

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

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

**COMMENTS OF  
THE UNITED STATES TELECOM ASSOCIATION**

Its Attorneys:

Jonathan Banks  
Robert Mayer  
Genie Barton  
Kevin Rupy  
607 14<sup>th</sup> Street, NW  
Suite 400  
Washington, D.C. 20005  
(202) 326-7300

July 15, 2010

Table of Contents

**EXECUTIVE SUMMARY .....III**

**I. UNDER THE CURRENT TITLE I FRAMEWORK, BROADBAND INTERNET TECHNOLOGY IN THE UNITED STATES HAS DEVELOPED WITH SPEED AND SCOPE UNPARALLELED BY ANY PRIOR NETWORK TECHNOLOGY. 1**

**A. United States Broadband Investment Is Flourishing in the Current Environment..... 4**

**1. Broadband Providers Are Investing Massive Amounts in Competitive Infrastructure ..... 4**

**2. The United States Is a World Leader in ICT Investment ..... 11**

**B. The United States Has Embraced Broadband Technology..... 18**

**1. Consumers Are Rapidly Adopting Broadband..... 18**

**2. The United States is a World Leader in Amount of Internet Usage ..... 19**

**C. Consumers Reap Benefits of Broadband Investment..... 21**

**1. Prices Falling and Throughput Increasing..... 22**

**2. Technology Choices Expanding..... 23**

**3. Consumer Value and Choice Growing Quickly..... 23**

**II. BROADBAND SERVICE IS AN INTEGRAL PART OF THE INTERNET AND CANNOT BE REGULATED SEPARATELY FROM THE INTERNET. .... 26**

**A. Definitions of What Constitutes the Internet Include Broadband Internet Connectivity Services..... 28**

**B. Commission Efforts to Define the Internet Will Interfere with the Internet’s Constant Evolution ..... 32**

**C. The Commission’s Proposal to Bifurcate the Internet Will Introduce Complexity, Confusion and Uncertainty in the Broadband Marketplace ..... 38**

**III. THE COMMISSION’S PROPOSAL TO APPLY 19TH CENTURY-STYLE MONOPOLY REGULATION WILL HARM BROADBAND INVESTMENT TO THE COMPETITIVE 21ST CENTURY INTERNET..... 42**

**IV. THE COMMISSION’S PROPOSED TITLE II REGULATORY REGIME VIOLATES THE ADMINISTRATIVE PROCEDURE ACT..... 44**

<b>A.</b>	<b>The Different Regulatory Treatment of Similarly Situated Providers Would be Arbitrary and Capricious in Violation of the APA.....</b>	<b>44</b>
<b>B.</b>	<b>The FCC’s Departure From Established Precedent Without Reasoned Explanation Would Violate The APA.....</b>	<b>49</b>
<b>C.</b>	<b>The NECA DSL Tariff Is Not Helpful In Defining “Broadband Internet Connectivity Service” And Is Not Evidence That Providers Are Voluntarily Offering Broadband Transmission as a “Telecommunications Service.” .....</b>	<b>59</b>
<b>V.</b>	<b>THE COMCAST DECISION DOES NOT WARRANT ADOPTION OF THE COMMISSION’S PROPOSED REGULATORY REGIME.....</b>	<b>63</b>
<b>A.</b>	<b>Comcast Is A Narrow Decision That Does Not Undermine The Commission’s Ancillary Authority To Implement Its Broadband Initiatives. ....</b>	<b>63</b>
<b>B.</b>	<b>Universal Service.....</b>	<b>70</b>
<b>C.</b>	<b>Privacy .....</b>	<b>73</b>
<b>D.</b>	<b>Access by Persons with Disabilities .....</b>	<b>75</b>
<b>E.</b>	<b>Public Safety and Homeland Security.....</b>	<b>77</b>
<b>VI.</b>	<b>CONCLUSION .....</b>	<b>79</b>

\* \* \*

## **Executive Summary**

Under the Commission's current Title I framework, the broadband Internet in the United States has been a tremendous success story. It has developed with a speed and scope unparalleled by any prior network technology, producing jobs, economic growth, productivity gains and vast social benefits. The Commission has recognized the essential role that private investment plays in building and operating the broadband Internet. In reliance on today's Title I framework, broadband providers invested over half a trillion dollars in building networks between 2000 and 2008. Private investment in broadband infrastructure continues at massive levels today.

In proposing to substitute Title II's 19<sup>th</sup> Century-style narrowband one-wire regulatory framework in place of the current Title I modern broadband framework, the Commission is creating a cloud of uncertainty over the most dynamic sector of our economy – an area of robust job creation, thriving innovation, and extraordinary levels of consumer satisfaction according to the Commission's own surveys. In doing so, it is acting in a way that would seem to be fundamentally at odds with our country's interest in promoting broadband deployment and adoption, encouraging expanded consumer choice through increased investment in facilities-based broadband networks, and encouraging jobs and economic growth. This proposal to change regulatory frameworks must face a very high bar in demonstrating how the public interest in jobs, economic growth and social welfare could possibly be served by changing a regulatory paradigm that has been so successful for consumers and the United States economy.

The Commission's proposal would also overturn years of broad consensus that policymakers should "preserve the vibrant and competitive free market that presently exists for the Internet ... unfettered by Federal or State regulation." Imposing Title II's long outdated regulatory framework on the broadband Internet is directly antithetical to this Congressional directive. Any claim that imposing Title II on "broadband Internet connectivity service" is not regulating the Internet is unfounded.

For years, since the Internet's inception, a wide range of commentators and experts uniformly agree that broadband networks and connectivity are part and parcel of the Internet. Whether viewed as part of the Internet's network of networks, or as an integral link between the computers that make up the Internet – or even as an "on/off ramp" – broadband connectivity and service is a fundamental, integral part of what the Internet is. While the Commission is emphatic about its desire not to regulate the Internet, imposing Title II obligations on broadband Internet connectivity service would be exactly that. Moreover, as the Internet continually evolves, the Commission's static regulatory definitions will hinder the flexibility and ongoing evolution that are the Internet's hallmarks.

The Commission's proposed legal contortions to create a "broadband Internet connectivity service" through regulatory fiat would violate the law and raise substantial constitutional issues. Over the past decade, the Commission has consistently found that broadband Internet access service is an "information service" premised on its factual determination that the transmission and data processing components of the service are functionally integrated and are not offered separately. During this time and through today,

USTelecom members have increasingly integrated more computer processing, content and applications into the service they provide consumers to create more consumer value and safer, more secure services. The Commission may not ignore these facts in an attempt to rewrite what services are being provided to consumers today. The evidence is that broadband Internet services are even more functionally integrated today than when the Commission first considered the matter more than a decade ago.

Similarly, the Commission's proposal would run afoul of the Administrative Procedures Act due to its selective interpretation of the universe of Internet connectivity service providers that would be subject to Title II regulation under the "Third Way." The Commission carves out from its proposed regulatory paradigm certain providers of such services, without any principled distinction whatsoever, or any consideration of how drawing artificial regulatory lines enforcing regulatory separations among various parts of the Internet could possibly work to the benefit of the Internet. Similarly, the proposed line drawing between "facilities-based" and "non-facilities-based" providers does not rest on a factual understanding of market realities and has no legal support. Absent reasoned explanation and substantial record evidence – each of which is sorely lacking – this approach would violate well-settled principles of administrative law.

The Commission's reliance on the NECA DSL access service tariff provides neither a source of guidance in defining "broadband Internet connectivity service" nor as evidence of voluntary offering by rate-of-return local exchange companies of broadband transmission service. NECA's tariff does not offer an Internet connectivity service, and the service it describes does not connect anyone or anything to the Internet.

The Commission's proposal that the change created by the Comcast decision somehow provides a basis for reversing course and imposing Title II obligations on the broadband Internet is likely to meet with considerable skepticism by a reviewing court. This is not the sort of "gap filling" that will receive judicial deference, as noted by former United States Solicitor General Seth Waxman. Any claim that forbearance can somehow be used to remedy discrete issues with particular sections of Title II ignores both the fact that the antiquated Title II framework itself is the problem, and that the path to forbearance on the scale proposed is untried, full of factual and legal difficulties, and can be reversed by the courts and future Commissions.

Finally, imposing a long outdated Title II framework on the broadband Internet is not necessary for the Commission to accomplish its core statutory missions or the key Commission objectives identified in the National Broadband Plan concerning universal service, disabilities access, privacy and public safety/homeland security.

\* \* \*

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

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

**COMMENTS OF  
THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom)<sup>1</sup> is pleased to comment on the Notice of Inquiry (*Notice*)<sup>2</sup> issued by the Federal Communications Commission (Commission) in the above referenced proceeding.

**I. UNDER THE CURRENT TITLE I FRAMEWORK, BROADBAND INTERNET TECHNOLOGY IN THE UNITED STATES HAS DEVELOPED WITH SPEED AND SCOPE UNPARALLELED BY ANY PRIOR NETWORK TECHNOLOGY**

In light of the robust Internet marketplace that has developed over the last decade, and strong indications throughout the market demonstrating its continued growth and innovation, those calling for last century regulation of broadband Internet access – either under Title II or the so-called “Third Way” approach – face a high bar in demonstrating the public interest benefits (and in overcoming the legal hurdles) in changing a regulatory paradigm that has been so successful for consumers and the United States economy. As the Commission considers whether to impose a new regulatory framework for the Internet and broadband Internet access services, it

---

<sup>1</sup> USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

<sup>2</sup> Notice of Proposed Rulemaking, *Preserving the Open Internet*, 24 FCC Rcd. 13064, 74 Fed. Reg. 62638 (November 2009) (*Notice*).

is imperative to understand where we are and how we arrived here. Putting aside the rhetoric about national rankings and the like, the fact is that broadband in the United States has developed with speed and scope unparalleled by any prior network technology. Moreover, we have built a national broadband infrastructure almost entirely with private sector investment. One of the greatest risks to imposing a new (and long outdated) regulatory framework on the operation of broadband networks – as Title II regulation and the “Third Way” would do – is the potential to undermine the environment that thus far has facilitated massive investment in broadband networks, innovation in content and application, and growth in Internet usage over the last decade.

A little more than a decade ago, the Commission was in the midst of implementing the Telecommunications Act of 1996 – a statute that hardly focused on the Internet, reflecting the fact that few at the time envisioned Internet access becoming integral to the lives of the vast majority of Americans. Nonetheless, the 1996 Act directed the Commission to study the Internet, not to regulate it, and Congress made clear its view that the Internet should develop “unfettered by Federal or State regulation.”<sup>3</sup> In the relatively short span since the 1996 Act, wireline, wireless, satellite and cable providers have invested hundreds of billions of dollars to deploy broadband networks. Indeed, the Commission’s National Broadband Plan notes that broadband in the United States has “improved considerably in the last decade,” “[d]ue in large part to private investment and market-driven innovation.”<sup>4</sup>

---

<sup>3</sup> See e.g., 47 U.S.C. §706(b) (calling for the Commission to conduct regular inquiries into the “availability of advanced telecommunications capability to all Americans.”); and see 47 U.S.C. 230(b) (establishing “policy” of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation”).

<sup>4</sup> *National Broadband Plan*, p. 3.

By some estimates, cumulative capital expenditures by broadband providers from 2000-2008 were over half a trillion dollars, and private investment in broadband infrastructure has continued to grow substantially. As the Commission noted in the National Broadband Plan, even in the face of the economic downturn, broadband providers continue to invest nearly \$60 billion annually.<sup>5</sup> As a result of this massive private investment in infrastructure, an overwhelming majority of Americans today can choose among *multiple* broadband platform providers. Broad deployment of competing platforms has spurred a dynamic of competitive investment and innovation among networks, applications, content, and devices, providing substantial benefits to consumers and the United States economy.<sup>6</sup>

Below, we document the substantial investment by competing broadband providers in increasingly powerful network platforms and the associated investment by other players throughout the economy in related information and communications technologies (ICT). We also document the benefits accruing to the United States economy and consumers as a result of such investment, including rapid adoption, growing usage, declining prices, exploding consumer value, a growing array of technology choices, sustained innovation, enhanced productivity, significant job creation, and international leadership.

Encouraging the sector's successful growth into the future must be the key goal of policymakers. Doing so will require careful attention to the entire ICT ecosystem and the checks and balances that exist within it. The new environment has opened new opportunities for

---

<sup>5</sup> *National Broadband Plan*, p. 18 (noting that “The 10 largest [network service] providers have . . . annual capital investments in excess of \$50 billion.”)

<sup>6</sup> See, e.g., Rob Pegoraro, *Fast Forward: Clear Gives Broadband Users Another Option*, The Washington Post (July 11, 2010) (touting wireless broadband service from Clearwire as “an effective substitute for land-based broadband”) (available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/09/AR2010070902884.html> (visited July 14, 2010)).

broadband network providers, but with cross-platform and cross-sector competition it also threatens traditional revenue streams that traditionally support network investment. In order to encourage continued investment and United States international leadership in this environment, providers will need flexibility to adapt business models and participate in the value creation made possible by broadband. Proponents of change to current regulatory policies should have to affirmatively demonstrate that such change would improve sector performance and would lead to more jobs, greater growth and expanded innovation through the ICT ecosystem. The possibility that increased regulation of broadband Internet access services would upset the balance that has produced the ICT record of economic success, consumer service, and demonstrated innovation over the last several years is too great a risk that should give any policymaker pause in considering whether to change course.

*A. United States Broadband Investment Is Flourishing in the Current Environment*

**1. Broadband Providers Are Investing Massive Amounts in Competitive Infrastructure**

By some estimates, cumulative capital expenditures by broadband providers from 2000-2008 were over half a trillion dollars.<sup>7</sup> The pro-competition environment and the deregulatory regime in place for the last decade has encouraged such network investment. Private capital investment grew consistently from 2003 through 2008.<sup>8</sup> In 2008 alone, broadband providers

---

<sup>7</sup> See, United States Department of Commerce, National Telecommunications and Information Administration (NTIA), *Networked Nation: Broadband in America 2007* (January 2008), pp. 32-34. The NTIA data include payments for wireless spectrum licenses. Wireless, capital expenditures for 2000-2002 were derived by taking the difference of cumulative capital expenditures published by the Federal Communications Commission in its Tenth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services (FCC-05-173) (Released September 30, 2005), Table 1 at p. 80.

<sup>8</sup> See, *id.*

invested \$64.2 billion to deploy and upgrade their networks<sup>9</sup> and in 2009 were projected to invest just under \$60 billion, a temporary reduction in capital spending of less than 10%.<sup>10</sup> This investment level is significant given the severe economic downturn, which led private firms across the economy to reduce investment by approximately 18% for 2009.<sup>11</sup> Moreover, broadband provider investment is projected to return to growth in either 2010 or 2011, sustaining an average of more than \$60 billion per year from 2007 through 2012.<sup>12</sup>

---

<sup>9</sup> Yankee Group Research, Inc. © Copyright 1997-2009. All rights reserved. Yankee Group estimates that broadband providers invested \$64.2 billion in 2008, up from \$62.5 billion in 2007. Data are in nominal dollars and include wired and wireless telecommunications carriers and cable providers. Wireless spectrum license payments are not included.

<sup>10</sup> *Id.* Note: The Commission issued NBP Notice #23, seeking comment on a study by the Columbia Institute for Tele-Information (“CITI Study”). The study attempted to apportion capital expenditures into “broadband” and “legacy” categories, estimating that “broadband” accounted for about half of capital spending today and increasing over time (CITI Study at pp. 30 and 66). The “broadband” category in the CITI Study appears to focus on access upgrades, thereby understating, in our view, “broadband” investment and overstating “legacy” investment. The distinction between broadband and legacy is not relevant for joint-use facilities that may be categorized as “legacy.” For example, while investments to maintain or consolidate copper voice loops and circuit switches would appropriately be termed “legacy,” investments in metropolitan area and long-haul transport, enterprise transport, wireless backhaul to accommodate data growth, as well as corporate spending and operating and billing support systems, are not appropriately limited to the “legacy” category. *See* Comments of the United States Telecom Association in the Matter of Comments – NBP Notice # 23 (GN Docket No. 09-47, 09-51, 09-137) at p. 5.

<sup>11</sup> *See*, United States Department of Commerce, Bureau of Economic Analysis, National Income and Product Accounts Table 5.5.3, “Private Fixed Investment by Type” available at <http://www.bea.gov/national/nipaweb/SelectTable.asp?Selected=N> (visited July 13, 2010). Annual non-residential investment was \$1.389 trillion in 2009, down from \$1.694 trillion in 2008.

<sup>12</sup> *See* Comments of the United States Telecom Association in the Matter of Comments – NBP Notice # 23 (GN Docket No. 09-47, 09-51, 09-137) at pp. 2-3 (citing market research projections for flat or slightly declining capital investment in 2010, with a return to growth in 2011). *See also* Communications Daily, Vol. 30, No. 6 (January 11, 2010) at p. 14 (citing a more recent analysis by Catharine Trebnick of Avian Securities projecting a 1.5% increase in capital spending for traditional telecom companies and cable operators in 2010). The \$60 billion average is for 2007-2012 and is based on a March 2009 projection from Yankee Group Research, Inc.

As a result of this massive private investment in infrastructure, the United States now has one of the most competitive broadband markets across one of the largest geographic spans in the world. An overwhelming majority of Americans today can choose among *multiple* broadband platform providers. The Commission’s National Broadband Plan found that 290 million Americans – representing 95% of the U.S. population – live in housing units with access to terrestrial, fixed broadband infrastructure capable of supporting actual download speeds of at least 4 Mbps.<sup>13</sup> 82% of U.S. households can choose from *at least* two such broadband service providers: cable modem in approximately 92% of the country and wireline broadband in approximately 84%, with some non-overlap.<sup>14</sup> In addition, more than 95% of the United States population can choose from three or more mobile broadband networks, and more than 90% of

---

<sup>13</sup> *National Broadband Plan*, p. 37 (noting that “the U.S. market structure is relatively unique in that people in most parts of the country have been able to choose from two wireline, facilities-based broadband platforms for many years.”).

<sup>14</sup> *Id.* Assuming a small amount of non-overlap among cable modem and DSL, 82% availability of two or more providers is consistent with other estimates of broadband availability in the United States. The FCC, *High-Speed Services for Internet Access: Status as of December 31, 2008* (February 2010) (*FCC High-Speed Internet as of December 31, 2008*) at Table 19, estimates DSL service is available to 84% of residential end-user premises to which ILECs offer local telephone service and cable modem service is available to 96% of residential end-user premises to which cable systems can provide cable television service. Since cable television is not available to all households, we look at data from NCTA at <http://www.ncta.com/StatsGroup/Availability.aspx> (visited July 6, 2010), estimating that cable high-speed Internet availability to end-user premises in the United States is 92%. The NBP at p. 37 cautions that, absent price and performance data for each provider at each housing unit, the data do not necessarily imply that 82% of housing units have at least two competitive options. While this is true enough, we suggest that this metric is a reasonable proxy for competitive availability of wired platforms in the mass market because (1) price-performance differences are likely to be most meaningful at the high-end of the market at any given time and (2) technological or pricing advantages tend to be transitory as competitive providers upgrade their networks and improve price-performance over time.

the population can choose from four or more mobile networks.<sup>15</sup> Satellite broadband is available to nearly every household in the country.

