

Before the
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)
)
Framework for Broadband Internet Service) GN Docket No. 10-127
)

NOTICE OF INQUIRY

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By the Commission: Chairman Genachowski and Commissioners Copps and Clyburn issuing separate statements; Commissioners McDowell and Baker dissenting and issuing separate statements.

Comment Date: July 15, 2010
Reply Comment Date: August 12, 2010

Comments to this Notice of Inquiry are herein provided by Jay R. Jaeger, 6606 Putnam Rd., Madison Wisconsin, as an individual.

I very much appreciate the opportunity to provide comments and suggestions in this matter. I have had and continue to have considerable respect for the Federal Communications Commission, whose name I recall being held in awe when I was a youngster.

Disclosure: I own very small quantities of common stock in Verizon (VZ) and Apple (AAPL)

Background. I have been working with and in the Internet and its protocols since the mid 1980's. I have conducted personal business with no less than 3 Internet Service Providers, ranging from an individual, a small business operated out of a trailer, and major telecommunications companies.

I am employed by the State of Wisconsin Department of Transportation as an Information Technology Management Consultant, and in that role have participated at the state level in setting policy and establishing technology architecture relating to networking and other IT matters for more than a decade.

I also serve as Secretary of the BadgerNet Consolidated Network Advisory Council, and serves on the Department of Administration Technology Architecture Review Committee. This response is NOT related to that body, or endorsed by that body, in any way.

I obtained a Bachelor of Science in Electrical and Computer Engineering from the University of Wisconsin, Madison, in 1973, and a Masters of Science in Computer Science from UW in 1975.

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1. This Notice begins an open, public process to consider the adequacy of the current legal framework within which the Commission promotes investment and innovation in, and protects consumers of, broadband Internet service. Until a recent decision of the United States Court of Appeals for the District of Columbia Circuit, there was a settled approach to facilities-based broadband Internet service, which combined minimal regulation with meaningful Commission oversight. The *Comcast* opinion, however, held that the Commission went too far when it relied on its “ancillary authority” to enjoin a cable operator from secretly degrading its customers’ lawful Internet traffic. *Comcast* appears to undermine prior understandings about the Commission’s ability under the current framework to provide consumers basic protections when they use today’s broadband Internet services. Moreover, the current legal classification of broadband Internet service is based on a record that was gathered a decade ago. Congress, meanwhile, has reaffirmed the Commission’s vital role with respect to broadband, and the Commission has developed a National Broadband Plan recommending specific agency actions to encourage deployment and adoption.

2. These developments lead us to seek comment on our legal framework for broadband Internet service. In addition to seeking original suggestions from commenters, we ask questions about three specific approaches. First addressing the wired service offered by telephone and cable companies and other providers, we seek comment on whether our “information service” classification of broadband Internet service remains adequate to support effective performance of the Commission’s responsibilities. We then ask for comment on the legal and practical consequences of classifying Internet connectivity service as a “telecommunications service” to which all the requirements of Title II of the Communications Act would apply. Finally, we identify and invite comment on a third way under which the Commission would: (i) reaffirm that Internet information services should remain generally unregulated; (ii) identify the Internet connectivity service that is offered as part of wired broadband Internet service (and only this connectivity service) as a telecommunications service; and (iii) forbear under section 10 of the Communications Act from applying all provisions of Title II other than the small number that are needed to implement the fundamental universal service, competition and small business opportunity, and consumer protection policies that have received broad support. We seek comment on the same issues as they relate to terrestrial wireless and satellite broadband Internet services, as well as on other factual and legal issues specific to these wireless services that bear on their appropriate classification. We further seek comment on discrete issues, including the states’ proper role with respect to broadband Internet service.

On the face of it, classification of broadband Internet service as an “information service” does not appear to be justified. Providers of internet service are, to the largest degree, not providing information as a service (for example, as a “directory service”). As with telephone service, there are certain aspects (for example, DNS) which could perhaps be taken to be information services, were they not fundamental to the system of addressing used for the Internet. Instead, broadband Internet service providers are in the business of *transporting* information from one place to another. This is clearly a *telecommunications* service. The classification of Internet access as an Information service appears to me to be a series of steps that can be traced back to a fundamental misunderstanding of the scope of impact which the Internet has had, and will continue to have, on our society.

I. INTRODUCTION

3. ...

4. We have held to our pro-competition and pro-consumer mission in the Internet Age. Indeed, for at least the last decade the Commission has taken a consistent approach to Internet services—one that industry has endorsed and Congress and the United States Supreme Court have approved. This approach consists of three elements:

- i. The Commission generally does not regulate Internet content and applications;
- ii. Access to an Internet service provider via a dial-up connection is subject to the regulatory rules for telephone service; and
- iii. For the broadband Internet services that most consumers now use to reach the Internet, the Commission has refrained from regulation when possible, but has the authority to step in when necessary to protect consumers and fair competition.

Clearly the Commission must balance competing interests, serving both the public and the telecommunications industry. Yet I believe that is as it should be. Except where Congress explicitly intervenes, it makes the best sense for participants who are well and continuously informed about matters of technology to provide guidance. Just as clearly, however, this provides more than ample opportunity for political ideology to influence the path of consideration. This presents particular dangers, (or opportunities, depending upon ones political ideology) at any given time. Ideally, the Commission would serve in a politically neutral way. However, the last decade has shown that to be impractical in our current society. Therefore it only makes sense that when an administration changes, the Commission will change direction with it. The present majority of Commissioners probably should not let angst about this turn of events diminish the intensity of their arguments, but instead vigorously defend government for, by and of the people, just as past administrations have, in essence, as James Cramer might put it, endorsed government for, by and of the corporation.

5. The first element of our consistent approach, preserving the Internet’s capacity to enable a free and open forum for innovation, speech, education, and job creation, finds expression in (among other provisions) section 230 of the Communications Act, which states Congress’s conclusion that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”

Certainly there is much more at stake than commerce. Events in China and other foreign lands have repeatedly demonstrated the value of the Internet as a means to convey free speech.

6. The second element, oversight of dial-up access to the Internet under the common carriage framework of Title II of the Communications Act, is a facet of traditional telephone regulation. Although Internet users increasingly depend on broadband communications connections for Internet access, approximately 5.6 million American households still use a dial-up telephone connection

7. The third element of the framework, restrained oversight of broadband Internet service, was expressed clearly on September 23, 2005, for example, when the Commission released two companion decisions. The first “establishe[d] a minimal regulatory environment for wireline broadband Internet access services.” It reclassified telephone companies’ broadband Internet service offerings as indivisible “information services” subject only to potential regulation under Title I of the Communications Act and the doctrine of ancillary authority. In that decision, the Commission articulated its belief that “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 access service providers.” The second decision that day adopted principles for an open Internet, again expressing confidence that the Commission had the “jurisdiction necessary to ensure that providers of telecommunications for Internet access . . . are operated in a neutral manner.” Earlier this year, the Commission unanimously reaffirmed in a *Joint Statement on Broadband* that “[e]very American should have a meaningful opportunity to benefit from the broadband communications era,” and that “[w]orking to make sure that America has world-leading high-speed broadband networks—both wired and wireless—lies at the very core of the FCC’s mission in the 21st Century.” Together, these and other agency decisions show the Commission’s commitment to restrained oversight of broadband Internet service, and its equally strong resolve to ensure universal service and protect consumers and fair competition in this area when necessary.

Viewed thru the lens of history, this gave the appearance of being “politically” driven by a laissez-faire administration policy. Viewed thru that same lens, it was also was clearly *not* advisable. I expect that there are many who predicted the current situation (which I would hardly call a dilemma) when the reclassification occurred in 2005. At the very least, it went too far, and some would almost certainly argue, with good cause, that this reclassification was an outright mistake.

8. Before the *Comcast* case, most stakeholders—including major communications service providers—shared the Commission’s view that the information service classification allowed the Commission to exercise jurisdiction over broadband Internet services when required. But the D.C. Circuit concluded that the Commission lacked authority to prohibit practices of a major cable modem Internet service provider that involved secret interruption of lawful Internet transmissions, which the Commission found were unjustified and discriminatory and denied users the ability to access the Internet content and applications of their choice. Today, in the wake of the *Comcast* decision, the Commission faces serious questions about the legal framework that will best enable it to carry out, with respect to broadband Internet service, the purposes for which Congress established the agency. Meanwhile, Congress has highlighted the importance of broadband networks and Internet-based content and services for economic growth and development and has directed the Commission to develop policies to address concerns about the pace of deployment, adoption, and utilization of broadband Internet services in the United States.

9. *Comcast* makes unavoidable the question whether the Commission’s current legal approach is adequate to implement Congress’s directives. In this Notice, we seek comment on the best

way for the Commission to fulfill its statutory mission with respect to broadband Internet service in light of the legal and factual circumstances that exist today. We do so while standing ready to serve as a resource to Congress as it considers additional legislation in this area.

I believe it is important to establish whether or not Comcast's behavior was acceptable using societal and technical norms. On the one hand Comcast was apparently faced with a legitimate problem: excessive network bandwidth used for what was to some degree likely to be illegal activity. Without arguing the merits of the Digital Millennium Copyright Act (DMCA), it is clearly the law of the land. On the other hand, this behavior, wherein an organization providing access to the Internet may, at a whim, and without due process, discriminate against traffic which it determined was detrimental to its operation, even though the volume of traffic was not in conflict with the terms of service, should not be generally acceptable.

If telecommunications companies were not themselves moving into the business of providing "content" (that is, providing a separate *information service*) to their customers, then this might be less troubling. However, given this context, it will be crucial for the Commission to be able to rule in these areas, lest such discrimination extend to effective censorship of information services.

Given these needs, I believe that there need to be limitations on the types of actions which Comcast perpetrated. Had Comcast followed some sort of due process and legally established that the material was in violation of the law, then they may have been justified in their actions. In absence of due process, I do not believe such activities are acceptable in our society, and would also serve to dampen technological innovation by those not directly connected with the media and telecommunications industries.

10. We emphasize that the purpose of this proceeding is to ensure that the Commission can act within the scope of its delegated authority to implement Congress's directives with regard to the broadband communications networks used for Internet access. These networks are within the Commission's subject-matter jurisdiction over communication by wire and radio and historically have been supervised by the Commission. We do not suggest regulating Internet applications, much less the content of Internet communications. We also will not address in this proceeding other Internet facilities or services that currently are lightly regulated or unregulated, such as the Internet backbone, content delivery networks (CDNs), over-the-top video services, or voice-over-Internet-Protocol (VoIP) telephony services. Our questions instead are directed toward addressing broadband Internet service in a way that is consistent with the Communications Act, reduces uncertainty that may chill investment and innovation if allowed to continue, and accomplishes Congress's pro-consumer, pro-competition goals for broadband.

I agree that reducing uncertainty is very important. In so doing, corporations and individuals will have the clarity that they need in order to avoid running afoul of the Commission, and Congress will be able to develop a sense of understanding if there are any areas which require legislative action to address.

II. DISCUSSION

A. Background

11. The Commission has long sought to ensure that communications networks support a robust marketplace for computer services operated over publicly accessible networks, from the early database lookup services to today's social networking sites. To provide context for the later discussion of

the Commission's options for a suitable framework for broadband Internet service, we briefly describe this historical backdrop.

1. The Commission's Classification Decisions

12. In 1966, the Commission initiated its *Computer Inquiries* "to ascertain whether the services and facilities offered by common carriers are compatible with the present and anticipated communications requirements of computer users." In *Computer I*, the Commission required "maximum separation" between large carriers that offered data transmission services subject to common carrier requirements and their affiliates that sold data processing services. Refining this approach, in *Computer II* and *Computer III* the Commission required facilities-based providers of "enhanced services" to separate out and offer on a common carrier basis the "basic service" transmission component underlying their enhanced services.

I thought it instructive to notice the care with which the Commission required separation between telecommunication carriers and those selling data processing services in the relatively distant past. It seems to me that it is the lack of such separation that is creating the conflict over the matter of Internet access. Were telecommunication carriers forbidden from providing an information service, then there would be far less concern about their activities in managing their telecommunication services, including Internet access.

Of course, no carrier is likely to desire that separation, nor would I argue that it should be forced upon them, unless they believe that being free of telecommunications regulation is paramount to the point where they would accede to such strictures with respect to other business opportunities.

So, if the telecommunications industry would like to participate in the field of information services, then it is not unreasonable that the Commission should impose reasonable limitations on how they treat other providers of information services *including their individual subscribers*.

13. In the Telecommunications Act of 1996, Congress built upon the *Computer Inquiries* by codifying the Commission's distinction between "telecommunications services" used to transmit information (akin to offerings of "basic services") and "information services" that run over the network (akin to "enhanced services"). In a 1998 report to Congress, the Commission attempted to indicate how it might apply the new law in the Internet context. Approximately 98 percent of households with Internet connections then used traditional telephone service to "dial-up" their Internet access service provider, which was typically a separate entity from their telephone company. In the report to Congress—widely known as the "*Stevens Report*," after Senator Ted Stevens—the Commission stated that Internet access service as it was then being provided was an "information service." The *Stevens Report* declined to address whether entities that provided Internet connectivity over their own network facilities were offering a separate telecommunications component. The courts, rather than the Commission, first answered that question.

It is important, I think, to note that the emergence of "Internet Service Providers" and the associated legislation and case law was, in a sense, an historical "blip". Unfortunately, this short-term situation in the earlier days of Internet access has served to unnecessarily cloud the present issues. Today, with converged telecommunication, where voice is carried over TCP network connections, communication of data is simply telecommunications. As such it ought to be under the purview of the Commission.

14. In 2000 the United States Court of Appeals for the Ninth Circuit held that cable modem Internet service is a telecommunications service to the extent that the cable operator "provides its subscribers Internet transmission over its cable broadband facility" and an information service to the

extent the operator acts as a “conventional [Internet Service Provider (ISP)].” At the time, the Commission’s *Computer Inquiry* rules required telephone companies to offer their digital subscriber line (DSL) transmission services as telecommunications services. The Ninth Circuit’s decision thus put cable companies’ broadband transmission service on a regulatory par with DSL transmission service.

