cable

National Cable & Telecommunications Association
25 Massachusetts Avenue, NW – Suite 100
Washington, DC 20001
(202) 222-2300

www.ncta.com

Kyle McSlarrow
President and CEO

(202) 222-2500
(202) 222-2514 Fax

March 1, 2010

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *A National Broadband Plan for Our Future*, GN Docket No. 09-51
Preserving the Open Internet, GN Docket No. 09-191;
Broadband Industry Practices, WC Docket No. 07-52;

Dear Chairman Genachowski:

As you know, NCTA has been very supportive of your leadership and the Commission's work in developing the National Broadband Plan. In particular, we are in complete agreement with two of the Plan's key working theses – first, that increased adoption of broadband offers the potential for numerous important improvements in education; and second, that universal service reform is an important aspect of any strategy for achieving universal access to broadband. Those two points – the educational potential of broadband and the importance of USF reform – have also been priorities for NCTA. Our Adoption Plus (" A+") initiative, developed with your critical support and after working with the FCC's Broadband team, highlighted a key educational priority: promoting adoption by low income families with children through a program providing discounted broadband service and equipment as well as digital literacy training. Our Petition for Rulemaking proposing reforms designed to eliminate unnecessary spending in the existing USF high-cost mechanism would allow the redirection of scarce funds to other priorities, such as the use of broadband.

In recent weeks, some parties have argued that the Commission should regulate broadband Internet access as a Title II telecommunications service, and that it must do so in order to bring Internet access within the universal service program. We believe it is unnecessary for the Commission to risk the adverse consequences of imposing Title II regulation on broadband Internet access service in order to promote the use of broadband for education. As described in the attached memorandum, Congress has given the Commission ample authority to use the universal service regime as a vehicle for investing in technology that promotes education. In particular, the FCC has authority under section 254(h)(2) of the Communications Act to adopt elements of the A+ program and/or develop other programs to extend universal service support to residential broadband Internet access service without having to classify this service as a telecommunications service.

As your Broadband team has documented, the instructional use of broadband is no longer confined to the classroom or limited to school hours; the use of broadband in the home has become a critical component of the American education system. Given these changes, it is entirely reasonable to read the statutory directive to support Internet access for classrooms to include support for residential broadband service to households where it is reasonably likely that such service would be used for educational purposes. Indeed, the Commission already has taken some steps to extend E-rate support for services used outside the classroom and relaxed the requirement that supported broadband service be used solely for educational purposes.

Our focus on mechanisms by which the Commission could support broadband in the educational context is not meant to suggest this is the only way the Commission can use the universal service program to support broadband. As I testified last fall before the House Subcommittee on Communications, Technology, and the Internet, NCTA believes that it is appropriate to consider tailored broadening of the universal service program to include carefully targeted subsidies for broadband service – and particularly broadband adoption – given the importance of broadband to our economy and society and its increasingly central role as a communications medium. Depending on the details of the specific program, the Commission may find the necessary legal authority in section 254(h) or in other provisions of the Act.

It is our hope that developing these types of programs will be one of the Commission's priorities following release of the Plan next month. The transition to broadband-focused universal service mechanisms must be done with care so as to ensure that funds are distributed in an efficient and targeted manner and consumers are not compelled to bear an unreasonable burden. We pledge our cooperation as the Commission faces these challenging issues.

Respectfully submitted,

/s/ Kyle McSlarrow

Kyle McSlarrow

MEMORANDUM

Some parties have suggested in the National Broadband Plan proceeding that the Commission will not be able to provide universal service support to promote broadband deployment or adoption without radical changes in the regulatory regime applicable to those services. In particular, they have argued that the only way to provide support for broadband Internet access is to classify it as a Title II telecommunications service.[1]

This memorandum explains how the Commission can move forward in developing programs to promote broadband deployment and adoption pursuant to section 254 of the Act, and particularly section 254(h), without reclassifying broadband Internet access as a Title II telecommunications service.[2] The memorandum first reviews the Commission's well-established authority under section 254(h)(2) to support the provision of Internet access service by non-telecommunications carriers, including cable operators, to eligible schools and libraries.[3] We then discuss that authority as a basis for promoting the deployment and adoption of broadband access services to the home. Finally, we review the Commission's authority under section 254 generally to support broadband Internet access services without having to classify such services as telecommunications services under Title II.