As the Commission noted in its National Broadband Plan, the United States compares very favorably to other countries when considering the breadth of platform competition among wireline, cable, and wireless broadband providers.<sup>16</sup> Looking first at platform competition among wired broadband providers, as of mid-2008, cable modem service was available to 92% of households in the United States.<sup>17</sup> The technology with the next highest availability rate in the United States is DSL, which was available to 83% of households.<sup>18</sup>

While more than four-fifths of households in the United States can choose from at least two wired broadband platforms, only two-fifths of European households have a similar level of

---

<sup>15</sup> See, *In the Matter of Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 10-81, at p. 37, Table 4 (May 20, 2010) (*14th CMRS Competition Report*). Wireless broadband providers are planning to upgrade existing third generation mobile broadband networks to higher-speed fourth generation technologies. Verizon and AT&T plan to deploy Long Term Evolution (LTE) technology over the next several years. See <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=30358&mapcode> (visited July 13, 2010) and <http://investor.verizon.com/news/view.aspx?NewsID=1028> (visited July 13, 2010). Clearwire, which was recently spun off from Sprint, projects that its fourth generation wireless broadband services using new mobile WiMAX technology will be available to 120 million people by 2010.<sup>15</sup> See Clearwire Corporation, United States Securities and Exchange Commission Form 10-K (filed March 26, 2009), at pp. 2-3.

<sup>16</sup> *National Broadband Plan*, p. 37 (noting that “the U.S. market structure is relatively unique in that people in most parts of the country have been able to choose from two wireline, facilities-based broadband platforms for many years.”).

<sup>17</sup> See FCC High-Speed Internet as of June 30, 2008 at p. 4 and Table 14 (stating that cable modem service is available to 96% of residential end-user premises to which cable systems can provide cable television service). Cable television is not available to all households. Therefore, for an estimate of availability to all households, see National Cable & Telecommunications Association at <http://www.ncta.com/StatsGroup/Availability.aspx> (visited September 2, 2009) (stating that cable high-speed Internet availability to households in the United States is 92%).

<sup>18</sup> See FCC High-Speed Internet as of June 30, 2008 at p. 4 and Table 14 (stating that DSL service is available to 83% of residential end-user premises to which ILECs offer local telephone service). This is an estimate of the percentage of residential end-user premises with broadband availability, not the percentage of zip codes in which DSL is available.

choice. In the European Union, while DSL was available to 93% of households as of year-end 2008, cable modem, the technology with the next highest availability rate in the European Union, was available to only 43% of households.<sup>19</sup>

The portion of subscribers relying on the two different wired platforms further illustrates the relative competitive balance among broadband platforms in the United States compared to the European Union, another indicator of competition. In the United States, as of year-end 2009, 53% of fixed broadband subscribers used cable modem and 45% used DSL or fiber.<sup>20</sup> In Europe, as of year-end 2009, 84% of subscribers used DSL or fiber and only 16% used cable modem.<sup>21</sup>

---

<sup>19</sup> iDATE, *Broadband Coverage in Europe: Final Report, 2009 Survey* (December 2009) (“iDATE Coverage in Europe”) at pp. 11 and 18 (stating that DSL was available to 93% of the population in the EU27 plus Norway and Iceland as of year-end 2008 and cable modem, the technology with the next highest availability rate, was available to 43%. There is, of course, variation within Europe, with high cable availability in a handful of countries, e.g., Malta (95%), the Netherlands (93%), Bulgaria (89%), Belgium (88%), and Portugal (85%). Nonetheless, cable availability remains low for the European Union as a whole (43%) and for the largest member countries, e.g., Italy (0%), France (26%), the UK (48%), Spain (53%), and Germany (56%).

<sup>20</sup> OECD, *Broadband Statistics* (December 2009) (“OECD Broadband Statistics”) at Table 1d; available at <http://www.oecd.org/dataoecd/21/35/39574709.xls> (visited July 6, 2010). *See also*, FCC, *High-Speed Internet as of December 31, 2008* at Table 1 (Total broadband subscribers with 200 kilobits per second in at least one direction is 76.9 million, with 44% using DSL or fiber and 54% using cable modem. DSL and fiber subscribers were 34.0 million. Cable modem subscribers were 41.5 million. This statistic excludes 25.1 million mobile broadband subscribers for comparison with the OECD data, which also exclude mobile wireless.)

<sup>21</sup> OECD Broadband Statistics, *Id.* OECD publishes data for eight non-European countries and 23 European countries. Of these European countries, 21 are included among the EU27 plus Iceland and Norway (Switzerland and Turkey are not). The OECD data exclude the following European countries that are included among the EU27 plus Iceland and Norway: Bulgaria, Cyprus, Estonia, Latvia, Lithuania, Malta, Romania, and Slovenia. For the 21 European countries that are among the EU27 plus Iceland and Norway, we calculated the total number of subscribers to each type of fixed broadband technology based the total fixed broadband subscribers and total penetration, the implied number of inhabitants per country, and on the per inhabitant penetration by technology, backing out figures for the countries that are not among EU27 plus Iceland and Norway.

Japan and South Korea have been recognized for their deployment of fiber. However, the deployment of alternative platform competition, particularly cable modem, has developed differently in both countries. It appears that Japan has a relatively weak cable modem presence, while the South Korean cable broadband industry appears to be more developed.<sup>22</sup> As of year-end 2009, 86% of Japanese broadband subscribers used fiber or DSL and 14% used cable modem, while in South Korea 68% of broadband subscriber used fiber or DSL and 32% used cable modem.<sup>23</sup>

For wireless broadband, the migration from third to fourth generation mobile broadband wireless in the United States is occurring in one of the most structurally competitive wireless markets in the world. Approximately 96% of the United States population has a choice of three or more mobile networks, and 91% of the population has a choice of four or more mobile networks.<sup>24</sup> As of the end of 2008, the top four mobile carriers in the United States had a market share of 90.4 of subscribers and the largest had a share of 31.0%. In a comparative study, in 23 of 26 OECD countries, which include the United States, the top four carriers had 100% of the market; in 13 of the 26 OECD countries, the top three carriers have 100% of the market.<sup>25</sup>

---

<sup>22</sup> See, Robert Atkinson, Daniel Correa, and Julie Hedlund, *Explaining International Broadband*, The Information Technology and Innovation Foundation (May 2008) at D2 (“Japan’s cable TV industry is highly fragmented, which makes it difficult for providers to upgrade their networks for two-way (broadband) service.”) and F3 (describing the history of the South Korean cable modem industry).

<sup>23</sup> OECD Broadband Statistics, *Id.*

<sup>24</sup> *14th CMRS Competition Report*, p. 37.

<sup>25</sup> Letter of Christopher Guttman-McCabe, CTIA – The Wireless Association, to Marlene Dortch, FCC (May 12, 2009) at p. 6, available at [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520216419](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520216419) (visited July 13, 2010). The letter listed the following market shares as of the fourth quarter of 2008 for U.S. providers: 28.5% (AT&T), 26.7% (Verizon), 18.2% (Sprint), 12.1% (T-Mobile), and 14.5% (Other). We shifted 4.9% share to Verizon to adjust for the Alltel acquisition in January 2009 and then shifted 0.6% of that to address Verizon’s divestitures to AT&T in mid

Furthermore, according to the European Commission staff, “the deployment of mobile/wireless networks in the EU is uneven. Even in the case of UMTS networks (where coverage ranges from 30% in the case of Estonia to 90% in the case of Denmark, Luxembourg and the United Kingdom), coverage does not yet compare to DSL, which has an average of 90% population coverage in most countries.”<sup>26</sup>

The wide availability of multiple platforms in the United States is significant for several reasons. First, it creates broad-based, sustainable competitive incentives to upgrade networks to increasingly powerful technologies, such as the wireline deployment of fiber, the cable industry deployment of DOCSIS 3.0, and wireless network deployments of WiMAX and LTE. Second, competition among network platforms creates strong incentives to fill networks with content and applications that consumers want and provides a competitive check against network providers limiting consumer access to particular content and applications.<sup>27</sup> Third, the availability of multiple powerful broadband networks has enhanced consumer value and enabled entirely new forms of competition and consumer choice. As discussed below, developments over the last half-decade have provided critical mass for the phenomenon of “convergence” – the coming

---

2010, moving Verizon to the lead at 31.0%, increasing AT&T to 27.9% and reducing the “Other” market share to 9.6%. Verizon Wireless gained 13.2 million subscribers from Alltel (Verizon, *Investor Quarterly Q1 2009* (April 27, 2009) at pp. 4-5), representing 4.9% of 270.3 million wireless subscribers at year-end 2008 (CTIA, *Semiannual Wireless Industry Survey: Top Line Results for Year-End 2009* (December 31, 2009) (“CTIA 2009 Survey”) available at [http://files.ctia.org/pdf/CTIA\\_Survey\\_Year\\_End\\_2009\\_Graphics.pdf](http://files.ctia.org/pdf/CTIA_Survey_Year_End_2009_Graphics.pdf) (visited July 14, 2010)). Verizon spun off 1.6 million former Alltel subscribers to AT&T, (AT&T Press Release, *AT&T Completes Acquisition of Divestiture Properties from Verizon Wireless* (June 22, 2010)) representing 0.6% of 286 million subscribers at year-end 2009 (CTIA 2009 Survey, 2009 is the most currently available data).

<sup>26</sup> See, *European Commission Staff Working Document*, p. 24.

<sup>27</sup> See, e.g., FTC Staff Report, *Broadband Connectivity Competition Policy*, June, 2007 at p. 157 (FTC Broadband Report).

together of the ICT (information, communications, and technology) industries technologically, economically, and competitively. In this dynamic and growing ecosystem, providers of broadband communications networks, digital devices, and a limitless array of content and applications all rely on each other to generate new value for consumers and multiple benefits for the U.S. economy. At the same time, these ICT industries are competing across traditional industry boundaries—not only across network platforms, but among networks, applications and devices—bringing added competitive discipline to the innovative process.

## **2. The United States Is a World Leader in ICT Investment**

The U.S. economy increasingly depends on a healthy broadband and ICT ecosystem. Continued investment in more and more powerful broadband networks is critical to stimulating technological innovation. Broadband and ICT investment is a key driver of economic growth, productivity, consumer value, and millions of high-paying jobs. It is also integral to achieving important policy goals, such as enhanced civic participation, health care delivery, energy independence, and education.

Growth and innovation in the broadband and ICT marketplace has flourished under the Commission's existing light-touch regulatory regime. As has been demonstrated time and time again, regulatory schemes that are unanimated by specifically identified widespread market failures impose costs that significantly impair the investment needed to meet the demand for faster and smarter broadband networks. As we have stated in the context of the National Broadband Plan proceeding,<sup>28</sup> private investment in broadband infrastructure supports the entire ICT sector, and all sectors of the U.S. economy increasingly depend on broadband and ICT to

---

<sup>28</sup> See e.g., Comments of United States Telecom Association, GN Docket No. 09-51, June 8, 2009.

facilitate their participation in the global information economy. As with the overall national broadband strategy, new rules affecting broadband network operations must be considered in the context of the broader goals of economic growth, consumer quality of life, and the Commission's public policy objectives.

The broadband-fueled ICT sector has become a major engine of economic output and growth. ICT contributed \$902 billion in GDP in 2007 – among the top contributing sectors in the U.S. economy and the primary driver of real, inflation-adjusted growth.<sup>29</sup> U.S. firms invested \$455 billion in ICT in 2008, representing 22% of total investment across the entire economy. As discussed above, broadband providers alone invested over \$64 billion in 2008 and, despite a relatively small decline due to macroeconomic pressures, broadband providers are projected to invest an average of approximately \$60 billion per year for the next several years.

ICT investment and usage have yielded substantial economic benefits, not only among ICT industries, but also throughout the economy. Economists have estimated that at least one-third, and likely more of productivity growth is attributable to ICT.<sup>30</sup> The impact of productivity is to raise incomes, generate economic growth, and enhance U.S. global competitiveness. ICT also provides at least ten million jobs in its industries and across the economy: As of mid-2008, there were about 5.7 million people working within the ICT industries and an additional 4.5 million ICT-related occupations outside of the ICT sector.<sup>31</sup>

Both within and outside of the ICT sector, the deployment of broadband and broadband-enabled applications creates opportunities for occupations such as network administrators,

---

<sup>29</sup> See, Patrick S. Brogan, United States Telecom Association, New York Law School Media Law & Policy, Volume 18, Number II (Spring 2009) at pp. 163-165.

<sup>30</sup> *Id.* at pp. 176-179.

<sup>31</sup> *Id.* at pp. 175-176.

software engineers, applications developers, and systems designers to produce and implement the technology. In fact, broadband- and ICT-enabled occupations are among the fastest-growing and highest paying jobs in the U.S. economy.<sup>32</sup> From an *occupational* perspective, the United States Department of Labor projects that network systems and data communications analyst positions will grow 53% from 2008 to 2018, adding 156,000 jobs; computer software engineer (applications) positions will grow 34%, adding 175,000 jobs, and computer software engineers (systems software) positions will grow 30% over ten years, adding 120,000 jobs.<sup>33</sup> From the *industry* perspective, the Computer Systems Design and Consulting industry will add 656,000 jobs from 2008-2018, growing from 1.45 million to 2.10 million jobs, about a 45% growth rate over the 10-year period.<sup>34</sup>

*a) The United States Compares Favorably in International Comparisons of ICT Investment*

The United States compares favorably to other countries in the area of ICT investment.

According to the OECD, the United States ranked first among twenty-one industrialized

---

<sup>32</sup> See, T. Alan Lacey and Benjamin Wright, U.S. Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review*, Vol. 132, No. 11 (November 2009) at pp. 82-123.

<sup>33</sup> *Id.* at Tables 4 and 5, pp. 91-94. The “fastest growing” data in Table 4 are ranked by percentage growth from 2008-2018. The 53% growth for network systems and data communications analyst positions is second only to biomedical engineering occupations, which are projected to grow 72% during the same period, but will add only 12,000 total jobs. In raw numbers, the greatest growth will be in health care occupations, which is not surprising given population and demographic trends. But the greatest growers in health care, in terms of raw numbers of jobs, are “very low” or “low” paying occupations (e.g., home health aides, personal and home care aides, medical and dental assistants). Among the “high” and “very-high” earning jobs, the networking and computer software jobs add the most in raw numbers.

<sup>34</sup> See, Rose A. Woods, U.S. Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review*, Vol. 132, No. 11 (November 2009) at pp. 52-81. Note: This industry figure cannot simply be added to the occupational numbers cited above, since there is very likely overlap with the occupational growth.

countries in ICT investment as a percentage of non-residential investment.<sup>35</sup> See Table 1 below. In other words, the United States led the industrialized world in the portion of total investment allocated to broadband and related information technologies. We can also measure ICT investment as a percentage of total GDP, rather than simply the share of investment. By looking at the share of the overall production of a national economy, we eliminate distortions arising from relative capital intensity. In other words, a country with low investment overall, but with a high portion devoted to ICT, cannot be assumed to allocate a large portion of national income to ICT investment. The OECD has released comparative data on nonresidential gross fixed capital formation for twenty-one countries.<sup>36</sup> The data break out investment in information and communications technology, as well as its communications equipment, hardware, and software components. The OECD separately publishes country GDP data.<sup>37</sup> Using these data, we computed ICT investment as a share of GDP. See Table 2 below. The United States shares the number one ranking for total ICT investment as a share of GDP with Australia and Sweden. Overall, the United States compares favorably to other countries when measuring ICT investment as a share of total nonresidential GFCF or as a share of gross domestic product (GDP). This means that under the current regulatory environment, network, content, application,

---

<sup>35</sup> See, OECD Science, Technology and Industry Scoreboard 2009 at section 1.14, ICT investment over the business cycle, available at [http://www.oecdilibrary.org/oecd/sites/sti\\_scoreboard-2009-en/01/14/index.html?contentType=&itemId=/content/serial/20725345](http://www.oecdilibrary.org/oecd/sites/sti_scoreboard-2009-en/01/14/index.html?contentType=&itemId=/content/serial/20725345) (visited July 13, 2010). The analysis lists ICT gross fixed capital formation (GFCF) as a share of nonresidential GFCF for 21 countries. The data are provided in percentages only, not actual investment levels. Ranging from 2004 to 2007, the year for which data are available vary by country.

<sup>36</sup> OECD Statistics Directorate, Productivity Statistics, Investment Data and Shares of ICT Investment in GDP and Total Non-residential GFCF (updated September 19, 2008) available at <http://www.oecd.org/dataoecd/27/37/36396989.xls> (visited July 13, 2010). The year of the most current data varies by country.

<sup>37</sup> OECD Statistics Extracts. Gross Domestic Product current prices in national currency, available at <http://stats.oecd.org/index.aspx> (visited 13, 2010).

and service providers in the United States lead the industrialized world in investing to attain the consumer and economic benefits of the global information economy.