15. In 2002, the Commission exercised its authority to interpret the Act and disagreed with the Ninth Circuit. Addressing the classification of cable modem service, the Commission observed that “[t]he Communications Act does not clearly indicate how cable modem service should be classified or regulated.” Based on a factual record that had been compiled largely in 2000, the Commission’s *Cable Modem Declaratory Ruling* described cable modem service as “typically includ[ing] many and sometimes all of the functions made available through dial-up Internet access service, including content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet, including access to the World Wide Web.” The Commission noted that cable modem providers often consolidated these functions “so that subscribers usually do not need to contract separately with another Internet access provider to obtain discrete services or applications, such as an e-mail account or connectivity to the Internet, including access to the World Wide Web.”

This is the kind of “historical blip” to which I referred earlier. I believe that services such as email and web pages were provided by telecommunication companies selling cable modem and other broad band internet access as a means to an end. Since small “mom and pop” ISPs offered such services, and because ferreting out providers of such services was beyond the experience of most Internet users, those providing broadband access had to provide such services. They also had other self-serving reasons for doing so: providing, email services reduced the amount of bandwidth required by their customers, since those services could be provided relatively locally.

But technology has now moved on. Many users use services such a Yahoo and Google Gmail for email services, even when their broadband service provider also offers such services, in part so that they can have an email address that is not tied to their service provider. Since email SPAM is also effectively handled by such commercial entities providing email service (as well as by broadband service providers), email bandwidth use is now the proverbial “drop in the bucket” compared to most other Internet use. Also, web site hosting is available from plethora of companies – many broadband service providers no longer offer the service.

Even if the Commission would have argued for such bundling (“indivisible”) in the past, such an argument would not hold sway today.

16. The Commission identified a portion of the cable modem service it called “Internet connectivity,” which it described as establishing a physical connection to the Internet and interconnecting with the Internet backbone, and sometimes including protocol conversion, Internet Protocol (IP) address number assignment, domain name resolution through a domain name system (DNS), network security, caching, network monitoring, capacity engineering and management, fault management, and troubleshooting. The *Ruling* also noted that “[n]etwork monitoring, capacity engineering and management, fault management, and troubleshooting are Internet access service functions that are generally performed at an ISP or cable operator’s Network Operations Center (NOC) or back office and serve to provide a steady and accurate flow of information between the cable system to which the subscriber is connected and the Internet.” The Commission distinguished these functions from “Internet applications [also] provided through cable modem services,” including “e-mail, access to online newsgroups, and creating or obtaining and aggregating content,” “home pages,” and “the ability to create a personal web page.”

This is a key piece of definition. Many of these things have parallels in the world of analog telecommunications: An IP address is much like a telephone number, DNS is something like a

telephone directory, though its distributed nature has no direct parallel in telephony. Certainly capacity engineering and network management are very similar (if not one in the same, as is true in many cases). Caching stands alone as probably not belonging in this definition, as it represents not so much a service of itself as a mechanism for Internet access providers to provide that access more efficiently and at lower cost.

The other items: email, newsgroup access, personal web pages, to the extent that they are still relevant, would more properly be grouped as information services.

One thing is key is that the internet access provider ought not be able to discriminate against other information service providers. Charter ought not be able to slow down the performance of Google's Gmail, for example.

17. The Commission found that cable modem service was “an offering . . . which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications.” The Commission further concluded that, “as it [was] currently offered,” cable modem service as a whole met the statutory definition of “information service” because its components were best viewed as a “single, integrated service that enables the subscriber to utilize Internet access service,” with a telecommunications component that was “not . . . separable from the data processing capabilities of the service.” The Commission thus concluded that cable modem service “does not include an offering of telecommunications service to subscribers.”

Again, in the best light I see this as an historical “blip” – and the wrong path to take. In the worst light it was almost ridiculous. Not all precedents are positive precedents.

18. When the United States Supreme Court considered the *Cable Modem Declaratory Ruling* in the *Brand X* case, all parties agreed that cable modem service either *is* or *includes* an information service. The Court therefore focused, in pertinent part, on whether the Commission permissibly interpreted the Communications Act in concluding that cable modem service providers offer only an information service, rather than a separate telecommunications service and information service. The Court's opinion reaffirms that courts must defer to the implementing agency's reasonable interpretation of an ambiguous statute. Justice Thomas, writing for the six-Justice majority, recited that “ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts.” Furthermore, “[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis.”

19. Turning specifically to the Communications Act, Justice Thomas wrote: “[T]he statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission.” “The questions the Commission resolved in the order under review,” Justice Thomas summed up, “involve a subject matter [that] is technical, complex, and dynamic. The Commission is in a far better position to address these questions than we are.” Justice Breyer concurred with Justice Thomas, stating that he “believe[d] that the Federal Communications Commission's decision falls within the scope of its statutorily delegated authority,” although “perhaps just barely.”

I think this clearly illuminates that the Commission has been effectively trying to “dance on the head of a pin” – to treat Internet access as essentially a telecommunications service, for the public benefit, but calling it an information service, to try and make the playing field more friendly to telecommunications vendors. The same wishful thinking permeates much of the requests for comment in the Notice of Inquiry – the hope that some legal “knot”, that telecommunications vendors undoubtedly hope will turn into a loophole, can be found to preserve the former state of affairs before the Comcast ruling. That approach has now failed, and yet regulation is still called

for. It is time to “bite the bullet”. **Broadband Internet access should be defined as a telecommunication service because that is exactly what it is.**

20. In dissent, Justice Scalia, joined by Justices Souter and Ginsburg, expressed the view that the Commission had adopted “an implausible reading of the statute[,] . . . thus exceed[ing] the authority given it by Congress.” Justice Scalia reasoned that “the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on offer—especially when seen from the perspective of the consumer or end user.”

Justices, who, with considerable foresight, were unafraid to “call a garden hose a garden hose”.

21. After the Supreme Court affirmed the Commission’s authority to classify cable modem service, the Commission eliminated the resulting regulatory asymmetry between cable companies and other broadband Internet service providers by issuing follow-on orders that extended the information service classification to broadband Internet services offered over DSL and other wireline facilities, power lines, and wireless facilities. The Commission nevertheless allowed these providers, at their own discretion, to offer the broadband transmission component of their Internet service as a separate telecommunications service. Exercising that flexibility, providers—including more than 840 incumbent local telephone companies—currently offer broadband transmission as a telecommunications service expressly separate from their Internet information service.

This would read more accurately as “After the Supreme Court barely affirmed...”.

This partial change in classification of DSL from telecommunication service to information service ought to have been, in hindsight, a huge red flag that the Commission was on the wrong track.. The very acronym, DSL, is steeped in telecommunications structure and technology, and to try and treat it as an information service just because it was bundled in the “marketware” of email access was not the right thing to do.

The political division within the Supreme Court also reflected the partisanship and a (perhaps understandable) lack of vision as to what was to come, and the composition of the Commission as a political entity, and thus erred in allowing the Commission to define a cable modem as an information service. That error now cries out for rectification.

2. The Commission’s Established Policy Goals

22. In the 1996 Act, Congress made clear its desire that the Commission promote the widespread availability of affordable Internet connectivity services, directing the Commission to adopt universal service mechanisms to ensure that “[a]ccess to advanced telecommunications and information services . . . [is] provided in all regions of the Nation.” Congress also instructed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” The Commission’s classification decisions in the *Cable Modem Declaratory Ruling* and the later follow-on orders were intended to support the policy goal of encouraging widespread deployment of broadband. The Commission’s hypothesis was that classifying all of broadband Internet service as an information service, outside the scope of any specific regulatory duty in the Act, would help achieve Congress’s aims.

To think that the explosive growth of the Internet, with trillions of dollars of goods and services that could be made available to consumers, would somehow depend upon classification of broadband Internet access as an “information service” borders on the amusing. The results were (and are) predictable. Those who represent the largest market-base have the best access: heavily populated areas. Thus it can be successfully argued that by classifying broadband Internet access as an information service, the Commission actually *hindered* the goal established by Congress to make this technology available to all Americans.

23. At the same time, the Commission acted with the express understanding that its information service classifications would not impair the agency's ability to protect the public interest. For example, when the Commission permitted telephone companies to offer broadband Internet service as solely an information service, it emphasized that this new classification would not remove the agency's "ample" Title I authority to accomplish policy objectives related to consumer protection, network reliability, and national security. The *Wireline Broadband Report and Order* thus was accompanied by a *Broadband Consumer Protection Notice*, in which the Commission sought comment on "a framework that ensures that consumer protection needs are met by *all* providers of broadband Internet access service, regardless of the underlying technology." The Commission stressed that its ancillary jurisdiction was "ample to accomplish the consumer protection goals we identify." The Commission similarly referenced the *Broadband Consumer Protection Notice* when it extended the information service classification to broadband Internet services offered over power lines and wireless facilities.

Obviously that Title I authority turned out to be anything but "ample". The Commission erred in its judgment, and it is now time to correct that error.

24. On the same day it adopted the *Wireline Broadband Report and Order* and *Broadband Consumer Protection Notice*, moreover, the Commission unanimously adopted the *Internet Policy Statement*. In this *Statement*, the Commission articulated four principles "[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet," and to "foster creation adoption and use of Internet broadband content, applications, services and attachments, and to insure consumers benefit from the innovation that comes from competition." The principles are:

- consumers are entitled to access the lawful Internet content of their choice;
- consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;
- consumers are entitled to connect their choice of legal devices that do not harm the network; and
- consumers are entitled to competition among network providers, application and service providers, and content providers.

The Commission expressed confidence that it had the "jurisdiction necessary to ensure that providers of telecommunications for Internet access . . . are operated in a neutral manner."

3. Legal Developments

25. Recent legislative and judicial developments suggest a need to revisit the Commission's approach to broadband Internet service. Since 2008, Congress has passed three significant pieces of legislation that reflect its strong interest in ubiquitous deployment of high speed broadband communications networks and bear on the Commission's policy goals for broadband: the 2008 Farm Bill directing the Chairman to submit to Congress "a comprehensive rural broadband strategy," including recommendations for the rapid buildout of broadband in rural areas and for how federal resources can "best . . . overcome obstacles that impede broadband deployment"; the Broadband Data Improvement Act, to improve data collection and "promote the deployment of affordable broadband services to all parts of the Nation"; and the Recovery Act, which, among other things, appropriated up to \$7.2 billion to evaluate, develop, and expand access to and use of broadband services, and required the Commission to develop the National Broadband Plan to ensure that every American has "access to broadband capability and . . . establish benchmarks for meeting that goal." In the Recovery Act, Congress further directed the Commission to produce a "detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public," and a "plan for [the] use of broadband structure and services" to advance national goals such as public safety, consumer welfare, and education.

These three pieces of legislation, passed within a span of nine months, make clear that the Commission must retain its focus on implementing broadband policies that encourage investment, innovation, and competition, and promote the interests of consumers.

To be blunt, the political winds have changed. Conservative commissioners should arguably now get something of a taste of what it felt like to be on the other side of the coin for a while. This is a good thing. It is healthy, if it leads to a certain amount of common understanding and empathy. That does not mean that the current Commission should discard all of the conservative stance out-of-hand – but it also means that there is not necessarily any compelling reason to keep those stances just because of precedent. In becoming politicized, the Commission and the Courts are losing their tie to, and support from, precedents. They no longer have the meaning and “pull” they once had.

26. Even more recently, the D.C. Circuit’s rejection of the Commission’s attempt to address a broadband Internet service provider’s unreasonable traffic disruption practices has cast a shadow over the Commission’s prior understanding of its authority over broadband Internet services. In late 2007, the Commission received a complaint alleging that Comcast was blocking peer-to-peer traffic in violation of the *Internet Policy Statement*. In 2008, the Commission granted the complaint and directed Comcast to disclose specific information about its network management practices to the Commission, submit a compliance plan detailing how it would transition away from unreasonable network management practices, and disclose to the public the network management practices it intends to use going forward. Comcast challenged that decision in the D.C. Circuit, arguing (among other things) that the Commission lacks authority to prohibit a broadband Internet service provider from engaging in discriminatory practices that violate the four principles the Commission announced in 2005.

27. On April 6, 2010, the D.C. Circuit granted Comcast’s petition for review and vacated the Commission’s enforcement decision, holding that the Commission had “failed to tie its assertion of ancillary authority over Comcast’s Internet service to any ‘statutorily mandated responsibility.’” The Commission had argued that ending Comcast’s secret practices was ancillary to the statutory objectives Congress established for the Commission in sections 1 and 230(b) of the Act. The court rejected that argument on the ground that those sections are merely statements of policy by Congress—as opposed to grants of regulatory authority—and thus were not sufficient to support Commission action against Comcast. The court also rejected the Commission’s position that various other statutory provisions supported ancillary authority. As to section 706 of the Telecommunications Act of 1996, the court noted that the agency had previously interpreted section 706 as not constituting a grant of authority and held that the Commission was bound by that interpretation for purposes of the case. The court also rejected the agency’s reliance on sections 201, 256, 257, and 623 of the Communications Act.

I find this history particularly instructive. The Commission no doubt did as good a job as it could in developing underpinnings for its arguments in the case. And yet those arguments were nonetheless unsuccessful. Later in the document there are multiple suggestions that the Commission essentially “try again” under various sections. As I will note in each case, success in such instances appears already compromised, and thus such courses of action do not seem likely to reach their goals.

B. Approaches to Classification

28. In light of the legislative and judicial developments described above, we seek comment on whether our existing legal framework adequately supports the Commission’s previously stated policy goals for broadband. First, we ask whether the current information service classification of broadband Internet service can still support effective performance of the Commission’s core responsibilities.

Second, we ask for comment on the legal and practical consequences of classifying the Internet connectivity component of broadband Internet service as a “telecommunications service” to which the full weight of Title II requirements would apply, and whether such a classification would accurately reflect the current market facts. Finally, we identify and invite comment on a third way, under which the Commission would classify the Internet connectivity portion of broadband Internet service as a telecommunications service but would simultaneously forbear, using the section 10 authority Congress delegated to us, from all but a small handful of provisions necessary for effective implementation of universal service, competition and small business opportunity, and consumer protection policies.

Clearly the existing framework does *not* adequately support the Commission’s previously stated policy goals, and classification of broadband Internet service as an information service *cannot* provide the underpinnings for effective performance of the Commissions core responsibilities.

29. The Commission has frequently expressed its commitment to protecting consumers and promoting innovation, investment, and competition in the broadband context. We reaffirm that commitment here and ask commenters to address—in general terms, as well as in response to the specific questions posed below—which of the three alternative regulatory frameworks for broadband Internet service (or what other framework) will best position the Commission to advance these fundamental goals. We note that because the broadband Internet service classification questions posed in this part II.B involve an interpretation of the Communications Act, the notice and comment procedures we follow here are not required under the Administrative Procedure Act. In order to provide the greatest possible opportunity for public comment, however, we are soliciting initial and reply comments via the traditional filing mechanisms, as well as input through our recently expanded online participation tools.