The focus on section 254(h) in this memorandum is not meant to suggest this is the only statutory provision upon which the Commission can rely in extending the universal service program to support broadband. AT&T, for example, has submitted a memorandum to the Commission identifying alternative provisions in section 254 that could serve as the basis for extending support to broadband without the need to reclassify broadband as a Title II service.[4] Vonage has likewise demonstrated that "current language of section 254 permits the Commission to include broadband as a supported service."[5] Our intent here is simply to identify an independent approach by which the Commission can pursue the objectives identified in the National Broadband Plan.

---

[1] *See, e.g.*, Letter from Andrew J. Schwartzman, Media Access Project, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Feb. 19, 2010) (describing meeting in which Media Access Project, Consumers Union, Consumer Federation of American, Free Press, New American Foundation, and Public Knowledge met with Chairman Genachowski and his senior advisors to support Title II classification as a "superior path" for achieving universal service and other goals of the National Broadband Plan); *see also* Letter from Harold Feld, Public Knowledge, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jan. 28, 2010); Reply Comments of Public Knowledge on NBP PN No. 30, GN Docket No. 09-51 (filed Jan. 26, 2010).

[2] We note that the Commission's decisions classifying broadband services as information services were based on the factual characteristics of these services. To the extent that there has been no material change in those characteristics, changing the classification to achieve particular policy goals would be unlawful.

[3] Internet access service, regardless of technology, is a currently a supported service. *See* Schools and Libraries' Eligible Services List for Funding Year 2010, p. 7, *available at* http://www.universalservice.org/sl/tools/eligible-services-list.aspx (last visited Feb. 20, 2010).

[4] *See* Letter from Gary L. Phillips, AT&T Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 09-51 (filed Jan. 29, 2010).

[5] Letter from Brita D. Strandberg, Counsel to Vonage Holdings Corp., to Marlene Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 09-47, 09-51, and 09-137 (filed Jan. 27, 2010).

I. The Commission Has Authority to Fund Broadband Services Pursuant to Section 254(h)(2) Without Classifying Them as Common Carrier Offerings

The Commission has firmly established its statutory authority to include information services offered by both telecommunications carriers and non-telecommunications carriers as eligible services under the E-rate program. As recently as December 2009, for example, the Commission modified its E-rate rules to add interconnected VoIP and text messaging to the list of E-rate supported services. In so doing, the Commission acknowledged that such services may ultimately be classified as information services but nonetheless asserted authority under subsections 254(c)(3), (h)(1)(B) and (h)(2) to extend universal service support to these offerings, whether provided by telecommunications carriers or non-telecommunications carriers.[6] The Commission concluded that such support will "enhance … access to advanced telecommunications and information services" for schools and libraries.[7]

As the Commission explained, the authority for this decision was grounded in the initial *Universal Service Order*.[8] There, the Commission concluded that it could extend universal service support to information services provided by non-telecommunications carriers. The Commission reached this conclusion through a two-step process. First, it held that "sections 254(c)(3) and 254(h)(1), in the context of the broad policies set forth in section 254(h)(2), authorize us to permit schools and libraries to receive the telecommunications and information services provided by telecommunications carriers needed to use the Internet at discounted rates."[9] Section 254(c)(3) authorizes the Commission to "designate additional services" for schools and libraries "for the purposes of subsection (h)."[10] Section 254(h)(1)(B), in turn, provides that "all telecommunications carriers shall" offer at a discount any of "its services that are within the definition of universal service under subsection (c)(3)." The Commission noted that these provisions use the broader term "services" rather than the more restrictive "telecommunications services" used elsewhere in section 254.[11] The Commission concluded that

