

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

**Framework for Broadband
Internet Service**

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GN Docket No. 10-127

**Comments of the
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

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SUMMARY

The United States Court of Appeals for the District of Columbia decision in *Comcast vs. FCC* did not foreclose the exercise of ancillary jurisdiction to address broadband Internet services where such exercise is properly tied to the jurisdiction afforded the Commission by the Communications Act. Rather, the decision articulated the standards to which the Commission must adhere when it invokes that authority, setting forth a framework within which sustainable decisions can be crafted. The Commission has previously addressed broadband-related matters successfully under Title I. The broadband market is strongly competitive. There is no reason to undertake wholesale reclassification of broadband services, whether by full Title II application or the “Third Way.” That approach would impose risks and costs that would harm broadband market. When and if there is a need for regulation in the broadband market, it can be satisfied through the Commission’s exercise of ancillary jurisdiction.

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I. INTRODUCTION

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits comments in the above captioned proceeding.¹ ITTA is an alliance of mid-sized local exchange carriers that collectively provide service to 23 million access lines in 44 states, offering subscribers a broad range of high-quality wireline and wireless voice, data, Internet, and video services.

The Commission's concerns following the United States Court of Appeals for the District of Columbia decision in *Comcast vs. FCC*² are misplaced. The *Comcast* decision did not foreclose the exercise of ancillary jurisdiction to address broadband Internet services where such exercise is properly tied to the jurisdiction afforded the Commission by the Communications Act. Rather, the decision articulated the standards to which the Commission must adhere when it invokes that authority, setting forth a framework within which sustainable decisions can be crafted. In fact, the Commission has frequently invoked its ancillary jurisdiction successfully to address broadband-related matters. In all events, however, there is no reason to undertake wholesale reclassification of broadband

¹ *Framework for Broadband Internet Service: Notice of Inquiry*, GN Docket No. 10-127, FCC 10-114 (2010) (NOI).

² *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

services, whether by full Title II application or the “Third Way.” Not only would this impose risks and costs that would harm broadband market, but it cannot give the Commission any additional jurisdiction beyond what it already has, because Title II jurisdiction is limited by the same grant of authority in the Communications Act that governs ancillary jurisdiction. When and if there is a need for regulation in the broadband market, it can be satisfied through the Commission’s exercise of ancillary jurisdiction. In sum, the broadband market is strongly competitive, the Commission has exercised ancillary jurisdiction successful, where appropriate, and the potential costs of regulation far exceed the perceived benefits of curing non-existent ills.

II. DISCUSSION

A. BACKGROUND

The Commission proposes that the *Comcast* decision “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.”³

Although the *Comcast* decision clarified the process by which the Commission may invoke ancillary jurisdiction, it did not foreclose Commission ability to exercise actions “reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.”⁴ Certainly, however, the *Comcast* decision addressed only an issue relating to provider/consumer relationships in the broadband context, it is far from clear that the outcome would have been any different if the Commission had been regulating the service under Title II. In any event, the court did not address specifically, nor compromise, Commission execution of ancillary authority to address universal service,

³ NOI at para. 1.

⁴ *American Library Association v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005).

privacy, access for individuals with disabilities, or public safety and homeland security in the broadband context. As such, proposals to regulate broadband Internet access, whether by full Title II regulation or “Third Way,” are unnecessary reactions: there is no imperative following *Comcast* to impose full-force regulation, nor is it clear that such regulation would alter the outcome with respect to the network management at issue in that case. Therefore, the proposed Third Way, like full blown Title II reclassification conflicts with the deregulatory stance of the Communications Act of 1934, as amended.⁵

The 1996 Act directs the Commission to “promote competition and *reduce regulation*.”⁶ Regulation of broadband access services would be inconsistent with that goal, as well as explicit Congressional policy to “preserve the vibrant and competitive free market that presently exists for the Internet.”⁷ The Commission has to date refrained from imposing expansive regulation upon Internet access or Internet Protocol-enabled (IP-enabled) services. The Commission has limited the instances in which it has invoked Title I ancillary jurisdiction to address broadband Internet service. Although the Commission issued the Broadband Policy Statement⁸ to guide provider behavior, it has

⁵ Communications Act of 1934, 47 U.S.C. § 151, *et seq.* The Communications Act of 1934 was amended by the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (1996 Act). Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as the Act, and citations to the Act will be to the codified Sections in the U.S. Code.