In general terms it was a misstep to reclassify broadband Internet access as an information service. The way forward is clear to those whose judgments are not clouded by ideological imperatives. This noon I approached a colleague of mine, a lawyer, with the general outline of the situation, with which he was previously unfamiliar. It took this man *less than 10 seconds* to formulate the unequivocal answer that the Commission ought to re-establish broadband Internet access as a telecommunication service – to get back on firm legal ground, and *then* if necessary, use arguments to loosen regulation (forbearance, if you like).

Another colleague, also a lawyer, who was also previously unfamiliar with the situation, and with whom I discussed the matter last week was more inquisitive. But when I outlined the dangers to free commerce (and, indeed, free speech) that classifying internet access as an information service could engender, his response was also that something clearly needs to change.

1. Continued Information Service Classification and Reliance on Ancillary Authority

30. In this part, we seek comment on maintaining the current classification of wired broadband Internet service as a unitary information service. Under this approach, we would rely primarily on our ancillary authority to implement the Commission’s broadband policies. We seek comment on whether our ancillary authority continues to provide an adequate legal foundation. Throughout the last decade, the Commission has stated its consistent understanding that Title I provided the Commission adequate authority to support effective performance of its core responsibilities. Commissioners, including the two former Chairmen who urged the information service approach, as well as cable and telephone companies and other interested parties, individually expressed this understanding. In *Brand X*, the Supreme Court appeared to confirm this widely held view, stating that “the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.” The *Comcast* decision, however, causes us to reexamine our ability to rely on Title I as the legal basis for implementing broadband policies.

Classification of broadband Internet access as purely an information service is fundamentally flawed, *has already failed*, and the Commission should abandon that approach.

31. Some have suggested that although the D.C. Circuit rejected the Commission's theory of ancillary authority in *Comcast*, the Commission can still accomplish many of its most important broadband-related goals without changing its classification of broadband Internet service as a unitary information service. We seek comment on the overall scope of the Commission's authority regarding broadband Internet service in the wake of the *Comcast* decision. Below we identify and seek comment on several particular concerns.

As espoused by some of the Commissioners and other persons, such a stance could be described as "wishful thinking". When voiced by more conservatively-minded persons, this argument has the appearance of a simple canard – a diversion. A stalling tactic.

a. Universal Service

32. Can the Commission reform its universal service program to support broadband Internet service by asserting direct authority under section 254, combined with ancillary authority under Title I? AT&T, for example, observes that section 254 provides that "[a]ccess to advanced telecommunications *and information services* should be provided in all regions of the nation," and that the Commission's universal service programs "shall" be based on this and other enumerated principles. AT&T notes that the Commission's information service classification for broadband Internet service creates "tension" with "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.'" But, AT&T suggests, "[o]ther evidence in the statutory text makes clear that Congress did not intend to disable the Commission from using universal service to support information services." For example,

- "Section 254(b) *requires* the Commission to use universal service to promote access to 'advanced telecommunications and information services,'"
- "Section 254(c) . . . [refers] to an '*evolving* level of telecommunications services that the Commission shall establish periodically under this section[.]'" and
- Section 254(c)(2) "expressly authoriz[es] the Joint Board and the Commission to 'modif[y] . . . the definition of the *services* that are supported by Federal universal support mechanisms.'" The reference to "services" in section 254(c)(2) may suggest that Congress intended universal service policies to support information services, even though the definition of universal service in section 254(c)(1) is explicitly limited to "telecommunications services."

AT&T explains that section 254 "contains competing directives," but asserts that "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.'"

I find myself agreeing with AT&T on this description. Reliance on language this old when technology has changed so very much has already proven to be problematic. Continued reliance on descriptions which have already proven to be self-contradictory would be inadvisable. This same point applies to #33 as well.

33. We seek comment on whether we may interpret section 254 to give the Commission authority to provide universal service support for broadband Internet service if that service is classified as a unitary information service. Could we provide support to information service providers consistent with section 254(e), which says that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support," and 214(e), which sets forth

the framework for designating “telecommunications carrier[s] . . . eligible to receive universal service support”?

34. AT&T posits that even after the *Comcast* decision, the Commission could bolster its reliance on section 254 by also relying on several other provisions of the Act. First, the “necessary and proper clause” in section 4(i) of the Act allows the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” Second, the Act makes clear that the Commission’s “core 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 with adequate facilities at reasonable charges.” Third, the text of 254, as described above, suggests that Congress intended the Commission to support universal broadband Internet service. Finally, the policy directive in section 706 of the 1996 Act instructs the Commission to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. AT&T contends that section 706’s directive supports the view that section 254 provides authority for supporting broadband Internet services with monies from the Universal Service Fund. We seek comment on AT&T’s analysis.

AT&T’s analysis appears to be self serving in this case. Such an approach may succeed in this limited area, as it seems likely that no one is likely to seriously contest how the Commission might apply Universal Service Funds. Naturally the telecommunications industry, as the “boots on the ground” recipients of such funds, are hardly likely to argue against it.

However, it seems to contradict, in principle, if not direct assertion, the observation made regarding point #32, above. Secondly, as I observed earlier, the notion that one could somehow patch together portions of directives, many of which have already been attacked by the Court is very unlikely to be successful. By way of analogy, a house built on sand would be more robust if a fishing net were put in place to try and loosely tie together the sand under the foundation.

35. The National Cable and Telecommunications Association (NCTA) has put forward a similar legal theory rooted in section 254(h)(2) of the Communications Act. That section gives the Commission authority “to enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries.” NCTA contends that because “the use of broadband in the home has become a critical component of the American education system . . . 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.” Could the Commission interpret section 254(h)(2) to permit this type of support for broadband Internet service? Is this approach a permissible extension of the Commission’s existing E-Rate program? Would this approach enable the Commission to provide support for broadband Internet service only to households with school-aged children, or could the Commission provide support for adult education as well?

A similar, seemingly self-serving, and likely flawed argument. It is an argument that suggests action in the very hope that the goal will not be achieved. E-Rate, while an admirable program, is of too small a scope as compared to truly Universal Service. The same issue arises throughout this discussion on point 35.

36. Another legal theory for promoting broadband deployment under the Commission’s current classification of broadband Internet service rests directly on section 706 of the 1996 Act. Section 706(a) states that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove

barriers to infrastructure investment.” Section 706(c) defines “advanced telecommunications capability” as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” The D.C. Circuit rejected section 706(a) as a basis for the Commission’s *Comcast* order because “[i]n an earlier, still-binding order . . . the Commission ruled that section 706 ‘does not constitute an independent grant of authority,’” and “agencies ‘may not . . . depart from a prior policy *sub silentio*.’” We seek comment on whether the Commission should revisit and change its conclusion that section 706(a) is not an independent grant of authority. What findings would be necessary to reverse that interpretation? If the Commission were to find that section 706(a) is an independent grant of authority, would that subsection, read in conjunction with sections 4(i) and 254, provide a firm basis for the Commission to provide universal service support for broadband Internet services?

Certainly the Commission will want to revisit its precedents with respect to section 706. While that may perhaps be helpful with respect to universal service, it does not begin to approach the broader issues which were created when the Commission ruled that broadband Internet access could be defined as an information service.

One interesting point. Should the Commission decide, as I am advising, to reclassify broadband Internet access as a telecommunications service, perhaps section 706, with its explicit *forbearance* language, could serve as a solid footing upon which to base some aspects of forbearance.

To me, this language makes the way forward clear. Rather than try and continue to classify broadband Internet access as an information service (Title I) with a few aspects of Title II “thrown in”, it would clearly be more effective, and allow the Commission to stand on much firmer legal ground, if it classifies broadband Internet access as what it is: *a telecommunications service*, and *then* use forbearance to promote investment where the industry can clearly demonstrate the need to do so.

There is an engineering parallel here, with respect to protecting computer systems that communicate with the Internet. Nearly two decades ago those of us who worked on Internet firewalls in the early days established that it would be impossible to block out only the undesirable traffic. It was just too hard. So, instead, firewall administrators applied the complimentary logic: only allow the needed, desirable traffic.

Should the Commission continue to define broadband Internet access as an information service it will be in exactly the same situation: there would be too many possible bad behaviors to prevent. The complement however, is tenable: use the historically sound footing of historical telecommunications regulation to restrain undesirable behaviors, and encourage necessary, desirable behaviors, by loosening those regulations when necessary either formally or thru forbearance. From a common-sense logical perspective it is, as they say, “a slam dunk”.

37. Some parties have suggested that the Commission could rely on section 706(b) as a source of authority to support broadband Internet service with Universal Service Fund money. That section provides that:

[t]he Commission shall . . . annually . . . initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission’s determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

We seek comment on whether we could interpret section 706(b) as an independent grant of authority.

Specifically, we ask whether Congress's direction that the Commission take "immediate action" if it makes a negative determination about the state of broadband deployment authorizes the Commission to provide universal service support to spur that deployment. Would any such support be contingent on continued negative findings in the annual broadband availability inquiry? Under section 706(b), would universal service programs have to be tailored to particular geographic areas where deployment is lagging, or could the Commission implement the program on a national basis? Would the Commission be limited to direct support for deployment, or could the Commission interpret section 706(b) also to support broadband Internet services to low-income populations, such as is the case with our support for voice services in the Lifeline and Link Up programs?

The problem here is reliance on taxation (Universal Service) for funding. Since there would be a definite ceiling on the effectiveness of such funding created by telecommunications counter-advertising, it will not be a reliable mechanism.

38. For each of these legal theories, the Commission seeks comment on the administrative record that would be needed to successfully defend against a legal challenge to implementation of the theory. Would adopting these theories be consistent with the federal Anti-Deficiency Act and Miscellaneous Receipts Act? What other issues should the Commission consider in evaluating these legal theories? Are there other legal frameworks that would allow us to promote universal service in the broadband context without revisiting our classification decisions?

In answer to this last question: It seems to someone who is not a lawyer that perhaps it might be possible to promote universal service without reclassification – but it is also not complete. There are reasons, that I have identified above, for classifying broadband Internet access as a telecommunications service which have nothing at all to do with the goal of universal service.

b. Privacy

39. The Commission has long supported protecting the privacy of users of broadband Internet services. In 2005, the Commission emphasized in the *Wireline Broadband Report and Order* that "[c]onsumers' privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on [telephone] services." The Commission believed at the time that it had jurisdiction to enforce privacy requirements, and "note[d] that long before Congress enacted section 222 of the Act," which requires providers of telecommunications services to protect confidential information, "the Commission had recognized the need for privacy requirements associated with the provision of enhanced services." In 2007, the Commission extended the privacy protections of section 222 to interconnected VoIP services without resolving whether interconnected VoIP services are telecommunications services or information services. More recently, the National Broadband Plan recommended that the Commission work with the Federal Trade Commission (FTC) to protect consumers' privacy in the broadband context. Indeed, we fully intend that our efforts with regard to privacy complement those of the FTC. We seek comment on the best approach for ensuring privacy for broadband Internet service users under the Commission's current information service classification, and any legal obstacles to protecting privacy that may exist if the Commission retains that classification.

As the incident with AT&T with regards to the Apple iPhone has demonstrated, relying on "nudging" corporations with respect to privacy is unlikely to prove adequate. The Internet needs the same kinds of privacy controls historically extended to telecommunications services, and for the same reasons. Sarbanes-Oxley provides a useful counter-example, as expensive as it was for business, initially, in most cases it has actually helped those same businesses, in spite of the high overhead, through the additional discipline it requires on their parts, and as a stand-in for long-departed integrity in American businesses.

The question regarding the classification of VoIP is an interesting one. After giving it some thought, I decided that I feel it should also be a telecommunications service, because:

- Consumers see it as a “telephone” regardless of how that telephone traffic is implemented
- Making classification decisions based on layers within the architecture (which might lead one to think that VoIP ought to be an information service) is not a tenable approach.

c. Access for Individuals with Disabilities

40. Section 255 requires telecommunications service providers and equipment manufacturers to make their services and equipment accessible to individuals with disabilities, unless not readily achievable. Section 251(a)(2) requires telecommunications carriers “not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255.” In the 2005 *Wireline Broadband Report and Order*, the Commission committed to exercise its authority “to ensure achievement of important policy goals of section 255” in the broadband context. In 2007, the Commission exercised its ancillary authority to extend section 255 to interconnected VoIP providers, and in 1999 the Commission similarly relied on ancillary authority to extend disability-related requirements to voicemail and interactive menu services. More recently, a unanimous Commission stated its belief that disabilities should not stand in the way of Americans’ “opportunity to benefit from the broadband communications era.” The Commission has also announced its intent to consider how “[t]o better enable Americans with disabilities to experience the benefits of broadband.” We seek comment on the best legal approaches to extending disability-related protections to broadband Internet service users under the Commission’s current information service classification. Could we exercise ancillary authority to ensure access for people with disabilities? Could the Commission rely on the mandate in section 706(a) to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to *all* Americans,” or the similar directive in section 706(b)?

Corporate entities and the Court have shown, time and again, that relying on broad interpretations of pre-existing language for regulations new initiatives, such as VoIP or ensuring persons with disabilities have reasonable access to broadband Internet to be risky at best. They will wiggle thru and around such broad interpretations for their own ends. If Congress desires to promote universal broadband internet access then it is incumbent upon that body to make its intent clear and unambiguous, from both a monetary and a legal standpoint, rather than “passing the buck” to the Commission.

d. Public Safety and Homeland Security

41. As noted above, Congress created the Commission, in part, “for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications.” *Comcast* did not address questions of national defense, public safety, homeland security, or national security. Are there bases for asserting ancillary authority over broadband Internet service providers for purposes of advancing such vital and clearly enumerated Congressional purposes? Could the Commission use its ancillary authority as a legal foundation for protecting cyber security and other public safety initiatives, such as 911 emergency and public warning and alerting services, with respect to broadband Internet service? Specifically, could the Commission rely on provisions in Title I either alone or in combination with provisions in Title II or Title III to support these public safety purposes, as well as data reporting and/or network reliability and resiliency standards with respect to broadband Internet services? As noted below, Title III contains several provisions that enable the Commission to impose on spectrum licensees obligations that are in the public interest. With the convergence of the various modes of communications networks, many broadband Internet services incorporate wireline and wireless elements. What would be the effect if the Commission employed its Title III authority to achieve public safety goals with respect to wireless elements of such converged

services? Could the Commission also regulate wireline elements of such services through its Title III and Title I authority because of the wireless elements incorporated into these services, or in the interests of ensuring regulatory parity and predictability? Could the Commission rely on the mandate in section 706(a) to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” to ensure the security, reliability and resiliency of wired broadband Internet services, or to advance other public safety and homeland security initiatives?