---

[6] *Schools and Libraries Universal Service Support Mechanism*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 02-6, FCC 09-105 at ¶12 (rel. Dec. 2, 2009) ("*Eligible Services Order*"). The Commission initially designated VoIP services in 2007, but had not revised its rules to expressly include them. *Id.* Subsection 254(c)(3) authorizes the Commission to designate "additional services" for support to schools and libraries "for the purposes of subsection (h)." Subsection (h)(1)(B) authorizes support for services to schools and libraries by telecommunications carriers and (h)(2) authorizes support for advanced telecommunications and information services.

[7] *Id.* (quoting 47 U.S.C. § 254(h)(2)(A)).

[8] *Id.* (citing *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776 (1997) ("*Universal Service Order*"), *aff'd in relevant part, Texas Office of Pub. Util. Council v. FCC*, 183 F.3d 393, 443-44 (5th Cir. 1999) ("*TOPUC I*")).

[9] *Universal Service Order* at ¶ 436.

[10] 47 U.S.C. § 254(c)(3).

[11] For example, section 254(h)(1)(A), which provides discounts for rural health care providers, expressly uses the term "telecommunications services." The Commission concluded that the varying use of the terms "telecommunications services" and "services" in sections 254(h)(1)(A) and 254(h)(1)(B) "suggests that the terms were used consciously to signify different meanings." *Universal Service Order* at ¶ 439.

section 254(h)(2)(A) supported including information services under the E-rate program.[12] Section 254(h)(2)(A) provides that the Commission "shall 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 nonprofit elementary and secondary school classrooms…."[13]

Having concluded that section 254(h) included information services provided by telecommunications carriers, the Commission took the next step and found that the provision of these services by non-telecommunications carriers would also be entitled to universal service support. Here the Commission relied on its authority under section 254(h)(2)(A) and its ancillary authority under section 4(i).[14] In reaching this conclusion, the Commission rejected arguments that section 254(e) precludes such an interpretation. That section states that "only an eligible telecommunications carrier designated under section 214(e)…shall be eligible to receive specific Federal universal service support."[15] The Commission concluded, however, that section 214(e) was limited to the supported services established under section 254(c)(1) and did not apply to the services provided to schools and libraries under subsection 254(h)(2)(A). Finally, the Commission held that the support for non-telecommunications carriers was consistent with the requirement under subsection (h)(2) that rules be competitively neutral.

The Commission's decision was affirmed by the Fifth Circuit in *TOPUC I*.[16] With respect to the Commission's first finding that section 254(h) includes information services, the court held that the language of section 254 was sufficiently ambiguous to defer to the agency's interpretation under the traditional *Chevron* step-two analysis[17] The court readily sustained the Commission's authority to provide support for non-telecommunications carriers. It rejected arguments that, because section 254(h)(1)(B) contained language providing how "telecommunications carriers" will be reimbursed, Congress meant to exclude non-telecommunications carriers, even with respect to section (h)(2). The court instead held that "the combination of the Commission'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 support to non-telecommunications carriers."[18] It concluded that "Congress intended to allow the FCC broad authority to implement this section of the Act."

---

[12] *Id.* at ¶ 440.

[13] 47 U.S.C. § 254(h)(2)(A) (emphasis added).

[14] *Universal Service Order* at ¶¶ 589-90.

[15] 47 U.S.C. § 254(e).

[16] *TOPUC I*, 183 F.3d at 405.

[17] *Id.* at 440.

[18] *Id.* at 443-44.

II. Providing USF Support to Broadband Services for Residential Customers

A. Expanding the E-Rate Program Beyond the Classroom

The Commission's authority under section 254(h)(2) to extend E-rate support to Internet access services provided by non-carriers is clear. Its use of ancillary authority in support of this determination has been upheld by the courts. Based on this firm foundation, the Commission has sufficient authority to expand the E-rate program to support Internet access service outside of the physical school or classroom without reclassifying Internet access as a common carrier service.

