Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF ALLIANCE LAW GROUP LLC ON THE FCC'S JUNE 17, 2010 NOTICE OF INQUIRY

Craig J. Blakeley
Jeffrey H. Matsuura
Alliance Law Group LLC
7700 Leesburg Pike, Suite 229
Tysons Corner, VA 22043-2623
(703) 848-8263

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Alliance Law Group LLC ("ALG"), by the undersigned, hereby submits its comments in response to the *Notice of Inquiry* ("NOI") in the above-referenced docket.[1] ALG believes that valuable lessons can be learned from the experiences of other countries throughout the world, many of which lead the U.S. in broadband development and deployment. Based upon the successful regulatory approaches utilized by other countries, ALG believes that the Commission should have jurisdiction over broadband Internet under Title II of the Communications Act.

Introduction and Summary

As set forth in more detail below, ALG takes no position on the question of *how* the Commission should assert jurisdiction over Internet broadband services.[2] However, ALG submits that it is vital that the Commission play a leading role in the development and implementation of national broadband Internet policies for the United States. In order to undertake that leadership role effectively, the Commission must retain the broadest possible

[1] *Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010).
[2] This includes the question whether the Commission itself has the authority to assert such jurisdiction or whether Congressional action is required.

regulatory authority over the telecommunications services, equipment, and operators involved in the development, management, and use of the U.S. broadband infrastructure.

Accordingly, regardless of how such jurisdiction is achieved, ALG believes that it is extremely important that the Commission have Title II jurisdiction over the Internet as a common carrier service. Such jurisdiction would be consistent with recognized international best practice and also would enable the United States to interact more effectively with other countries throughout the world as they address important issues concerning Internet oversight and regulation.

The Commission must carefully consider those international best regulatory practices, which provide useful and appropriate models for the Commission with respect to regulation of broadband Internet access, and apply them as appropriate as it asserts its regulatory oversight of broadband development in the United States. The failure to take into account the plainly relevant experiences and approaches of other countries, particularly of those that lead the U.S. in broadband development, would, we believe, be arbitrary and capricious. Moreover, if the Commission fails to reserve regulatory authority applicable to Internet broadband services consistent with that retained by other national governments, the competitive disadvantage that the United States is now experiencing relative to the development and deployment of broadband in those other countries will become even greater. Such a situation would be manifestly inconsistent with the American public interest.

Background

ALG's legal practice is focused on legal and policy issues associated with technology. This includes telecommunications, intellectual property, Internet and Internet-related issues

(such as e-commerce, e-government, and cybercrime), digital media, and electronic equipment (such as those regulated by the Commission).

ALG's practice has a strong international component. ALG lawyers have worked on telecom, intellectual property, e-commerce, cybercrime, digital media, and other issues in Lebanon, Jordan, Qatar, the Palestinian territories, Macedonia, Azerbaijan, South Africa, China, Canada, Japan, and other countries. The bulk of ALG's international work has been to provide policy-level advice to various governmental institutions on the enumerated issues.

Because of their international experience, the undersigned attorneys at ALG were asked to write a book on global information and communications technology ("ICT") issues. Research and writing of the book, covering ICT issues in more than 20 countries, including issues associated with broadband Internet access and management, has been completed and the book will be published later this year by West Publishing of Thomson Reuters.

In sum, the lawyers of ALG have been actively involved in telecommunications and information technology regulatory issues surrounding broadband Internet access, use, and management in the United States and abroad for many years. ALG thus is well qualified to comment on the Commission's NOI, particularly with respect to its relationship to and impact upon international telecommunications and Internet-related issues.

I. The U.S. Lags Behind Other Countries With Respect to Broadband Internet.

There is no question that the U.S. is not among the world leaders with respect to the penetration, speed or price of broadband.[3] Thus, according to statistics compiled by the Organization for Economic Cooperation Development ("OECD"), the United States ranks 15th

[3] See "Explaining International Broadband Leadership," Atkinson, R., Correa, D., & Hedlund, J., (The Information Technology & Innovation Foundation, May 2008) ("hereinafter "Broadband Leadership"), p. vii, ("The United States is behind in broadband deployment, speed, and price. Despite what some advocates and analysts claim, the United States is behind in broadband performance and its rank has been falling since 2001.")