Past events have shown that US and local law enforcement will, if given the authority or even when there is not a clear lack of authority, capture internet data streams for their purposes, and throw a very wide net indeed. Google’s relatively innocent inadvertent missteps in collecting WiFi information from members of the public provide another relevant, if less chilling, example. Defining broadband Internet access as an information service seems likely to result in the continuation of, and increase the frequency of, such abuses. Therefore it seems prudent to classify broadband Internet access (indeed, *all* Internet access) as a telecommunications service, so as to provide (the albeit meager) protections that exist in that venue.

e. Addressing Harmful Practices by Internet Service Providers

42. Although the D.C. Circuit rejected the legal theory the Commission relied on to address Comcast’s interference with its customers’ peer-to-peer transmissions, some have suggested that other theories of ancillary authority could support Commission action to protect against harmful practices of this sort. For example, one commentator has proposed that the Commission assert ancillary authority pursuant to sections 251(a) and 256 of the Act, which address interconnection by telecommunications carriers. Although these provisions apply specifically to telecommunications carriers, the proposal asserts that they are not explicitly limited to the telecommunications services provided by such carriers.

I more or less repeat my earlier comment that: As espoused by the some Commissioners and other persons, such a stance (in this case to avoid defining Internet access as a telecommunications service, while attempting to apply regulations that were defined for a telecommunications service) could be described as “wishful thinking”. When voiced by more conservatively-minded persons, this has the appearance of a simple canard – a diversion. A stalling tactic.

43. Section 251(a) requires each carrier “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” Reading section 251(a) as limited to telecommunication services, it has been suggested, “would make [the Commission’s] rules promoting interconnection irrelevant” as the major carriers move increasingly toward providing services over broadband Internet networks. Likewise, “[i]n a world where traditional public telecommunications networks and newer Internet-data-transmission networks are pervasively interconnected,” it has been asserted, “it makes no sense to preclude the FCC’s interoperability efforts [pursuant to section 256] from affecting information services.”

Would it not be easier, simpler and quicker to simply define Internet access, including such interconnections, as telecommunications services? Again, it feels like those who promote such suggestions have goals other than successful application of such regulations in mind. Without such a simple change, these several paragraphs have become tedious: wrapping up a fundamental issue in legal mumbo-jumbo in an apparent (and actually surprisingly transparent) attempt to tie them up in knots.

44. We seek comment on this reasoning. What factual findings would the Commission have to make to support reliance on sections 251(a) and/or 256 with respect to broadband Internet service?

Would those facts support exercise of authority sufficient to implement the Commission's broadband policies in full, or in part? Under this approach, could the Commission address conduct by broadband Internet service providers that are not also telecommunications carriers? Does reliance on sections 251(a) and 256 limit Commission authority to protect competition and consumers to only those networks that are interconnected with the public telephone network? If so, what are the practical implications of this limitation? What is the significance of the *Comcast* decision, which held that "[t]he Commission's attempt to tether its assertion of ancillary authority to section 256" was flawed in that context because section 256 states that "[n]othing in this section shall be construed as expanding or limiting any authority that the Commission" otherwise has under law? What else should the Commission consider as it evaluates the significance of sections 251(a) and 256 in this proceeding?

45. Section 202(a) of the Communications Act makes it

unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

It has been suggested that "[i]f network operators are allowed the option of offering broadband Internet access services on a completely unregulated basis, that option could enable them to end run Section 202(a)" as carriers move toward providing services over broadband Internet networks, "and render that provision a dead letter." We seek comment on the factual and legal assumptions underlying this argument, and whether this reasoning provides the Commission authority to address practices of broadband Internet service providers that endanger competition or consumer welfare.

[It seems, again, that simply defining Internet access as a telecommunications service would effectively block such attempted "end runs".](#)

46. As the Commission argued to the D.C. Circuit in the *Comcast* case, section 706(a) might also provide a basis for prohibiting harmful practices of Internet service providers. As noted above, the D.C. Circuit gave no weight to section 706(a) because the Commission had determined in a prior order that section 706(a) is not an independent grant of authority. We seek comment on the best reading of section 706(a). We also seek comment on whether section 706(b) could provide a legal foundation for rules addressing harmful practices by Internet service providers. If so, could the Commission adopt such rules on a national basis, or would it have to tailor its rules to particular geographic areas? Would its rules depend on continued negative determinations in the annual broadband availability report?

[I more or less repeat my earlier comment that: As espoused by some Commissioners and other persons, such a stance \(in this case to avoid defining Internet access as a telecommunications service, while attempting to apply regulations that were defined for a telecommunications service\) could be described as "wishful thinking". When voiced by more conservatively-minded persons, this gives the appearance of a simple canard – a diversion. A stalling tactic.](#)

47. The *Comcast* opinion also rejected arguments that other provisions of Titles II, III, and VI of the Communications Act supported the Commission's action against Comcast because Internet-enabled communications services that depend on broadband Internet service—such as VoIP and Internet video services—may affect the regulated operations of telephony common carriers, broadcasters, and cable operators. The court did not address the merits of these theories, but rather rejected them because they were not sufficiently articulated in the underlying Commission order. Could such theories provide

sufficient support for the Commission to address harmful practices of Internet service providers? What type of factual record would be required to support such theories? If the Commission relied on these theories, could it prohibit behavior—such as the covert blocking of online gaming or e-commerce services, perhaps—that does not obviously affect services clearly addressed by Titles II, III, or VI? Could the Commission rely on sections 624 or 629 of the Act to establish broadband policy related to cable modem service?

It seems imprudent for the Commission to put itself in such a position – thereby prolonging uncertainty.

48. We also invite comment on whether the portions of section 214(a) addressing discontinuance, reduction, and impairment of service provide a potential basis for an assertion of ancillary authority regarding harmful Internet service provider practices. That provision mandates that a common carrier may not “impair service to a community” without prior Commission approval. Impairment, in the section 214(a) context, refers to both “the adequacy” and “quality” of the service provided.

The difficulty with this approach is that an organization could argue that impairing service for one individual may make service better for the community as a whole. Long have tyrants proclaimed “it’s for your own good”.

49. Are there other statutory provisions that could support the Commission’s exercise of ancillary authority in this area? Do any statutory provisions preclude such action if the Commission retains its information service classification?

50. Other harmful practices by broadband Internet service providers may involve a failure to disclose practices to consumers. For instance, one problem identified by the Commission in the *Comcast* case was Comcast’s failure to identify to customers its practice of degrading peer-to-peer traffic. If the Commission maintains its information services framework for broadband Internet services, will it have sufficient authority to address these concerns?

In the end, no, it will not. As I argued by analogy (Internet firewall) above, the Commission cannot know or predict the countless loopholes that telecommunication vendors will use to promote their self-interest. Each one will end up in court, with arguments at substantial cost. In the end, the telecommunications industry could paralyze the ability of the Commission to effectively promote the public welfare simply by the volume of such cases.

f. Other Approaches to Oversight

51. Finally, we ask for public input on whether there are other approaches to fulfilling our role for broadband Internet services that would provide meaningful oversight consistent with maintaining robust incentives for innovation and investment. For instance, in a number of proceedings commenters have suggested that the Commission should pursue policies based on standards set by third parties and enforced by the Commission. In the Open Internet proceeding, Verizon and Google suggest that the Commission could create technical advisory groups “comprised of a range of stakeholders with technical expertise” to develop best practices, resolve disputes, issue advisory opinions, and coordinate with standards-setting bodies. Although Verizon and Google “may not necessarily agree on which federal agency does or should have authority over these matters,” they “do recognize as a policy matter that there should be some backstop role for federal authorities to prevent harm to competition and consumers if or when bad actors emerge anywhere in the Internet space, and . . . agree that involvement should occur only where necessary on a case-by-case basis.” Commenters in other proceedings have suggested similar approaches. We ask commenters to address whether the Commission should pursue a regime in which one or more third parties play a major role in setting standards and best practices relative to maintaining our policy goals for broadband Internet service. Pursuant to what authority could the Commission create

a third party advisory group? What authority could the Commission delegate to such a third party or third parties? Would it be appropriate for other federal governmental entities, such as the FTC, to have a role in such an approach? Would the Commission have sufficient ancillary authority under its information service framework to serve as a backstop if the third party is unable to resolve a dispute or implement a necessary policy?

These suggestions appear to be based on the plausible argument that the technology is too complex for the Commission to regulate effectively on its own. Regardless of whether or not I agree with that assessment, it would seem useful for the Commission to avail itself of the expertise available from third parties, much as it is doing with this Notice of Inquiry.

It would clearly be wrong to use a single third party because of the enormous risk for conflict of interest, and in the present climate it also does not seem likely that delegation is advisable. Delegation is a good tool when there is relatively little controversy. Clearly that is not the case here.

However, I do think it would be appropriate for the Commission to consider forming some sort of “advisory board” that could provide Commissioners with useful insight as to the likely or possible outcomes of some future contemplated courses of action.

2. Application of All Title II Provisions

52. Title II of the Communications Act provides the Commission express authority to implement, for telecommunications services, rules furthering universal service, privacy, access for persons with disabilities, and basic consumer protection, among other federal policies. We seek comment on whether the legal and policy developments discussed above and the facts of today’s broadband marketplace suggest a need to classify Internet connectivity as a telecommunications service, so as to trigger this clear authority. We also ask whether that approach would be consistent with our goals of promoting innovation and investment in broadband, or would result in overregulation of a service that has undergone rapid and generally beneficial development under our deregulatory approach.

I believe I have argued well in preceding comments that indeed it is necessary for the Commission to classify broadband Internet access (“Internet connectivity”) as a telecommunication service to remove ambiguity quickly, and so as to provide a solid foundation for the road forward.

Then the Commission could use forbearance, perhaps rooted in Section 706, or other Sections, or with duly established precedent, to accomplish the goal of promoting innovation and investment.

I think it is instructive to think about motivations at this point. Is the telecommunications industry motivated by the public good? No – only by coincidence when it aligns with their ability to derive income. Their allegiance is necessarily to their investors and stockholders. The industry *cannot* put the public good first. It simply isn’t their role to do so.

On the flip side, if the Commission were to treat broadband Internet access as the telecommunications service that it is, would the Commission be motivated to promote innovation and investment in broadband Internet access? Clearly the answer here is “Yes”. The Commission *can* put investment first over regulation, when it aligns with the public good.

The lack of symmetry in this situation should make the way forward obvious.

a. Current Facts in the Broadband Marketplace

53. In the *Cable Modem Declaratory Ruling*, the Commission observed that “the cable modem service business is still nascent, and the shape of broadband deployment is not yet clear,” and nearly a decade has passed since the Commission examined the facts surrounding broadband Internet service in the *Cable Modem Declaratory Ruling*. In this part we therefore ask whether or not the facts of

today's broadband marketplace support a conclusion that providers now offer Internet connectivity as a separate telecommunications service. In addition to the specific questions we ask below, we seek comment on what facts are most relevant to this inquiry. The Commission has explained that because the Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public[,] . . . whether a telecommunications service is being provided turns on what the entity is 'offering . . . to the public,' and customers' understanding of that service." Similarly, in *Brand X*, the majority opinion noted that "[i]t is common usage to describe what a company 'offers' to a consumer as what the consumer perceives to be the integrated finished product." The *Brand X* dissent asserted that "[t]he relevant question is whether the individual components in a package being offered still possess sufficient identity to be described as separate objects of the offer, or whether they have been so changed by their combination with the other components that it is no longer reasonable to describe them in that way." The *Brand X* majority opinion and the dissent examined consumers' understanding of the services, analogies to other services, and technical characteristics of the services being provided. What factors should the Commission consider in order to assess the proper classification of broadband Internet connectivity service?

To view Cable Modem service as nascent now would be, well, let's say amusing. Indeed we seem to be headed towards a convergence, not unlike that of voice service, where Cable TV will be provided over an Internet access connection (e.g., U-Verse and FIOS).

Indeed, this too points the way forward. In not too many years it may be that *all* communication services are likely to be based on Internet access of one sort or another. This makes the goal of universal access all the more important – and makes consistent, clear regulation, for the public good, but without undue restraint on commercial enterprise, all the more necessary.

On the other hand other ancillary services, such as email, web hosting, "cloud computing" and the like clearly *are* information services, and should be treated as such.

54. *Status of Current Offerings.* Is wired broadband Internet service (or any telecommunications component thereof) held out "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public," for instance through a tariff such as the NECA DSL Access Service Tariff or through facilities-based Internet service providers' public websites? If so, we seek specific examples of such offerings. If not, does the Commission have legal authority to compel the offering of a broadband Internet telecommunications service that is not currently offered? If legal authority exists, would it be appropriate for the Commission to exercise such authority? Are there First Amendment constraints on the Commission's ability to compel the offering of such a service? Would such a compulsion raise any concerns under the Takings Clause of the Fifth Amendment?

My answer to the above is to express considerable puzzlement. The Commission seems to be trying to dance on the head of a pin once more. Is the answer not obvious and straight-forward? Presumably the Commission has looked at the web sites for such organizations as Charter, Comcast, Time Warner, AT&T, TDS and all the rest. If one substitutes "telephone service" or "cable TV service" in the above, what would you decide? For all practical purposes, broadband Internet service is in the same boat.

I could foresee cases where it might make sense for the Commission to compel telecommunications vendors to offer service in areas geographically near to other locations where service is presently offered where it may not be (quite as) profitable as other opportunities that the vendors may see.

55. *Services Offered Today.* When the Commission gathered the record for its classification orders, broadband Internet service was offered with various services—such as e-mail, newsgroups, and the ability to create and maintain a web page—that we described as "Internet applications." The Commission understood that subscribers to broadband Internet services "usually d[id] not need to contract

separately” for “discrete services or applications” such as e-mail. We seek comment on whether this remains the case. To what extent are these and other applications and services sold with wired broadband Internet service today? Are providers offering the same applications and services that they did when the Commission began building the record in 2000, or have their offerings changed? Are these applications and services always packaged with Internet connectivity, or can consumers choose not to purchase them? What test(s) should the Commission use to evaluate whether particular features are today integrated with the underlying Internet connectivity?