**Table 1: ICT Investment as a Share of Non-Residential Gross Fixed Capital Formation, 2007 unless otherwise indicated**

Country	IT Equipment	Communication Equipment	Software	Total ICT
United States	6.0	6.4	14.6	27.0
United Kingdom (2005)	7.6	3.6	15.2	26.4
Sweden (2006)	7.3	2.7	15.0	25.0
Netherlands (2005)	7.0	4.2	10.9	22.1
Denmark (2005)	9.5	0.9	11.8	22.1
Finland (2005)	1.5	6.5	13.2	21.2
Switzerland (2006)	4.3	5.3	10.6	20.3
Belgium (2004)	10.4	4.2	5.5	20.1
France	2.6	2.3	11.8	16.7
Canada	4.9	3.1	8.4	16.4
New Zealand (2006)	3.3	4.6	6.8	14.7
Germany	4.4	2.9	6.6	13.8
Japan (2006)	4.2	1.8	7.7	13.8
Australia	5.4	2.3	5.6	13.3
Portugal (2005)	4.5	7.0	1.2	12.7
Korea (2005)	1.8	3.5	6.8	12.2
Austria (2005)	4.6	2.2	5.2	11.9
Greece (2004)	3.8	5.4	1.7	10.9
Italy (2006)	2.8	3.6	4.2	10.7
Spain (2006)	2.5	3.8	4.2	10.5
Ireland	2.1	1.5	2.0	5.6

*Source: OECD*

**Table 2: ICT Investment and Share of GDP, 2006 unless otherwise indicated**

Country	IT Equipment	Communication Equipment	Software	Total ICT
United States	0.8%	0.8%	1.8%	3.5%
Australia (2005)	1.4%	0.9%	1.2%	3.5%
Sweden	1.0%	0.4%	2.1%	3.5%
New Zealand	0.8%	1.1%	1.6%	3.4%
Denmark (2005)	1.4%	0.1%	1.8%	3.3%
United Kingdom (2005)	0.9%	0.4%	1.9%	3.2%
Switzerland	0.6%	0.8%	1.6%	3.0%
Finland (2005)	0.2%	0.9%	1.8%	2.8%
Japan	0.9%	0.4%	1.6%	2.8%

Country	IT Equipment	Communication Equipment	Software	Total ICT
Netherlands (2005)	0.9%	0.5%	1.4%	2.8%
Belgium (2004)	1.4%	0.6%	0.7%	2.7%
South Korea (2005)	0.4%	0.8%	1.5%	2.7%
France	0.4%	0.4%	1.6%	2.4%
Canada	0.9%	0.4%	1.1%	2.4%
Greece (2003)	0.7%	1.0%	0.3%	2.0%
Spain	0.5%	0.7%	0.8%	2.0%
Austria (2005)	0.7%	0.3%	0.8%	1.9%
Germany	0.6%	0.4%	0.8%	1.9%
Italy	0.5%	0.6%	0.7%	1.7%
Portugal (2005)	0.6%	0.9%	0.2%	1.6%
Ireland	0.3%	0.2%	0.3%	0.8%

*Source: OECD and USTelecom Analysis*

*b) Broadband Providers Compare Favorably Among ICT Industry Leaders in Market Share*

High investment across the ICT ecosystem has created strong market leaders in certain areas, while creating strong new competitive dynamics across the ecosystem. See Figure 1 for selected examples of market shares across a portion of the ICT supply chain. The chart first indicates that, within the ICT ecosystem, the market shares of United States wired broadband providers are relatively well balanced. The top two *wired* broadband industries that serve most geographic markets, cable and telecom, have proportionately closer market shares than most other segments shown. Furthermore, no individual *wired* broadband provider has more than 20% of the wired broadband subscribers nationwide, meaning no single company has more than one-fifth of the national wired broadband audience. Considering this (and the fact that there are a substantial number of wireless broadband customers in the broadband marketplace served by

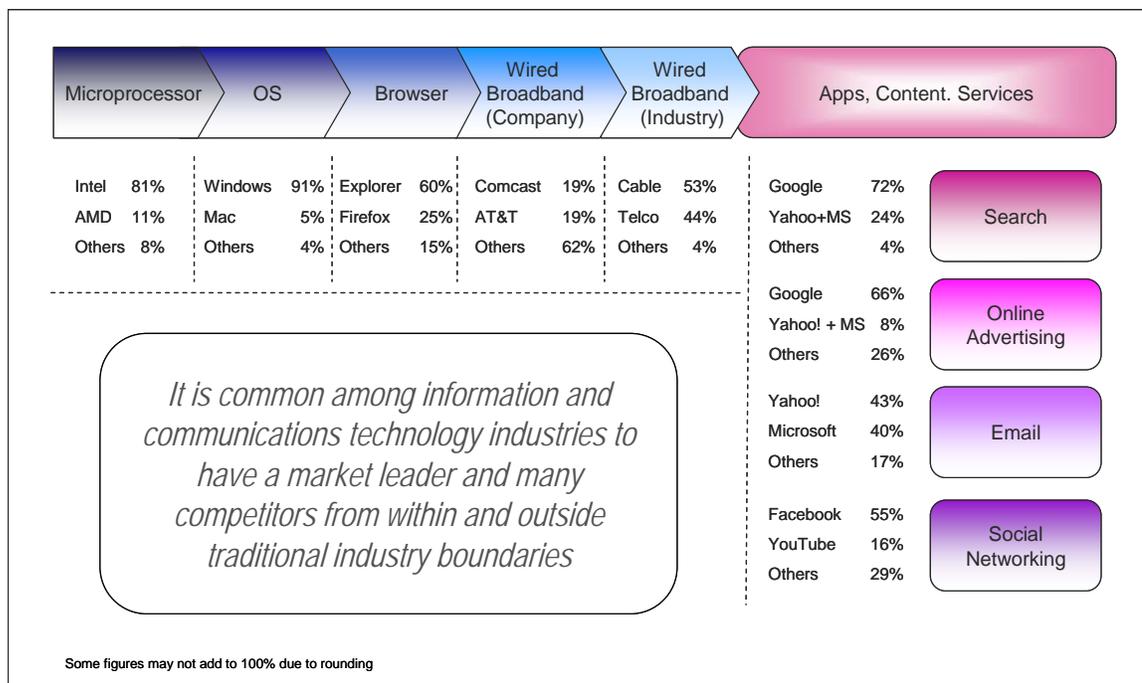
independent providers) no one provider has the ability to thwart content and application providers from reaching their potential customers.<sup>38</sup>

The second point that this chart makes clear is that vigorous competition is occurring within and across segments. Broadband and ICT have enabled substantial competition to the traditional voice telephony business. Voice competition now comes from facilities-based wireless providers, Voice over Internet Protocol (VoIP) over cable, and various over-the-top VoIP providers (Vonage and Skype). In broadband access, chip makers are actively investing in alternative platforms, such as Intel's investment in WiFi and WiMAX wireless broadband. Competition among applications has also flourished. Social networking has exploded in recent years and Facebook has supplanted MySpace as the market leader in less than a couple of years. In about a decade, Google has become the leading Internet search provider and moved into the online advertising, operating system, browser, cloud computing, email, mapping, book publishing, video delivery, social networking, voice service, and smart phone markets segments, among others. In fact, the broadband industry network segments are among the least concentrated parts of the ICT ecosystem.

### **Figure 1: ICT Industry Segment Market Share Leaders**

---

<sup>38</sup> See, e.g., Mobile Access 2010, Pew Internet & American Life Project (July 7, 2010) (noting that “59% of adults now access the internet wirelessly using a laptop or cell phone,” as compared to “51% who used a laptop or cell phone wirelessly in April 2009”) (available at <http://www.pewinternet.org/Reports/2010/Mobile-Access-2010.aspx>) (visited July 14, 2010).



Sources: See Appendix 1

## **B. The United States Has Embraced Broadband Technology**

### **1. Consumers Are Rapidly Adopting Broadband**

U.S. consumers have embraced broadband technology. Residential subscribership has grown from 1.8 million in 1999 to 79 million as of mid-2008. The U.S. achieved 50% broadband household penetration in less than nine years, more rapidly than any other network technology and many critical information technologies.<sup>39</sup> Broadband household adoption is now greater than 60%. Combined household adoption of broadband and dial-up access, the latter used by households focused on low bandwidth activities, now is about 70%.<sup>40</sup> For broadband

<sup>39</sup> See, John Horrigan, Pew Internet & American Life Project, Home Broadband Adoption 2008 (June 2009) at p. 13. According to Pew, broadband achieved 50% penetration sometime between March of 2007 and May of 2008.

<sup>40</sup> *Id.*, at p. 13 (indicating that 79% of adults surveyed in April 2009 access the Internet from home, with 72% accessing the Internet from home, 63% using home broadband, and 7% identified as using dial-up). The 2% gap is either rounding error or access via different technology, such as wireless. See also Pew Internet & American Life Project, Internet, broadband, and cell phone statistics (January 5, 2010) at p. 1, which reports updated survey from

alone to exceed 50% penetration in less than nine years is remarkable, especially when compared to other communications and information technologies. After its invention by Alexander Graham Bell in 1876, the first telephone exchange appeared in 1878 and the first automatic switch went into commercial use in 1892.<sup>41</sup> After the Bell patents expired in 1894, thousands of companies entered the market to provide local exchanges. Yet the telephone did not achieve 50% household penetration until sometime between 1940 and 1950—about a half a century after the patent expiration. In the United States, cable television service took over thirty-five years to achieve 50% household penetration;<sup>42</sup> personal computers took 20 years; color televisions took 20 years; and wireless telephones took 16 years.<sup>43</sup>

## **2. The United States is a World Leader in Amount of Internet Usage**

To date, international broadband comparisons seem to have largely ignored actual usage of the Internet in favor of more theoretical measurements based on advertised maximum speed, which are largely reflections of household density. We believe that the amount that Internet consumers are actually making use of their broadband connections to pull value from the Internet – whether education, government services or entertainment – provides a more real-world,

---

November-December 2009, showing 74% of adults surveyed using the Internet and 60% using home broadband. The report does not update figures for dial-up or percentage of adults accessing the Internet from home. We cannot conclude that there has been a drop in broadband penetration from the prior to the current survey. The current survey is within the margin of error of the prior survey and the prior survey broadened the sample to include results for Spanish-speaking respondents, whereas the prior survey included results only for English-speaking Hispanics.

<sup>41</sup>Federal Communications Commission, Statistical Trends in Telephony July 1998, Table 16.3, p. 87 (available at: [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/trend298.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend298.pdf)) (visited July 13, 2010).

<sup>42</sup> U.S. Department of Commerce, Census Bureau, Statistical Abstracts of the United States (2008, 2000, 1994, 1985, 1980, 1976) available at ([http://www.census.gov/compendia/statab/past\\_years.html](http://www.census.gov/compendia/statab/past_years.html)) (visited July 13, 2010).

<sup>43</sup> Consumer Electronics Association, Household Product Penetration, 2008-9.

practical measure of how successfully a country's broadband networks and regulatory environment are providing consumers with what they want. By this more consumer-focused measure, U.S. Internet users and our broadband networks are among the world leaders.

We divided Internet traffic data from Cisco's Visual Networking Index<sup>44</sup> by the number of Internet users from Internet World Stats<sup>45</sup> to get a rough measure of the amount of IP traffic per Internet user. This analysis of actual bandwidth consumed shows that, on a regional basis, North American users are the heaviest users of the Internet, surpassing users in Europe and Asia. The United States consumes more bandwidth per user at 14.25 GB per month, as compared to Western Europe at 13.35 GB per month and Japan at 9.90 GB per month. Comparisons of smaller areas are limited by the data available. For example, a breakdown of U.S. data by state is not available, but the data that is broken out show that the United States (taken as a whole) is essentially on par with France in its per-user consumption of the Internet and uses more bandwidth per user than Germany, Italy, the United Kingdom, and Japan. Only South Korea appears to consume a substantially larger amount of bandwidth per user at 24.5 GB per month.<sup>46</sup>

---

<sup>44</sup> Cisco publishes projected global IP traffic data and forecasts from 2008-2013 for the various regions of the world and selected countries. Regional aggregates are available from the Cisco Visual Networking Index: Forecast and Methodology, 2008–2013 (June 9, 2009). Selected country data are available from Cisco VNI Forecast Widget for the Cisco Visual Networking Index IP Traffic Forecast, 2009 at [http://www.ciscovni.com/vni\\_forecast/index.htm](http://www.ciscovni.com/vni_forecast/index.htm) (visited January 11, 2010).

<sup>45</sup> 2009 Internet user data by region and country are available from Internet World Stats (IWS) (available at: <http://www.internetworldstats.com/stats.htm>) (visited July 14, 2010). The Internet user data include all users, regardless of how they access the Internet (home, business, or public hot spot).

<sup>46</sup> See Letter of Walter B. McCormick, Jr., United States Telecom Association, to FCC (December 22, 2009). When comparing country performance, it may make sense to normalize consumption per Internet user, as opposed to per capita, because variation in Internet adoption rates across countries can be significant. The traffic data we use include all IP traffic – business and residential; fixed and mobile; IP voice, video, and data; and private and public Internet. This inclusion is necessary because all of these types of traffic contribute to the economic and

Assessments of per-user consumption could improve rankings and studies in several ways. First, usage, or bits consumed, is a better proxy for value received than throughput speed, either advertised or actual. Furthermore, usage – including business usage – may be a more precise explanatory variable than subscribers or penetration, for instance, when attempting to assess the economic impacts of Internet usage.

There are admittedly challenges associated with usage data. For example, if the intent is to adjust pricing data for actual consumption, meaningful pricing data would be required, but the data generally do not account for differential costs structures of providers based on different regulation, subsidy and public investment levels, demographics, geography, density, and allocation of costs among shared network services. Usage data also boils everything down to raw bytes, not distinguishing among applications, which may have differential economic and consumer benefits. Nonetheless usage data has clear advantages over other metrics that are commonly used in broadband rankings. Therefore, usage data could be used in place of or as a complement to other commonly used metrics.

### ***C. Consumers Reap Benefits of Broadband Investment***

Consumers have benefited from policies encouraging broadband competition, enjoying lower prices, more broadband options, and faster throughput.

---

consumer impacts of IP data usage and the Internet World Stats Internet user figures do not distinguish business and residential users. We note that regions with widespread legacy multi-channel video adoption (i.e., North America) undercount a great deal of video traffic currently delivered via traditional means, while such traffic are more likely to be delivered over an IP connection in other areas. Finally, while Cisco provides aggregate data for Western Europe and selected countries, it does not provide data for several Western European countries that are generally ranked highly in broadband rankings, such as Finland, Sweden, Denmark, and the Netherlands.

## 1. Prices Falling and Throughput Increasing

Prices for basic wireline broadband services have dropped by half since the beginning of the decade. By 2007, consumers could get 10-20 times the speed they could get for the same price as they paid at the start of the decade. See Figure 2. Moreover, competition between cable, wireline and wireless companies is continuing to encourage investment in faster and faster networks. Today, broadband providers are in the initial stages of deploying technologies that will be capable of providing speeds of 50 to 100 megabits per second to the home. Despite recent suggestions that broadband *prices* are increasing,<sup>47</sup> such characterizations are misleading. Given the constantly evolving broadband market, in which speeds continue to increase and service offerings continue to expand (*e.g.*, enhanced parental controls, firewalls, virus protection, etc.), a price increase may simply reflect these higher speeds or greater functionality. Moreover, as Figure 4 shows, the introductory prices for leading edge speed tiers continues to fall as newer, faster speed tiers are introduced.

**Figure 2: Wireline Broadband Pricing 2001-2007**<sup>48</sup>

Weighted Average Monthly Prices for Top 5 ILEC Wireline Broadband Services

Year	Maximum Advertised Price by Downstream Speed Tier					
	Up to 768 kbps	768 kbps -1.5 mbps	Up to 3.0 mbps	Up to 7.0 mbps	Up to 15 mbps	Up to 30 mbps
2001	*	\$50	n/a	n/a	n/a	n/a
2002	\$28	\$32	*	n/a	n/a	n/a
2003	\$28	\$30	*	n/a	n/a	n/a
2004	\$30	\$33	\$46	*	*	n/a
2005	\$20	\$27	\$33	\$39	*	*
2006	\$20	\$23	\$28	\$36	*	*
2007	\$18	\$25	\$28	\$39	\$51	*

<sup>47</sup> See, *e.g.*, Pew Home Broadband Adoption 2009 at 25.

<sup>48</sup> Wireline Broadband Pricing 2001-2007, USTELECOM: THE BROADBAND ASSOCIATION (June 2008), *available at*

## 2. Technology Choices Expanding

In addition to lower prices, consumers have more broadband options. As discussed above, due to the parallel development of wireline and cable broadband platforms, the United States has the most competitive broadband market in the world. Broadband subscriptions now also reflect availability of additional technologies, such as fiber and mobile broadband.<sup>49</sup>

## 3. Consumer Value and Choice Growing Quickly

As broadband networks have proliferated and evolved, consumers have received exponentially better value for a stable share of national income. Since 1990, consumer spending on communications services has tripled, from \$77 billion to \$243 billion, or 2.3% of national disposable income.<sup>50</sup> As shown in Figure 3, this is up from 1.8% of national disposable income in 1990 but below its peak of 2.5% in 2001.<sup>51</sup> Yet consumer value and choice has grown *exponentially* in the intervening years as evidenced by the exploding amount of Internet, video and mobile voice services acquired through these expenditures. Figure 4 shows that the mix of spending has shifted over time to address not only traditional voice services but also broadband, entertainment, and mobile services. And while U.S. communications expenditures as a share of national disposable income have been flat since 1997, U.S. consumers, in aggregate, have added

---

<http://www.ustelecom.org/uploadedFiles/Learn/Broadband.Pricing.Document.pdf> (visited July 13, 2010).

<sup>49</sup> FCC High-Speed Internet Services as of December 31, 2008 (data based on FCC's most comprehensive definition of broadband, i.e., residential "high-speed services" that are greater than 200 kbps in at least one direction.). "Fiber" includes only fiber to the home. Other fiber-based offerings, such as fiber to the node/neighborhood/curb combined with DSL and hybrid fiber-coax are not reflected. Therefore, these data understate the extent of fiber-based offerings.

<sup>50</sup> This consumer spending includes wireline, wireless, subscription video (e.g., cable television) and Internet access.

<sup>51</sup> See, Patrick S. Brogan, *Id.*, at pp. 172-174.

over 100 million broadband and video connections, received access to hundreds of new video programming choices, and established over 100 million wireless connections.

- In 1990, the Internet was unknown to most of the United States, yet by the end of 2009, approximately two-thirds of U.S. households subscribed to home broadband.<sup>52</sup> As broadband penetration has grown, new technologies such as fiber and mobile broadband have taken a growing share of new subscriptions.<sup>53</sup>
- In 1990, there were approximately 52 million multi-channel video subscribers, compared to 101 million as of year-end 2009.<sup>54</sup> In 1994 there were 106 national cable programming networks<sup>55</sup> compared to 565 in 2006.<sup>56</sup>
- In 1990 there were 5 million wireless subscribers compared to 286 million in 2009.<sup>57</sup> Wireless consumers used an average of 140 minutes per month in 1993 compared to 708 in 2008.<sup>58</sup> Wireless data accounted for 23% of wireless service revenue in 2008, as

---

<sup>52</sup> See, *National Broadband Plan*, p. 23.

<sup>53</sup> FCC, High-Speed Internet as of December 31, 2008 at Table 3.

<sup>54</sup> See, National Cable & Telecommunications Association (available at: <http://www.ncta.com/Statistics.aspx>) (visited July 9, 2010) (in 1990, there were approximately 52 million multi-channel video subscribers, compared to 101 million as of year-end 2009. 2009 data include 61.8 million cable and 40.3 million non-cable subscribers. 1990 data include cable subscribers only, as non-cable subscribers were negligible).

<sup>55</sup> *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 95-491 at 72 (Dec. 11, 1995), available at <http://www.fcc.gov/mb/csrptpg.html> (visited Apr. 16, 2009).

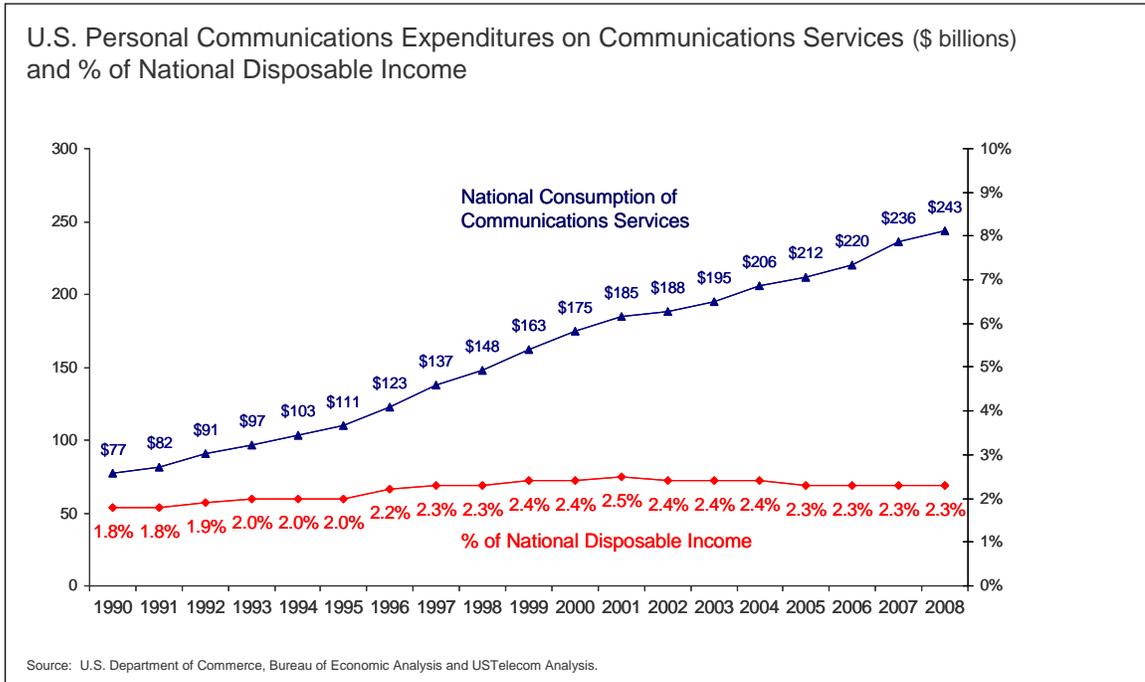
<sup>56</sup> *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Annual Report, FCC 07-206 at 9 (Nov. 27, 2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-206A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-206A1.pdf) (visited July 13, 2010).