⁶ Preamble, 1996 Act (describing the purpose of the 1996 Act as “[a]n Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies”).

⁷ 47 U.S.C. § 230(b).

⁸ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company*

refrained from going further to impose multiple the myriad regulatory requirements that would inexorably flow from the instant proposal.

Notably, the Commission has previously addressed the Title I/Title II issue, and wisely enabled providers to promote their offerings with market-oriented flexibility. Broadband service providers are permitted to select from three regulatory models: they are permitted to offer the broadband transmission component of their Internet service under non-common carriage arrangements;⁹ as a tariffed telecommunications service;¹⁰ or on a permissive detariffing basis.¹¹ This “elective” approach “enable[s] facilities-based wireline broadband Internet access service providers . . . to embrace a market-based approach to their business relationships with ISPs. . . .”¹² The Commission reports in the

Provision of Enhanced Services, 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities: Policy Statement, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, 20 FCC Rcd 14986, FCC 05-151 (2005) (Broadband Policy Statement).

⁹ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers* (CC Docket No. 02-33); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services* (CC Docket No. 01-337); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1008 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements* (CC Docket Nos. 95-20, 98-10); *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. §160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises* (WC Docket No. 04-242); *Consumer Protection in the Broadband Era* (WC Docket No. 05-271); *Report and Order and Notice of Proposed Rulemaking*, FCC 05-150, at paras. 87, 88 (2005) (Wireline Broadband Order).

¹⁰ *Wireline Broadband Order* at para. 90.

¹¹ *Wireline Broadband Order* at para. 90.

¹² *Wireline Broadband Order* at para. 87.

NOI that approximately 800 NECA pool carriers have elected to offer broadband under Title II.¹³ The Commission should preserve the value in enabling providers to make market-based decisions, and ensure that such flexibility is available to all broadband service providers. Market-based decisions enable providers to implement the business model that offers greatest efficiencies and end-user benefits. Moreover, history has demonstrated that in a competitive environment such as exists for broadband Internet access services, providers are quick to comport practices with those demanded by consumers. Since the market has grown competitively under the current “light touch” approach, prescriptive Commission action that preempts providers’ ability to respond to consumers and operate efficiently should be rejected.

B. THE BROADBAND MARKET IS COMPETITIVE: RECLASSIFICATION IS NOT NECESSARY, AND WOULD DISCOURAGE INVESTMENT

The broadband market is healthy, and does not show characteristics that would justify reclassification. The current market evidences progressive growth fueled by technological development, increasing provider deployment, and sophisticated consumer demand. The growth trends are evident in the Commission’s recent Section 706 Report.. In 2005, the Commission found that the “appropriate framework for wireline broadband Internet access service, including its transmission component, is one that is eligible for a lighter regulatory touch.”¹⁴ The Commission pointed to a record of “several emerging [wireline broadband] platforms and providers, both intermodal and intramodal, in most areas of the country,” and predicted that the light-touch regulatory regime would “promote the availability of competitive broadband Internet access services to consumers,

¹³ NOI at n.90.

