



common carrier regulations under Title II of the Communications Act,<sup>3</sup> the FCC can and should invoke its ancillary jurisdiction to protect competition and safeguard communications consumers.

## **II. The Commission Has Both Direct And Ancillary Jurisdiction Over Wireless Broadband Service Providers.**

### **a. The Commission Maintains Title III Jurisdiction Over Wireless Broadband Service Providers.**

In its Notice of Inquiry, the Commission inquires whether classifying *wireless* broadband services as "information services" gives the Commission adequate authority to "support effective performance of the Commission's responsibilities."<sup>4</sup> Since wireless broadband services use public spectrum, the Commission retains the authority to regulate wireless broadband services. The radio spectrum has long been recognized as a scarce resource, and the Communications Act mandates that spectrum licensing and rules serve the "public interest, convenience and necessity."<sup>5</sup> The fundamental principle for FCC spectrum licensing is the mandate that the FCC ensure that spectrum is used in the "public interest, convenience, and necessity."<sup>6</sup>

In its 2007 decision to reclassify wireless ISPs as information service providers, rather than "common carriers," the FCC determined that the licensing and other rules governing use of spectrum for *wireless* ISPs would continue to apply.<sup>7</sup> The FCC's decision to classify wireless ISPs as "information service providers" did not, however, relegate wireless ISP regulation to the penumbra of ancillary FCC jurisdiction.

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<sup>3</sup> See Comments of the Broadband Institute of California and the Broadband Regulatory Clinic, *In re* Preserving the Open Internet Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, at 2-3 (filed Jan. 14, 2010), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020378859>.

<sup>4</sup> *Framework for Broadband Internet, Notice of Inquiry*, ¶2 (GN Docket No. 10-127) (released June 17, 2010) [hereinafter *Broadband Framework NOI*].

<sup>5</sup> 47 U.S.C. § 303. See also *NBC v. U.S.*, 319 U.S. 190, 215 (1943).

<sup>6</sup> 47 U.S.C. § 303.

<sup>7</sup> *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 F.C.C.R. 5901, 5914-5915 (2007) [hereinafter *Wireless Internet Regulation*].

In the FCC's order reclassifying wireless broadband ISPs as information service providers, the FCC emphasized that wireless ISPs use the radio spectrum and remain subject to Title III obligations:

Title III generally provides the Commission with authority to regulate "radio communications" and "transmission of energy by radio."<sup>8</sup> Among other provisions, Title III gives the Commission the authority to adopt rules preventing interference and allows it to classify radio stations.<sup>9</sup> It also establishes the basic licensing scheme for radio stations, allowing the Commission to grant, revoke, or modify licenses.<sup>10</sup> Title III further allows the Commission to make such rules and regulations and prescribe such restrictions and conditions as may be necessary to carry out the provisions of the Act.<sup>11</sup> Application of provisions governing access to and use of spectrum (and their corresponding Commission rules) is not affected by whether the service using the spectrum is classified as a telecommunications or information service under the Act. Accordingly, our decision today to classify wireless broadband Internet access services as information services does not affect the applicability of Title III provisions and corresponding Commission rules to these services. Further, nothing in this order should be construed as modifying any spectrum use authorizations and service rule obligations arising out of license conditions or rules governing unlicensed use of the spectrum.<sup>12</sup>

Accordingly, wireless ISPs are subject to the requirements of Title III with regard to spectrum licensing, authorization, and service rules including public interest mandates.<sup>13</sup> The FCC retains

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<sup>8</sup> See Title III - Provisions Relating to Radio, 47 U.S.C. §§ 301 et seq. See also *IP-Enabled Services NPRM*, 19 FCC Rcd at 4918.

<sup>9</sup> 47 U.S.C. §§ 302, 303.

<sup>10</sup> 47 U.S.C. §§ 307-309, 312, 316.

<sup>11</sup> 47 U.S.C. § 303(r). See, e.g., *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 16340, para. 27 (1999) (used the Commission's licensing authority under Title III to extend resale requirements to enhanced services provided by CMRS carriers).