Section 254(h)(2)(A) directs the Commission to establish competitively neutral rules to enhance access to advanced telecommunications and information services "*for* all public and nonprofit elementary and secondary school classrooms."[19] The plain language of the statute thus does not require that such services be used "in" the classroom setting or "at" the school, and the Commission's rules require only that such services be used for educational purposes.[20] The Commission defines educational purposes as "activities that are integral, immediate, and proximate to the education of students."[21] While the Commission's rules establish a presumption that activities that occur "on school property" meet the test for "educational purposes,"[22] the rules do not limit the test to such activities. To the contrary, in the same order creating this presumption, the Commission found that certain services used offsite would qualify as integral, immediate, and proximate to the education of students. The Commission cited as examples the use of wireless services by school bus drivers or teachers when on a field trip.[23] The Commission clarified that support is available "in a place of instruction," and not just on school property.[24]

It would be a logical extension of these policies to provide E-rate support for broadband services to the homes of elementary and secondary students. Such a policy reflects both that the home as become an extension of (or in some cases a replacement for) the classroom and that supporting broadband in the home is necessary to give full effect to the Commission's existing E-rate efforts. While support for access to Internet access "for classrooms" may have assumed a classroom setting in 1997, the use of broadband services for educational purposes today extends beyond the physical boundaries of the school and reaches into the home. Schools today routinely provide information on their websites regarding homework assignments[25] and links to sites that provide educational instruction. Schools also provide Internet-based services, such as e-mail and

---

[19] 47 U.S.C. § 254(h)(2)(A) (emphasis added).

[20] *Schools and Libraries Universal Service Support Mechanism*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 02-6, 18 FCC Rcd 9202 at ¶ 15 (2003) ("*Second Report and Order*").

[21] *Id.* at ¶ 17; 47 C.F.R. § 54.500(b).

[22] 47 C.F.R. § 54.500(b).

[23] *Second Report and Order* at ¶ 19 & n. 28.

[24] *Id.* at ¶ 20 ("We find that our clarification [of the education purpose] is consistent with statutory mandates that the purpose for which support is provided be for educational purposes in a place of instruction.").

[25] Hosting a school's website has been an eligible service since 2004. *Eligible Services Order* at ¶ 37. The Commission is seeking comment on whether to continue webhosting as a priority 1 supported service. *Id.*

texting, for parents and school administrators and teachers to communicate.[26] In addition, a survey by the National Center for Education Statistics found that an estimated 1.5 million students were homeschooled in 2007.[27]

Studies have found that students without access to broadband Internet access at home are at a disadvantage. One survey found that 71% of teens say the Internet has been the primary source for school projects and that 65% of teens go online at home to complete Internet-related homework.[28] The *ACLP Report* notes that "[s]tudents are using broadband as a supplement for in-class learning and as a resource to assist with assignments."[29]

Similar themes were struck by participants and commenters in the Commission's review of educational topics as part of its National Broadband Plan development. For example, during the Commission's educational workshop, Kumar Garg, Education Policy Analyst at the White House Office of Science and Technology Policy, noted that "[w]hether it is the high school administrator that wants to use cloud computing to improve operational efficiency, whether it's the teacher that wants to use cutting-edge media resources, *or the student that wants to continue learning at home in the same rich content that might be available at the school*, bandwidth is necessary."[30] In response to the Commission's public notice regarding education and the National Broadband Plan, a number of commenters urge the Commission to expand the E-rate program to the home. As succinctly stated by the Florida Virtual School:

[26/] Both e-mail and texting are eligible services. *Eligible Services Order* at ¶ 17 (adding text messaging as a supported service).

[27] U.S Department of Education, National Center for Education Statistics, *1.5 Million Homeschooled Students in United States in 2007* (December 2008), available at http://nces.ed.gov/pubs2009/2009030.pdf.

