) (per curiam).

*Second*, and more generally, this understanding of the Commission’s authority is also consistent with the case law interpreting and applying the Commission’s Title I authority. As noted, in *Nuvio*, the D.C. Circuit upheld the Commission’s authority to implement its central statutory mission in Section 1 – a mission that includes the obligation “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,” 47 U.S.C. § 151 – and, in *TOPUC I*, the Fifth Circuit affirmed the Commission’s invocation of Section 4(i) to complement its authority under Section 254. And courts have upheld the Commission’s exercise of its ancillary jurisdiction to bolster its express statutory authority in other areas as well. *See, e.g., Southwestern Cable*, 392 U.S. at 177 (invoking Title I in support of Commission’s power to promote “the orderly development of an appropriate system of local television broadcasting”); *id.* at 180-81 (upholding, under Section 4(i), the Commission’s authority to grant interim relief pending further hearings, even though nothing in the Act explicitly gave the Commission that power); *Mobile Communications Corp. of Am. v. FCC*, 77 F.3d 1399, 1404-07 (D.C. Cir. 1996) (invoking Section 4(i) in support of the Commission’s power to determine “whether the public interest, convenience, and necessity will be served” by granting a broadcast license) (internal quotation

marks omitted); *New England Tel.*, 826 F.2d at 1107-09 (holding that Section 4(i) gave the FCC authority to require refunds, even though the Act did not expressly permit this remedy).

Nor is there tension between the Commission's use of Title I here and the Supreme Court's decision in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) ("*Midwest Video II*"). In *Midwest Video II*, the Supreme Court examined the scope of the Commission's Title I authority over cable television providers (which the Court had first recognized and upheld in *Southwestern Cable* as ancillary to the Commission's authority to regulate broadcasting). The Commission had adopted rules requiring that cable television providers make a certain number of channels available to third parties, without any editorial control over the content to be transmitted over those channels. *See id.* at 691-94. The Court held that those rules exceeded the Commission's jurisdiction because they impermissibly "impose[d] common-carrier obligations on cable operators," in conflict with the Act's statutory prohibition on the imposition of common carrier duties on "a person engaged in radio broadcasting." *See id.* at 701-04. As the Court explained, "Congress was plainly anxious to avoid regulation of broadcasters as common carriers under Title II, which commands, *inter alia*, that regulated entities shall 'furnish . . . communication service upon reasonable request therefor.'" *Id.* at 705 n.15 (quoting 47 U.S.C. § 201(a)). Indeed, the Court distinguished the obligations at issue in the case from the rules upheld in *Southwestern Cable* on the ground that, in *Southwestern Cable*, the Commission had not imposed "a duty to hold out facilities indifferently for public use and thus did not compel cable operators to function as common carriers." *Id.* at 707 n.16. Here, there is no such concern. A universal service program that funds broadband Internet access service would not compel broadband Internet service providers to hold out service indiscriminately to all comers, to tariff their services, to offer pure transmission free from all information-processing capabilities, or to undertake any of the other incidents of traditional common-carriage regulation. On the contrary, it would permit providers to participate in such a program while retaining the flexibility the Commission has provided to *not* act as common carriers. Providing such flexibility in no way conflicts with the Supreme Court's decision in *Midwest Video II*.<sup>9</sup>

The D.C. Circuit's decision in *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) ("*MPAA*"), is also no barrier to Commission jurisdiction here. In *MPAA*, the D.C. Circuit held that the Commission lacked authority under Title I to require broadcasters and cable operators to provide "video descriptions" of their programs.<sup>10</sup> The court

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<sup>9</sup> It is true that Section 214(e)(1) requires a provider receiving universal service funds to offer the supported services "throughout the service area for which the designation is received." But – unlike the regulations at issue in *Midwest Video II* – broadband providers would be able to decide for themselves whether to participate in the high-cost universal service program from broadband. *See* Comments of AT&T Inc., *In re High-Cost Universal Service Support*, WC Dkt. No. 05-337, at 20 (filed May 8, 2009). As to AT&T's proposal for Lifeline, providers would choose for themselves where to offer service and what services to offer. *See* Ex Parte Letter from Jamie Tan, AT&T Inc., to Marlene Dortch, FCC, WC Dkt. No. 03-109 *et al.*, Attach. at 1-2 (Dec. 22, 2010).