If read literally, users of broadband Internet service do not *need* to contract separately for e-mail, newsgroups or web pages. Indeed, they hardly need to contract at all for information services. Customers of broadband Internet service can and often do obtain these services separately, with the possible exception of email. And certainly the landscape has changed. With Facebook and the like, who needs a separate web site? And even if one did, multiple vendors stand ready to provide that information service. Generally broadband Internet providers no longer offer newsgroup service, so that one is certainly moot. That leaves email. Sure, people *can* use the Internet service provider’s email, and email is typically available packaged in, but I argue that this is for the benefit of the *provider*, not the benefit of the customer. And given the likes of Google’s Gmail and Yahoo email, there are certainly alternatives to bundled information services. In point of fact, I am in the process of moving my primary email address away from my provider (Charter), for two reasons. Firstly, the performance of their email service from “offsite” (say, when traveling) is abysmal, and have been for years. Secondly, I prefer a “portable” email address not bound to a single provider, in case I desire to change providers.

56. *Consumer Use and Perception.* Next, we seek comment on how consumers use and perceive broadband Internet service. Do customers today perceive that they are receiving one unitary service comprising Internet connectivity as well as features and functionalities, or Internet connectivity as the main service, with additional features and functionalities simultaneously offered and provided? To what extent do consumers continue to rely on the features and applications that are provided as part of their broadband Internet service package, and to what extent have they increased their use of applications and services offered by third party providers? For instance, some users now rely on free e-mail services provided by companies such as Yahoo and Microsoft, social networking sites including Facebook and MySpace, public message boards like those found in the Google Groups service, web portals like Netvibes, web hosting services like Go Daddy, and blog hosting services like TypePad. How does the use of these third party services compare with the use of similar services offered by broadband Internet service providers? To what extent do consumers rely on their Internet service provider or other providers for security features and spam filtering? To what extent do consumers rely on their Internet service provider, as opposed to alternative providers, for content such as news and medical advice? To the extent broadband Internet service providers offer applications to consumers, do consumers view them as an integrated part of the Internet connectivity offering? To what extent do consumers today use “the high-speed wire always in connection with the information-processing capabilities provided by Internet access”?

I think your question basically answers itself. If consumers were not relying on external email providers, would those businesses not die on the vine? As for going to one’s Internet provider for things like the news, I assert that that service is offered to keep the traffic localized – for the provider’s benefit.

I also believe that the way forward is not illuminated by what consumers currently do, but by what they will want to do and will do in the future. With multiple devices in the household, potentially served by multiple telecommunications providers (say, a Cable modem, an iPhone/Android phone served by a wireless telecommunications provider, and an iPad or other tablet device used at “hot spots” around the country) it is clear that the Cable modem – the broadband Internet access service -- will generally be used as simple telecommunications service

in the future, with other information services located “in the cloud” (and moved from place to place on the cloud) based on merit, style, convenience or even whim.

57. *Marketing Practices.* We also seek comment on how broadband Internet service providers market their services. What do broadband Internet service providers’ marketing practices suggest they are offering to the public? What features do broadband Internet service providers highlight in their advertisements to consumers? How do the companies describe their services? What are the primary dimensions of competition among broadband Internet service providers? Are cable modem and other wired services marketed or understood differently from each other, or in a generally similar way?

I haven’t the time for a full market survey, but looking at Charter’s page for Internet access, they highlight the following, in order:

- Download speed
- Upload speed
- New! Faster downloads with PowerBoost®
- Includes Charter Security Suite (desktop software)
- Access to Charter.net (first occurrence of an information service – but see the discussion on item 56, above)
- New! Watch games LIVE online with ESPN3.com (a 3rd party information service arrangement used to lure customers)
- Email Accounts (and storage)
- 24/7 Technical Support
- Wireless Home Networking Support

Of these 10 items, only 3 (charter.net, email accounts and email storage) are information services provided by Charter (and for which there are other, often better, alternatives). The rest are either telecommunication services (5 – including Technical Support), software (1) and an outside information service (1).

58. *Technical and Functional Characteristics.* In addition, to aid our understanding of what carriers offer to consumers, we seek to develop a current record on the technical and functional characteristics of broadband Internet service, and whether those characteristics have changed materially in the last decade. For example, DNS lookup is now offered to consumers on a standalone basis, and web page caching is offered by third party content delivery networks. Web browsers, for example, are often installed separately by users. We ask commenters to describe the technical characteristics of broadband Internet service, including identifying those functions that are essential for web browsing and other basic consumer Internet activities. What are the necessary components of web browsing? How is caching provided to end users, and how have caching services changed over time? How do routing functions and DNS directory lookup enable users to access information online?

I appears that DNS lookup is often provided as part of Internet broadband access for multiple reasons. Firstly it serves to allow the provider to direct (route, if you like, though the term is not strictly applicable) traffic in ways that are more efficient for them (for example, to direct an email connection to the local email server, with the same DNS name regardless of location). This can be easily perceived when you observe what happens when there is a DNS error. The providers are notoriously difficult to convince to refresh their DNS caches – a problem which has occurred to me personally on at least two separate occasions. Secondly, having localized DNS servers

reduces network traffic between the service provider and the Internet, saving costs for the provider.

The same would apply to caching – the design there is not one of a service, but rather something designed to reduce the traffic between the broadband Internet access provider and the “backbone” of the Internet – to reduce costs.

All that is really technically *necessary* for web browsing is a web client (browser, provided by the customer), DNS (to translate a web site host name to an IP address) and TCP connectivity. The rest is “frosting” (however tasty it may be to the provider). So, certainly caching is valuable – but the value is to the provider, not to the consumer – they download the same bits either way. Furthermore, providers can often derive income by bringing in 3rd party caching services, such as Akamai.

59. In classifying services, the Commission has taken into account the purpose of the feature or service at issue. For example, some features and services that meet the literal definition of “enhanced service,” but do not alter the fundamental character of the associated basic transmission service, are “adjunct-to-basic” and are treated as basic (*i.e.*, telecommunications) services even though they go beyond mere transmission. Do any of the features and functionalities offered by broadband Internet service providers have relevant similarities to or differences from those that resemble an information service but are treated differently under Commission precedent? Similarly, which, if any, of the “Internet connectivity” functions listed in the *Cable Modem Declaratory Ruling* fall within the management exceptions to the information services category, and why?

60. Some have suggested that the Commission should take account of the different network “layers” that compose the Internet. Are distinctions between the functional “layers” that compose the Internet relevant and useful for classifying broadband Internet service? For example, the Commission could distinguish between physical, logical, and content and application layers, and identify some of those layers as elements of a telecommunications service and others as elements of an information service. (As discussed above, the Commission historically has distinguished between Internet connectivity functions and Internet applications.) If the Commission adopted this approach, which of the services offered by wired broadband Internet service providers should be included in each category? Are the boundaries of each layer sufficiently clear that such an approach would be workable in practice? Would such an approach have implications for services other than broadband Internet service?

I see some potential problems with such an approach. Firstly, the layers are arcane and technical, making it difficult for those not immersed in the technology stack to discern. Secondly, functions tend to move between layers. For example, routing. At one time, in the very early days, routing occurred at both layers 2 and 3 (because sometimes one needed to route different protocols over the same network). Then, once networking converged on TCP/IP, routing took place pretty universally at layer 3. Now, routing is migrating back into layer 2 with switching, MPLS and other technologies. So establishing rules based on layers could prove pretty tricky.

One might at first think, as I did when I was considering this issue, that there is still a pretty clear distinction between the content and application layers and the rest of the layers. If one were to use such an approach, that would be the layer to consider. Thus email, web hosting, news, DNS, LDAP and the rest would all be information services. All of the others would be telecommunications services (at least below layer 4 in the ISO stack).

However when one considers that a telecommunications service might well be implemented on top of basic Internet access, such as VoIP or “TV” (video service) (and indeed probably will be the majority of time within the foreseeable future), then using even the application layer for such decisions seems tricky, at best.

In the end I would suggest that the Commission not use layers *alone* in deciding what is what, but I do think it would be appropriate to derive *guidance* from the layers, as well as whether or not it is a case of the application itself comprising a telecommunication service (such as VoIP or TV over the network) or an information service (video on demand might reasonably be classified as such an information service, even when it flows over the link that also carries “TV”).

61. *Competition.* We also seek comment on the level of competition among broadband Internet service providers. The Commission adopted the unitary information service classification for broadband Internet services in part “to encourage facilities-based competition.” The Commission envisioned competition among cable operators, telephone companies, satellite providers, terrestrial wireless providers, and broadband-over-powerline (BPL) providers. Has the market for broadband Internet services developed as expected, and, if not, what is the significance for this proceeding of the market’s actual development?

If one looks at the web sites of Internet access providers, it is clear that it is “all about bandwidth”. At least in many metropolitan areas, there is competition between at least one Cable provider and one or more “telcos”.

62. Are there other relevant facts or circumstances that bear on the Commission’s application of the statutory definition of “telecommunications service” to wired broadband Internet service?

How about applying some common sense? If the consumer connects to the service provided by third party by wire, fiber optics or radio (wireless), so that the consumer can transmit and receive information that service is a telecommunications service.

If the service provided consists of the information itself (and the “window dressing” around the information, like web site scripting, user authentication, etc.), then it is an information service.

I think even Homer Simpson could understand such logic. D’Oh.

b. Defining the Telecommunications Service

63. If the Commission were to classify a service provided as part of the broadband Internet service bundle as a telecommunications service, it would be necessary to define what is being so classified. Here we ask commenters to propose approaches to defining the telecommunications service offered as part of wired broadband Internet service, assuming that the Commission finds a separate telecommunications service is being offered today, or must be offered.

64. We have previously defined “Internet connectivity” to include the functions that “enable [broadband Internet service subscribers] to transmit data communications to and from the rest of the Internet.” Identifying a telecommunications service at a similarly high level—for instance, as the service that provides Internet connectivity—may be appropriate for this proceeding if a telecommunications service is classified. Is this approach or some other mechanism appropriate to give the Internet service provider latitude to define its own telecommunications service? For instance, would it be desirable for the Commission to identify only bare minimum characteristics of an Internet connectivity service? Or is it necessary for the Commission to define the functionality, elements, or endpoints of Internet connectivity service? What are the pros and cons of these and other approaches? Would use of the term “Internet connectivity service” in this context be unduly confusing because the Commission has previously defined that term to include the function of “operating or interconnecting with Internet backbone facilities” in order to “enable cable modem service subscribers to transmit data communications to and from the rest of the Internet”?

See my “common sense” comments above. Specifying specific elements or endpoints might not stand the test of time – they are apt to change. Besides, the term “Internet” implies any endpoint the consumer might choose to connect to.

Other endpoints are, of course, possible (for example, a small corporation wide area network that is isolated from the Internet for security reasons). It would still be a telecommunications service – just not broadband Internet access.

65. Commenters should also identify the particular aspects of broadband Internet service that do and do not constitute “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” Does the catalog of Internet connectivity functions provided in the *Cable Modem Declaratory Ruling* include all the functions an end user would need from its broadband Internet service provider in order to use the Internet? Are there other connectivity functions the Commission should consider? Can the Commission draw guidance from other attempts to define the functionality of an Internet connectivity service, such as the definition in NECA’s DSL Access Service Tariff?

There are certainly other aspects of broadband Internet service that are not exactly moving bits from point a to point b. DNS is an example, as is email and web caching for improved response time. Of these three, only DNS is *essential* – and all of these capabilities are now available elsewhere. Indeed, one might expect that many purveyors of broadband Internet service might start to avail themselves of such services, preferring to outsource to leverage external expertise at lower cost.

c. Consequences of Classifying Internet Connectivity as a Telecommunications Service

66. If we were to classify Internet connectivity service as a telecommunications service and take no further action, that service would be subject to all requirements of Title II that apply to telecommunications service or common carrier service. If the Commission chose, it could provide support for Internet connectivity services through the Universal Service Fund under section 254. Under section 222, the Commission could ensure that consumers of Internet connectivity enjoy protections for their private information. Consumers with disabilities would see greater accessibility of broadband services and equipment under section 255. And the Commission could protect consumers and fair competition through application of sections 201, 202, and 208. Would application of all Title II requirements to the wired broadband Internet connectivity service be consistent with the approach to broadband Internet service described in part II.A.2, above? We seek comment on whether these benefits to classifying Internet connectivity as a telecommunications service would outweigh the costs of doing so, including the application of numerous regulatory provisions that the Commission, in its information service classification orders, determined should not apply. Are there any elements of our framework that the Commission could not pursue if it adopted a Title II classification? Under Title II classification what role, if any, might be played by third party standard setting bodies?

There seems to be the notion that classifying broadband Internet access as a telecommunications service under Title II means that forbearance would be somehow unusual. From the lawyers I speak to from time to time I have learned that forbearance is a time-honored tradition in enforcement with a long and successful history. Thus to me it feels that classification as a telecommunications service, should that occur as I have suggested, will necessarily mean some level of forbearance in some areas, in order to accomplish the goals of Congress and the Commission, and to give the industry some reasonable amount of time to adjust to a new reality.

The real issue here is whether the Commission continues to deal with the industry from a place of fundamental weakness, under Title I, or a place of greater strength and stability under Title II.

Forbearance thus becomes a matter of degree – which is, I think a good place from which to operate for a body such as the Commission.

3. Telecommunications Service Classification and Forbearance

67. In addition to the traditional information service and telecommunications service approaches discussed above, we identify and seek comment on a third option for establishing a suitable legal foundation for broadband Internet and Internet connectivity services. This third way would involve classifying wired broadband Internet connectivity as a telecommunications service (as suggested above), but simultaneously forbearing from applying most requirements of Title II to that connectivity service, save for a small number of provisions.

Again, we can see that forbearance is a matter of degree. I will say that forbearing from applying *most* requirements of Title II makes me a little uneasy. Too high a degree of forbearance could lead to inconsistent application of forbearance, resulting in uncertainty at best and unethical activities at worst.

Going back to the firewall analogy, I believe the Commission would do better to apply the regulations under Title II consistently, except where the industry can make good, specific arguments for forbearance in a particular area.