[28] FCC Broadband Taskforce Presentation, Sept. 29, 2009 at slide 83, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf. Pew Research also showed that 80 percent of parents surveyed said that the Internet helps their children with schoolwork. *Id*. at slide 120. According to National Education Association (NEA) research, 95 percent of educators agree that "technology [*e.g.*, computers; the Internet], when used properly, improved student learning." *Barriers to Broadband Adoption*, A Report to the Federal Communications Commission, The Advanced Communications Law & Policy Institute, New York Law School, October 2009, Table 13, Overview of Broadband's Impacts on Traditional Education Paradigm ("*ACLP Report*") at 71, *available at http://fjallfoss.fcc.gov/ecfs/document/view?id=7020142497* (citing *Access, Adequacy, and Equity in Education Technology*, NEA at 23 (May 2008), *available at* http://www.edutopia.org/files/existing/pdfs/NEA-Access,Adequacy,andEquityinEdTech.pdf).

[29] *ACLP Report* at 70 ("Students are also using broadband as a supplement for in-class learning and as a resource to assist with assignments."), citing *Connected to the Future*, Center for Public Broadcasting (2002), *available at* http://www.cpb.org/stations/reports/connected/connected_report.pdf; *see also* Linda A. Jackson *et al*., *Does Home Internet Use Influence the Academic Performance of Low-Income Children*, Developmental Psychology 42(3) (2006) 429; Robert Atkinson & Daniel Castro, *Digital Quality of Life: Understanding the Personal and Social Benefits of the Information Technology Revolution: Education & Training* at 22, Information Technology and Innovation Foundation, Oct. 2008.

[30] *See Comment Sought on Broadband Needs in Education, Including Changes to E-Rate Program to Improve Broadband Deployment, NBP Public Notice #15*, GN Docket No. 09-51, 24 FCC Rcd 13560 at p.2 (2009) ("*NBP E-Rate Public Notice*") (quoting Kumar Garg, National Broadband Plan Education Workshop at p.48 of transcript (Aug. 20, 2009) (transcript available at http://www.broadband.gov/docs/ws_13_edu.pdf (last visited Feb. 18, 2010))) (emphasis added).

> [a]s part of modifying the E-rate program, the FCC should explicitly expand eligibility to broadband costs associated with delivering instructional service to students regardless of where the student is located, even it is a home…. [This] merely extends the definition of a classroom to more closely reflect the realities of the 21st century that a student's home can be a 'classroom' due the broadband and high-quality online courses taught by a teacher.[31]

A recent article in Education Week also expressed the hope of educators and experts for schools to be able to use the Internet to "expand learning opportunities for students," and even to extend supported Internet services "for use in community programs after the school day has ended" or in the home.[32]

The Commission has also progressively relaxed its requirement that E-rate funding must be strictly limited to educational purposes. On February 18, 2010, the Commission adopted an order enabling schools that receive E-rate funding to allow members of the general public to use the schools' Internet access during non-operating hours, such as after school hours or during times students are out of school.[33] On its own motion, it granted an 18-month waiver of rules it found "discourage public use of resources funded by E-rate."[34] It has also sought comment on whether the make the program permanent by revising its rules.[35]

This decision builds on the Commission's *Alaska Order*, where the Commission found good cause to waive its rule requiring schools to certify that they would use the services obtained through discounts for educational purposes only.[36] In that order, the Commission allowed members of rural remote communities to use the Internet access services obtained at a discount

---

[31] Comments of Florida Virtual School at 5. *See also* Comments of Sunesys, Inc. at 10 ("The Commission should extend e-rate funding for the infrastructure necessary to allow students to access their schools' intranet, advanced on-line content, and other classroom materials from their homes."); ENA Comments at 8 (the Commission should address home access when revising the E-rate program); Comments of the Council of the Great City Schools at 3 ("…[u]rban schools would support extending network access to eligible users outside of the school buildings…. [W]ider access would also provide access for itinerant teachers and other professionals that are not tethered to specific schools, but nonetheless are required to provide instructional and other educational services to students regardless of their physical location.").