<sup>57</sup> CTIA 2009 Survey.

<sup>58</sup> *In the Matter of Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 10-81, pp. 10-111 and Table 19 at p. 112 (May 20, 2010).

consumers increased their use of wireless text messaging, multimedia messaging, and wireless broadband services.<sup>59</sup>

**Figure 3: Communications Consumption and Share of National Income**<sup>60</sup>

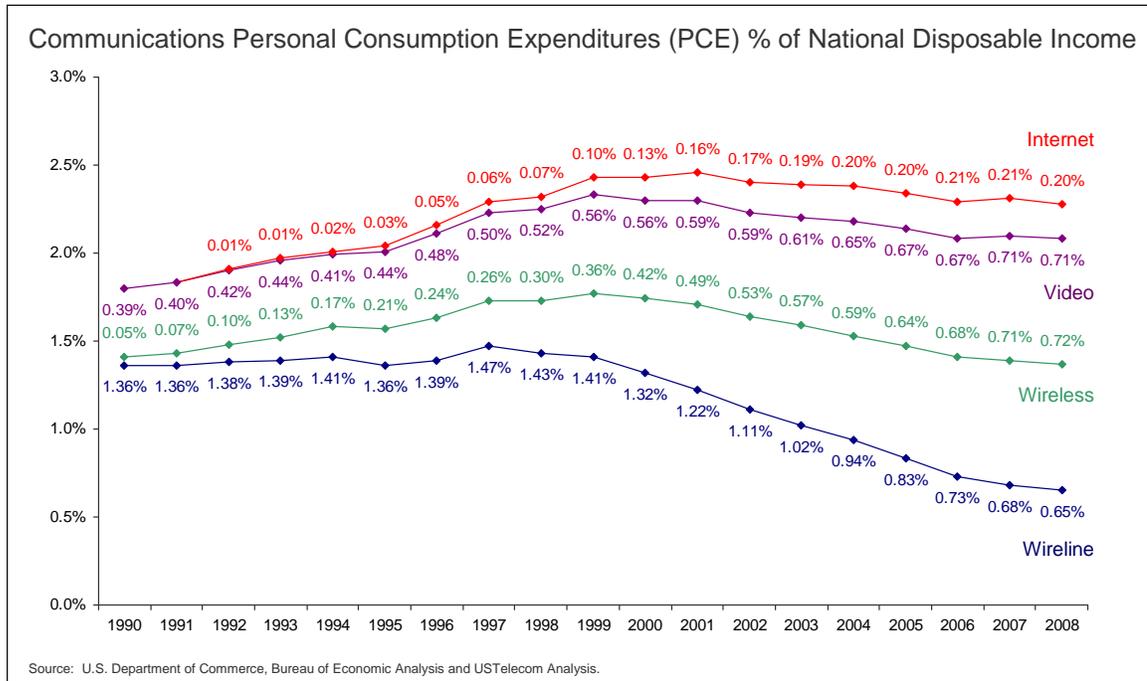


**Figure 4: The Changing Mix of Communications Service**<sup>61</sup>

<sup>59</sup> *Id.*

<sup>60</sup> *See*, Patrick S. Brogan, *Id.*, Figure 10 at p. 171.

<sup>61</sup> *Id.* at p. 174.



**II. BROADBAND SERVICE IS AN INTEGRAL PART OF THE INTERNET AND CANNOT BE REGULATED SEPARATELY FROM THE INTERNET.**

In its *Notice*, the Commission proposes to: (i) separate the transmission component from a functionally integrated broadband Internet connectivity service; and (ii) classify that broadband transmission component as a “telecommunications service” subject to regulation under Title II of the Communications Act, while purportedly not regulating the Internet.<sup>62</sup> However, broadband service and networks are an integral part of the Internet, and regulating them is the same as regulating the Internet. Indeed, it is worse in some ways because, as explained below, it applies disparate treatment to various Internet segments.

In announcing the so-called ‘Third Way’ approach, Chairman Genachowski stated the Commission’s intention to regulate “only the transmission component of broadband access service as a telecommunications service” while at the same time “preserving the longstanding

<sup>62</sup> *Notice* ¶ 67.

consensus that the FCC should not regulate the Internet.”<sup>63</sup> The Commission’s General Counsel, Austin Schlick was even more categorical when he stated that “[t]he Commission does not regulate the Internet.”<sup>64</sup> Commissioner Michael Copps echoed these sentiments, noting that the Commission is “talking about meaningful oversight of the infrastructure and services that allow Americans to get to the Internet. This isn’t about government regulating the Internet.”<sup>65</sup>

In an attempt to justify its proposed regulatory scheme, the Commission engages in semantics, drawing arbitrary regulatory lines between “Internet connectivity service” that it seeks to regulate from what it claims is the “Internet” that will be unregulated -- applications and content, as well as a host of other facilities and services such as the backbone, content delivery networks (CDNs), over-the-top video services, or voice-over-Internet-Protocol (VoIP) telephony services.<sup>66</sup> But this approach ignores countless and well-established definitions of what constitutes the Internet. Almost every available definition of the Internet settles on the premise that – whatever the Internet ‘is’ – it includes the broadband networks and Internet connectivity service that the Commission seeks to regulate.

---

<sup>63</sup> See, Statement of Commission Chairman Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework*, Federal Communications Commission, May 6, 2010 (available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-297944A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf)) (visited July 13, 2010).

<sup>64</sup> Statement of Austin Schlick, General Counsel, Federal Communications Commission, *A Third-Way Legal Framework For Addressing The Comcast Dilemma*, May 6, 2010 (available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-297945A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf)) (visited July 6, 2010).

<sup>65</sup> Statement Of Commissioner Michael J. Copps, *Framework for Broadband Internet Service, GN Docket No. 10-127*, June 17, 2010 (available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-10-114A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-114A3.pdf)) (visited July 13, 2010).

<sup>66</sup> Notice, ¶10.

***A. Definitions of What Constitutes the Internet Include Broadband Internet Connectivity Services***

Although commentators acknowledge that “what comprises the Internet is a difficult question,” and the answer “changes over time,”<sup>67</sup> the Internet cannot reasonably be defined so as to exclude a regulatory created “Internet connectivity service.” Indeed, there is very broad consensus that the Internet necessarily includes the networks that create broadband Internet connectivity.<sup>68</sup>

In its broadest sense, the Internet is commonly understood to be a global system of interconnected computer networks that use the standard Internet Protocol Suite (TCP/IP) to serve consumers and businesses across the globe. It is often described as a “network of networks” consisting of countless private, public, academic, business, and government networks of local to global scope that are linked by a broad array of electronic and optical networking technologies. Each of these networks is a part of the Internet.

One definition of the Internet that the Commission has embraced was adopted by the Federal Networking Council. It does not separate out broadband connections and networks from the Internet. In its Cable Modem Order, the Commission defined the Internet as referring to “the global information system that -- (i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and (iii)

---

<sup>67</sup> See, The Internet Engineering Task Force website, Comments of the Network Working Group, University of Illinois Comments, May 1993 (available at: <http://tools.ietf.org/rfcmarkup?rfc=1462>) (visited July 13, 2010).

<sup>68</sup> See, Newton’s Telecom Dictionary, 25<sup>th</sup> Edition, 2009, p. 605 (*Newton’s 25<sup>th</sup> Edition*).

provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.”<sup>69</sup>

Some commentators have embraced the description of the Internet as the “Information Superhighway.”<sup>70</sup> Such views are consistent with definitions of the Internet as “the world’s largest and most complex computer and communications network.”<sup>71</sup> In this regard, the Internet has been defined as “a worldwide system of computer networks - a network of networks in which users at any one computer can, if they have permission, get information from any other computer.” More succinctly stated the Internet has been defined as “[a] worldwide system of interconnected networks and computers.”<sup>72</sup>

Many have defined the Internet to include both transport and applications layers. One such approach defines the Internet as “the global information system that includes communication capabilities and many high level applications.”<sup>73</sup> Similarly, it has been defined as “both a transport network – moving every form of data around the world (voice, video and

---

<sup>69</sup> See FNC Resolution: Definition of ‘Internet’ (available at: [http://www.itrd.gov/fnc/Internet\\_res.html](http://www.itrd.gov/fnc/Internet_res.html)) (visited July 13, 2010). Statutory definitions of the Internet are in Communications Act § 230(f)(1), 47 U.S.C. § 230(f)(1) (“the international computer network of both Federal and non-Federal interoperable packet switched data networks”) and Communications Act § 231(e)(3), 47 U.S.C. § 231(e)(3) (“the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the Interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit the information.”).

<sup>70</sup> Robert E. Kahn and Vinton G. Cerf, *What Is The Internet (And What Makes It Work)*, p. 11, December, 1999 (available at: <http://www.policyscience.net/cerf.pdf>) (visited July 13, 2010) (*Cerf Article*).

<sup>71</sup> *Newton’s 25<sup>th</sup> Edition*, p. 605.

<sup>72</sup> Yale University website, *Definitions of Words and Phrases Commonly Found in Licensing Agreements* (available at: <http://www.library.yale.edu/~llicense/definiti.shtml>) (visited July 13, 2010).

<sup>73</sup> *Cerf Article*, p. 14.

data images) – and a network of computers which allow you (and them) to access, retrieve, process and store all manner of information.”<sup>74</sup>

In an article written by Robert E. Kahn and Vinton G. Cerf, appropriately titled “*What Is The Internet (And What Makes It Work)*”, the authors noted that the Internet was designed as “an architecture that provided for both communications capabilities and information services.”<sup>75</sup> The authors reject the notion that “on/off ramps” are not somehow part of the Internet. They conclude that, “[l]ike the federal highway system, whose underpinnings include not only concrete lanes *and on/off ramps*, but also a supporting infrastructure both physical and informational, including signs, maps, regulations, and such related services and products as filling stations and gasoline, the Internet has its own layers of ingress and egress, and its own multi-tiered levels of service.”<sup>76</sup>

The Internet has also been defined as “a means of connecting a computer to any other computer anywhere in the world. When two computers are connected over the Internet, they can send and receive all kinds of information such as text, graphics, voice, video, and computer programs.”<sup>77</sup> Others define the Internet as a “global data communications system,” that includes “a hardware and software infrastructure that provides connectivity between computers.”<sup>78</sup>

The Internet’s networking technology has also been described as “very smart.”<sup>79</sup> More specifically, “[e]very time someone hooks a new computer to the Internet, the Internet adopts

---

<sup>74</sup> *Newton’s 25<sup>th</sup> Edition*, p. 605.

<sup>75</sup> *Cerf Article*, p. 11.

<sup>76</sup> *Cerf Article*, p. 11 (emphasis added).

<sup>77</sup> See, Business Dictionary website, definition of Internet (available at: <http://www.businessdictionary.com/definition/internet.html>) (visited July 13, 2010).

<sup>78</sup> See, Wikipedia website, definition of Internet (available at: <http://en.wikipedia.org/wiki/Internet>) (visited July 13, 2010).

<sup>79</sup> *Newton’s 25<sup>th</sup> Edition*, p. 606.

that hookup as its own and begins to route Internet traffic over that hookup and through that new computer. Thus as more computers are hooked to the Internet, its network (and its value) grows exponentially.”<sup>80</sup> And as computer chips implementing TCP/IP protocols are becoming increasingly pervasive in devices ranging from traditional laptop and desktop computers, to an ever-increasing number of devices including hand-held organizers, digital cameras and household appliances, the breadth of Internet connectivity is growing in new ways.<sup>81</sup>

This has led others to note that the physical topology of the Internet “changes from day to day and varies considerably from place to place.”<sup>82</sup> This same Internet topology is defined to consist of “leased lines that connect various major computing centers through switches and routers.”<sup>83</sup>

Taken as a whole, any reasonable definition of the Internet includes the portion containing the broadband Internet connectivity service component. While a single definition of the Internet may be difficult to come by, existing definitions uniformly acknowledge broadband networks and connectivity as part and parcel of the network of networks that is the Internet. Whether viewed as part of the Internet’s network of networks, or as an integral link between the computers that make up the Internet or even an “on/off ramp,” broadband connectivity and service is a fundamental, integral part of what the Internet is. While the Commission is emphatic

---

<sup>80</sup> *Newton’s 25<sup>th</sup> Edition*, p. 606.

<sup>81</sup> See e.g., *Cerf Article*, p. 17 (stating that “[m]any of the devices connected to the Internet will be Internet-enabled appliances (cell phones, fax machines, household appliances, hand-held organizers, digital cameras, etc.) as well as traditional laptop and desktop computers. Information access will be directed to digital objects of all kinds and services that help to create them or make use of them.”). The authors’ observations have since become a reality.

<sup>82</sup> Ray Horak, *Telecommunications and Data Communications Hand Book*, p. 631 (Wiley-Interscience, 2007) (*Data Communications Hand Book*).

<sup>83</sup> *Data Communications Hand Book*, p. 631.

about its desire not to regulate the Internet, imposing Title II obligations on broadband Internet connectivity service would be exactly that.

***B. Commission Efforts to Define the Internet Will Interfere with the Internet's Constant Evolution***

Another common theme shared by numerous Internet commentators over the years, is that the Internet has been evolving, and can be expected to continue to evolve over time. The Commission's effort to set in stone a definition of what is and is not the Internet is antithetical to the flexibility and evolution that are hallmarks of the Internet. The significant evolution throughout the Internet ecosystem can be seen through numerous studies and reports, including the recent Annual Report by the ATLAS Internet Observatory (ATLAS Report).<sup>84</sup>

The ATLAS Report highlights the danger of the Commission attempting to bifurcate or compartmentalize specific aspects of a changing Internet. The ATLAS Report quantifies the changing nature of the Internet in terms of access and content delivery, and emphasizes the consolidation of content contributors and the evolution of Internet connectivity. The findings of the ATLAS Report highlights that the Commission's focus on broadband Internet connectivity

---

<sup>84</sup> Annual Report by the ATLAS Internet Observatory, Arbor Networks Inc., University of Michigan, Merit Networks, Inc. (available at: [http://www.eecs.umich.edu/eecs/about/articles/2009/Observatory\\_Report.html](http://www.eecs.umich.edu/eecs/about/articles/2009/Observatory_Report.html) (visited July 13, 2010) (*ATLAS Report*). The ATLAS Report, which details a landmark two-year study of global Internet traffic that offers detailed trend data and analysis, was developed by researchers at the University of Michigan, Arbor Networks, and Merit Network. The ATLAS Report, believed to be the largest study of global Internet traffic since the birth of the commercial Internet in the mid-1990s, provides analysis of two years' worth of detailed traffic statistics, as the study, at its peak, monitored more than 12 terabits per second for a total of more than 256 exabytes of Internet traffic.

service provided only by telecom and cable providers, ignores the substantial broadband Internet connectivity occurring *throughout* the Internet.<sup>85</sup>

The ATLAS Report found that content on the Internet has migrated out of the enterprise and edge to aggregators.<sup>86</sup> Whereas five years ago Internet traffic was proportionally distributed across tens of thousands of enterprise-managed web sites and servers around the world, most content today is increasingly concentrated with a small number of very large hosting, cloud, and content providers. According to the ATLAS Report, “[o]ut of the 40,000 routed end sites in the Internet, 30 large companies – ‘hyper giants’ like Limelight, Facebook, Google, Microsoft, and YouTube – together now generate and consume a disproportionate 30% of all Internet traffic.”<sup>87</sup>

This consolidation of content traffic by hyper giants – which commenced in 2005 and continues to this day – resulted from the collapsing price of both wholesale Internet transit and content distribution networks (CDNs). These decreasing prices, combined with such things as the growth of advertisement-supported content, have resulted in an aggregation of non-ISP entities that are handling and managing Internet traffic.<sup>88</sup> The ATLAS Report concludes that this shift in Internet traffic has “[i]ncreasingly blurred lines between ISP and CDN.”<sup>89</sup> CDNs *alone*

---

<sup>85</sup> The *ATLAS Report* offers analysis of two years’ worth of detailed traffic statistics from 110 large and geographically diverse cable operators, international transit backbones, regional networks, and content providers.

<sup>86</sup> In general, aggregators host third-party contents for fast delivery of any digital content, including static contents (*e.g.* static HTML pages, images, documents, software patches etc.), streaming media (*e.g.* audio, real time video etc) and varying content services (*e.g.* directory service, e-commerce service, file transfer service etc.). The sources of content can be large enterprises, web service providers or media companies.

<sup>87</sup> See Press Release, *Researchers from U-M, Arbor Networks, and Merit Network Present Findings from Two-Year Internet Traffic Study* (available at: [http://www.eecs.umich.edu/eecs/about/articles/2009/Observatory\\_Report.html](http://www.eecs.umich.edu/eecs/about/articles/2009/Observatory_Report.html)) (visited July 13, 2010) (*Atlas Report Website*).

<sup>88</sup> *ATLAS Report*, p. 11.

<sup>89</sup> *Id. at*, p. 15.

currently account for 10% of all Internet traffic.<sup>90</sup> Although everyone may be an Internet content provider as the Commission notes,<sup>91</sup> the reality is that content flows are increasingly coming from a smaller set of large “hyper giant” operators.

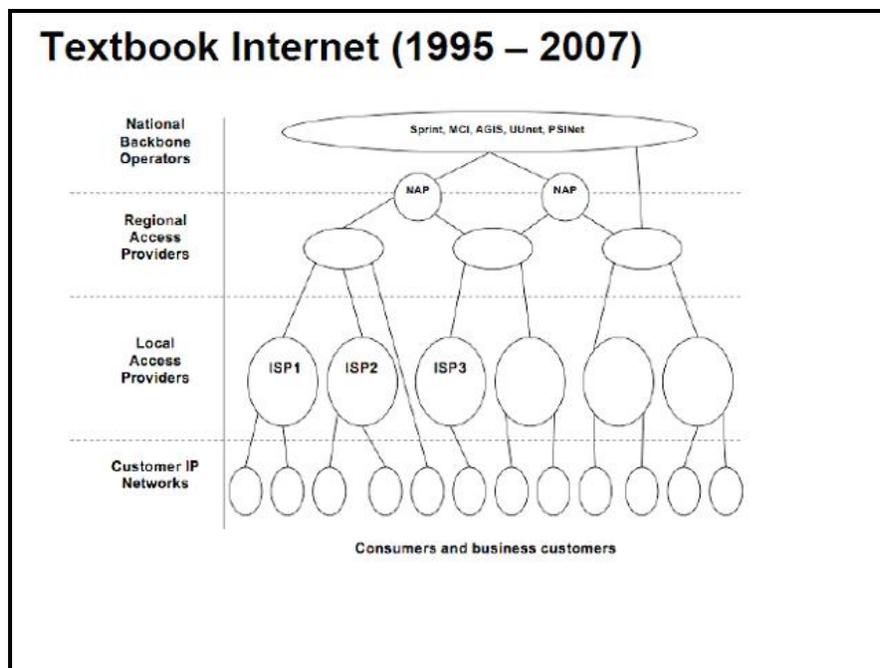
The evolution of the Internet core is captured in the ATLAS Report’s comparison between the Internet of the past, with the “New Internet.” Pictured below is the ATLAS Report’s representation of the so-called “Textbook Internet” of 1995 through 2007.<sup>92</sup> Key to this former architecture was the hierarchical nature of the network: Online consumers accessed any content on the Internet through a vertical path -- initiating at the ISP, passing over a regional access provider’s network and using facilities of a national backbone operator. This mechanism resulted in a form of ‘out and back’ network, where the desired content was provisioned to the consumer through a relatively simple connectivity and routing of traffic.