68. Specifically, if the Commission decided, after appropriate analysis, to classify wired broadband Internet connectivity (and no other component of wired broadband Internet service) as a telecommunications service, it could simultaneously forbear from applying all but a handful of core statutory provisions—sections 201, 202, 208, and 254—to the service. Two other provisions that have attracted longstanding and broad support in the broadband context—sections 222 and 255—might also be implemented for the connectivity service, perhaps after the Commission provides guidance in subsequent proceedings as to how they will apply in this context. We seek comment on this third approach, and whether it would constitute a framework for broadband Internet service that is fundamentally consistent with what the Commission, Congress, consumer groups, and industry believed the Commission could pursue under Title I before the *Comcast* decision.

As I have stated before, I think the “pick and choose what to enforce” mode of operation is flawed as compared to the “pick and choose what *not* to enforce” mode. The former will lead to more uncertainty, lobbying and other undesirable situations and behaviors than the latter. So unless those portions that the Commission can explicitly identify that it does not want to enforce approach a large group of regulations as compared to those that it wishes to enforce, this does not seem to be an advisable course.

I think trying to pick and choose what areas upon which to apply regulation would be counterproductive. Firstly I would say that it is *essential* to treat fiber-optic communications the same as wired communications. Secondly, I am puzzled about why the Commission would consider exempting wireless broadband Internet service from the same regulation as wired broadband Internet service. Both are just different means to the same end, and unless the Commission has some specific reason to favor one over the other in a way that is consistent with the goals of Congress and the Commission, and makes a public, explicit, transparent case for doing so, then I would be fearful of giving an advantage to one medium as compared to another. People make all kinds of assumptions all the time about the capacity to transmit information over various media – and they are almost always proven wrong by clever engineers.

So long as the goals of universal access are appropriately encouraged, I see no reason to exempt wireless from the same deliberations as wired broadband Internet access.

a. Forbearing To Maintain the Deregulatory Status Quo

69. In recognition of the need to tailor the Commission’s policies to evolving markets and technologies, Congress gave the Commission in 1996 the authority and responsibility to forbear from applying provisions of the Communications Act when certain criteria are met, and specifically directed the Commission to use this new power to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” In typical forbearance proceedings, a petitioner—usually a telecommunications service provider—files a petition seeking relief from a provision of the Act that applies to it. The Commission “shall” grant the requested relief if:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

In ordinary forbearance proceedings, therefore, the Commission must make a predictive judgment whether, without enforcement of the provisions or regulations in question, charges and practices will be just and reasonable, consumers will be protected, and the public interest will be served.

In other words, as I argued earlier, there is a long, solid tradition of forbearance – when that forbearance is justifiable. That seems to me to be the best way forward.

70. The forbearance analysis here has a different posture. The Commission would not be responding to a carrier’s request to change the legal and regulatory framework that currently applies. Rather, it would be assessing whether to forbear from provisions of the Act that, because of our information service classification, *do not apply* at the time of the analysis. In this situation, could the Commission simply observe the current marketplace for broadband Internet services to determine whether enforcing the currently inapplicable requirements is or is not necessary to ensure that charges and practices are just and reasonable and not unjustly or unreasonably discriminatory, whether application of the requirements is or is not necessary for the protection of consumers, and whether applying the requirements is or is not in the public interest?

I think that there is a position that can be supported here, under the items described under 69(1), (2) and (3), above.

b. Identifying the Relevant Telecommunications Service and Telecommunications Carriers

71. In this part of the Notice we assume, solely for purposes of framing the forbearance option, that the Commission has decided to classify the Internet connectivity service underlying broadband Internet service as a telecommunications service. Section 10 provides that “the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services” if certain criteria are met. The relevant “telecommunications service” would be Internet connectivity service as the Commission defines it. The “class of telecommunications carriers” at issue would comprise the providers of the Internet connectivity service identified as a telecommunications service.

72. In this proceeding, however, we do not intend to disrupt the status quo for incumbent local exchange carriers or other common carriers that choose to offer their Internet transmission services as telecommunications services. Nor do we propose to alter the status quo with regard to the application of section 254(k) and related cost-allocation rules to these carriers. We therefore seek comment on excepting from forbearance any carrier that elects to be subject to the full range of Title II requirements, and on the mechanism that would be most suitable for a carrier to make such an election.

If the Commission wishes to encourage the broadest availability of broadband Internet service, then those local or other carriers ought to have access to the same level of forbearance as those that provide such access via other means. They should be on equal footing – but that forbearance should extend *only to the Internet transmission service*. If the Internet transmission service is offered over a facility that provides other services of a more traditional communications nature, then the more strict regulations should apply (for example, to inside household wiring, the wiring that connects the exchange to the customer, dial up over a voice line (the voice line part should be treated more strictly), etc.)

c. Defining the Geographic Scope for Analysis

73. Section 10 requires the Commission to forbear from unnecessary requirements “in any or some of [carriers’] geographic markets.” By its terms section 10 requires no “particular . . . level of geographic rigor,” and the Commission has flexibility to adopt an approach suited to the circumstances. The Commission decisions classifying broadband Internet service did not rely on any particular, defined geographic area. Instead, where those decisions evaluated the state of the marketplace, they did so “in view of larger trends.” The 2005 *Wireline Broadband Report and Order* granted forbearance on a nationwide basis. The Commission has adopted a similar approach to evaluating the broadband marketplace in other forbearance decisions. Given that backdrop, and the fact that the forbearance discussed here would be designed to maintain a deregulatory status quo for wired broadband Internet service that applies across the nation, the same approach may be warranted here, with the effect that forbearance would be granted or denied on a nationwide basis. We seek comment on this approach. If commenters suggest a more granular geographic market as is sometimes used in other forbearance proceedings, we ask them to address whether such an approach would be legally required.

I think that perhaps one might argue that the forbearance granted on the basis of access, bandwidth, etc. are still, in the end, based on geographic area. Its just that how one arrives at the patchwork of geographic areas involved is different – some of the geographic areas might be as small as an individual household. Others might be as large as an entire state.

d. Identifying the Provisions of Title II from Which the Commission Would Forbear

74. The forbearance option contemplates a determination not to apply all but the small number of provisions of Title II that provide a solid legal foundation for the Commission to implement its established broadband policies. In this part, we seek comment on declining to forbear from the three core provisions of Title II—sections 201, 202, and 208. We also seek comment on whether we should decline to forbear from section 254 in order to ensure that the Commission has clear authority to pursue universal service goals for broadband services. And we seek comment on whether we should decline to forbear from two other provisions—sections 222 and 255—that speak to two other broadband issues the Commission has believed it can address (customer privacy and access by persons with disabilities). We further seek comment on whether forbearing from any of the remaining provisions of Title II is beyond our forbearance authority or otherwise should be rejected.

I do not have enough experience to comment on many of these individual questions, but will instead offer the observation that the Commission ought to use the general criteria for forbearance

(and removing forbearance later, if necessary) outlined in item #69. In general I believe the Commission should err, at least initially, on the side of protection of consumers, and forbear only when it becomes very clear that not doing so would be damaging.

75. *Exclusions from Forbearance: Sections 201, 202, and 208.* The Commission has never exercised its authority under section 10 to forbear from these three fundamental provisions of the Act, although it has been asked to do so on many occasions. In addition to being consistent with our precedent, a determination not to forbear from these core provisions would comport with Congress's approach to commercial mobile radio services (CMRS), such as cell phone services. In 1993, CMRS services were still nascent, and Congress specified in a new section 332(c)(1)(A) of the Communications Act that although Title II applies to CMRS, the Commission may forbear from enforcing any provision of the title *other* than sections 201, 202, and 208. After Congress gave the Commission broader forbearance authority in the Telecommunications Act of 1996, the Commission considered a petition to forbear from sections 201 and 202 as applied to certain CMRS services. The Commission rejected that forbearance request, finding that even in a competitive market those provisions are critical to protecting consumers.

76. Applying sections 201 and 202 could provide the Commission direct statutory authority to protect consumers and promote fair competition, yet allow the Commission to avoid burdensome regulation. For example, while CMRS providers are subject to sections 201 and 202, they do not file tariffs because the Commission forbore from section 203. We seek comment on these issues as well as how to address in any forbearance analysis the existing agency rules that have been promulgated under sections 201 and 202.

77. In addition, we seek comment on not forbearing from section 208 and the associated procedural rules. Would the enforcement regime that would apply if we enforce only section 208 be sufficient if we decide to forbear from the damages and jurisdictional provisions of sections 206 (carrier liability for damages), 207 (recovery of damages and forum election), and 209 (damages awards)? Would forbearance from these additional provisions render enforcement under section 208 procedurally or substantively deficient, or would section 208 (together with Title V of the Act) provide the Commission adequate authority to identify and address unlawful practices involving broadband Internet service?

I believe that great care should be taken in this particular area, because of the vast difference in power between the telecommunications vendors and their customers. The relationship is very asymmetric, with the vendor having much more power and sway as compared to the consumer. Vendors can seek redress in courts (as we have seen) and with the Commission. Consumers are basically helpless, short of an action so egregious that Congress gets involved. Class action suits take years and years to play out, and usually result in miniscule awards.

78. *Exclusion from Forbearance: Section 254.* Section 254, the statutory foundation of our universal service programs, requires the Commission to promote universal service goals, including “[a]ccess to advanced telecommunications and information services . . . in all regions of the Nation.” In March 2010, a unanimous Commission endorsed reform of universal service programs to “encourage targeted investment in broadband infrastructure and emphasize the importance of broadband to the future of these programs.” Reforming universal service to encompass broadband is also a keystone of the National Broadband Plan. Our current universal service support programs, including our high-cost program and our low-income programs, address deployment and income-related adoption barriers for voice. The Plan recommends that the Commission provide high-cost and low-income support that ensures that all households have the ability to subscribe to a high-quality broadband connection that provides both broadband and voice services.

I think a good argument can be made that these issues are even more important with respect to broadband Internet access than ordinary telephone service, given the current prevalence of inexpensive wireless telephone access.

79. Two subsections of section 254 bear particularly on whether to forbear from this universal service provision. First, section 254(c) defines universal service as “an evolving level of *telecommunications service*.” By not forbearing from section 254(c), the Commission would retain clear authority to support the availability and adoption of broadband Internet connectivity service through reformed high-cost and low-income programs in the Universal Service Fund.

I believe that the Commission should not forbear in this particular area without clear cause.

80. Second, section 254(d) requires *all* providers of telecommunications service to contribute to the Universal Service Fund on an equitable and nondiscriminatory basis. Should the Commission apply the mandatory contribution requirement to broadband Internet connectivity providers? If so, should we delay implementation of the contribution obligation, through temporary forbearance or other means, until the Commission adopts rules governing specifically how broadband Internet connectivity providers should calculate their contribution consistent with the requirement that all telecommunications carriers “contribute[] on an equitable and nondiscriminatory basis,” possibly as part of comprehensive Universal Service Fund reform?

I believe this question should be reversed: can the Commission identify any particular class of providers which should be exempt from such contributions. Only then should the commission adopt a stance of long-term forbearance in this area. Otherwise the Commission would create an inadvertent advantage for one or more media as compared to other media. That said, temporary forbearance in order to give the industry time to plan and adjust might be warranted – but only if it is clearly in the public good.

81. If commenters suggest that we should forbear from applying the support provisions of section 254 in the context of broadband Internet connectivity service, we ask them to provide alternative proposals to ensure universal availability of broadband Internet connectivity services, and to assess the legal sustainability of proposed alternatives. If commenters suggest that we forbear from (or delay) applying the mandatory contribution provisions of section 254, what would be the consequences for the Universal Service Fund?

82. *Possible Exclusion from Forbearance: Section 222.* Section 222 of the Communications Act requires providers of telecommunications services to protect their customers’ confidential information, as well as proprietary information of other telecommunications service providers and equipment manufacturers. As discussed above, the Commission has supported applying this provision in the broadband context. Section 222 would appear to provide the Commission clear authority to implement appropriate privacy requirements for broadband Internet connectivity. We question, however, whether it would be in the public interest to apply section 222 to broadband Internet connectivity service immediately. It might be more effective for the Commission to interpret the specific provisions of section 222, including the definition of “customer proprietary network information,” in the broadband context before requiring broadband Internet connectivity providers to comply. Proceeding otherwise could cause confusion and disparity among broadband Internet connectivity providers, and confusion for consumers. Compliance with section 222 could also be more expensive if the provision took effect immediately, and we later adopted specific rules. On the other hand, most providers are already subject to privacy requirements, at least for other services they provide; their costs of immediate compliance with section 222 may not outweigh the benefit to consumers of quick assurance of their privacy while using broadband Internet connectivity services. In addition, section 631 of the Communications Act requires cable operators to fulfill certain obligations with respect to consumer privacy for cable or “other service[s]” to which a consumer subscribes. The term “other service” includes “any wire or radio communications service provided using any of the facilities of the cable operator that are used in the provision of cable service.” How should the obligations of sections 222 and 631 be reconciled for cable operators offering broadband Internet service? More broadly, we seek comment on the application of section 222 to any wired broadband Internet connectivity service that may be classified as a telecommunications service, and

on whether the public interest would be served by permitting section 222 to apply in the absence of new implementing rules.

I think it important to define carefully what kind of privacy is contemplated in this question. I certainly believe that broadband Internet service providers should be held to the same standards as any telecommunications provider when it comes to the privacy of contact and other personally identifying customer information.

Similarly, when it comes to privacy of information, I think the same kinds of “wiretap” laws designed to protect people’s communications when they have a reasonable expectation of privacy up to the point where it leaves the providers network are also in order. The case cited above, where AT&T apparently implemented an illegal wiretap scheme in their Chicago office, widely reported on public news media outlets, should not be justified on the basis of some difference between voice communications and Internet communications – particularly when voice communications are carried over Internet facilities to greater degrees every day. (Of course, if Congress should act to allow such behavior, that is another matter (even though I find it undesirable) – see the CALEA discussion below).

Finally, however, I believe that broadband Internet service providers should be held to the same *low* standard when it comes to interpreting information transmitted. If I choose to carry on a conversation in the clear on my telephone, the telephone carrier should not be required to protect me beyond not providing illegal wiretap access. Similarly, if I choose to carry on a network conversation via a broadband Internet service without encryption, the telecommunications carrier should not be required to protect me beyond not providing illegal, unwarranted network data capture access.

83. One aspect of retaining the information service classification for broadband Internet service (other than for the Internet connectivity telecommunications service that may be offered separately with broadband Internet service) is that it minimizes interference with the FTC’s ability to enforce the Federal Trade Commission Act’s prohibition of unfair, deceptive, or anticompetitive practices by broadband Internet service providers. Section 5(a)(1) of the FTC Act declares to be unlawful all “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce,” but section 5(a)(2) of the FTC Act restricts the FTC’s ability to enforce this prohibition with respect to common carrier activities. We seek comment on how the Commission might use its authority under section 222 to ensure privacy for users of Internet connectivity without significantly compromising the FTC’s ability to address privacy issues involving broadband Internet services and applications.