[32] Kathleen Kennedy Manzo, *Digital Innovation Outpaces E-Rate Policies*, Education Week, Feb. 2, 2010.

[33] *In the Matter of Schools and Libraries Universal Service Support Mechanisms*, Order and Notice of Proposed Rulemaking, CC Docket No. 02-6, FCC 10-33 (rel. Feb. 19, 2010) ("*February 18 Order*").

[34] *Id.* at ¶ 7 (waiving sections 54.504(b)(2)(v) and 5.504(c)(1)(vii). Schools may allow members of the community access on three conditions: (1) participating schools are not allowed to request more services than are necessary for educational purposes; (2) community use is restricted to non-operating hours; and (3) schools may not resell discounted services or network capacity. *Id.* at ¶ 3. The waiver applies to members of the community who access the Internet on the school's campus. *Id.* at n. 21.

[29] *Id.* at ¶ 17. Specifically, the Commission proposes to change its rules to require schools to certify that services will be primarily for educational purposes, rather than solely for educational purposes.

[36] F*ederal-State Joint Board on Universal Service; Petition of the State of Alaska for Waiver for the Utilization of Schools and Libraries Internet Point-of-Presence in Rural Remote Alaska Villages Where No Local Access Exists and Request for Declaratory Ruling*, Order, CC Docket No. 96-45, 16 FCC Rcd 21511 at ¶ 6 (2001) (waiving 47 C.F.R. 54.504(b)(2)(ii)) ("*Alaska Order*"). The rule is now codified at 47 C.F.R. § 54.504(c)(1)(vii).

by the schools after school hours.[37] The Commission found that waiver of its certification rule to expand the use of Internet services for non-education purposes did not violate section 254(h)(1)(B), which provides the discounts for educational purposes, "so long as in the first instance they are used for education purposes."[38] The Commission further found good cause for waiver because "it is consistent with the Commission's efforts to encourage access to advanced telecommunications and information services."[39]

The Commission's established authority to extend E-rate funding to Internet access services and its evolving conception of what constitutes an educational use for broadband services provide a firm footing for making E-rate funding available to households with elementary and secondary students – without reclassifying Internet access as a common carrier service. Given these precedents, including the *February 18* and *Alaska* orders, and the well-documented educational uses of broadband, there would likewise be no statutory bar to the Commission's extending E-rate support to any low income household where there is a reasonable likelihood that residents will utilize their broadband connections to further their education though online courses. While there are many important issues that would need to be considered in deciding whether, and how, to expand the E-rate program, such as budget and eligibility requirements, the Commission has the necessary legal authority should it decide to move forward with such an approach.

B. Authority Under Section 254 to Designate Broadband Services Generally as Eligible for USF Support.

Much of the reasoning that supports the Commission's funding of Internet access services for schools and libraries provided by telecommunications and non-telecommunications carriers also supports making universal service funds available for broadband more generally, and not solely through the E-rate program. As the Commission has found, sections 254(a)(1) and (a)(2) of the Communications Act, which "mandate that the Commission define the 'services that are supported by Federal universal service support mechanisms' [do] not limit support to telecommunications services."[40] Sections 254(a)(1) and (a)(2) refer to supported services generally, not simply to those under the schools and libraries program. Further, two of the six universal service principles enumerated in section 254(b) direct the Commission to establish universal service policies that preserve and enhance access to advanced or information services.[41] These principles are "mandatory" and any one may be ignored or discounted only if it directly conflicts with another principle or statutory obligation.[42] Moreover, as reflected in the discussion of the E-rate program above, the Commission clearly does not consider the definition

---

[37] The Internet service was provided by satellite under a flat-fee arrangement that provided for 24/7 access.

[38] *Alaska Order* at ¶ 8.