<sup>12</sup> *Wireless Internet Regulation*, *supra* note 4, at 5914-5915.

<sup>13</sup> *Wireless Internet Regulation*, *supra* note 4, at 5914-5915. FCC General Counsel Austin Schlick in a speech explaining FCC Chairman Genachowski's proposal for a "Third Way" to regulate ISP conduct to protect consumers and competition emphasized that the Commission retained "direct jurisdiction over licensing of wireless services under Title III of the Communications Act." Austin Schlick, *A Third Way Legal Framework for Addressing the Comcast Dilemma 5* (May 6, 2010), available at: <http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html>.

direct jurisdiction to regulate wireless ISP practices that harm consumers and competition or do not serve the public interest.

Professor Sandoval's study of wireless ISP advertising promises, described more fully in her reply comments in the FCC's Open Internet proceeding,<sup>14</sup> indicates that many wireless ISPs contradict promises of unlimited Internet service through separate terms that materially restrict the scope of the service offered. Her study examined wireless ISPs AT&T, MetroPCS, T-Mobile, Sprint, Clearwire, Verizon, and Comcast Mobile. Table I highlights this study's findings regarding wireless ISP practices:

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<sup>14</sup> Reply Comments of Catherine J.K. Sandoval, *In re Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, (filed April 26, 2010), available at <http://fjallfoss.fcc.gov/ecfs/comment/view?id=6015587689>.

**Table 1**

<b>ISP</b>	<b>Restricts P2P</b>	<b>Restricts VoIP</b>	<b>Advertises Internet Service as Unlimited but Prohibits Excessive Use or has Soft Bandwidth Caps</b>	<b>Prohibits “excessive” or atypical use</b>	<b>Notable Network Management limits</b>
<b>Wireless ISPs:</b>					
AT&T Mobile	Yes	No	Until June 8, 2010 marketed Unlimited plans subject to excessive use limits. Such plans still available to subscribers before that date	Yes for Unlimited plans	
T-Mobile	Yes	No	Yes	Yes for Unlimited Plans	
MetroPCS	Yes	Yes	Yes	Yes for Unlimited Plans	
Sprint	No	No	Yes, soft 5 GB cap	Yes though Plan labeled Unlimited	
Verizon	No	No	No, Bandwidth caps 250 MB to 5 GB		
Clearwire	No	No	Yes for “Unlimited” plans		
Comcast Mobile	No	No	No, 5 GB Bandwidth Cap	May use “fairness” tools to temper “excessive” use	Uses “proportional fairness algorithm.” Does not define fair allocation levels. May limit throughput speeds, data transfer rates, deny, terminate, modify or suspend Service for undefined excessive use

b. The Commission Has Ancillary Jurisdiction Over Broadband Internet Service Providers Whose Actions Affect The Regulated Operations Of Telephony Common Carriers, Broadcasters, And Cable Operators

The Commission inquires whether "discontinuance, reduction, [or] impairment of service [provides] a potential basis for an assertion of ancillary authority regarding harmful Internet service provider practices."<sup>15</sup> Policies and practices by an information service that negatively affect directly regulated services under Titles II, III and VI constitute the basis for ancillary jurisdiction the D.C. Circuit recognized in *Comcast v. FCC*.<sup>16</sup>

The D.C. Circuit in *Comcast v. FCC* recognized that the Commission's attempt to constrain Comcast's behavior in the ISP market satisfied the first part of the ancillary jurisdiction test in that it involved communication by wire, the subject of the Commission's express regulatory authority.<sup>17</sup> The D.C. Circuit found that the Commission's rationale in the *Comcast* case did not, however, satisfy the second part of the ancillary jurisdiction test.<sup>18</sup> That second prong requires that the regulation be "reasonably ancillary to the Commission's effective performance of its statutorily mandated duties."<sup>19</sup> This test allows Commission regulatory intervention to address practices by entities using wireless or wireline communication that harm services within the boxes of express regulation under Communications Act titles II, III or VI: common carriers, spectrum-based services, or cable-video services.