<sup>10</sup> Video descriptions – which are designed to make television programs accessible to visually impaired individuals – are narrated descriptions of a program's key visual elements during pauses in the dialogue. *MPAA*, 309 F.3d at 798.

reached that conclusion, first and foremost, because of concerns over the Commission’s authority to regulate the *content* of television programs. *See id.* at 802-05. “Congress,” the court stressed, “has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content,” in large part “because such regulations invariably raise First Amendment issues.” *Id.* at 805. And the court refused to permit the Commission to use Title I – which “focus[es] on the FCC’s power to promote the accessibility and universality of transmission, not to regulate program content” – to expand its authority over content beyond the limits established by Congress. *See id.* at 804-05. Here, a broadband universal service program would do nothing to circumvent limitations on the Commission’s authority to regulate content, while at the same time furthering the statutory goal of ensuring widespread deployment and adoption of “advanced telecommunications and information services.” 47 U.S.C. § 254(b)(2).<sup>11</sup>

4. Nor, finally, is there any statutory reason to believe that Congress, by enacting Section 254, sought to limit the Commission’s authority to use Title I to pursue universal service goals.

First, Congress’s use of the term “telecommunications services” in Section 254(c)(1) does not prohibit the Commission from using authority elsewhere in the Act to fund other types of services. The expression of one thing in a statute does generally indicate the exclusion of others. *See, e.g., Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 81 (2002). But, as noted, the Fifth Circuit in *TOPUC I* rejected the argument that the use of one term – there, “telecommunications carrier” – in setting out the parameters of a universal service program foreclosed the Commission from using Title I authority to support a broader class of providers. And with good reason: the *expressio unius* canon is not an inexorable command. *See generally Custis v. United States*, 511 U.S. 485, 501 (1994) (*expressio unius* is “a dangerous master to follow in the construction of statutes”) (internal quotation marks omitted). Indeed, like the Fifth Circuit in *TOPUC I*, the D.C. Circuit has expressly rejected the application of *expressio unius* in circumstances similar to those at issue here. The Act and its amendments specify only two situations in which the Commission may charge fees for spectrum licenses, but – relying in part on Section 154(i) – the D.C. Circuit upheld the Commission’s authority to charge fees for other types of licenses as well. *See Mobile Communications Corp.*, 77 F.3d at 1404-07. The court stressed that the *expressio unius* canon “has little force in the administrative setting.” *Id.* at

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<sup>11</sup> *American Library Association* is inapposite for reasons similar to *MPAA*. There, the D.C. Circuit invalidated the Commission’s “broadcast flag” rules because “the agency’s general jurisdictional grant does not encompass the regulation of consumer electronics products . . . when those devices are not engaged in the process of radio or wire transmission.” 406 F.3d at 700; *see id.* at 703. No comparable concerns are present here. Likewise, to the extent the D.C. Circuit questioned the Commission’s exercise of Title I authority in the *Comcast P2P Order*, 23 FCC Rcd 13028 (2008), in oral argument on review of that decision, the panel directed its concerns toward the apparent absence of a statutory mandate to which the exercise of Title I was reasonably related. *See Dow Jones Newswires, Court Unfriendly to FCC’s Internet Slap at Comcast* (Jan. 8, 2010) (Judge Randolph noted to counsel that “[y]ou have yet to identify a specific statute” authorizing the Commission’s actions). Here, in contrast, the invocation of Title I to fund broadband Internet access service would be ancillary to the Commission’s express statutory authority in Section 254(a), (b), and (c)(2) and Section 151.

1404-05. And it held that charging a fee for additional types of licenses was reasonably ancillary to the Commission’s duty to determine whether “the public interest, convenience, and necessity will be served” by granting a broadcast license; not requiring the broadcaster to pay might result in “unjust enrichment,” or might give that broadcaster an unfair advantage over rivals who did have to pay for their licenses. *Id.* at 1406 (internal quotation marks omitted). The same is true here. Confining universal service funding to providers that elect to offer transmission on a common-carriage basis would compromise competitive neutrality, undermine the flexibility the Commission intended to give providers by enabling them to chose between private and common carriage, and dramatically limit the effectiveness of the Commission’s universal service broadband initiative. Under *Mobile Communications Corp.*, those considerations are more than sufficient to justify the Commission’s exercise of its Title I authority.