¹⁴ Wireline Broadband Order at para. 3.

via multiple platforms, while ensuring adequate incentives are in place to encourage the deployment and innovation of broadband platforms consistent with our obligations and mandates under the Act.”¹⁵ Three years later, the success of the Commission’s approach was evidenced by its findings in the 2008 Section 706 Report (Fifth Report).¹⁶ In the Fifth Report, the Commission documented the following findings:

- (1) [C]able operators have continued to upgrade their hybrid fiber coaxial (HFC) networks and are working to deliver new or improved services to residential and, increasingly, business customers through bandwidth increases and savings. The Commission estimates that high-speed cable modem service available to 96 percent of the households to which cable system operators could provide cable TV service.¹⁷
- (2) Local telephone companies primarily use digital subscriber line (DSL) service offerings to provide consumers with broadband services where they have not deployed fiber technologies. . . . The variety and speed of DSL service offered continues to increase as carriers more fully realize the potential of copper-based technologies.¹⁸
- (3) Fiber technologies have increased dramatically since the *Fourth Report*. . . . In addition, many small providers are deploying FTTH networks.¹⁹
- (4) Since the *Fourth Report*, Wireless Fidelity (Wi-Fi) access to the Internet has continued to grow with an ever-increasing number of hot-spots . . .²⁰
- (5) Worldwide Interoperability for Microwave Access (WiMax) has made large strides . . .²¹

¹⁵ Wireline Broadband Order at para. 3, internal citations omitted.

¹⁶ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996: Fifth Report*, GN Docket No. 07-45, FCC 08-88 (2008) (Fifth Report).

¹⁷ Fifth Report at para. 8 (internal citation omitted).

¹⁸ Fifth Report at para. 12 (internal citations omitted).

¹⁹ Fifth Report at para. 14 (internal citations omitted).

²⁰ Fifth Report at para. 15 (internal citations omitted).

The Commission also noted growth in licensed wireless technologies²² and satellite,²³ and discussed developments in new services, applications, and devices.²⁴ Overall, the

Commission found that,

the number of high-speed lines increased from 26 million in December 2003 to 65.9 million as of June 2007. Further, as of June 2007, only 0.1 percent of zip codes in the United States reported no high-speed lines, compared to 6.8 percent of zip codes with no reported lines in December 2003. The percent of zip codes reporting four or more providers of high-speed lines also has increased, from 46.3 percent in December 2003 to 88.5 percent in June 2007. . . . these figures do provide evidence that broadband deployment is increasing over time.²⁵

The growth documented in the 2008 report has continued on its trajectory today under a “light touch” regime. Notwithstanding current efforts to improve broadband data collection, even less granular methodologies disclosed overall market growth.

As the broadband Internet access market has grown impressively and become increasingly competitive over the past decade, network providers have responded swiftly to the interest of consumers and the marketplace.²⁶ Only two instances have arisen in

²¹ Fifth Report at para. 17 (internal citations omitted).

²² Fifth Report at paras. 19-21.

²³ Fifth Report at para. 24.

²⁴ Fifth Report at paras. 25-29.

²⁵ Fifth Report at para. 35 (internal citations omitted).

²⁶ Earlier this year, Windstream stopped redirecting Firefox users’ searches to its own search engine. *See*, Matthew Lasar, “Windstream in Windstorm Over ISP’s Search Redirects,” ARS Technia (available at <http://arstechnica.com/telecom/news/2010/04/windstream-in-windstorm-over-dns-redirects.ars> (last viewed Jul. 14, 2010, 16:39) In other instances, Verizon reversed a decision on text messaging after a public outcry. “Verizon Reverses Itself on Abortion Messages,” Adam Liptak, New York Times (Sep. 27, 2007), www.nytimes.com/2007/09/27/business/27cnd-verizon.html?ref=technology (last viewed Jul. 14, 2010, 16:40). AT&T garnered unfavorable attention for allegedly censoring portions of a concert that were critical of President George W. Bush, and for including in its terms of service a condition that some interpreted as providing the carrier with

which the Commission was compelled to adjudicate a dispute. In 2005, the Commission acted swiftly to address the alleged blocking of VoIP traffic by a telephone company.²⁷ That proceeding did not end in a declaration of policy, or promulgation of rules, but rather a voluntary settlement agreement that evidences the Commission's recognition of public expectations. And, in 2008, the Commission addressed complaints regarding Comcast Corporation, resulting in the order whose rejection by the *Comcast* court instigated the instant proceeding.²⁸