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<sup>15</sup> *Broadband Framework NOI*, *supra* note 4, at note 48.

<sup>16</sup> *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (citing *American Library Assn. v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 175 (1968) (holding that even though the then-existing Communications Act gave the FCC no authority to regulate cable television, it could adopt a rule limiting the extent to which cable television systems could transmit local broadcast signals as "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.")).

<sup>19</sup> *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 175.

An example of such a practice is broadband terms of service giving ISPs wide latitude to discipline subscribers charged with using “excess” Internet service and impose surcharges, suspend or terminate service. Many wireless ISPs offer both “telephone” service as a “commercial mobile radio service” common-carrier under Section 332, and wireless broadband internet services regulated under Title III. A wireless ISP’s determination that the subscriber has violated the Internet service’s AUP or TOS policies, surcharges, or termination of subscriber service for “excessive” use of “Unlimited” Internet service, may also lead to disconnection of Title II CRMS voice services bundled with Internet services. In this manner, ISP policies affect common-carrier services, and may reduce access to telecommunications services, as well as Internet service.

The Social Science Research Council found that ISP billing problems stemming from different understandings about the services offered and its costs were the second leading cause of loss of Internet service after subscriber income fluctuation.<sup>20</sup> Subscribers who lose their Internet service because of billing issues may also lose their wireless telephone service. Subscribers sent to collections for not paying additional charges for data use they believed was unlimited based on ISP advertisements may incur a negative credit report. The resulting lower credit score may affect their ability to get other wireless telephone or ISP service, or the deposits they have to pay for such services, as well as their ability to secure cable, DSL or satellite video or telephone service.<sup>21</sup> In this manner, wireless ISP practices affect the ability of consumers to secure other

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<sup>20</sup> Social Sciences Research Council (SSRC), Dharma Dailey, Amelia Byrne, Joe Karaganis and Jaewon Chung, BROADBAND ADOPTION IN LOW-INCOME COMMUNITIES, 8 (March 2010), *available at* <http://www.ssrc.org/publications/view/1EB76F62-C720-DF11-9D32-001CC477EC70/>..

<sup>21</sup> *See* Universal Service Administrative Company, Overview of the Low Income Program, <http://www.universalservice.org/li/about/default.aspx> (providing funds and programs to support access to telecommunications services for low-income Americans). No such regulations protect access to cable, satellite or ISP services.

services regulated under the Communications Act; accordingly, the Commission has the authority to regulate these behaviors, the *Comcast* decision notwithstanding.

The FCC's Broadband Framework NOI, inquires whether it can "address conduct by broadband Internet service providers that are not also telecommunications carriers."<sup>22</sup> The Commission specifically asks whether it can take action against broadband service providers that are not telecommunications carriers, but whose actions "may affect the regulated operations of telephony common carriers, broadcasters, and cable operators."<sup>23</sup>

In addition to its direct Title III jurisdiction over wireless ISPs, the Commission's ancillary jurisdiction over wireless ISPs is founded upon the Commission's authority to regulate ISP practices that compete with, interconnect with, and affect spectrum-based services, common-carriers, and cable video services.<sup>24</sup> There are a number of practices which are of particular concern: ISP mischaracterizations about the type and extent of Internet service offered, deceptive practices undermining spectrum-based services, and network management efforts which shift network traffic from information service providers onto common carriers.

i. ISP Mischaracterizations

ISP mischaracterizations about the type and extent of Internet service offered affects competition between ISPs using different media, including spectrum-based ISPs. Deceptive practices also undermine spectrum-based services such as broadcast, CMRS services, common carriers, and cable-based video.

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<sup>22</sup> *Broadband Framework NOI*, *supra* note 1, at note 44.

<sup>23</sup> *Id.*, at note 47.

<sup>24</sup> *Cf.* U.S. v. *Southwestern Cable Co.*, 392 U.S. 157, 175.