---

<sup>90</sup> *Id.*

<sup>91</sup> Notice of Proposed Rulemaking, *Preserving the Open Internet*, FCC 09-93, ¶99 (released October 22, 2009).

<sup>92</sup> This version of the Internet was embodied in four key segments: 1) National Backbone Operators (*e.g.*, Sprint, MCI, UUNet); 2) Regional Access Providers; 3) Local Access Providers (*i.e.*, traditional ISPs); and 4) Customer IP Networks. *ATLAS Report*, p. 9.



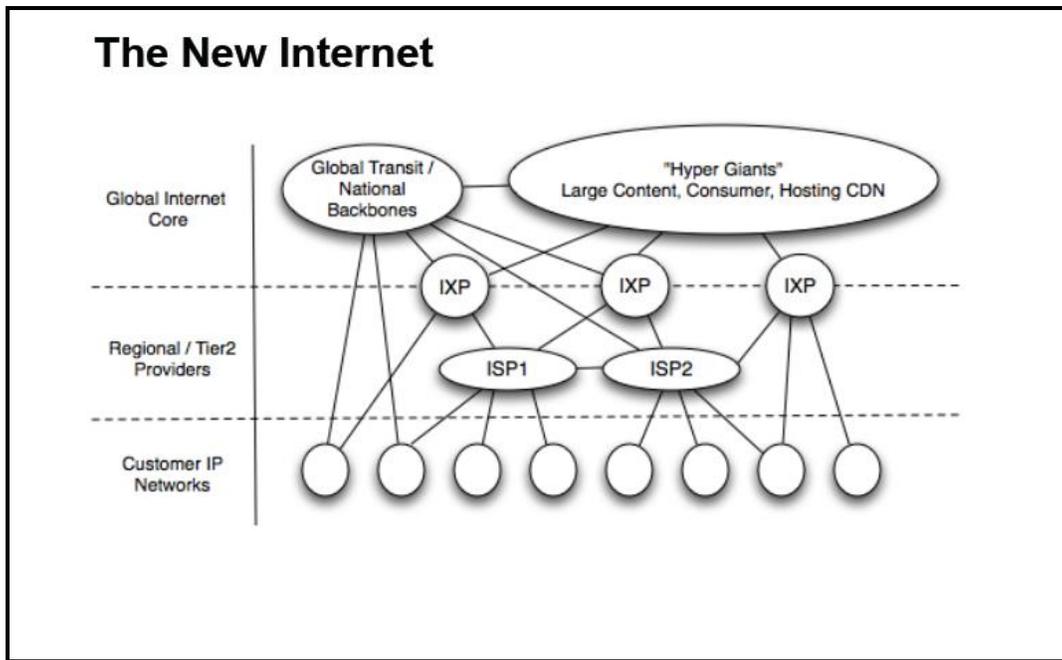
But with the innovation and evolution of the Internet, Internet architecture has moved from traditional hierarchical networks to more open architecture. As the ATLAS Report highlights, there is today a new core of multi-connected content and consumer networks that have resulted in “dramatic improvements in capacity and performance.”<sup>93</sup> This shift in network design has resulted in tremendous disintermediation; in some instances it has resulted in the direct interconnection between content and consumers. This in turn has resulted in the majority of Internet traffic by volume flowing “directly *between* large content providers, datacenter/CDNs and consumer networks.”<sup>94</sup> As Danny McPherson, the VP and CSO of Arbor Networks (one of the contributors to the study), commented, “[t]he Internet is a lot flatter today, more densely

---

<sup>93</sup> *ATLAS Report*, p. 17.

<sup>94</sup> *Atlas Report Website* (emphasis added).

connected.”<sup>95</sup> Changing broadband connectivity patterns will continue, likely resulting in more direct connections.



The Commission in its Notice defines “Internet connectivity service” or “broadband Internet connectivity service” as a service that “allows users to communicate with others who have Internet connections, send and receive content, and run applications online.”<sup>96</sup> The evolution of the Internet away from its traditional hierarchical structure has resulted in numerous forms of broadband Internet connectivity service in today’s Internet between and amongst its different segments. Connections may be made directly through ISPs, Internet Exchange Points or Global Transit/National Backbones. The practical reality of this evolution is that broadband Internet connectivity has now moved into – and throughout – different levels of the Internet.

---

<sup>95</sup> Thomas Claburn, Information Week, *Google Now Largest Source Of Internet Traffic*, October 13, 2009 (available at: [http://www.informationweek.com/news/infrastructure/management/showArticle.jhtml?articleID=220600387&cid=RSSfeed\\_IWK\\_All](http://www.informationweek.com/news/infrastructure/management/showArticle.jhtml?articleID=220600387&cid=RSSfeed_IWK_All)) (visited July 13, 2010).

<sup>96</sup> Notice, ¶ 1, n.1.

For example, according to Akamai, co-location of edge servers closer to consumers within ISP points-of-presence (POPs), enables ISPs to reduce the amount of bandwidth needed to deliver requested Web pages including rich content, streaming media and software downloads. As a result, “much of the world's most popular content, from hundreds of heavily-trafficked Web sites using Akamai's service, will reside in an ISP's network.”<sup>97</sup> USTelecom's members are caching content for CDNs in central offices much closer to end users than ISP POPs, which further flattens the Internet.

Arbor Networks, one of the contributors to the ATLAS Report, noted that the increasing competition between large content players, such as Google, Microsoft and Yahoo!, is increasingly focused on “how efficiently (i.e. quickly and cheaply) you can deliver content to the consumer.” Along these lines, the same report notes that “[i]f Google were an ISP, it would be the fastest growing and third largest global carrier.”<sup>98</sup>

According to the same report, in 2007, Google used transit providers for the majority of its Internet traffic. But over the last three years, Google both built out its global data center and content distribution capability as well as “aggressively pursued direct interconnection with most consumer networks.” Such relationships buttress the findings in the ATLAS Report of increasing direct interconnection of content and consumer.<sup>99</sup>

The ATLAS Report illustrates the dramatic shifts that have occurred in broadband Internet connectivity and content source aggregation, which inevitably affect consumer and business access to content and the relationships between the various stakeholders in the Internet

---

<sup>97</sup> Akamai website ([http://www.akamai.com/html/about/press/releases/2000/press\\_052500a.html](http://www.akamai.com/html/about/press/releases/2000/press_052500a.html)) (visited July 9, 2010).

<sup>98</sup> Arbor Networks website (<http://asert.arbornetworks.com/2010/03/how-big-is-google/>) (visited July 9, 2010).

<sup>99</sup> *Atlas Report*, p. 16.

ecosystem. These developments may also signal further changes coming to the Internet core, including CDNs, regional access providers and new systems for delivery of content, which further complicates the Commission's desire to change the current regulatory regime and makes it substantially more likely that any such change would result in unintended consequences.

***C. The Commission's Proposal to Bifurcate the Internet Will Introduce Complexity, Confusion and Uncertainty in the Broadband Marketplace***

Ultimately, the Commission is creating more problems with the proposal to bifurcate broadband Internet connectivity service from the Internet than its proposal purports to solve. Rather than creating certainty in the broadband marketplace, the proposal, in effectively calling for the Commission to change its existing definition of Internet connectivity, would introduce new complexity and confusion regarding what exactly constitutes broadband Internet connectivity service, and how such service can be distinguished from the Internet. The Commission does not even purport to define its proposed "Internet connectivity service."<sup>100</sup>

The Commission states in its *Notice* that it will "simply observe the current marketplace for broadband Internet services" in order to determine whether or not to enforce specific sections of Title II.<sup>101</sup> Yet, how relevant will these Commission observations regarding the Internet be in

---

<sup>100</sup> *Notice*, ¶ 64 (differentiating "Internet connectivity service" from the "connectivity" discussed in its *Cable Modem Broadband Order* (See, *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4809-11, ¶¶ 17-18 (2002)), but stating that it may be best to "give the Internet service provider latitude to define its own telecommunications service." It seems arbitrary and capricious for the Commission to insist that there is a separate "Internet connectivity service" that is a "telecommunications service" but not identify what (at least in the Commission's view) this "telecommunications service" is - only that whatever it is, the Commission does not intend it to include certain types of Internet companies or the services they offer.

<sup>101</sup> *Notice*, ¶ 70.

the days, months and years ahead and how would such an approach treat innovative new offerings and services currently available to consumers?

For example, Amazon currently offers to consumers its updated Kindle e-book reader, which includes 3G wireless access with no annual contracts or monthly fees.<sup>102</sup> Importantly, the Kindle that was recently introduced this year, includes not only the ability to download books from the Amazon website, but the newer product now allows consumers robust access to various social media websites, as well as basic web browser functionality.<sup>103</sup>

The Kindle is just one example of services and devices that could fit within the Commission's definition of broadband Internet connectivity that could be swept up in the Commission's burdensome regulatory proposals.<sup>104</sup> Other examples include telepresence real-time videoconferencing, network based virtual private network services and even so-called 'widgets' incorporated into video service offerings. A common theme among all of these services is that, while not necessarily viewed by consumers as a broadband Internet access service offering, they enable or include a transparent link to Internet connectivity.

The Commission cannot cure these problems by attempting to rely upon its forbearance authority. The Commission promises more than it can deliver in suggesting that forbearance would alleviate the problems of imposing the antiquated Title II regime on the Internet. First, regulating broadband transmission under Title II while forbearing from "all but a handful of core statutory provisions" would force a long-outdated Title II framework on the Internet and would

---

<sup>102</sup> Amazon Kindle website (available at: <http://www.amazon.com/Kindle-Wireless-Reading-Display-Generation/dp/B0015T963C>) (visited July 1, 2010).

<sup>103</sup> *See e.g.*, Comments of AT&T, Inc., Preserving the Open Internet, pp. 97 – 98.

<sup>104</sup> *See e.g.*, Comments of AT&T, Inc., Preserving the Open Internet, pp. 97 – 98.

inject considerably more uncertainty into the industry to the detriment of consumers and investment.<sup>105</sup>

Second, the Commission’s decision not to forbear from sections 201, 202, and 208 would subject every provider of broadband Internet “connectivity” service to the core elements of the common carrier regime, without any demonstration that these requirements are likely to benefit consumers or that they can rationally be applied on a stand-alone basis to this artificially segregated segment of the Internet ecosystem. For example, is the Commission proposing to import decades of one-wire narrow band common carrier regulations and rulings to the 21<sup>st</sup> century and apply them to today’s Internet?

Third, notwithstanding the Commission’s suggestion to the contrary,<sup>106</sup> the *Notice* provides no assurance that any decision to forbear from the application of any requirements of Title II would be honored by future Commissions, let alone upheld by the courts. Indeed, it is unclear how the Commission could make the necessary findings under section 10 to forbear from applying provisions of Title II while at the same time concluding that the regulation of broadband transmission under Title II is necessary to protect consumers.<sup>107</sup>

In fact, the cursory forbearance analysis in the *Notice* is tortuous, contradictory and skirts a number of issues that suggest just how uncertain and risky a legal path it is. Just to mention a few of these issues. There is no precedent for the wholesale application of the Commission’s forbearance authority to multiple provisions, but the Commission brushes this aside. It argues

---

<sup>105</sup> See 1998 Stevens Report ¶ 47 (noting that “uncertainty about whether the Commission would forbear from applying specific provisions could chill innovation”).

<sup>106</sup> *Notice* ¶ 98 (seeking 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”).

<sup>107</sup> *Notice* ¶ 28.

that this forbearance analysis is somehow different because we are in a different “posture” from the usual forbearance case because “the Commission 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.”<sup>108</sup> Thus, incredibly, the Commission relies on the status quo that it believes must be changed as support for applying a new legal standard to its forbearance authority. And as if this weren’t enough, the Commission then turns around and asks whether it can future proof its exercise of forbearance from future Commissions’ change of heart: “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.”<sup>109</sup>

Thus, the Commission proposes imposing 19th century-style railroad regulation on modern broadband Internet networks and then attempts to alleviate some of the consequences of Title II through its so-called “Third Way,” a perilous and untested forbearance road, resting on shaky legal foundations. The Commission could find itself in what it terms the “theoretical” situation in which a reviewing court upholds reclassification, but strikes down forbearance, painting the Commission into the corner of its own making. Under this scenario, the vaunted “Third Way” would dissolve and leave Internet service saddled with the full weight of Title II regulation. The Commission has no answer to this nightmare scenario, but merely states: “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

---

<sup>108</sup> See Notice ¶ 70.

<sup>109</sup> Notice, ¶ 98. It is interesting that the Commission argues here that a future Commission would have to meet a higher standard to “unforbear” in view of the factual findings it has adduced in support of forbearance and given parties’ reliance interest in forbearance, the very arguments that it ignores in its discussion of reclassification itself.

Internet connectivity as a telecommunications service.”<sup>110</sup> Could the Commission make another abrupt about face and reverse itself on its reclassification holding? Or would that be the ultimate arbitrary and capricious action?

### **III. THE COMMISSION’S PROPOSAL TO APPLY 19TH CENTURY-STYLE MONOPOLY REGULATION WILL HARM BROADBAND INVESTMENT TO THE COMPETITIVE 21ST CENTURY INTERNET.**

In proposing to apply a 19th Century-style monopoly regulation framework to the competitive 21st Century Internet, the Commission has put a cloud of uncertainty over the most dynamic sector of the economy – an area of robust job creation, thriving innovation, and extraordinary levels of consumer satisfaction. In doing so, it is acting in a way that would seem to be fundamentally at odds with its own stated interest in promoting broadband deployment and adoption, encouraging expanded consumer choice through increased investment in facilities-based broadband networks, and encouraging jobs and economic growth.

Regulating the Internet under a Title II framework would be a profound mistake with harmful and lasting consequences for consumers, the Internet and our economy. Adoption of such an approach by the Commission would indisputably mire all aspects of the Internet in years of investment-deterring, innovation-stunting legal uncertainty while the Commission and the courts sort through a new generation of mind-glazing statutory characterization disputes. To subject broadband Internet access to 20th Century monopoly telephone regulation will stifle job creation, investment and economic growth. This consensus is shared by leading economists.<sup>111</sup>

Financial and economic analysts have found that Title II reclassification – even after considering the FCC's proposed "third way" combining partial reclassification with forbearance

---

<sup>110</sup> Notice at ¶ 99.

<sup>111</sup> A sampling of the quotes from various stakeholders is attached to these comments as Appendix 3.

– will exert negative pressures on network providers’ ability to invest capital in expanded and enhanced broadband networks. As it became clear that a Title II reclassification was under consideration, analysts sounded alarms about the negative implications for investment. One analyst wrote, “Title II designation would ... call into question virtually every assumption about the terminal value of networks, as they would be subject to enormous and unpredictable regulatory risk going forward... In the face of this uncertainty, capital investment – and, therefore, employment in the sector – would decline, and perhaps precipitously.”<sup>112</sup>

Upon the FCC’s release of its “third way” proposal, analysts confirmed the risk, uncertainty, and negative investment pressures it would spawn. “What is inevitable is a lengthy period of uncertainty, first about the precise shape of the order, then about its fate in court, and then about the ways it will be implemented, and then about the fate of the implementation orders in court,” wrote one analyst.<sup>113</sup> Another stated, “Markets abhor uncertainty. Today we got uncertainty in spades.... We would expect a profoundly negative impact on capital investment....”<sup>114</sup> Yet another analyst noted that, “The FCC’s move is likely to lead to a lengthy and unnecessary legal battle, create needless uncertainty in the market, and detract from the FCC’s important work in implementing the recently unveiled national Broadband Plan.”<sup>115</sup>

---

<sup>112</sup> Craig Moffett, Bernstein Research, Weekend Media Blast: Internet En-title-ment... The Nuclear Option (April 16, 2010).

<sup>113</sup> Anna-Maria Kovacs, Regulatory Research Associates, FCC update: Title II reclassification and net neutrality (May 6, 2010).

<sup>114</sup> Craig Moffett, Bernstein Research, Quick Take - U.S. Telecommunications, U.S. Cable & Satellite Broadcasting: The FCC Goes Nuclear (May 5, 2010).

<sup>115</sup> Robert D. Atkinson, Information Technology & Innovation Foundation, FCC Goes Too Far (Once Again) (May 6, 2010).

#### IV. THE COMMISSION'S PROPOSED TITLE II REGULATORY REGIME VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.

##### A. *The Different Regulatory Treatment of Similarly Situated Providers Would be Arbitrary and Capricious in Violation of the APA.*

In the *Notice* the Commission does not define precisely the universe of providers of Internet connectivity service that would be subject to Title II regulation under the “Third Way.” However, the Commission’s apparent desire to carve out from its regulatory paradigm non-traditional providers – such as Akamai’s content delivery network, Google’s transmission facilities, and Amazon’s Kindle – is tacit recognition that its “Third Way” would dramatically (and adversely) impact the broadband industry.<sup>116</sup> This desire may in part reflect a lack of understanding of the changing nature of the Internet and broadband connectivity discussed in the previous section. The absence of any principled distinction runs afoul of the APA, as discussed below. As discussed above, the Commission’s Title II proposal would subject the Internet to 19<sup>th</sup> Century style regulation.

But the Commission’s line-drawing efforts do not stop there. Another distinction that the Commission seeks to draw is between facilities-based broadband providers that would be subject to legacy Title II regulation under the “Third Way” proposal and non-facilities-based broadband providers that would escape such regulatory oversight. *Notice* ¶ 106. The Commission offers no

---

<sup>116</sup> It is no answer for the Commission to decline “to address in this proceeding” non-traditional providers that offer the same functionality that the Commission proposes to regulate. *Notice* ¶ 10. As the Supreme Court has explained, agency action is arbitrary and capricious if the agency entirely ignores important aspects of the problem it is attempting to address or reaches a decision that is so implausible that it cannot be ascribed to a difference in view. *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

principled explanation for this proposed dichotomy, which runs afoul of the Communications Act.<sup>117</sup>

The Commission’s attempt at line drawing by which similarly situated entities would be treated differently violates the Administrative Procedure Act (“APA”). Under well-settled principles of administrative law, the “[g]overnment is at its most arbitrary when it treats similarly situated people differently.”<sup>118</sup> When attempting to draw distinctions between entities that are similarly situated, the APA requires the Commission to “do more than enumerate factual differences, if any ... *it must explain the relevance of those differences to the purposes of the ... Communications Act.*”<sup>119</sup> As the D.C. Circuit has explained, “Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.”<sup>120</sup>

The *Notice* refers to the 1998 *Stevens* report as concluding that non-facilities based ISPs provide only information services and seeks comment on what policy goals the Commission

---

<sup>117</sup> See, e.g., *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 996 (2005) (*Brand X*) (noting that “[t]he Act’s definition of ‘telecommunications service’ says nothing about imposing more stringent regulatory duties on facilities-based information-service providers” but rather “hinges solely on whether the entity ‘offer[s] telecommunications for a fee directly to the public ...’”) (citations omitted); see *id.* at 997 (“the relevant definitions [of ‘telecommunications service’ and ‘information service’] do not distinguish facilities-based and non-facilities-based carriers”).