Certainly the Commission has other mechanisms suitable for unfair or anticompetitive practices in the telecommunications industry, yes? (Or is this wishful thinking on my part?) I would think that this is something that the Commission and the FTC could work out, even if it required some relatively minor legislation.

And the FTC’s ability would still apply to the rest of the Internet – to legitimate *information* services – which is likely to be a much larger issue than with broadband Internet telecommunications services (not to minimize the need to keep vendors of the latter from running amok, of course).

84. *Possible Exclusion from Forbearance: Section 255.* Section 255 requires telecommunications service providers to make their services accessible to individuals with disabilities, unless not reasonably achievable. As discussed above, the Commission has repeatedly expressed its intent to apply this requirement in the broadband context.

85. We seek comment on the appropriateness of implementing section 255 to ensure that Americans with disabilities have access to broadband Internet connectivity services. As with section 222,

might it be appropriate to apply section 255 only after a separate notice-and-comment proceeding that allows detailed consideration of disabilities-access issues in the broadband context? We seek comment on implementation questions and other issues related to the application of section 255.

86. *Scope of Forbearance Generally.* We believe that the six sections we have just discussed—sections 201, 202, 208, 222, 254, and 255—could compose a sufficient set of tools for effecting the established policy approach and implementing the Commission’s goals for 21st Century communications. Are there others that should be added to this list? Some provisions of Title II relate directly or indirectly to the effective application and enforcement of the six provisions we have identified. Section 214, for example, deals primarily with “Extension of Lines” yet contains section 214(e), which provides the framework for determining which carriers are eligible to participate in universal service support programs. Similarly, section 251(a)(2) directs telecommunications carriers “not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255,” and section 225 establishes the telecommunications relay services program. Is application of these or any other provisions of Title II required to allow effective implementation and enforcement of the six provisions identified above? If so, should the Commission exempt such provisions from forbearance for administrative reasons, if this third approach to classification is adopted?

I think the observation that would be relevant here is that the Commission (or at least some on the Commission) thought (or hoped) that the existing framework that has proven insufficient would compose a sufficient set of tools. That proved to be unwise, and I fear that this approach of what might be called “forbearance by default” would be similarly unwise.

87. Are there provisions of Title II from which we lack authority to forbear? Section 10(a) directs the Commission to forbear from applying regulations or provisions of the Communications Act to telecommunications carriers or services in those instances where the Commission determines that the particular provision is unnecessary to ensure that carrier “charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;” enforcement of such regulation is “not necessary for the protection of consumers;” and forbearance is consistent with the public interest. We ask whether section 10 provides authority to forbear from provisions of the statute that do not directly impose obligations on carriers. For example, section 224 provides the framework for the Commission’s regulation of pole attachments, including the rates therefor. Does section 10 provide the Commission authority to forbear from section 224 insofar as it imposes rate-related obligations on the Commission and utilities that own poles, rather than on telecommunications carriers or telecommunications services? Similarly, section 253 permits the Commission to preempt state regulations that prohibit the provision of telecommunications services. Does section 10 provide the Commission authority to forbear from section 253, which does not impose obligations on telecommunications carriers? If the Commission were to forbear from section 253, how would the Commission’s general authority to preempt inconsistent state requirements be affected?

I believe there are two sorts of forbearance. One is the explicitly authorized forbearance contemplated here. However the reality is that all kinds of rules and regulations receive forbearance as a reasonable expedient as compared to the laborious task of excising no longer relevant regulation and law. While I am no legal expert on the Commission and its bodies of regulations [1], I have to believe and expect that the Commission forbears on all manner of regulations, be it thru the neglect of forgetfulness or the benign neglect that stems from wisdom. Naturally, in such a situation, the Commission could be approached with a suit or threat of a suit to force its hand. But I feel that would be a much better, more predictable, more stable and more powerful position to be in than to “forbear by default” and have the powerless left with no realistic way to approach the Commission to actively enforce some provision of the regulations.

I believe the Commission should not forbear by default. If there are areas where forbearance is appropriate and required, we can be sure that the telecommunications industry will find ways to

make that known and appropriate action taken. We can be equally as sure that the reverse would not hold.

[1] Though I do recall with some fondness reading about the FCC “gray vans with loop antennae” designed to track down ne’er-do-wells’ radio transmissions when I was a young person very interested in electronics.

88. Congress created the Commission in part “for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communication.” Would it be consistent with the Commission’s mission with respect to promoting safety of life and property, and consumer protection generally, to forbear from the portions of section 214(a) that address discontinuance, reduction, or impairment of service? Would it be consistent with our mission to forbear from section 214(d), which allows the Commission to require a carrier “to provide itself with adequate facilities for the expeditious and efficient performance of its service”; or section 218, which permits the Commission to “inquire into the management of the business of all carriers subject to this Act”? Does section 10 provide authority to forbear from these provisions? Should the Commission exclude them from forbearance so it may proceed with, for example, cybersecurity or data gathering initiatives, or would authority under sections 201 and 202 (or other provisions) be sufficient? How would forbearance from these provisions affect the Commission’s ability to promote adequate service to underserved communities?

I would be quite concerned about forbearance in this area, without due cause and process. A broadband internet service provider might decide that a particular geographic area or technology servicing a particular geographic area was no longer as profitable as it desires, and effectively let it “die on the vine” resulting in steady degradation of service, along with steadily increasing costs, to the remaining customers. Those consumers need and deserve protection.

Indeed, this is happening before our very eyes. My “land line” costs for telephone access have skyrocketed in recent years, even as other communications costs decrease, as AT&T struggles to spread a fixed cost over a lower number of customers. Verizon sold off a good chunk of its “land line” business to Frontier. In each case customers are harmed, though perhaps not crippled. The end result is that I am likely to be, in essence, forced by economics to move my telephone service over to my Internet access provider, much as that worries me with respect to communications during an emergency.

89. Also with regard to our national defense and homeland security mission, we note that section 229 directs the Commission to implement the provisions of the Communications Assistance for Law Enforcement Act (CALEA). CALEA is a separate statute that requires “telecommunications carriers” to meet certain assistance capability requirements in support of electronic surveillance. The Commission has previously found that CALEA’s definition of “telecommunications carrier” is broader than the definition of “telecommunications carrier” in the Communications Act. All service providers that are “telecommunications carriers” under the Communications Act are also “telecommunications carriers” subject to CALEA, and some providers—including facilities-based broadband Internet access providers—are subject to CALEA even if they are not “telecommunications carriers” as defined in the Communications Act. Specifically, the Commission held in 2005 that “facilities-based providers of any type of broadband Internet access service, including but not limited to wireline, cable modem, satellite, wireless, fixed wireless, and broadband access via powerline are subject to CALEA.” Thus, it appears that regardless of whether we maintain the current statutory classification for broadband Internet service or classify Internet connectivity (or some other service) as a telecommunications service, CALEA will continue to apply to these providers. We seek comment on this analysis. In addition, as we do with regard to the sections described just above, we seek comment on whether section 10 would provide authority to forbear from section 229, and on whether forbearance from application of section 229 would

be consistent with the purposes for which CALEA was enacted and the public interest. Finally, we emphasize that section 10 does not provide the Commission authority to forbear from provisions of CALEA or any other statute other than the Communications Act.

I believe that the analysis in this paragraph is likely to be correct. Personally, I find this unfortunate – see my earlier citation of concern in the area of “network sniffing”. But that is not the issue before the Commission at this juncture.

Nonetheless, I will offer the observation that when we allow law enforcement access to information out of fear to which it would not otherwise have access, we place our liberties at considerable risk -- we place our rights under the Constitution of the United States in jeopardy.

90. Section 257(c) requires the Commission to make periodic reports to Congress concerning the elimination of previously identified barriers to market entry by entrepreneurs and other small businesses. This obligation applies to “the provision and ownership of telecommunications and information services” and thus applies regardless of the legal classification of broadband Internet service and broadband Internet connectivity service. It thus would appear that none of the three alternative approaches suggested here would affect the Commission’s duty to make the mandated reports. Nor, given the importance of lowering barriers to market entry, do we contemplate any circumstance in which it would be sound policy to cease making the reports. We seek comment on these issues and on how best to ensure that the obligation of section 257(c) is preserved in this context.

I suggest that the best way to ensure this obligation is preserved is to classify broadband Internet access as a telecommunications service, because while the Commission appears to have the obligation in any case, the mechanisms available to the Commission to ensure that obligation are met appear to be stronger when such service is properly classified as a telecommunications service.

91. We further seek comment on whether there are provisions of Title II that would require interpretation even after forbearance. For example, would forbearance from section 203 mean that carriers may not file tariffs even if they want to, or just that they are not required to do so? Would the Commission’s review of transactions involving providers of broadband Internet connectivity service be affected if the Commission forbore from applying section 214?

I suggest that so long as the status-quo is rejected (which I sincerely hope will be the case), and to a lesser or greater extent broadband Internet access is classified as a telecommunications service, then other elements of relevant rule or law may become suitable candidates for adjustment. To expect that such law and rules could remain static in the face of such dramatic changes in technology would be unrealistic.

92. We also seek comment on whether there are approaches superior or complementary to forbearance that the Commission should consider as means of easing regulatory burdens. For example, in the past the Commission has “streamlined” the statutory procedures that apply to non-dominant carriers, and has granted blanket authority to all carriers under section 214 to provide domestic interstate services and to construct, acquire, or operate any domestic transmission line. Is any similar approach appropriate here?

93. Finally, we seek comment on the role of third party standard setting bodies if the Commission were to adopt one of the deregulatory approaches described here.

My earlier comments in response to item #51 regarding third party standard setting appear to be applicable regardless of classification and regulation.

e. Application of the Statutory Forbearance Criteria

94. *Charges, Practices, Classifications, and Regulations.* In 2002, when the Commission decided to classify cable modem service as an information service, only 12 percent of American adults

had broadband at home. Now nearly two-thirds of American adults use broadband at home. In just the last two years, home broadband use has grown more than 25 percent. The quality and availability of broadband services continue to improve, with cable and telephone companies investing about \$20 billion in wireline broadband capital expenditures in 2008 and about \$18 billion in 2009. As described in the National Broadband Plan, “[t]op advertised speeds available from broadband providers have increased in the past few years. Additionally, typical advertised download speeds to which consumers subscribe have grown approximately 20% annually for the last 10 years.”

Well, if you were looking for just cause with respect to change conditions upon which to base a stance, I think this information ought to be more than sufficient. Interestingly, I think that this information also serves as a counter argument to those who say that classifying broadband Internet access as a telecommunications service would inappropriately stifle investment. I find such arguments inadequate. Insatiable demand for bandwidth will drive investment on its own, without need for any additional incentive from extraordinarily lax regulation.

95. Still, a number of reported incidents suggest there is a role for the Commission. Comcast’s secret disruption of its customers’ peer-to-peer communications, which the Commission determined to be unjustified, is one example. There have been recent reports involving: AT&T’s alleged failure to deliver DSL service at the speeds promised; allegations that although RCN promised subscribers “fast and uncapped” broadband, it delayed or blocked peer-to-peer file transfers without users’ knowledge or consent; and Windstream’s redirection of subscribers who used the default search function in the Firefox web browser to a Windstream “landing page.” Furthermore, legislative developments described above suggest that Congress is not satisfied with the pace of broadband deployment, adoption, and utilization.

One “tricky bit” will be how to handle cases where a broadband Internet service provider leverages their telecommunications service to shape, alter or otherwise influence traffic for their own profit, ala Comcast. This kind of abuse needs to be prevented thru law and/or regulation by a (relatively) powerful body such as the Commission. And it is not just an Internet issue. (A recent clip by “The Onion” depicts a fictional mobile phone carrier using voice recognition to suggest specific advertising targeted at detection of keywords in the conversation. This is not all that far-fetched, and seems to parallel the Windstream case cited in this particular inquiry.)

96. We seek comment on whether, in light of the current charges, practices, classifications, and regulations of broadband Internet connectivity service providers, it would be consistent with section 10(a)(1) for the Commission to forbear from all provisions of Title II except the six identified provisions. If we found on the record developed in response to this Notice that the marketplace for broadband Internet connectivity services is operating sufficiently well with regard to competition and consumers’ interests, then retaining only the authority in sections 201, 202, and 208; reforming universal service under section 254; and continuing to enforce the privacy and access provisions of sections 222 and 255 could be sufficient to address current and foreseeable future concerns.

As I have outlined above, I do not believe that this would be a wise course of action, even though it would probably be preferable to the current state of affairs. However I strongly urge those commissioners who would prefer to have “forbearance by exception”, the way forbearance ought to be, to argue vigorously against this approach, the “Third Way”, or what might be called “forbearance by default”.

The truth is that it is a continuum, and I believe that the best approach would be from a position of strength, rather than a position of weakness.

97. *Protection of Consumers and the Public Interest.* Section 10(b) directs the Commission, in making its public interest analysis, to “consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions.” As discussed above, the goals of any action to

classify broadband Internet connectivity as a telecommunications service would include preserving the Commission's ability to step in when necessary to protect consumers and fair competition, while generally refraining from regulation where possible. Further, the Commission has tools to promote competition for broadband Internet services that would be unaffected by the forbearance proposal discussed here. We seek comment on this element of the forbearance test.

Amen.

f. Maintaining Forbearance Decisions

98. We seek comment on whether, if we forbore from applying those provisions of Title II that go beyond minimally intrusive Commission oversight, that decision would likely endure. Section 10 allows the Commission to revisit a decision to forbear. Normally, to depart from a prior decision, an agency may simply acknowledge that it is doing so and provide a rational explanation for the change, which may or may not need to be more detailed than the explanation for the original decision. The agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." Section 10, though, requires the Commission to forbear if the statutory criteria are met. Thus, to reverse a forbearance decision, the Commission must find that at least one of the criteria is no longer met with regard to a particular statutory provision. That determination would be subject to judicial review, and the Supreme Court has stated that an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" in instances where, for example, "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." Reversal of forbearance also might be in arguable tension with section 706(a) of the 1996 Act, which directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, . . . regulatory forbearance." We seek comment on the Commission's authority to reverse a forbearance decision concerning broadband Internet connectivity service. We also seek comment on what provisions, if any, could appropriately be included in a forbearance order to establish a heightened standard for justifying future "unforbearance."