In light of the defined standards for invoking ancillary jurisdiction articulated by *Comcast*, the Commission now seeks comment on the best route to proceed toward fostering a robust broadband market. The Commission notes three recent Congressional actions supporting the further deployment of broadband: the 2008 Farm Bill; the Broadband Data Improvement Act; and the ARRA, which ordered the Commission to prepare a National Broadband Plan. The Commission explains, "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,

grounds to terminate service if a user criticized AT&T or related corporate entities. "AT&T Says it Didn't Censor Rock Band Pearl Jam," Grant Gross, Washington Post, Aug. 9 2007, www.washingtonpost.com/wpdyn/content/article/2007/08/09AR2007080901436html (last viewed Feb. 7, 2008).

²⁷ See, *Madison River LLC and Affiliated Companies: Order*, File No. EB-05-IH-0110, DA 05-543 (2005).

²⁸ *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices Petition of Free Press, et al., for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management:" Memorandum Opinion and Order*, File No. EB-08-IH-1518, WC Docket No. 07-52, FCC 08-183 (2008).

innovation, and competition, and promote the interests of consumers.”²⁹ Increased regulation, however, will not further the Commission’s goals of promoting innovation, investment, or competition in the in the broadband marketplace.³⁰ It is also not necessary to protect consumers.³¹

As noted above, the market has developed under the Commission’s “light touch” approach. With rare exception, as described above, anti-competitive and anti-consumer practices have not been evident. The American Consumer Institute (ACI) observed, “little of great consequence has happened, but in the view of [regulation-proposing] advocates: ‘It might!’”³² The Commission must be wary of “relying on a record of abuse that in fact [does] not exist;” in *National Fuel Gas Supply Corporation v. Federal Energy Regulatory Commission*, the D.C. Circuit remanded a FERC Order, explaining,

FERC staked its rationale in part on a record of abuse, but that abuse is non-existent. Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decision making.³³

Similarly, the broadband market has grown impressively in the absence of regulation.

The scattered problems that have arisen were resolved under existing policies, evidencing that future such occurrences, should they arise, can be addressed without the

²⁹ NOI at para. 25

³⁰ See, NOI at para. 29.

³¹ See, NOI at para. 29.

³² “To Regulate, or Not to Regulate: Where is the Broadband Market Failure,” Larry F. Darby, The American Consumer Institute, at 4 (Dec. 2009) (available at <http://www.theamericanconsumer.org/wp-content/uploads/2009/12/nn-and-market-failure.pdf> (last viewed Jul. 14, 2010, 17:06).

³³ See, *National Fuel Gas Supply Corporation v. Federal Energy Regulatory Commission*, 458 F.3d 831 (D.C. Cir. 2006) (court rejects FERC Order for failure to rely upon actual occurrences of harm).

reclassification the Commission has proposed. Therefore, proposals to reclassify broadband do not reflect reasoned decision making and should be rejected.

In the absence of actual harms, there exists no justification for pursuing courses whose mere introduction has already wrought adverse effects on the financial values of broadband providers. The Commission's announcement of the Third Way resulted in negative investment impacts. The empirical data were gathered in a study that collected equity price returns for broadband providers that are also multi-channel video distribution providers (MVPDs).³⁴ The study also collected data on MVPDs that do not provide broadband service. Noting "large negative returns" for MVPD broadband providers following the Commission's Third Way announcement, and no equivalent impact in MVPDs that do not provide broadband, the study concluded

the markets looked at the FCC's "the markets looked at FCC's [Third Way] *Statements* and sent the stock prices of the relevant firms significantly downward. This decline suggests that the capital markets do not accept the FCC's promises, nor their characterization of the proposed change in the regulation. Since investment is determined by the capital markets, this is strong evidence that the reclassification scheme will undermine the allocation of new resources to broadband infrastructure, even if the FCC ultimately keeps its word."³⁵