ISP representations of “Unlimited” Internet or data access contradicted by poorly communicated restrictions on their Internet access invite people to cancel cable, satellite, common-carrier or other regulated services. Over the past two years, over 800,000 U.S. households have cancelled their cable-video, satellite or telephone company-based video service and now rely on the Internet for video.<sup>25</sup>

Attenuated links to Internet service restrictions do not satisfy the Federal Trade Commission Act’s requirements for proximity, placement and conspicuousness of material limits.<sup>26</sup> Neither do they fulfill the mandate that wireless ISPs operate in the public interest as spectrum-based services under the Communications Act.<sup>27</sup> ISP enticements to switch based on deception, misrepresentation, or material omissions invoke FCC ancillary jurisdiction in the same way that the Supreme Court upheld regulation of cable service in *Southwestern Cable* to address unfair competition with regulated broadcast services.<sup>28</sup> Deceptive conduct in the ISP marketplace can and does undermine the ability of cable-video, common carrier and spectrum-based services to compete and serve American consumers.

ii. Deceptive/Anticompetitive Behavior.

Professor Sandoval’s study of wireless ISP advertising promises, described more fully in her reply comments in the FCC’s Open Internet proceeding,<sup>29</sup> indicates that ISPs commonly

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<sup>25</sup> Erik Shonfeld, Estimate: 800,000 U.S. Households Abandoned Their TVs for the Web, TechCrunch (April 13, 2010), <http://techcrunch.com/2010/04/13/800000-households-abandoned-tvs-web/>.

<sup>26</sup> Sandoval, *supra* note 4, at 667 (“placement, proximity, and prominence are key factors for effective disclosure” under the FTCA deceptive conduct provisions); FTC, DOT COM DISCLOSURES: INFORMATION ABOUT ONLINE ADVERTISING (2000), *available at* <http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf>).

<sup>27</sup> *Wireless Internet Regulation*, *supra* note 5, at 5914-5915.

<sup>28</sup> *See supra*, note 13.

<sup>29</sup> Reply Comments of Catherine J.K. Sandoval, *In re* Preserving the Open Internet Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, (filed April 26, 2010), *available at* <http://fjallfoss.fcc.gov/ecfs/comment/view?id=6015587689>.

contradict promises of unlimited Internet service through separate terms that materially restrict the scope of the service offered. Many of those restrictions are difficult to find, so vague that they are incomprehensible, are written in smaller fonts than the advertising representations, and are displayed in gray lettering against a white background that makes them difficult to read.<sup>30</sup> Many wireless ISPs prohibit “excessive use” that is not typical of a residential consumer, or limit subscribers to “fair share” use, without giving the subscriber any yardstick for what level of use is permitted for their “Unlimited” Internet service.<sup>31</sup>

### iii. Effects of ISP Network Management Policies on Common Carrier ISPs

In 2010, 840 ISPs offered their services as common carriers.<sup>32</sup> Choosing this regulatory category makes common-carrier ISPs eligible for universal service funding which offers subsidies for carriers and discounts for consumers.<sup>33</sup> The Organization for the Promotion and Advancement of Small Telecommunications Companies explained that “[A]ll RoR[rates of return]-regulated carriers (which encompasses most rural ILECs [Independent Local Exchange Carriers]) offer broadband transmission on a stand-alone Title II common carrier basis.<sup>34</sup> This

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<sup>30</sup> See, for example, Clearwire, Acceptable Use Policy, (Effective Nov. 22, 2009) (using a small gray font for its AUP and TOS, in contrast to the larger black font for its service descriptions), <http://www.clearwire.com/company/legal/aup.htm> (last visited April 4, 2010).

<sup>31</sup> See *supra* note 16.

<sup>32</sup> *Framework for Broadband Internet*, *supra* note 5, at ¶ 34.

<sup>33</sup> *Framework for Broadband Internet*, *supra* note 5, at ¶ 34 (citing 47 U.S.C. § 254(e) (“only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support”). ISPs operating under the Information Service Provider category are not eligible for universal service funding according to the letter of the Communications Act, an interpretation that FCC seeks to clarify to determine whether Information Service Providers are eligible for Universal Service Funding. *Framework for Broadband Internet*, *supra* note 5, at ¶ 34.