[39] *Id.* at ¶ 11.

[40] *Universal Service Order* at ¶ 437.

[41] 47 U.S.C. §§ 254(b)(2) ("[a]ccess to advanced telecommunications and information services should be provided in all regions of the nation."); 254(b)(3) (consumers in rural areas should have access to "telecommunications and information services").

[42] *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199-1200 (10th Cir. 2001).

of universal service in section 254(c)(1) as an "evolving level of telecommunications services" to be a bar to the funding of information services.[43]

Even if section 254 in and of itself does not provide sufficient authority to support broadband services to the home, the Commission's ancillary jurisdiction fills the gap. As noted above, the courts have already upheld the Commission's ancillary authority as a basis for extending universal service eligibility to non-telecommunications carriers that provide information services to schools and libraries. Ancillary jurisdiction would similarly support the universal service funding for broadband services to homes and businesses by non-telecommunications carriers.

Ancillary jurisdiction may be employed where the Commission satisfies a two-part test. First, the Commission must have "subject matter jurisdiction over the communications at issue."[44] Here, broadband services fall within the Commission's subject matter jurisdiction, because they consist of interstate communications by wire or radio.[45] Second, the regulation must be "reasonably ancillary to the effective performance of the Commission's various responsibilities."[46] The Commission has suggested that it has such authority with respect to a variety of issues related to the provision of broadband Internet access service.[47]

Even assuming that section 254 does not directly authorize the Commission to provide universal service support for residential broadband Internet access services, there can be little doubt that providing such support is reasonably ancillary to the Commission's implementation of that provision. In particular, sections 254(b)(2) and (b)(3) direct the Commission to ensure that universal service policy promotes access to "advanced telecommunications *and information services*."[48] Likewise, as discussed above, section 254(h)(2)(A) calls on the Commission to establish rules that enhance "access to advanced telecommunications *and information services*" in the educational context.[49] Thus, reliance on such authority here would be closely tied to concrete statutory directives and would be consistent with established judicial precedent.[50]

---

[43] *Universal Service Order* at ¶ 438.

[44] *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, ¶ 95 (citing *United States v. Southwestern Cable Co.*, 392 U.S.157 (1968)).

[45] 47 U.S.C. §§ 151, 152(a).

[46] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

[47] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, 20 FCC Rcd 14853, ¶ 109 (2005) ("*Wireline Broadband Order*") ("We recognize that both of the predicates for ancillary jurisdiction are likely satisfied for any consumer protection, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet service providers.").

[48] 47 U.S.C. §§ 254(b)(2)&(3) (emphasis added).

[49] 47 U.S.C. § 254(h)(2)(A) (emphasis added).

[50] *See TOPUC I*, 183 F.3d at 405 (upholding extension of universal service support to non-telecommunications carriers providing information services); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (upholding establishment of early high-cost support mechanism under Title I).

As with proposals to expand the E-rate program, there are many important issues the Commission would need to consider in deciding whether, and how, to support broadband deployment and adoption. For example, funding for deployment of broadband networks should not be made available in areas where existing providers already have invested private capital to build such networks and are providing broadband services to consumers. But if the Commission conducts further proceedings and is able to develop efficient, appropriately targeted programs to support broadband deployment and adoption, it has the necessary authority to adopt such programs without reclassifying broadband Internet access as a Title II service.

Conclusion

FCC precedents demonstrate that it has ample authority under section 254 to designate broadband services provided by non-telecommunications carriers for support without having to classify them as telecommunications services. This authority includes judicial approval of ancillary jurisdiction to fulfill its responsibilities set forth in section 254. To abandon these precedents and reclassify broadband as a Title II telecommunications service for the purpose of bringing it within section 254 is unnecessary and will impede broadband support by entangling it in new litigation over whether this classification is appropriate and lawful. Rather than abandon these settled precedents, the Commission can and should build on them by updating its interpretation of what it means to support broadband services “for” classrooms to match the realities of 2010.