The results were presented with financial analysts' views of the Third Way: "a Trojan horse for greater regulation;"³⁶ "potential for lower investment are likely and the ramifications will be felt not just in telecom and cable, but potentially in the vendor

³⁴ See, George S. Ford, Lawrence J. Spiwak, "The Broadband Credibility Gap," Phoenix Center for Advanced Legal and Economic Public Policy Studies, Washington (Jun. 2010) (Phoenix Report).

³⁵ Phoenix Report at 33.

³⁶ Phoenix Report at 34, quoting Greg Miller, *FCC Moving to Closer to Some Title II Regulations?* Collins Stewart, LLC (May 7, 2010).

sector as well;”³⁷ a “profoundly negative impact on capital investment;”³⁸ and, “potential long-term negative investment (and competitive) implications for major cable broadband providers.”³⁹

The evidence is clear: the broadband market has grown dramatically under a “light touch;” in a thriving competitive market, only anomalous isolated incidents implicating consumer relationships have occurred; the mere prospect of increased regulation punched a negative impact on broadband provider stock values; and industry analysts conclude that increased regulation will depress incentives for investment. Therefore, the Commission should conclude that is no demonstrated need for the proposed action that is expected to engender only damaging results. The D.C. Circuit found in *Comcast* that the FCC had failed to tie its assertion of ancillary authority to any “statutorily mandated responsibility,” rejecting several of the Commission’s arguments. But, the Court also did not foreclose Commission exercise of ancillary jurisdiction over broadband. Rather, it simply enunciated the standards to which the Commission must adhere when invoking that authority. In response to the court’s admonition that the Commission must identify clear basis in order to assert ancillary authority, the

³⁷ Phoenix Report at 34, quoting Bernstein Research, *U.S. Cable: Pulling the Plug . . . Regulatory Uncertainty Clouds Terminal Growth Rates; Downgrading Sector to Neutral* (May 10, 2010).

³⁸ Phoenix Report at 35, quoting T. Shields, *FCC Begins Reclaiming Authority Over Internet Access Providers*, Bloomberg News (May 6, 2010) (<http://sfgate.bloomberg.com/SFChronicle/Story?docId=1376-L206XH0UQV19-1>).

³⁹ Phoenix Report at 35, quoting W. Spain, *FCC Chief Broaches New Approach on “Net Neutrality,”* MarketWatch (May 6, 2010) (available at: <http://www.marketwatch.com/story/cable-shares-hit-by-fcc-move-on-net-neutrality-2010-05-06>).

Commission proposes instead to impose broad reclassification, taking the form of either full Title II application or the Third Way.

The Chairman has noted the “serious drawbacks” of full Title II reclassification.⁴⁰ Similar concerns attend implementation the Third Way. Although the Third Way proposal might be less burdensome in theory, in reality is a difficult, uncertain attempt to foist regulation where Congress and previous Commissions have refrained from intervention. Moreover, as has been demonstrated by prior Commission actions, the public interest and corollary Commission goals can be met adequately under Title I. The so-called “Third Way” of reclassification and concurrent forbearance threatens the successful broadband services market with uncertainty. In the first instance, forbearance is not permanent. In addition, there is insufficient confidence in the market that deregulatory standards would be maintained. Under Title I, the default is a light-touch approach that is consistent with the deregulatory nature of the Act. By contrast, if the Commission were to reclassify broadband as Title II, the default would be regulation, an outcome that would be inconsistent with both the deregulatory nature of the Act and successful agency policy until this point. The Commission and Congressional policies have facilitated a successful market. Those standards should be maintained, and unnecessary regulation should be eschewed.