<sup>34</sup> *Framework for Broadband Internet*, *supra* note 5, at ¶ 34 (citing Organization for the Promotion and Advancement of Small Telecommunications Companies, GN Docket No. 09-51, at 30-31 (June 8, 2009).

means that they are required to offer that transmission at “specified, non-discriminatory rates, terms, and conditions, including to non-facilities based Internet service providers.”<sup>35</sup>

Common carrier laws require ISPs electing this classification to treat traffic flowing across the ISP’s network including all Internet traffic without unreasonable discrimination.<sup>36</sup>

This would prohibit a common-carrier ISP from engaging in unreasonable discrimination to refuse P2P traffic, and may require them to take P2P traffic non-common-carrier ISPs deflect.<sup>37</sup>

Cablevision’s Optimum Internet service “allocates maximum bandwidth to non-subscribers seeking to upload P2P files from subscribers,” but doesn’t disclose the boundaries of that bandwidth limit.<sup>38</sup> This policy may shift traffic to other ISPs who do not limit non-subscriber access to subscriber P2P files. Time Warner Cable’s Acceptable Use Policy Time Warner Cable reserves right to “(l)imit the number of P2P sessions a user may conduct at the same time” and “(l)imit the aggregate bandwidth for certain usage protocols such as peer-to-peer and newsgroups.”<sup>39</sup> Time Warner Cable does not reveal the limit for simultaneous P2P sessions, information subscribers could use to moderate their bandwidth consumption.

The FCC cited the likelihood that Comcast’s interference with P2P use shifted traffic to ISPs offering their services as common carriers as a basis for FCC jurisdiction over Comcast’s

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<sup>35</sup> *Id.*

<sup>36</sup> *Framework for Broadband Internet*, *supra* note 5, at ¶ 34; 47 U.S.C. § 202(a) (it is “unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service....”).

<sup>37</sup> *Framework for Broadband Internet*, *supra* note 5, at ¶ 34 (citing 47 U.S.C. § 153(46) (A provider is engaged in common carriage if it “make[s] capacity available to the public indifferently”); *U.S. Telecom Ass’n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002) (“[C]ommon carrier status turns on: (1) whether the carrier ‘holds himself out to serve indifferently all potential users’; and (2) whether the carrier allows ‘customers to transmit intelligence of their own design and choosing.’”).

<sup>38</sup> *Optimum AUP*, *supra* note 16.

<sup>39</sup> Time Warner Cable, Operator Acceptable Use Policy, [http://help.twcable.com/html/twc\\_misp\\_aup.html](http://help.twcable.com/html/twc_misp_aup.html).

actions.<sup>40</sup> The D.C. Circuit in *FCC v. Comcast* found that the FCC waived this argument because of a shift in its defense on appeal.<sup>41</sup> This jurisdictional basis merits further exploration as the basis for ancillary jurisdiction and an example of the consequences of ISP protocol discrimination and network management practices. No meta-network data is publicly available to detect shifts from one ISP to another or to a class of ISPs such as common carriers based on policies to limit or reject certain types of traffic and applications. Such diversions are, however, not only logically possible but likely.

P2P enables users to search the Internet for others known as “peers” willing to share files at minimum speeds specified by the user.<sup>42</sup> If some ISPs deny or limit access to their subscribers, the P2P program will continue to seek out peers subscribing to other ISPs who will accept that traffic.<sup>43</sup> ISP refusals to accept P2P traffic may in fact increased load on the network as users resubmit their queries or the P2P software resends queries.<sup>44</sup> Traffic-shifting would burden networks whose subscribers can transmit files at the specified minimum speed, and who must, by law, accept all traffic without unreasonable discrimination.<sup>45</sup>

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<sup>40</sup> Sandoval, *supra* note 4, at n. 40 (citing *FCC Comcast Order*, *supra* note 12, at 13,037–38) (contending that the FCC’s ancillary jurisdiction over Comcast’s actions rested in part on Title II of the Communications Act, 47 U.S.C. § 201(a), based on the “the possibility that Comcast’s interference with its customers’ uploads will cause the computer trying to download to seek content from another computer connected to the network of a common carrier, thereby increasing the traffic on that common carrier’s network”).