*Second*, there is likewise no merit to the broader argument that, by enacting Section 254’s provisions related to universal service, Congress intended Section 254 to, in essence, occupy the field of universal service – *i.e.*, to supplant the Commission’s Title I authority and to function as the sole basis of the Commission’s universal service authority. As noted, prior to the 1996 Act, the Commission had relied on its Title I authority to put in place various universal service funding mechanisms. Congress thus legislated with an understanding that the Commission has Title I authority to implement universal service objectives, and, far from providing the requisite evidence that would be necessary to eliminate that authority,<sup>12</sup> it did the contrary. In Section 254(j), Congress expressly *preserved* the Lifeline Assistance Program the Commission had created prior to the 1996 Act pursuant to Title I. *See* 47 U.S.C. § 254(j). It is therefore not correct to suggest that Congress intended Section 254 to displace Title I and thereby to provide the exclusive basis for Commission authority to support universal service, as the Commission itself recognized in the *Universal Service Report and Order* (through its invocation of Title I). *See supra* pp. 6-8; *see also Core Communications, Inc. v. FCC*, --- F.3d ---, Nos. 08-1365 *et al.*, 2010 WL 86672, at \*4 (D.C. Cir. Jan. 12, 2010) (rejecting argument that a provision of the 1996 Act specifically addressing one subject area displaced pre-existing Commission authority over the same subject area: “‘When . . . two statutes apply to intersecting sets . . . , neither is more specific.’”) (quoting *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 264 (7th Cir. 1998)).

In sum, that Section 254(c)(1) identifies one type of supported service does not preclude the Commission from exercising its complementary authority under Title I to fund broadband. Providing support for broadband Internet access service is reasonably related to – indeed, *critical* to – the Commission’s mandate to establish a universal service program that ensures that “all regions of the Nation” have access to “advanced telecommunications and information services,” 47 U.S.C. § 254(a), (b)(2), (c)(2), as well as 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

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<sup>12</sup> *See City of New York v. FCC*, 814 F.2d 720, 725 (D.C. Cir. 1987) (“Since Congress legislated against the backdrop of the Commission’s preexisting preemption regulation without criticizing that regulation, we infer that Congress endorsed it, except where the Cable Act explicitly or implicitly modified its provisions.”), *aff’d*, 486 U.S. 57 (1988); *see also Traynor v. Turnage*, 485 U.S. 535, 546 (1988) (courts should assume that Congress “know[s] the law” and thus legislates against the backdrop of pertinent agency regulations).

communication service with adequate facilities at reasonable charges,” *id.* § 151. The Commission accordingly has ancillary authority to provide such support.<sup>13</sup>

### CONCLUSION

For the foregoing reasons, the Commission has authority under Section 254 and Title I to promote universal access to broadband services, including broadband Internet access service.

January 29, 2010

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<sup>13</sup> The Anti-Deficiency Act, 31 U.S.C. §1341(a)(1) (“ADA”), would also pose no obstacle to providing universal service support for broadband Internet access service. Congress has granted the Commission a temporary exemption from the ADA for “any amount collected or received as Federal universal service contributions required by Section 254 of the [Act],” and “the expenditure or obligation of amounts attributable to such contributions for universal service support programs established pursuant to that section.” P.L. 108-494, 118 Stat. 3986, § 302(a); *see also* P.L. 111-117, 123 Stat. 3034, § 501 (extending exemption through Dec. 31, 2010). Just as the ADA exemption covers the use of universal service funds to reimburse non-telecommunications providers (which, as explained, was put in place pursuant to Section 254 *and* Title I), so too here. For the reasons explained above, a decision to provide universal service support for broadband Internet access would be based on *both* section 254 and Title I, so the existing ADA exemption would apply, as would any future exemptions of comparable scope.