C. TITLE I IS SUFFICIENT

The Commission offers as prelude the proposition that “Comcast makes unavoidable the question whether the Commission’s current legal approach is adequate to

⁴⁰ “The Third Way: A Narrowly Tailored Broadband Framework,” Julius Genachowski, Chairman, Federal Communications Commission (May 6, 2010) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.doc) (last viewed Jul. 12, 13:40).

implement the Congress's directives."⁴¹ The Commission then enunciates five categories of concern that are, in its post-*Comcast* view, not readily accessible to the Commission via ancillary jurisdiction. Specifically, the Commission addresses universal service,⁴² privacy,⁴³ access for individuals with disabilities,⁴⁴ public safety and homeland security,⁴⁵ and "harmful practices" of Internet service providers.⁴⁶ The Commission's concern is misplaced. The Comcast decision did not implicate the Commission's ability *per se* to address those issues. And, as noted above, the paucity of problems in an ever-growing broadband market evidences the fact that the current "light touch" approach is appropriate. Accordingly, the Commission should rely on historically successful invocations of ancillary jurisdiction, coupled with the guidance provided by the *Comcast* court, to effect narrowly-tailored actions where necessary.

1. Universal Service

The Commission asks whether the Federal universal service fund (USF) and, specifically, the high-cost mechanisms can support broadband Internet service under Section 254, combined with ancillary authority under Title I.⁴⁷ The Commission has several templates by which to pursue the furtherance of broadband deployment under current USF standards. In the first instance, the Commission may take guidance from its

⁴¹ NOI at para. 9.

⁴² NOI at paras. 32-38.

⁴³ NOI at para. 39.

⁴⁴ NOI at para. 40.

⁴⁵ NOI at para. 41.

⁴⁶ NOI at paras. 42-50.

⁴⁷ NOI at para. 32.

previous extension of USF support to Internet access for schools and libraries.⁴⁸ That action, which relied upon the Commission's interpretation of ambiguous portions of the Act, was upheld by the U.S. Court of Appeals for the Fifth Circuit.⁴⁹ Additional interpretations are addressed recently in recommendations the Commission has received from the industry regarding how USF funding can be used to support broadband in the absence of reclassification. AT&T has provided a White Paper analyzing Section 254 of the Act,⁵⁰ while the National Cable Telecommunications Association (NCTA) has argued that support may be based upon Section 254(h)(2) of the Act, which sets forth educational purposes of USF.⁵¹ The AT&T analysis bridges internal gaps in Section 254 with the overall intent of Act -- universal service is intended to support access to advanced services, yet certain sub-sections of the statutes articulate limitations to support only telecommunications. Resolution of the statute's ambiguity is the jurisdiction of the Commission. Indeed, the Commission quoted the Supreme Court statement that, "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in a reasonable fashion."⁵² That reminder is particularly relevant in the instant matter, where, as noted previously by the Supreme

⁴⁸ See, *Federal-State Joint Board on Universal Service: Order*, CC Docket No. 96-45, FCC 97-157, at para. 29 (1997).

⁴⁹ *Texas Office of Public Utilities Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

⁵⁰ Letter from Gary Philips, General Attorney and Associate General Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-47, 09-137, WC Docket Nos. 05-337, 03-109 (Jan. 29, 2010) (AT&T White Paper).

⁵¹ Letter from Kyle McSlarrow, President and CEO, National Cable and Telecommunications Association, to Julius Genachowski, Chairman, FCC GN Docket Nos. 09-51, 09-191, WC Docket No. 07-52 (Mar. 1, 2010) (NCTA USF Letter).

⁵² NOI at para. 18, quoting *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 980 (2005).