<sup>118</sup> *Etelson v. Office of Personnel Mgmt.*, 684 F.2d 918, 926 (D.C. Cir. 1982).

<sup>119</sup> *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) (emphasis added).

<sup>120</sup> *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005); see also *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994); *Independent Petroleum Ass’n of America v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996) (“An agency cannot meet the arbitrary and capricious test by treating type A cases differently from similarly situated type B cases .... The treatment ... must be consistent. That is the very meaning of the arbitrary and capricious standard.”).

should have for non-facilities-based ISPs separately from facilities-based ISPs.<sup>121</sup> But the Commission’s proposal to define broadband Internet connectivity service at a “high level,” potentially as any “service that provides Internet connectivity,” makes it difficult if not impossible to determine what is and is not a facilities-based provider. To the extent the Commission believes that the term “facilities-based” should refer to broadband Internet access providers that own last-mile facilities to the customer premises, the *Notice* never explains the relevance of ownership of last-mile facilities to the classification of broadband transmission as a telecommunications service.

Furthermore, there are many facilities beyond the last mile that are required to provide Internet connectivity, and very few of USTelecom’s member companies own the facilities necessary to provide a connection from an end user to the Internet over those facilities. The vast majority of member companies lease facilities or purchase services to transport Internet-bound traffic for potentially hundreds of miles and involving multiple providers and then pay a monthly capacity charge for the facilities necessary to create an Internet connection. And, as discussed below, it is typical for USTelecom members that subscribe to the NECA DSL Access Tariff to purchase DSL service under tariff and provide broadband service through an affiliate or division separate from the local exchange company. Thus, the distinction between facilities-based and non-facilities based broadband providers is illusory.

In seeking to distinguish between facilities-based and non-facilities based broadband providers, the Commission also points to Justice Scalia’s dissent in *Brand X*, in which he observed in a footnote that “[t]he consumer knows very well, however, that the physical connection is a necessary component for Internet access which, just as in the dial-up context, is

---

<sup>121</sup> *Notice*, ¶ 106.

not provided by the ISP.” The factual basis for Justice Scalia’s understanding about what consumers “know” about their broadband service is unclear. Indeed, the recent survey conducted by the Commission, which found that 91% of home broadband users were either very satisfied or somewhat satisfied with their home connection speed, made no attempt to ascertain consumer understanding about the entity providing their “physical connection” to the Internet.<sup>122</sup>

Furthermore, the broadband Internet access service that providers offer to consumers does not vary depending upon whether the provider is “facilities-based” (however that term is defined). That is, the service being offered is an “information service” consisting of an “integrated finished product” that is comprised of various data-processing functions, including DNS, security features, email, and web-hosting.<sup>123</sup>

In 2002 when it first classified cable modem service as an information service, the Commission determined – and the Supreme Court agreed – that, from the consumer’s perspective, broadband Internet access service “is a single, integrated service” that “is not itself and does not include an offering of telecommunications service to subscribers.”<sup>124</sup> The Commission followed this same approach in subsequent decisions which found that wireline

---

<sup>122</sup> News Release, *FCC Survey Finds 4 out of 5 Americans Don’t Know Their Broadband Speeds* (June 1, 2010) (available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-298525A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298525A1.doc)) (visited July 14, 2010).

<sup>123</sup> See *Brand X*, 545 U.S. at 999-1000; see also *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 38, n.153 (2002) (*Cable Modem Broadband Order*).

<sup>124</sup> *Cable Modem Broadband Order*, 17 FCC Rcd 4798, ¶¶ 38-39; see also *Brand X*, 545 U.S. at 990 (noting 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, even to the exclusion of discrete components that compose the product”).

broadband, wireless broadband, and broadband over Power Line (“BPL”) services are properly classified as “information services.”<sup>125</sup>

As the Supreme Court held in *Brand X*, the question of whether broadband Internet access services “are functionally integrated (like the components of a car) or functionally separate (like pets and leashes) ... turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided[.]”<sup>126</sup> For more than a decade, the “factual particulars” of how the Internet functions and how broadband Internet service is provided has led the Commission to conclude that broadband transmission is not a separate telecommunications service. No basis exists for the Commission to reach a different conclusion now.<sup>127</sup>

---

<sup>125</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶¶ 1-3 (2005) (*Wireline Broadband Order*), *aff’d* *Time Warner Telecom v. FCC*, 507 F.3d 205 (3rd Cir. 2007); *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281, ¶ 1 (2006); Declaratory Ruling, *Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, ¶ 2 (2007) (*Wireless Broadband Order*).

<sup>126</sup> *Brand X*, 545 U.S. at 991.

<sup>127</sup> In addition to running afoul of the APA, the Commission’s proposal to treat broadband transmission as a separate telecommunications service subject to Title II regulation faces significant constitutional hurdles. For example, the proposal to compel common carriage of broadband transmission would restrict speech in violation of the First Amendment by forcing broadband Internet access providers and their partners to provide third-party access to their content delivery system to the Internet and give such third parties the same relative voice on that system. *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876, 904-05 (2010). Likewise, the proposal would violate the Takings Clause in the Fifth Amendment by compelling broadband Internet access providers to dedicate their private property to the use of others with no express statutory authorization and without compensation. *See, e.g., Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994).

***B. The FCC's Departure From Established Precedent Without Reasoned Explanation Would Violate The APA.***

An agency's decision will be vacated as arbitrary and capricious when it departs from established precedent without a reasoned explanation.<sup>128</sup> Such would be the case if the Commission were to alter dramatically its regulatory approach to broadband Internet access services.

Particularly instructive is *FCC v. Fox Television Stations, Inc.*,<sup>129</sup> in which the Supreme Court held that an agency must satisfy an even higher burden of explanation when it departs from established precedent in two circumstances, both of which are present here. Specifically, *Fox* requires an agency to “provide a more detailed justification [for its departure from established precedent] than what would suffice for a new policy created on a blank slate” when: (i) the agency’s “new policy rests upon factual findings that contradict those which underlay its prior policy”; and (ii) “its prior policy has engendered serious reliance interests that must be taken into account.”<sup>130</sup> According to the Supreme Court, under such circumstances, “[i]t would be arbitrary or capricious to ignore such matters.”<sup>131</sup>

---

<sup>128</sup> See, e.g., *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 301 (D.C. Cir. 2009) (“If the Commission changes course, it ‘must supply a reasoned analysis’ establishing that prior policies and standards are being deliberately changed”) (quoting *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 57); see also *Telecomms. Research and Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986) (“When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms”).

<sup>129</sup> 129 S. Ct. 1800 (2009) (noting that, in order to survive APA review, when an agency decision departs from established precedent it must “display awareness that it *is* changing position” and may not “depart from a prior policy *sub silentio* or simply disregard rules that are still on the books”) (emphasis in original).

<sup>130</sup> *Id.*, at 1811.

<sup>131</sup> *Id.*

Here, the Commission has held for more than a decade that broadband Internet access service is an “information service” that should be lightly regulated. This holding was premised, at least in part, upon the Commission’s desire to encourage broadband providers to invest heavily in broadband networks so that broadband services would be widely deployed across the United States.<sup>132</sup> And, as demonstrated above, broadband providers responded to the Commission’s “light touch” regulatory regime, investing hundreds of billions of dollars in their networks, just as the Commission hoped and expected that they would. A decision by the Commission to now regulate broadband transmission under Title II would trigger heightened review under the Supreme Court’s decision in *Fox* because it would disrupt “serious reliance interests that must be taken into account.”<sup>133</sup>

Likewise, the Commission’s holding over the past decade that broadband Internet access service is an “information service” was premised on its factual determination that the transmission and data processing components of the service are functionally integrated and are not offered separately. Thus, consistent with *Fox*, in order to change course and now determine that broadband transmission is a standalone “telecommunications service,” the Commission must find that there has been some seismic change in the Internet landscape and in the offering of broadband services. However, the facts do not support any such finding. Indeed, if anything, broadband Internet access services are even more functionally integrated today than when the Commission first considered the matter more than a decade ago.

---

<sup>132</sup> *Wireline Broadband Order*, 20 FCC Rcd at 14855 ¶ 1 (explaining that its decision to treat wireline broadband Internet access service as an “information service” would “allow facilities-based wireline broadband Internet access service providers to respond to changing marketplace demands effectively and efficiently, *spurring them to invest in and deploy innovative broadband capabilities that can benefit all Americans*”) (emphasis added).

<sup>133</sup> *Fox*, 129 S. Ct. at 1811.

Broadband Internet access service continues to involve a functionally integrated service that combines transmission with data processing, retrieval, storage, and similar capabilities. DNS look-up remains at the core of broadband Internet access service. DNS is often referred to as the “phone book” of the Internet because it allows consumers to “tell the computer” what websites they want to visit in human language. In other words, DNS translates domain names that consumers can understand into binary identifiers which can be understood by computers. This service is what makes the World Wide Web and modern Internet navigation possible. An inextricable part of this service involves network operators enabling consumer access to information by changing the physical hosts with which consumers communicate, even though consumers may not intend or expect to communicate with those hosts. Consumers need this information service so they can use the Internet without having to utilize IP coded addresses. DNS has been and remains today part and parcel of broadband Internet access service.

Broadband Internet access service integrates other capabilities that involve “generating, acquiring, storing, transforming, processing, retrieving [and/or] utilizing” information.<sup>134</sup> The *Notice* acknowledges that when the Commission gathered the record for its various classification orders, the most recent of which was issued in 2007, “broadband Internet service was offered with various services – such as e-mail, newsgroups, and the ability to create and maintain a web page.”<sup>135</sup> The same is true today, and these “information-processing capabilities” are “inextricably intertwine[d]” with broadband transmission.<sup>136</sup> Then, as now, these “Internet applications” – including various forms of e-mail, personal web spaces, virus protection, to name

---

<sup>134</sup> 47 U.S.C. § 153(20) (definition of “information service”).

<sup>135</sup> *Notice*, ¶55.

<sup>136</sup> *Wireline Broadband Order*, ¶10.

just a few – are offered to consumers as part and parcel of the broadband service offering, and customers are not required to contract separately for such “discrete services or applications.”<sup>137</sup>

Based on a recently completed USTelecom analysis, its members generally include Internet applications such as e-mail, web-mail, personal web pages and other services as part of their broadband offerings. This was the case in 2006 and remains the case today. Screenshots of broadband service offerings in 2006 and July 2010 are attached as Appendix 2 to these comments.<sup>138</sup>

There have been no material changes in the types of Internet applications that are included in the broadband Internet access service offered to consumers. Of the twenty offerings that USTelecom analyzed from 2006, a majority of providers typically provided free e-mail addresses to their subscribers (often multiple addresses), and many provided web-mail access. In 2006, other typical service offerings included access to newsgroups, virus and spam protection and online storage. During that time period, for example, Big Bend Telephone Company offered all of these Internet applications as part of its broadband Internet access service, while Waldron Telephone Company included e-mail, personal web-space, and both virus and spam protection.

---

<sup>137</sup> *Notice*, ¶55. The Commission defines Internet applications in the *Notice* as “various services . . . such as e-mail, newsgroups, and the ability to create and maintain a web page.”

<sup>138</sup> In total, USTelecom examined twenty broadband service offerings currently offered by its members by visiting their respective websites. In addition, USTelecom determined each company’s previous offerings as of late 2006, by utilizing tools available on the Internet Archive website. *See*, Internet Archive website (available at: <http://www.archive.org>) (visited July 12, 2010) (according to its website, the Internet Archive retains “over 150 billion web pages archived from 1996 to a few months ago.”). In addition, USTelecom focused its analysis to smaller, more rural broadband service providers. In order to provide context regarding the size of each broadband provider, USTelecom has included the line counts for each company from the JSI Capital Advisors 2009 report. *See*, JSI Capital Advisors, *Phone Lines 2009* (2009).

The majority of broadband providers in 2006 also offered consumers free personal web-space, ranging in size from 10 MB to 40 MB.<sup>139</sup> On average, companies offering web-space services allocated 15 MB of storage space for their subscribers. At least one of these companies, Hickory Telephone Company, offered its customers access to an “Online Site Creator.”

In the past four years broadband providers have substantially expanded many of their offerings, particularly with respect to e-mail. For example, while Clear Lake Telephone Company did not expressly offer e-mail addresses in 2006, it now includes five e-mail addresses with its broadband Internet access service offering.<sup>140</sup> Others substantially expanded storage space for e-mail. For example, Big Bend Telephone Company in 2006 advertised one offering that included one email address with 100 MB of storage.<sup>141</sup> Today, its basic offering includes five such addresses *all* with 100 MB of storage. In addition, while Darien Telephone Company included one email address with its broadband service in 2006, its offering has since expanded to include today 100 MB for e-mail storage, e-mail forwarders, e-mail aliases, as well as grey mail, video mail and webmail.<sup>142</sup>

More providers are offering specific “Internet applications” (*e.g.*, e-mail and personal web-space) today than four years ago. So, for example, in 2006 while 15 of 20 providers

---

<sup>139</sup> As the Commission noted in its 2005 Wireline Order, “To the extent a provider offers end users a capability to store files on the service provider’s computers to establish “home pages,” the consumer is utilizing the “capability for . . . storing . . . or making available information.” Report and Order and Further Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14853, ¶9 (2005) (*Wireline Order*).

<sup>140</sup> Appendix 1, p. 10.

<sup>141</sup> *Id.*, p. 1.

<sup>142</sup> *Id.*, p. 12.

expressly offered e-mail services as part of their broadband Internet access service,<sup>143</sup> 18 of 20 providers offer such service in 2010. Similarly, while 7 of 20 broadband service providers offered web-mail in 2006 with their broadband Internet access services, at least nine providers offer this service in 2010.

In fact, the most notable change between 2006 and 2010 is that USTelecom member companies are integrating more features, functionalities and content to create a more attractive broadband service offering. For example, various providers have expanded their broadband Internet access service offerings to include additional features, functions and content, such as streaming music, online customer service support chat, advanced website hosting, and even access to exclusive content.<sup>144</sup> For example, Guadalupe Valley Telephone Cooperative (GVTC) currently offers subscribers to its broadband service “[o]ver 40 free channels of commercial-free radio stations.”<sup>145</sup> This access is provided through its “MyGVTC.com Custom Home page,” which is “customizable so you can access content most important to you.”<sup>146</sup>

A notable example of integration of broadband Internet access and content is the ESPN3 service that broadband providers offer. ESPN3 (formerly ESPN360) is a vast library of sports

---

<sup>143</sup> It should be noted, that some providers may have actually offered e-mail services to their customers although it was not disclosed on their website. For purposes of its analysis, USTelecom only considered in its final count those offerings that are expressly made on the provider’s website.

<sup>144</sup> For example, Home Telephone Company in 2010 added online customer service support chat to its broadband offering. *See*, Appendix 2, p. 15. BPS Telephone Company did not originally offer free virus and spam protection in 2006, but does so today. *See*, Appendix 2, p. 8. Similarly, Carnegie Telephone Company added free e-mail, free basic and advanced website hosting to its broadband service as of 2010. *See*, Appendix 2, p. 9. Also of note, several providers offered increased broadband speeds, and additional tiers.

<sup>145</sup> *See*, GVTC Brochure (available at: <http://www.gvtc.com/brochures/ResidentialBroadband.pdf>) (visited July 12, 2010) (*GVTC Brochure*).

<sup>146</sup> *GVTC Brochure*.

related content and information.<sup>147</sup> The ESPN3 library is available from broadband Internet access providers that have agreed to offer the service to their subscribers, including many USTelecom members serving millions of broadband customers.<sup>148</sup> The list includes large companies with a national presence (such as AT&T and Verizon), mid-size carriers (such as Consolidated Communications, Frontier Communications and Windstream Communications), as well as small, rural carriers such as Prairie Grove Telephone Company in Prairie Grove, Arkansas, Smithville Telephone Company in Ellettsville, Indiana and Thacker-Grisby Telephone Company in Hindman, Kentucky.

Such unique offerings are not limited to the ESPN franchise. For example, subscribers to North State Communication's broadband service, "receive exclusive web content and have access to a number of premium services with their account."<sup>149</sup> In addition to ESPN3, its subscribers receive access to exclusive content from Disney, ABC News and Soapnetic.<sup>150</sup> Another distribution avenue for content can be seen in Zillion TV, a television entertainment service that gives consumers instant, subscription-free access to on-demand television shows and

---

<sup>147</sup> See, ESPN3 website (available at: <http://espn.go.com/espn3/>) (visited July 12, 2010).

<sup>148</sup> A full list of broadband providers offering ESPN3 can be accessed here: <http://espn.go.com/espn3/affList> (visited July 12, 2010).

<sup>149</sup> See, North State Communications Plex Broadband website (available at: <http://www.northstate.net/productpage.php?id=157&landingpageid=1&productlandingpageid=2>) (visited July 15, 2010).

<sup>150</sup> Full details on each of these content offerings can be found on North State Communication's website. See North State Communications Plex Broadband Premium Services website (available at: <http://www.northstate.net/productdetailpage.php?id=175&landingpageid=1&productlandingpageid=36&productpageid=157>) (visited July 15, 2010).

movies, via a broadband connection. Its distribution strategy “includes a primary focus on continued partnerships with [broadband providers].”<sup>151</sup>

Broadband providers have also responded to customer concerns about security and privacy by increasingly offering their Internet access services with a variety of security information processing capabilities.<sup>152</sup> While relatively few broadband service providers offered virus or spam protection in 2006, an increasing number of such providers offer free protection in 2010. For example, in 2006 neither BPS Telephone, Clear Lake Telephone Cooperative, Coon Valley Farmers Telephone nor Home Telephone offered virus protection as part of their respective broadband services. Today, all five companies include such services as part of their broadband Internet access service offering.

Broadband providers are increasingly integrating security capabilities and technologies into every level of the Internet so that they can prevent, detect, mitigate, and respond to any security threats. Below are specific examples that illustrate how security capabilities and technologies are inextricably linked to the end user’s Internet experience, helping to ensure that end users enjoy an overall sense of security and privacy.

---

<sup>151</sup> See, Zillion TV press release, *ZillionTV™ Expands Distribution Strategy*, September 17, 2009 (available at: [http://corporate.zilliontv.tv/press-room/2009-09-17\\_ZTVrelease.php](http://corporate.zilliontv.tv/press-room/2009-09-17_ZTVrelease.php)) (visited July 13, 2010).