Things will change over time. This is to be expected. Areas where forbearance was once appropriate may in the future require more scrutiny. The converse is also possible. In my view this is no different than traffic enforcement deciding that a particular stretch of roadway needs more enforcement attention from time to time, based on observed undesirable behavior by the motoring public, complaints by citizens, etc. (Presumably the Commission can refrain from "speed traps" on the Internet. 8^).

99. If the Commission were to elect the option of classifying Internet connectivity as a telecommunications service but forbearing from most of Title II, then a reviewing court could in theory uphold the classification determination but vacate the accompanying forbearance in whole or in part. In that situation, the Commission could maintain the classification of broadband Internet connectivity service as telecommunications service and allow the relevant provisions of Title II, which the court restored, to apply. We seek comment on any lawful mechanisms that (assuming adoption of the third classification option) could be utilized to address this theoretical situation, even if that means the Commission would not, in the post-litigation situation just described, ultimately maintain the classification of Internet connectivity as a telecommunications service.

To me this is one reason to avoid the "third way". If forbearance is chosen as the default, then it seems that this scenario might conceivably play out. If, on the other hand, forbearance is the exception rather than the default, then given the tradition of forbearance in law enforcement generally, and other language which specifically instructs the Commission to appropriately apply

forbearance in some situations, this does not seem a likely outcome. Under those circumstances, if it did, and additional forbearance were indicated, it seems it would not be difficult to seek legislative remedy for the issues involved.

C. Effective Dates

100. If the Commission decided to alter its current approach to Internet connectivity service, affected providers might need time to adjust to any new requirements. To reflect this, the Commission could delay the effective date of a classification (or classification and forbearance) decision for 180 days after release, or another suitable period. Moreover, as discussed above, certain provisions of Title II, such as sections 222, 254(d), and 255, could be phased-in on an even longer timetable. We seek comment on the effective date the Commission should adopt for a classification decision under one of the approaches proposed here, or an alternative approach identified by the commenter.

I agree that a *reasonable* time for vendors to adjust would be appropriate. I doubt that the vendors would sit still for less than 1 year. Two years seems to me to be too long. 18 months feels about right – perhaps with the re-introduction of regulation staggered over that time based on maintaining a reasonable impact on the vendor while protecting consumers.

D. Terrestrial Wireless and Satellite Services

101. The Commission currently classifies broadband Internet service solely as an information service regardless of whether it is provided over cable facilities, wireline facilities, wireless facilities, or power lines. At the same time, the Commission has in the past taken a deliberate approach to extending its classification framework. In particular, though the Commission had classified all cable modem and wireline Internet access services as information services by 2005, it was not until 2007 that it extended that classification to wireless broadband Internet services, even though the first 3G networks went into service in 2003.

Classifying wireless broadband Internet service as an information service is also not appropriate.

102. We seek comment on which of the three legal frameworks specifically discussed in this Notice, or what alternate framework, would best support the Commission’s policy goals for wireless broadband. In addition, as the Commission recently noted in the *Open Internet NPRM*, “there are technological, structural, consumer usage, and historical differences between mobile wireless and wireline/cable networks.” We seek comment on whether these differences are relevant to the Commission’s statutory approach to terrestrial wireless and satellite-based broadband Internet services. Do consumers today view wireless broadband as a substitute for wired services? How are terrestrial wireless and satellite Internet services purchased, provided, and perceived?

I suggest that all broadband Internet access, and all inter-organizational voice access (thus excepting local corporate exchanges and the like) – should all be classified as telecommunications services, regardless of the media over which they travel.

103. Several provisions of Title III of the Communications Act provide the Commission authority to impose on spectrum licensees obligations that are in the public interest. For example, section 301 provides the Commission authority to regulate “radio communications” and “transmission of energy by radio.” Under section 303, the Commission has the authority to establish operational obligations for licensees that further the goals and requirements of the Act if the obligations are in the “public convenience, interest, or necessity” and not inconsistent with other provisions of law. Section 303 also authorizes the Commission, subject to what the “public interest, convenience, or necessity requires,” to “[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class.” Section 307(a) likewise authorizes the issuance of licenses “if public convenience, interest, or necessity will be served thereby.” Section 316 provides a similar test for new conditions on existing licenses, authorizing such modifications if “in the judgment of the Commission such action will

promote the public interest, convenience, and necessity.” On the other hand, Title III provides the Commission no express authority to extend universal service to wireless broadband Internet services. We seek comment on whether these or other technical, market, or legal considerations justify different classification of wireless and wired broadband Internet services. We also seek comment on whether our approach to classification of non-facilities-based Internet service providers should be different in the wireless context, or the same as in the wired context.

As I stated above, broadband Internet access should be classified as telecommunications services, regardless of media. Because that is what they are.

104. In addition, section 332 sets forth various provisions concerning the regulatory treatment of mobile wireless service. Sections 332(c)(1) and (c)(3), in particular, require that CMRS providers be regulated as common carriers under Title II of the Act. To what extent should section 332 of the Act affect our classification of wireless broadband Internet services? Section 332(c)(1) gives the Commission the authority to specify certain provisions of Title II as inapplicable to CMRS providers. If the Commission were to take the third way described above in the wireless broadband context, could it and should it apply section 332(c)(1) as well as section 10 in its forbearance analysis? We also seek comment on whether the Commission would have reason to apply sections 201 and 202 differently to wireless and wired broadband Internet services.

I perceive that the radio transmission issues and regulations with respect to wireless broadband Internet access are severable with respect to the telecommunications service itself. An organization wishes to use radio spectrum for some purpose, and so the Commission has responsibilities and authorities with respect to that. In addition, when the organization wishes to use it for a telecommunications service, then additional regulation comes into play because of that.

It's not unlike the situation with landlines. The Commission does not regulate some aspects of wired communications – but other bodies do. For example, I cannot place my local telephone wire lower than certain heights to get to my house (if from a telephone pole), nor can I place that wire in close proximity to a power feed, etc. In a sense I see the Commission's regulatory responsibilities with respect to wireless to be not unlike those local codes with respect to telephone wires, and that those are separate from responsibilities with respect to broadband Internet access as a telecommunications service.

105. We also ask commenters to address whether, if the Commission were to alter its present approach to broadband Internet service, it would be preferable for the Commission to address wireless services at the same time that it addresses wired services, or whether there are reasons for the Commission to defer a decision on classification of non-wired broadband Internet services (and any associated forbearance if a wireless broadband telecommunications service is identified).

That would depend very much on how long it would take the Commission to address any additional wireless questions. On the surface, it would be preferable to get Internet access classified as the telecommunications service that it is, regardless of transmission media. But if dealing with untangling some thorny wireless issue would cause significant delay (more than a month or two – as seems almost inevitable for this sort of thing), then it would seem to make sense to defer those activities to a more suitable time.

E. Non-Facilities-Based Internet Service Providers

106. In 1998, the Commission addressed non-facilities-based Internet service providers and concluded that they provided only information services. In *Brand X*, Justice Scalia stated in his dissent that non-facilities-based Internet service providers using telephone lines to provide DSL service stand in a

different position in the eyes of the consumer than the provider of the physical connection. Some industry members have suggested, however, that providers of Internet connectivity could avoid compliance with consumer protection measures by relying on non-facilities-based affiliates to offer retail broadband Internet service. We seek comment on what policy goals we should have for non-facilities-based Internet service providers, and what legal foundation for non-facilities-based Internet service providers can best support effective implementation of those goals.

I suggest that it all depends on the nature of the service is being provided, not whether or not an end-to-end service is being provided. So, for example, someone providing web site hosting or FTP or news or email, but not connectivity – that would be an information service. But if an organization provides VoIP (say, for example, Vonage) or provides some “routing boost” service that affects the routing of the customers packets on the Internet, then I would argue they are providing a telecommunications service – just as surely as a long-distance telephone provider does not have anything to do with the wires that go to my house, but when we (perhaps via a misdial) invoked their services, we received a bill – as a telecommunications service. I see non-facilities based broadband Internet service providers in the same light.

F. Internet Backbone Services, Content Delivery Networks, and Other Services

107. The focus of this proceeding is limited to the classification of broadband Internet service. We remain cognizant that, under the Act, all information services are provided “via telecommunications,” and therefore the use of telecommunications does not, on its own, warrant the identification of a separate telecommunications service component. For example, we do not intend to address in this proceeding the classification of information services such as e-mail hosting, web-based content and applications, voicemail, interactive menu services, video conferencing, cloud computing, or any other offering aside from broadband Internet service. Services that utilize telecommunications to afford access to particular stored content, such as content delivery networks, also are outside the scope of this proceeding. Nor do we intend here to address or disturb our treatment of services that are not sold by facilities-based Internet service providers to end users in the retail market, including, for example, Internet backbone connectivity arrangements. In short, the Commission proposes not to change its treatment of services that fall outside a commonsense definition of broadband Internet service. We seek comment on whether any of the three legal approaches described in this Notice would affect these services directly or indirectly, and how we should factor that into our decision-making about the treatment of broadband Internet service.

This approach makes sense to me. Just as we should call a garden hose a garden hose, we should not call a flower bed a garden hose. The only one I might question is video conferencing, which might in some eyes be a telecommunications service. It is certainly over a distance (“tele”) and it certainly represents communications. But I think an argument could be made that that particular industry is too green to require strong oversight, as the customers of such facilities tend to be larger corporations, who are in a much better position to look after their own interests with respect to telecommunications vendors than an individual consumer might be.

108. In a separate proceeding, the Commission has asked for public comment on the treatment of other services (including Internet-Protocol-based voice and subscription video services) that may be provided over the same facilities used to provide broadband Internet service to consumers, but that have not been classified by the Commission. The Commission has described these as “managed” or “specialized” services, and recognized “that these managed or specialized services may differ from broadband Internet services in ways that recommend a different policy approach, and it may be inappropriate to apply the rules proposed here to managed or specialized services.” We do not intend to address the classification or treatment of these services in this proceeding. We seek comment on whether any of the three legal approaches identified in this Notice would affect these services directly or indirectly, and how we should factor that into our decision-making about the treatment of Internet connectivity service.

It seems to be that telephone services (VoIP) are telecommunications services – by focusing on the service, rather than the media, this becomes readily apparent. Subscription video, on the other hand (as compared to “TV”) is probably more accurately described as an information service. Regardless, it does not seem to me that the media upon which such services are transported would necessarily affect those services themselves (see again the analogy of telephone service as a separate subject of regulation as compared to the placement of wires would appear to apply).

G. State and Local Regulation of Broadband Internet and Internet Connectivity Services

109. We also ask commenters to address the implications for state and local regulation that would arise from the three proposals described above. Under each of the three approaches, what would be the limits on the states’ or localities’ authority to impose requirements on broadband Internet service and broadband Internet connectivity service?

110. We anticipate that if a state were to impose requirements on broadband Internet connectivity service or broadband Internet service that are contrary to a Commission decision not to apply similar requirements, we would have authority under the Communications Act and the Supremacy Clause of the United States Constitution (Article III, section 2) to preempt those state requirements. In addition, section 10(e) provides that “[a] State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying.” We seek comment on the application of these provisions in the context of broadband Internet service and broadband Internet connectivity service, the states’ role in the broadband marketplace, and how our decision to apply or not apply section 253 could relate to this authority.

[By classifying broadband Internet access as a telecommunications service the Commission would be on the best possible firm ground with respect to the relationships with state regulatory bodies, such as states’ public service commissions.](#)

H. Related Actions

111. We seek comment on whether there are actions we can and should take outside the proceeding this Notice initiates to implement the established policy approach to broadband Internet service. As one example, the Commission could decline to pursue the “open access” policies for cable modem service on which the Commission sought comment in 2002 when it decided to classify cable modem service as a single information service. We seek comment on terminating the docket initiated by the notice of proposed rulemaking that accompanied the *Cable Modem Declaratory Ruling*, and we invite additional proposals.

[Unfortunately, the time available to me in replying to this inquiry precludes commenting upon on this topic at this time.](#)

III. PROCEDURAL MATTERS

A. Paperwork Reduction Act

112. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 47 U.S.C. § 3506(c)(4).

B. Ex Parte Presentations

113. The inquiry this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the

presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required. Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

C. Comment Filing Procedures

114. Interested parties may file comments and reply comments regarding the Notice on or before the dates indicated on the first page of this document. Comments and reply comments may be filed: (1) using the Commission's Electronic Comment Filing System (ECFS), (2) using the Federal Government's eRulemaking Portal, or (3) by filing paper copies. In addition, *ex parte* comments may be filed at any time except during the Sunshine Period. *Ex parte* comments may be filed: (1) using the Commission's Electronic Comment Filing System (ECFS), (2) using the Federal Government's eRulemaking Portal, (3) by filing paper copies, or (4) by posting comments and ideas on the Broadband.gov blog at <http://blog.broadband.gov/?categoryId=494971> or on <http://broadband.ideascale.com/a/ideafactory.do?discussionID=11271>. **All filings related to this Notice should refer to GN Docket No. 10-127. Further, we strongly encourage parties to develop responses to this Notice that adhere to the organization and structure of this Notice.**

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Blog Filers: In addition to the usual methods for filing *ex parte* comments, the Commission is allowing *ex parte* comments in this proceeding to be filed by posting comments on <http://blog.broadband.gov/?categoryId=494971> and on <http://broadband.ideascale.com/a/ideafactory.do?discussionID=11271>. Accordingly, persons wishing to examine the record in this proceeding should examine the record on ECFS, <http://blog.broadband.gov/?categoryId=494971>, and <http://broadband.ideascale.com/a/ideafactory.do?discussionID=11271>. Although those posting comments on the blog may choose to provide identifying information or may comment anonymously, anonymous comments will not be part of the record in this proceeding and accordingly will not be relied on by the Commission in reaching its conclusions in this rulemaking. The Commission will not rely on anonymous postings in reaching conclusions in this matter because of the difficulty in verifying the accuracy of information in anonymous postings. Should posters provide identifying information, they should be aware that although such information will not be posted on the blog, it will be publicly available for inspection upon request.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.
- Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.
- Documents in GN Docket No. 10-127 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street S.W., Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

D. Accessible Formats

115. People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

IV. ORDERING CLAUSE

116. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i), 4(j), 10, 218, 303(b), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 160, 218, 303(b), 303(r), and 403, this Notice of Inquiry IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