Court, “It would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction.”⁵³ The AT&T White Paper offers a template for a reasonable and sustainable analysis by the Commission. That approach would be consistent with general agency actions to which the judiciary accords deference.⁵⁴

Finally, it should also not escape consideration that substantial broadband deployment has occurred under current practices that limit USF support to telecommunications. Although Section 254(c) of the Act defines universal service as an “evolving level of telecommunications services that the Commission shall establish periodically,”⁵⁵ the USF has enabled deployment of voice networks that can be leveraged to provide broadband. The Commission found that support to invest in infrastructure capable of providing access to advanced services does not violate section 254(e), which mandates that support be used “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”⁵⁶ The Commission has noted that networks that support those core services may also support broadband, without compromising their eligibility for USF support. In 2006, the Federal-State Joint Board for Universal Service observed,

A significant portion of the High Cost Loop fund supports the capital costs of providing broadband-capable loop facilities for rural carriers. Under this system, rural LECs (RLECs) have done a commendable job of providing broadband to nearly all their customers. While this program may need adjustments, we recognize its effectiveness in maintaining an

⁵³ *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999).

⁵⁴ *See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁵⁵ 47 U.S.C. § 254(c)(1).

⁵⁶ *See*, 47 U.S.C. § 254(e).

essential network for POLRs [providers of last resort] and in deploying broadband.⁵⁷

In sum, the Commission has previously exercised Title I ancillary jurisdiction to capture broadband Internet access for certain USF purposes. Moreover, position papers offered by AT&T and NCTA provide templates for interpretation upon which the Commission may rely to craft a sustainable order. Finally, substantial broadband deployment has occurred under current approaches that support dual-use networks. In light of these approaches, there should be no need to reclassify broadband Internet access as a Title II service for purposes of deploying broadband under the current statutory construct.

2. Privacy, Access by Individuals with Disabilities, Public Safety

The Commission seeks comment on how it may exercise Title I ancillary jurisdiction to address privacy, access for persons with disabilities, and public safety/homeland security in the broadband context. The *Comcast* decision did not, however, preclude or preempt any valid Commission action in those regards. Where the Commission may exercise ancillary jurisdiction, it must do so with attention to the standards set forth by *Comcast* and in furtherance of specified mandates of the Act. Wholesale reclassification of broadband Internet access, by contrast, is an unnecessary and potentially harmful change in course. The Commission can support important goals without resorting to reclassification. Therefore, if the Commission can identify a specific statutory mandate to which it can tie its ancillary authority, *Comcast* need not be

⁵⁷ *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service: Recommended Decision*, WC Docket No. 05-337. CC Docket No. 96-45, FCC 07J-4, at para. 30 (2007) (2007 Joint Board Recommendation).

interpreted as foreclosing Commission action in those regards. Further, for each of those issues, competent jurisdiction either already exists or should be rationally obtainable in light of prior Commission action.

Privacy

The Commission need not reclassify broadband Internet access in order to protect consumer privacy. In the first instance, in 2007, the Commission extended Section 222 privacy requirements to interconnected VoIP without determining whether VoIP is a telecommunications or information service. The Commission found that Sections 222 and 1 provided the “requisite nexus,” and drew additional support from Section 706. The Commission found that extension of CPNI requirements to interconnected VoIP was necessary to protect the privacy of wireline and wireless consumers, and therefore held that extending CPNI obligations to interconnected VoIP was “reasonably ancillary to the effective performance of the Commission’s duty to protect the CPNI of all telecommunications carriers under the Act.”⁵⁸ Noting the burgeoning use of VoIP calls to and from wireline and wireless customers, the Commission found that, “[i]f we failed to exercise our responsibilities under sections 222 and 1 of the Act with respect to customers of interconnected VoIP service, a significant number of American consumers might suffer a loss of privacy and/or safety resulting from unauthorized disclosure of their CPNI – and be harmed by this loss.”⁵⁹ The extension of CPNI to interconnected

⁵⁸ *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; IP Enabled Services: Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-115, WC Docket No. 04-36, FCC 07-22, at para. 57 (2007).

⁵⁹ *Id.*, at para. 58.