<sup>152</sup> Service providers today are faced with growing consumer concerns and expectations regarding security on the Internet. A recent survey by BitDefender revealed that 74 percent of Americans run a virus scan when they hear about a computer virus spreading; 66 percent check to see if their antivirus software is up to date; and 65 percent are more cautious about the links and files they open. The survey concluded that despite low awareness about the details of cyber security, most Americans know how to use (and depend on) antivirus software. See, bitdefender website, Press Release, *Survey Finds Americans as Concerned About Contracting a Computer Virus as a Human Virus Like H1N1*, July 30, 2010 (available at: <http://news.bitdefender.com/NW1635-en--Survey-Finds-Americans-as-Concerned-about-Contracting-a-Computer-Virus-as-a-Human-Virus-like-H1N1.html>) (visited July 14, 2010).

- **Intrusion Detection System (IDS)** -- IDS is an application that looks for malicious activities which can harm or otherwise compromise consumers' computers and the information on them. When such threats are identified, IDS can be used to modify offending traffic through quarantine or removal. As such, filters that broadband providers integrate into their email service that prevent "junk" or malware from reaching end users are examples of IDS information services. Similar services may be classified as Intrusion Prevention System (IPS) services, which are extensions of IDS with additional capabilities such as warning consumers of risks, dropping malicious packets, resetting connections, and blocking IP addresses to protect consumers. Both IDS and IPS are designed to provide consumers with security and convenience while using the Internet and are functionally integrated with broadband Internet access service.
- **Firewalls** - Firewalls protect consumer data, communications, and investments by denying unauthorized access to consumers' computers. A firewall examines messages that are either entering or leaving the Internet, and blocks those which do not conform to a specified criteria. Traditional firewalls monitor network traffic without the ability to recognize patterns in the flow of data. However, the new generation of firewalls, known as stateful firewalls, examine traffic from one endpoint to another and can determine the state of a connection (*i.e.* TCP streams and UDP communication). This means that consumers now enjoy even greater security because stateful firewalls can prevent attack from a malicious packet disguised as something the user requested.

- **Border Gateway Protocol (BGP)** – When an end user is the victim of a DDoS attack, network operators can use BGP to block the flow of traffic, thereby protecting the end user. Once the flow of traffic is blocked, a network operator can filter the traffic, isolating the offending portion, and restoring communication to the end user.

These security capabilities and technologies involve data processing and, whether employed in the end user’s computer or in the network, include processing Internet access traffic flows. These capabilities and technologies are fully integrated with the broadband Internet access service that providers offer to end users, who cannot access the Internet without also benefitting from such capabilities and technologies.

In short, the record is clear that consumers today are offered one unitary service comprised of broadband transmission and data processing capabilities that include a host of features, functionalities and content. The only significant change is that consumers today are offered increasingly more robust data processing capabilities as part of broadband Internet access service than they received just three or four years ago. Thus, the same reasons that led the Commission to determine more than a decade ago that broadband Internet access service is a functionally integrated offering apply equally today.

The Commission suggests that broadband transmission is now functionally separate from the other components of broadband Internet access service because some users rely upon: (i) free email from providers such as Yahoo! and Microsoft; (ii) web hosting services like Go Daddy; and (iii) web page caching. *Notice* at ¶¶ 56-58. But these offerings are not new and hardly represent a change in the “factual particulars of how Internet technology works and how it is provided.” *See Brand X*, 545 U.S. at 991. For example, both Yahoo! and Microsoft have been

offering free email service since 1997.<sup>153</sup> Likewise, alternative web hosting and web caching services have been available since the 1990s.<sup>154</sup> Furthermore, that a consumer can obtain email, web hosting, web caching, and even standalone DNS elsewhere has no bearing on the integrated nature of the service “offered” by a broadband provider.<sup>155</sup>

***C. The NECA DSL Tariff Is Not Helpful In Defining “Broadband Internet Connectivity Service” And Is Not Evidence That Providers Are Voluntarily Offering Broadband Transmission as a “Telecommunications Service.”***

The *Notice* looks to NECA’s DSL access service tariff as a source of guidance in defining “broadband Internet connectivity service” and as evidence of voluntary offering by rate-of-return local exchange companies of broadband transmission service. The tariff serves neither role.

Notwithstanding the Commission’s suggestion otherwise (*Notice* ¶ 65), it is not possible for the Commission to draw “guidance” from NECA’s DSL Access Service Tariff about the functionality of an Internet connectivity service. NECA’s tariff does not offer an Internet connectivity service, and the service it describes does not connect anyone or anything to the Internet. It merely provides a DSL connection from a modem to a central point at the premises

---

<sup>153</sup> See e.g., Wikipedia website (available at: [http://en.wikipedia.org/wiki/Yahoo!\\_Mail](http://en.wikipedia.org/wiki/Yahoo!_Mail)) (visited July 14, 2010); See also, Wikipedia website (available at: <http://en.wikipedia.org/wiki/Hotmail>) (visited July 14, 2010).

<sup>154</sup> See, e.g., History of Web Hosting (Dec. 12, 2007) (noting that “web hosting services came into being in 1991”) (available at: <http://www.webhostingsearch.com/articles/history-of-web-hosting.php>) (visited July 14, 2010); Akamai Press Release, *Akamai and Novell to Integrate Cache Interface Standard* (Sept. 22, 1999) (announcing “caching solution” that enables “Web site owners to easily modify Web page content for delivery by Akamai’s global Internet content delivery network”) (available at [http://www.akamai.com/html/about/press/releases/1999/press\\_092299f.html](http://www.akamai.com/html/about/press/releases/1999/press_092299f.html)) (visited July 14, 2010).

<sup>155</sup> *Brand X*, 545 U.S. at 990 (in describing “what a company ‘offers’ to a consumer” the question is “what the consumer perceives to be the integrated finished product, *even to the exclusion of discrete components that compose the product*”) (emphasis added).

of a rural local exchange carrier – the DSL Access Service Connection Point. *See* 8.1.1 and associated diagrams; 8.1.3(C). The NECA tariffed service stops at that point, which may be hundreds of miles from the nearest point at which a connection to the Internet can be made. National Broadband Plan at 143. The NECA tariff provides that the “Provider” that ordered the DSL circuit may order special access, Frame Relay, Ethernet or other services to transport traffic from the DSL Access Service Connection Point to a premises designated by that Provider. That Provider then must arrange for any additional transport and exchange of traffic over an Internet connection.

To the best of USTelecom’s knowledge, no end user customers have ordered the DSL access service described in section 8 of NECA’s tariff. Because the tariff itself requires combining the DSL access service with transport services often provided under a different tariff, it is unlikely that any consumer would find it practicable or economically rational to order from NECA’s DSL Access Service Tariff. *See, e.g.* Tariff at 8.1.5(D) (the provider “is responsible for determining and ordering the number of DSL Extended Transport virtual circuit paths it requires to meet its end users’ data transmission needs”). Instead, NECA DSL access services are purchased by ISPs, typically affiliated in some way with the underlying DSL service provider, combined with a variety of information service functions that are provided on a functionally integrated basis to end users as Title I information services.

To bolster support for subjecting the transmission component of broadband Internet access service to Title II regulation, the Commission points to the NECA DSL Tariff as evidence that providers are exercising the “flexibility” to offer on a “voluntary” basis “broadband transmission as a telecommunications service separate from their Internet information service.” *Notice ¶¶ 21, n.53 & 54.* But this assertion glosses over important limitations imposed by the

Commission on the ability of rate-of-return carriers to offer the transmission component of wireline broadband Internet access service as anything other than a telecommunications service.

In its *Wireline Broadband Order*, the Commission established a light touch regulatory framework for broadband Internet access services offered by wireline providers.<sup>156</sup> This framework gave wireline providers three options by which to offer broadband transmission, one of which was on a private carriage basis under Title I rather than as a common carriage service subject to Title II. While ostensibly making the private carriage option available to all wireline providers,<sup>157</sup> the Commission declined to resolve in its *Wireline Broadband Order* the “cost allocation issues for rate-of-return carriers that, as a practical matter, are a prerequisite to a carrier's availing itself of the ability to offer the transmission component of wireline broadband Internet access services on a non-common carrier basis.”<sup>158</sup>

In its subsequent *ACS Forbearance Order*, the Commission clarified the circumstances under which a rate-of-return carrier could offer broadband transmission service on a private carriage basis. Specifically, the Commission made clear that before a rate-of-return carrier could elect the private carriage option, the carrier must demonstrate that there “is an appropriate allocation of a rate-of-return carrier’s costs for the non-common carrier provision of DSL

---

<sup>156</sup> *Wireline Broadband Order*, 20 FCC Rcd 14853, ¶¶ 1-3.

<sup>157</sup> *Id.* ¶ 89 (finding that the Commission’s goal could best be served “by providing *all* wireline broadband providers the flexibility to offer these services in a manner that makes the most sense as a business matter...” (emphasis added)).

<sup>158</sup> *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance*, Memorandum Opinion and Order, 22 FCC Rcd 16304, ¶ 75 (2007) (*ACS Forbearance Order*); see also *Wireline Broadband Order* ¶ 138 (declining to “address the treatment of private carriage arrangements by rate-of-return carriers because the issue is entirely hypothetical” given the desire of rate-of-return carriers at the time “to continue offering broadband transmission as a Title II common carrier service”).

transmission service ....”<sup>159</sup> This demonstration requires a rate-of-return carrier to: (1) file a detailed description of the methods it will use to exclude the costs and revenues of broadband transmission services from the ratemaking calculations for those services that remain subject to Title II regulation; (2) identify in its cost support for all future interstate tariff filings those costs and revenues of broadband transmission services that have been excluded; and (3) comply with the affiliate transaction rules if broadband transmission services will be offered on a non-common carrier basis through a nonregulated affiliate.<sup>160</sup>

Notwithstanding the Commission’s suggestion to the contrary, rate-of-return carriers are effectively forced to offer the transmission component of wireline broadband Internet access service as a telecommunications service because they would be required to jump through a number of burdensome regulatory hoops in order to do otherwise. Thus, the fact that rate-of-return carriers continue to offer broadband transmission as a telecommunications service is simply the byproduct of the Commission’s current regulatory regime and is hardly evidence of how broadband service is “voluntarily” being offered in the market today.<sup>161</sup>

---

<sup>159</sup> *ACS Forbearance Order*, ¶ 75; see also *id.* ¶ 81, n.230 (finding no basis “to deviate from ... the necessity of addressing cost allocation issues before providers, such as rate-of-return carriers, for which an earnings determination is used for ratemaking purposes could avail themselves of regulatory relief”).

<sup>160</sup> *Id.* ¶ 80, n.229.

<sup>161</sup> USTelecom is unaware of any rate-of-return carrier that has been permitted by the FCC to offer the transmission component of wireline broadband Internet access service on a private carriage basis. Although in the *ACS Forbearance Order* the Commission “required as a condition of forbearance that ACS file, and have approved by the Commission, a description of how it will address the cost allocation implications of this forbearance before it exercises this relief,” *id.* ¶ 80, the record does not reflect that this condition has ever been satisfied.

**V. THE COMCAST DECISION DOES NOT WARRANT ADOPTION OF THE COMMISSION’S PROPOSED REGULATORY REGIME.**

***A. Comcast Is A Narrow Decision That Does Not Undermine The Commission’s Ancillary Authority To Implement Its Broadband Initiatives.***

As described above, there has been no change in the broadband Internet access services being offered to customers, as compared to 12 years ago when the Commission first determined that such services were “information services” or even three years ago when the Commission last examined the issue in the context of wireless broadband Internet access services. Then as now, broadband Internet access services involve functionally integrated transmission and data processing capabilities and, as such, are properly classified as “information services.” Thus, “the factual particulars of how Internet technology works and how it is provided” remain the same.<sup>162</sup>

But if broadband Internet access service has not changed, why dramatically alter the existing regulatory regime that has functioned so well for so long? The *Notice* suggests that the Commission needs to “revisit” its approach to broadband Internet access service because of recent “legislative” developments, pointing to the 2008 Farm Bill, the Broadband Data Improvement Act, and the American Recovery And Reinvestment Act (Recovery Act).<sup>163</sup> But this suggestion is inaccurate.

While these legislative acts “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,”<sup>164</sup> they do not direct, let alone intimate, that the Commission should modify its deregulatory approach to broadband Internet access services. In his report on rural broadband submitted to Congress as required by the 2008 Farm Bill, Acting

---

<sup>162</sup> *Brand X*, 545 U.S. at 991.

<sup>163</sup> *Notice*, ¶ 25.

<sup>164</sup> *Id.*

Chairman Michael Copps included recommendations about how best to “respond to rural broadband requirements and overcome obstacles that currently impede rural broadband deployment.”<sup>165</sup> Noticeably absent from the *Rural Broadband Report* was any discussion of the need for the Commission to modify the regulatory classification of broadband Internet access service. Indeed, the report generally lauds the Commission’s “deregulatory approach” to broadband Internet access service, noting its “reliance on market forces, rather than regulation” and implicitly acknowledging that the Commission had not seen the need to impose “regulatory obligations” on broadband Internet access service providers in order to “further important public policies.”<sup>166</sup>

With respect to the Broadband Data Improvement Act and the Recovery Act, Congress could have used either legislative act as a mechanism by which to compel the Commission to reexamine its deregulatory approach to broadband Internet access services or to establish a new regulatory regime, had it been so inclined. That Congress did not do so is telling. Congressional silence on the subject can hardly be a reason for the Commission to alter dramatically a regulatory policy embraced for more than a decade by Democratic and Republican administrations alike.

In reality, the only thing that has “changed” is that the D.C. Circuit released its decision in *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). The court vacated the Commission’s order regarding Comcast’s network management practices because it “failed to make the requisite showing that its action was ‘reasonably ancillary to the ... effective performance of its

---

<sup>165</sup> 2008 Farm Bill § 6112(a)(1)(D); see *Rural Broadband Report* (available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-291012A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291012A1.pdf)) (visited July 14, 2010).

<sup>166</sup> *Rural Broadband Report* ¶¶ 122, 123.

statutorily mandated responsibilities.”<sup>167</sup> As the Chairman and other representatives of the Commission have candidly acknowledged, the so-called “Third Way” is in direct response to the D.C. Circuit’s *Comcast* decision to restore a previously existing “status quo.”<sup>168</sup> But the idea that the Commission must engage in legal contortions in order to try to make a square peg (broadband Internet access services) fit into a round hole (Title II) so that the agency may “reclaim our authority” is likely to meet with considerable skepticism by a reviewing court.<sup>169</sup>

Indeed, the Commission’s attempt to rely upon Title II in order to justify its exercise of authority over broadband services is, at best, a bootstrap argument. The Commission cannot ground the classification of broadband transmission as a “telecommunications service” under Title II so as to fulfill “core missions” that are not articulated in a grant of delegated authority over broadband services by Congress. This would not be an exercise in “gap filling” but, as one journalist has bluntly characterized it, would represent nothing more than a “naked jurisdictional grab.”<sup>170</sup> As former United States Solicitor General Seth Waxman has explained:

---

<sup>167</sup> *Comcast*, 600 F.3d at 644 (quoting *American Library Association v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

<sup>168</sup> See Chairman Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework* (May 6, 2010) (claiming that the *Comcast* decision “creates a serious problem that must be solved so that the Commission can implement important common sense broadband policies ...”); New Release, Statement of Commissioner Michael J. Copps on Chairman Genachowski’s Announcement to Reclassify Broadband (May 6, 2010) (noting “the present confusion emanating from the *Comcast* court decision” that placed a “legal cloud hanging over the FCC’s ability to protect America’s broadband users”); see also Austin Schlick, *A Third-Way Legal Framework for Addressing the Comcast Dilemma* (May 6, 2010) (insisting that the *Comcast* court imposed “new restrictions” on the Commission’s ancillary authority that undermines the Commission’s ability to take action on its broadband agenda).

<sup>169</sup> Statement of Commissioner Michael J. Copps, *Framework for Broadband Internet Service*, GN Docket No. 10-127, at 2 (June 17, 2010).

<sup>170</sup> Editorial, Internet oversight is needed, but not in the form of FCC regulation, Wash. Post, Apr. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041604610.html> (visited July 14, 2010).

[T]his is not a case where the Commission would simply be responding to a major legislative innovation by Congress or engaging in a mere gap-filling exercise. Instead, the Commission would be—for the first time ever and with no action by Congress—extending a common carrier regime, designed for the monopolist telephone market of the early twentieth century, to a dynamic Internet marketplace that [the Commission] recently called “the foundation for our new economy.” Such a significant and consequential policy choice should be made, if at all, by Congress.<sup>171</sup>

It is because the Commission cannot point to any statutory hook on which to hang its regulatory hat that it now seeks to create out of whole cloth a “new” common carrier service the agency calls “broadband Internet connectivity.” All this is simply an attempt to shoehorn broadband into a specific grant of authority under the Communications Act. Such jurisdictional legerdemain has been soundly rejected by the courts. As Waxman points out:

“[W]here agencies cite supposed ‘ambiguities’ in a statute to effectuate major shifts in federal policy or assert aggressive new regulatory authority over broad subject areas, courts have refused deference on the ground that the cited ambiguity cannot plausibly be thought to delegate such enormous discretion. One instructive case is *FDA v. Brown & Williamson Tobacco Corp.* In that case, after many years of proceeding otherwise, the FDA undertook an exhaustive rulemaking and concluded that cigarettes were subject to regulation under the federal Food, Drug, and Cosmetic Act. Although the literal statutory language supported the agency’s conclusion, the Supreme Court rejected the FDA’s interpretation. The Court expressed doubt that the rationale of *Chevron* should apply where, as in that case, the ‘breadth of the authority’ the agency had asserted made it less plausible that Congress would have intended an implicit delegation of such broad discretion. However pliable the relevant statutory terms might be, the Court was “confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>172</sup>

A careful reading of the *Comcast* opinion reflects a clear admonition by the D.C. Circuit against the Commission engaging in precisely this kind of usurpation of Congressional authority.

---

<sup>171</sup> See Letter from Seth P. Waxman, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-47, 09-137, WC Docket Nos. 05-337, 03-109 at 2 (April 28, 2010) (*Waxman Letter*). The Waxman Letter is incorporated into this filing as Appendix 4.

<sup>172</sup> *Waxman Letter* at 4, citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000).

While not unsympathetic to the predicament in which the Commission finds itself — attempting to regulate in a transformed technological landscape — the *Comcast* court made clear that the Commission’s predicament requires a legislative solution:

It is true that “Congress gave the [Commission] broad and adaptable jurisdiction so that it can keep pace with rapidly evolving communications technologies.” Resp’t’s Br. 19. It is also true that “[t]he Internet is such a technology,” *id.*, indeed, “arguably the most important innovation in communications in a generation,” *id.* at 30. Yet notwithstanding the “difficult regulatory problem of rapid technological change” posed by the communications industry, “the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer . . . Commission authority.” *NARUC II*, 533 F.2d at 618.<sup>173</sup>

According to the D.C. Circuit, the Commission is in the same situation with respect to broadband Internet access services as it was before Congress gave it explicit authority over cable services by enacting Title VI: as the court explained, the doctrine of ancillary jurisdiction evolved out of a series of cases dealing with “Commission jurisdiction over early cable systems at a time *when, as with the Internet today, the Communications Act gave the Commission no express authority to regulate such systems.*<sup>174</sup> Ultimately, the Congress exercised its prerogative to provide explicit jurisdictional authority over cable. But in the interim, the Commission took the circumscribed and legally appropriate steps of acting through ancillary jurisdiction rather than embarking, as it proposes to do now on an expansive and hardly credible exercise of “gap

---

<sup>173</sup> *Comcast*, 600 F.3d at 661 (internal citations and notes omitted).