<sup>41</sup> *Comcast v. FCC*, 600 F.3d 642, 660-61 (holding that the FCC waived this jurisdictional basis because it changed its characterization of this argument in its appellate brief).

<sup>42</sup> Stephanos Androutsellis-Theotokis and Diomidis Spinellis, *A Survey of Peer-to-Peer Content Distribution Technologies*, 36 ACM Computing Surveys 335, 346 (2004).

<sup>43</sup> *Id.* (observing that the P2P software sends a user’s query through the network, searching for other users who have that file, and are able to deliver the file at the requested minimum speed). To prevent searches from remaining on the network indefinitely, file sharing programs usually limit the number of “hops” a search can take from peer to peer; once the search reaches that limit, the software terminates the query. *Id.*

<sup>44</sup> Oleg V. Pavlov and Khalid Saeed, *A Resource-Based Analysis of Peer-to-Peer Technology*, 20 SYS. DYNAMICS REV. 237, 251 (2004).

<sup>45</sup> See 47 U.S.C. § 202(a).

The ability of information service provider-based ISPs to burden or undermine common-carriers ISPs through traffic shifting is a real concern that merits further study. The fact that many common-carrier ISPs are rural telephone companies raises the additional concern that information service provider ISP traffic-shifting practices may burden rural telecommunications services and rural broadband access.

The Farm Bill mandated that the Commission take steps to promote rural broadband access, complementing the goals of the Broadband Data Improvement Act and the American Recovery and Investment Act which required to the Commission to promote broadband access nationally.<sup>46</sup> The Commission should also investigate the effect of denial or limits on P2P traffic by information service provider-classified ISPs on common-carrier ISPs, rural ISPs, and rural broadband service. Regulations to redress ISP practices that shift traffic to common carriers, particularly rural common carriers who serve areas where residents have few choices of ISPs, would fall under *Southwestern Cable's* recognition of the Commission's ancillary jurisdiction to address practices that undermine services directly regulated under Title II of the Communications Act.<sup>47</sup>

## **Conclusion**

The Commission has the authority and duty to ensure that spectrum-based services operate in the public interest and that information services do not engage in unfair competition against other services regulated under Titles II, III and VI of the Communications Act. Lack of market power by any one ISP has not prevented deceptive or anticompetitive behavior or harm to

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<sup>46</sup> Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 6112, 122 Stat. 923, 1966 (2008) (2008 Farm Bill); Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (codified at 47 U.S.C. § 1301 *et seq.*; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

<sup>47</sup> *Cf. U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 175.

consumers. Pending consideration of proposals to adjust the regulatory classification,<sup>48</sup> and thus the rules governing ISPs, the Commission can and should exercise its direct jurisdiction over wireless ISPs to ensure that spectrum-based licensees serve the “public interest, convenience, and necessity” under their Title III licensing obligations. The Commission can also use its ancillary jurisdiction to address unfair, deceptive or anticompetitive practices that undercut services regulated under Title II. This theory of ancillary jurisdiction also supports reclassification of ISPs to recognize their effect on regulated services, as well as their use of regulated wireline and wireless transmission components.

The Commission should gather and evaluate evidence of traffic-shifting and other anticompetitive practices that indicate the failure of the information service provider regulatory classification to restrain such practices and prevent harm to services regulated under Titles II, III and VI of the Communications Act. Commission regulation in this arena can and should protect consumers and competition, promote innovation and efficiency, serve the public interest, and promote the Internet as an open forum that supports economic development, speech, and democracy.

Sincerely

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<sup>48</sup> See Comments of the Broadband Institute of California and the Broadband Regulatory Clinic, *In re* Preserving the Open Internet Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, at 2-3 (filed Jan. 14, 2010), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020378859>.