VoIP was upheld by the D.C. Circuit.⁶⁰ The implication that *Comcast* throws into doubt the Commission's ability to assert ancillary jurisdiction over consumer privacy is undermined by the Commission's prior successful action. *Comcast* does not foreclose additional measures that are consistent with the standards articulated by the *Comcast* court. Absent Commission reclassification, consumers can be protected if that Commission finds sustainable basis upon which to assert ancillary jurisdiction. Moreover, the Federal Trade Commission (FTC) has announced its intent to address privacy issues.⁶¹ Between the Commission's ancillary jurisdiction and the FTC's jurisdiction over non-common carriers, there is ample opportunity for Federal agencies to engage proper privacy controls. Commission reclassification is not necessary to achieve these goals and, in, light of the potential adverse consequences, should be avoided.

Access for individuals with disabilities

The Commission seeks comment on exercising ancillary authority to ensure access for persons with disabilities. As noted by the Commission, it previously invoked that approach to extend protections for VoIP, voice-mail, and interactive menu services. By way of example, in 1999 the Commission extended disability-related requirements to voicemail and interactive menu services.⁶² The Commission explained that it sought to

⁶⁰ See, *National Cable & Telecom. Association v. FCC*, 555 F.3d 996 (D.C. Cir. 2009).

⁶¹ Cecelia Kang, "FTC Says It is Creating Internet Privacy Framework Amid Growing Concerns," *Washington Post* (Apr. 27, 2010) (available at http://voices.washingtonpost.com/posttech/2010/04/ftc_says_it_is_creating_intern.html) (last viewed Jul. 12, 2010, 17:55)

⁶² *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities: Report and Order and Further Notice of Inquiry*, WT Docket No. 96-198, FCC 99-1818, at para. 106 (1999) (*Section 255 Order*) ("Where, as here, we have subject

“avoid the disruptive effects caused by inaccessible voicemail and interactive menus so as to ensure that the implementation of section 255 is not thwarted.”⁶³ The Commission specifically declined, however, “to extend accessibility obligations to any other information services,”⁶⁴ stating that it “use[d] our discretion to reach only those services we find essential to making telecommunications services accessible.”⁶⁵ This finding was prospectively consistent with the approach defined by the *Comcast* decision. The Commission is not barred from exercising authority in a manner enabled by the statute once it has identified and proven the relevant nexus. Reclassification, by contrast, is upends the successful “light touch” approach under which broadband services have thrived.

Public safety and homeland security

The Commission has previously extended public safety obligations to information services. In 2005, the Commission asserted its ancillary jurisdiction under Title I of the Act and its authority under section 251(e) to require interconnected VoIP providers to supply 911 emergency calling capabilities to their customers for services that utilize the PSTN.⁶⁶ Similar to the inquiries regarding privacy and access by individuals with disabilities, the Commission has proven previously that it can extend sustainable ancillary

matter jurisdiction over the services and equipment involved, and the record demonstrates that implementation of the statute will be thwarted absent use of our ancillary jurisdiction, our assertion of jurisdiction is warranted. Our authority should be evaluated against the backdrop of an expressed congressional policy favoring accessibility for persons with disabilities.”).

⁶³ *Section 255 Order* at para. 100.

⁶⁴ *Section 255 Order* at para. 107.

⁶⁵ *Section 255 Order* at para. 107.

⁶⁶ *See, IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers: First Report and Order and Notice of Proposed Rulemaking*, WC Docket Nos. 04-36, 05-196, FCC 05-116 (2005).

jurisdiction over these issues. The NOI, however, does not offer sufficient specificity to explain why the Commission should extend ancillary authority further than it has already.

III. CONCLUSION

The broadband market is strongly competitive, and the Commission has previously addressed broadband-related matters successfully under Title I. There is no reason to undertake wholesale reclassification of broadband services, whether by full Title II application or the “Third Way.” That approach would impose risks and costs that would harm broadband market. When and if there is a need for regulation in the broadband market, it can be satisfied through the Commission’s exercise of ancillary jurisdiction.

Respectfully submitted,



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