<sup>174</sup> Courts have come to call the Commission’s section 4(i) power its “ancillary” authority, a label that derives from three foundational Supreme Court decisions: *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*), and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II*). All three cases dealt with Commission jurisdiction over early cable systems at a time *when, as with the Internet today, the Communications Act gave the Commission no express authority to regulate such systems.* (Title VI, which gives the Commission jurisdiction over “cable services,” was not added to the statute until 1984. See Cable Communications Policy Act of 1984, Pub. L. No.98-549, 98 Stat. 2779.)

filling” as a way of creating jurisdiction absent Congressional action. The Commission should exercise similar restraint today.

The exercise of such restraint would not prevent the Commission from achieving its broadband goals, notwithstanding claims to the contrary. Although some at the Commission have expressed the view that, in the wake of the *Comcast* decision, it would be “too risky” to rely on ancillary authority to accomplish its broadband goals, this view rests on a mistaken reading of the *Comcast* opinion. In the particular case before it, the *Comcast* court carefully noted its disapproval of the Commission’s attempt to expand its ancillary authority without a limiting principle anchored in a statutory grant of delegated authority.<sup>175</sup> However, *Comcast* is consistent with other decisions approving the FCC’s use of its legally well-established ancillary authority when that authority is based on the statutory mission of the agency and the action taken by the Commission is reasonably related to the effective performance of its statutorily mandated responsibilities.<sup>176</sup>

Notwithstanding the Commission’s claims otherwise, the *Comcast* decision does not “undermine” its ability to implement the National Broadband Plan by relying upon its Title I ancillary authority.<sup>177</sup> The only issue the D.C. Circuit addressed in *Comcast* was whether the Commission had the “authority to regulate an Internet service provider’s network management

---

<sup>175</sup> *Comcast*, 600 F.3d at 643 (citing *National Ass’n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 618 (D.C. Cir. 1976) (“the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer . . . Commission authority.”) (internal quotation marks and footnote omitted).

<sup>176</sup> *Comcast*, 600 F.3d at 644 (citing *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005) (the action taken by the agency must be “reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities”).

<sup>177</sup> *Notice of Inquiry* ¶ 1 & 30,

practices.”<sup>178</sup> The D.C. Circuit did not have occasion to consider the broader issues regarding the Commission’s ancillary authority over its broadband agenda or its ability to rely upon Title I to implement the initiatives in the National Broadband Plan, such as universal service reform, customer privacy, disability access, and cybersecurity. Nothing in *Comcast* can reasonably be read to compel or even contemplate the abandonment of the current deregulatory approach to broadband Internet access services in order for the Commission to achieve these public policy objectives.<sup>179</sup>

USTelecom believes that with respect to universal service, disabilities access and public safety/homeland security the Commission likely has the requisite Title I ancillary authority to achieve its broadband goals. Similarly, with respect to privacy, the Commission has a clear statutory mandate to protect consumers’ CPNI which can support the exercise of ancillary authority under Title I.<sup>180</sup> With respect to the rest of the Commission’s goals in the National Broadband Plan, the *Comcast* court left open the door for the Commission to base a claim of ancillary jurisdiction on provisions of the Act that D.C. Circuit did not address on procedural grounds.<sup>181</sup>

In contrast, the Commission’s “Third Way” is a novel and convoluted construct with concomitant legal risks. The Third Way is guaranteed to mire the Commission in a protracted

---

<sup>178</sup> *Comcast*, 600 F.3d at 644.

<sup>179</sup> *Notice* at ¶¶ 30-50.

<sup>180</sup> *See* 47 U.S.C § 222.

<sup>181</sup> *Comcast*, 600 F.3d at 660-661 (declining to consider whether the Commission could justify its actions based on sections 201 and 623 “because the section 201 argument the Commission sets forth in its brief is very different from the one appearing in the *Order*” and because the Commission did not assert ancillary authority based on the “narrow grant of regulatory power” in section 623).

legal battle, which will retard or even block its achievement of the worthy goals set out in the National Broadband Plan. Such a result is not in consumers' interest.

### ***B. Universal Service***

As the *Notice* points out, both AT&T<sup>182</sup> and NCTA<sup>183</sup> have filed detailed comments setting out well reasoned and complementary legal arguments that demonstrate the Commission's ample authority under Title I to extend universal service support mechanisms to broadband services. Under the first part of the *American Library Association* test cited in the *Comcast* opinion,<sup>184</sup> the agency's action must be covered by the general grant of jurisdiction that Congress extends to the agency. The Commission's general jurisdiction extends to "all interstate and foreign communications by wire or radio," 47 U.S.C. § 152(a), of which broadband Internet access service is plainly a part. And the Commission's core mission is to "make available, so far as possible, to *all people of the United States* . . . a rapid, efficient, *Nation-wide*, and world-wide wire and radio communication service *with adequate facilities at reasonable charges*." 47 U.S.C. § 151 (emphasis added). In this respect, universal service is one of the Commission's key statutory missions.<sup>185</sup>

---

<sup>182</sup> See Letter from Gary L. Phillips, General Attorney & 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 USF White Paper*); Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-137, WC Docket Nos. 05-337, 03-109 (April 12, 2010) (*AT&T USF/Comcast Letter*).

<sup>183</sup> See Letter from Kyle McSlarrow, President & CEO, National Cable & Telecommunications Association, to Julius Genachowski, Chairman, FCC, GN Docket Nos. 09-51, 09-191, WC Docket No. 07-52 (March 1, 2010) (*NCTA USF Letter*).

<sup>184</sup> *American Library*, 406 F.3d at 693-94.

<sup>185</sup> As AT&T has demonstrated, before the Communications Act of 1996 added section 254 to the statute, the Commission had created universal service obligations in furtherance of this core mission. Section 254 did not abrogate this authority; it furthered it and made it more explicit. See *AT&T USF White Paper* at 9, 12.

The second part of the test is that the regulatory action undertaken must be “reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.”<sup>186</sup>

Funding the deployment of broadband Internet access service fits squarely under the express mandates of section 254 of the Act. As AT&T points out, section 254 as a whole is best read to include both “telecommunications services” and “information services” as part of the universal service mandate. USTelecom agrees.

An analysis of how the terms “telecommunications services” and “information services” are used in section 254 demonstrates that there is true ambiguity in the use of the terms. Several times the term “telecommunications services” is used inclusively to include “advanced services.”<sup>187</sup> At other times, both “telecommunications” and “information services” are enumerated. To add further ambiguity, the section also uses the catch-all term “services.” The inherent ambiguity and tension in the use of these terms gives the Commission, as the expert agency, the authority to resolve the ambiguity consistent with the overall purposes of the Act. It is this type of limited “gap filling” for which a court properly gives *Chevron* deference to an agency.

It would be a crabbed and unnecessarily restrictive reading of section 254 to focus only on “telecommunications services” in section 254(c)(1)<sup>188</sup> and conclude that this section controls

---

<sup>186</sup> *American Library*, 406 F.3d at 692.

<sup>187</sup> For example, section 254(h) is captioned “TELECOMMUNICATIONS SERVICES FOR CERTAIN PROVIDERS,” but section 254(h)(B)(2) authorizes the provision of “ADVANCED SERVICES.”

<sup>188</sup> Section 254(c)(1) states: “[u]niversal service is an evolving level of telecommunications service that the Commission shall establish periodically under this section.”

the grant of authority contained in section 254 as a whole.<sup>189</sup> Plainly it does not. Section 254(c), which provides mandatory directives to the Commission on its duties under section 254,<sup>190</sup> states that the Commission “shall” ensure that both telecommunications and information services are provided by universal service funding. Two of the controlling Congressional directives in section 254(b) reference both telecommunications and information services.<sup>191</sup> The rest of the provisions of section 254(b) are consistent with these principles. Moreover, as AT&T points out, “Section 254(c) itself rejects a static focus on legacy technologies, referring instead to an ‘*evolving*’ level of telecommunications services that the Commission shall establish periodically under this section.” 47 U.S.C. § 254(c)(1) (emphasis added), and expressly authorizing the Joint Board and the Commission to “modif[y] . . . the definition of the services that are supported by Federal universal support mechanisms,” *id.* § 254(c)(2).

Because section 254(c)(2) refers to the broad term “services,” and does not restrict what “services” can be supported as technologies evolve, the Commission has correctly concluded, and the Fifth Circuit has affirmed, that it has authority “to include *non*-telecommunications services in the supported universal services, despite the fact that section 254(c)(1) refers to

---

<sup>189</sup> AT&T explains the limitations of the doctrine of “*expression unius*” in the context of administrative agencies generally and in this context in particular. *See AT&T Universal Service White Paper* at 8, 10-12.

<sup>190</sup> *See Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) (“This language indicates a mandatory duty on the FCC.”).

<sup>191</sup> Section 254(b)(2) provides: “[a]ccess to advanced telecommunications *and information services* should be provided in all regions of the Nation,” 47 U.S.C. § 254(b)(2) (emphasis added). Section 254(b)(3) elaborates on this requirement: “Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including . . . advanced telecommunications and information services that are reasonably comparable to those services provided in urban areas.” 47 U.S.C. § 254(b)(3).

“telecommunications services.”<sup>192</sup> Extending this precedent to cover the provision of broadband Internet access services to the high cost and other universal service programs is precisely the kind of “gap filling” that *Chevron* authorizes. This assertion of ancillary authority fits squarely within the precedent as explicated by the *Comcast* court, and following this legal path has little risk. Indeed, it has the benefit of allowing the Commission with reforming the universal service program to support its broadband initiatives without delay.

### ***C. Privacy***

In the *Notice* the Commission asks whether it can accomplish its goals in the National Broadband Plan with respect to consumer privacy under the current legal framework or whether the classification of broadband Internet “connectivity” service under Title II is necessary to accomplish these goals. The answer to these questions requires a careful review of the Plan’s analysis of consumer privacy and its recommendations for reform.

The Commission’s discussion of privacy in the National Broadband Plan is thorough and thoughtful. The Plan focuses, in particular, on ensuring that consumers have control of the data that is collected about them online and compiled into user profiles. The National Broadband Plan recognizes that currently there is a patchwork of law and regulation covering consumer privacy and emphasizes the need for a comprehensive privacy framework. The Commission notes that it currently has jurisdiction over certain aspects of consumer privacy under section 222 (telecommunications services) and section 631 (cable service). The National Broadband Plan places the Commission’s statutory responsibilities for privacy within the wider context of privacy regulation. In this regard, the National Broadband Plan not only discusses specific

---

<sup>192</sup> See *Universal Service Report and Order*, 12 FCC Rcd 8766, (*Universal Service Report and Order*), *aff’d*, *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (*TOPUC I*).

sectoral law and regulation in such fields as health care and financial services, but also more importantly, recognizes the role of the Federal Trade Commission as the expert agency on privacy. As the National Broadband Plan notes, the FTC has exercised its broad authority over unfair trade practices to protect consumer privacy in a wide range of online contexts and is currently in the process of revising its privacy framework.

The Commission recognizes that the current patchwork of law and regulation governing privacy is unsatisfactory and calls on Congress for necessary reform. The National Broadband Plan recommends “[c]larify[ing] the relationship between users and their online profiles to enable continued innovation and competition in *applications* and ensure consumer privacy, including the obligations of firms collecting personal information to allow consumers to know what information is being collected, consent to such collection, correct it if necessary, and control disclosure of such personal information to third parties.”<sup>193</sup> In particular, the National Broadband Plan states that the “FCC and the FTC should jointly develop principles to require that customers provide informed consent before broadband service providers share certain types of information with third parties.”<sup>194</sup>

With respect to the question posed in the *Notice* it is important to keep in mind three important facts. First, the National Broadband Plan’s goal of joint development by the FCC and FTC of privacy principles can be implemented without resorting to Title II regulation. Second, as the National Broadband Plan makes clear, data privacy is not about “connectivity” but about “applications,” so creating a new category of “broadband Internet connectivity service” will not address the central privacy issues relating to broadband Internet access services.

---

<sup>193</sup> *National Broadband Plan*, p. xii (emphasis added and bold removed).

<sup>194</sup> *Id.* at 36.

Finally, the FTC is the expert agency with respect to privacy and is addressing online consumer privacy issues in a comprehensive fashion. By virtue of the common carrier exception under the Federal Trade Communications Act, classification of broadband transmission as a “telecommunications service” would diminish the FTC’s authority over broadband Internet access services and make it harder to create an overarching framework for privacy on the Internet as the National Broadband Plan recommends. It cannot seriously be contended that it will serve consumers well to wrest jurisdiction over one aspect of consumers’ privacy on the Internet from the FTC, the acknowledged expert agency on privacy matters, by applying an artificial “common carrier” regime that separates out the provision of some (undefined) “connectivity” service to the Internet from other aspects of broadband Internet access services.

Instead, the FCC should, as the National Broadband Plan recommends, work hand in hand with the FTC with respect to consumer privacy. Moreover, as the National Broadband Plan further recommends, Congress is already considering comprehensive privacy legislation to provide a cohesive privacy framework both in the online and offline context and the jurisdictional decisions that Congress makes as it proceeds with this legislative reform should govern the Commission’s further role in privacy protection.

#### ***D. Access by Persons with Disabilities***

As part of its core mission, the Commission must ensure that “*all* the people of the United States” have access to communications services. 47 U.S.C. § 151. (Emphasis added). Thus, inclusion of all Americans, including the disabled, is one of the purposes of the Act and therefore the first part of the *American Library* ancillary jurisdiction test is satisfied. With respect to providing a statutory anchor for the assertion of ancillary authority, section 255 mandates that the Commission ensure “access by persons with disabilities” to

“telecommunications equipment” and customer premises equipment,” as well as access to “telecommunications services” to the extent “readily achievable.” 47 U.S.C. § 255 (a)(2),(b),(c).

Consistent with this mandate, the Commission has already promulgated rules requiring “telecommunications and interconnected VoIP service providers and manufacturers to consider accessibility issues in the design and development phase and to include accessibility features in their products when it is readily achievable to do so.”<sup>195</sup> The Commission imposed these requirements on the interconnected VoIP community, irrespective of whether the service is an information or a telecommunications service. The *Notice* further points out that in addition to using its ancillary jurisdiction to extend section 255 to VoIP providers, “the Commission similarly relied on ancillary authority to extend disability-related requirements to voicemail and interactive menu services.”<sup>196</sup> There is no absolute jurisdictional bar to the Commission extending its ancillary jurisdiction authority to achieve the other goals set forth with respect to disability access in the Plan.

The Commission also has the statutory mandate in section 225 to establish a Telecommunications Relay Service (TRS) to provide “Telecommunications Services for Hearing Impaired and Speech-Impaired Individuals.” TRS began as a simple TTY service and has continued to evolve to offer a host of different programs. The Commission has not hesitated to include new technological services, such as Video Relay Service (VRS), as technologies that provide improved functional equivalency have developed. VRS makes use of broadband to allow people with hearing or speech disabilities to use American Sign Language to communicate with an interpreter who then relays the conversation to a person without such disabilities. The

---

<sup>195</sup> *National Broadband Plan*, p. 189, n. 136.

<sup>196</sup> *Notice*, ¶40.

Commission can rely on its ancillary authority to extend TRS to other broadband-enabled technologies, as the Plan suggests.

That said, more remains to be done on the legislative front to update disabilities laws and regulations, and the Plan states that “Congress, the FCC and the U.S. Department of Justice (DOJ) should modernize accessibility laws, rules and related subsidy programs.”<sup>197</sup> Congress is in the process of updating disability access legislation as the Plan notes.<sup>198</sup> The Commission has the ancillary authority to complement those efforts with the rulemakings it contemplates in the Plan.

#### ***E. Public Safety and Homeland Security***

Among the enumerated purposes for which the FCC was created are “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.” 47 U.S.C. § 151. Among the most important tasks that the Commission has before it with respect to public safety is the creation of a “nationwide interoperable public safety wireless broadband communications network.”<sup>199</sup> The classification of “broadband Internet connectivity” service as a “telecommunications service” under Title II is unnecessary to achieve this critical mission.

The Commission has also been given specific responsibilities by Congress for the development of programs in cooperation with Federal, state and local governments and the private sector that further these missions, most notably in the field of emergency communications and first response. In particular, the Commission has led in the development of the critical wireline and wireless emergency 911 systems by ensuring that carriers are capable of

---

<sup>197</sup> *National Broadband Plan*, p. 182.

<sup>198</sup> *See National Broadband Plan*, pp. 181-82, 183, nn.138, 142.

<sup>199</sup> *See id.*, p. 313.

delivering location information to state and local Public Safety Answering Points (PSAPs).<sup>200</sup> In 2005, the Commission, by ancillary authority, extended the duties of communications providers to provide 911 services to VoIP providers.<sup>201</sup> Several years after the Commission’s assertion of ancillary authority, Congress enacted the “New and Emerging Technologies 911 Improvement Act of 2008” which gave the Commission plenary rulemaking authority over IP-enabled voice providers for the provision of 911 and E-911 services.<sup>202</sup> The NET 911 Act also tasked Executive Branch agencies with developing a plan and timetable for the migration to and implementation of next generation 911(NG911). In this regard, the Plan recommends that Congress implement an overarching Federal framework for implementing NG911 and calls on the Department of Transportation’s National Highway Traffic Safety Administration to determine the costs of funding a nationwide NG911 system. Regulation of broadband transmission under Title II is irrelevant to this effort, as well.

But the NG911 effort is illustrative of a central point. Just as in regard to NG911, with respect to other public safety and national security issues, the Commission has and should continue to work in lockstep with Executive Branch agencies to which Congress has given the mandate and funding to achieve particular core public safety and security missions. By careful

---

<sup>200</sup> See, e.g., Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286, § 2(b) (1999) (911 Act) (charging the Commission with the responsibility to “encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure” for public safety).

<sup>201</sup> See *E-911 Requirements for IP-Enabled Services*, 20 FCC Rcd 10245, ¶¶ 26-35 (2005) (E-911 rules for interconnected VoIP providers are “reasonably ancillary” to the Commission’s statutory duty in Section 1 to “promot[e] safety of life and property” and its plenary authority over numbering contained in section 251(e)), *aff’d sub nom. Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

<sup>202</sup> New and Emerging Technologies 911 Improvement Act of 2008, Pub. L. No. 110-283, 122 Stat. 2620 (2008) (NET 911 Act) (amending Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 (1999)).

exercise of its ancillary jurisdiction with respect to public safety, the Commission will be able to do so.

## VI. CONCLUSION

The nation's remarkable progress under the current regulatory framework has resulted in unprecedented broadband deployment and adoption levels, coupled with increased broadband speeds and greater competition in the voice, video and broadband marketplace. Those calling for last century regulation of broadband Internet access face a high bar in demonstrating the public interest benefits (and in overcoming the legal hurdles) in changing a regulatory paradigm that has been so successful for consumers and the United States economy. The nation's remarkable progress under the current regulatory framework has resulted in unprecedented broadband deployment and adoption levels, coupled with increased broadband speeds and greater competition in the voice, video and broadband marketplace.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: 

Jonathan Banks  
Robert Mayer  
Genie Barton  
Kevin Rupy

607 14<sup>th</sup> Street, NW, Suite 400  
Washington, D.C. 20005

July 15, 2010