among the OECD countries in the number of broadband subscribers per 100 inhabitants.[4] Moreover, the OECD ranks the U.S. 16th in the average monthly broadband subscription price (as measured in U.S. dollars).[5] When broadband speeds are examined, the U.S. also lags behind. According to the OECD, the average advertised broadband download speed in the U.S. is 14,619 kbit/s or 24th in the world, versus the broadband speed for number 1 Japan of 107,725 kbits/s.[6]

We submit that the U.S. lags behind other countries not only in terms of these measurable performance, penetration, and price characteristics for broadband but also in the way that broadband is defined and treated from a legal and regulatory perspective. For example, in 2009, France's highest court, the Constitutional Council, considered a challenge to the constitutionality of a French law that penalized repeat Internet copyright pirates by depriving them of Internet access. The court determined that the law was unconstitutional, in part because of its finding that denial of Internet access violated a fundamental human right protected by France's 1789 Rights of Man (Article 11).[7] Similarly, EU lawmakers have voted to require that any decision to sever Internet access, for example as punishment for copyright law violations, must be subject to legal review.[8]

Other nations have also moved toward recognition of Internet access as a vital right of citizenship. In 2000, the government of Estonia took legislative action to recognize access to information systems such as the Internet as a basic right of citizenship.[9] Similarly, the

[4] See "Broadban d Subscribers per 100 Inhabitants (Dec. 2009), on the OECD Broadband Portal at http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_1,00.html.
[5] See "Average Broadband Monthly Subscription Price," by Country, USD PPP (OECD, Oct. 2009) on the OECD Broadband Portal at http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_1,00.html.
[6] See "Average Advertised Download Speeds by Country, "(OECD, Oct., 2009) on the OEDC Broadband Portal at http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_1,00.html.
[7] For an overview of this decision see "France: Internet Access Now a Universal Right While U.S. Lags Behind in Broadband Rankings," (June 12, 2009) at http://www.openmediaboston.org/node/733.
[8] "E.U. Leaders Bolster Internet Access Protections," (N.Y. Times, Nov. 5, 2009).
[9] "Estonia, where being wired is a human right," 2003, at www.csmonitor.com/2003/0701/p07s01-woeu.html.

government of Greece declared a constitutional right of Greek citizens for access to the information society under development in that country.[10]

And, of course, within the past few weeks, the Finnish Government made broadband Internet access (of at least one megabyte per second) a legal right for all citizens of Finland.[11] Finland's government also committed that, by 2015, all Finns will have a 100 megabyte per second connection to the Internet. The government of Spain has established a similar public broadband access obligation, to be effective in 2011.[12]

Other countries, while not going quite so far as Finland, have made commitments to extend broadband connections to all homes[13]or have included extending broadband connections to rural or underserved communities as part of their universal service obligation. For example, the government of South Africa has made development of universal access to all digital services a key national priority, and to that end it created a government agency with the mission of promoting universal service, the Universal Service and Access Agency of South Africa ("USAASA).[14] The USAASA has the mandate to promote "digital inclusion" in South Africa by facilitating affordable access to the digital network and by fostering use of telecommunications and information services in support of economic development.[15]

Universal access to Internet and other information services is also a vital national policy objective in Malaysia. The government of Malaysia adopted a Broadband Implementation Strategy, and a core goal of that Strategy is provision of access to at least fifty percent of the

[10] APC European Internet Rights Project, at http://europe.rights.apc.org/c_rpt/greece.html.
[11] See "Finland: Internet Connection Made a Legal Right," (N.Y. Times, July 1, 2010)
[12] Marguerite Reardon, "Spain mandates affordable broadband for all," Nov. 20, 2009, at http://news.cnet.com/8301-30686_3-10402643-266.html.
[13] The United Kingdom, for example, has announced that all homes will be provided with a 2 megabyte per second Internet connection by 2012. See "Finland makes broadband a "legal right," (BBC, July 1, 2010) at http://www.bbc.co.uk/news/1046101048.
[14] Universal Service and Access Agency of South Africa Web site, at www.usaasa.org.za. .
[15] USAASA Vision and Mission, at www.usaasa.org.za/?q=con,11,StrategicOverview.

households in Malaysia by the end of 2010.[16] Management of the Malaysian Broadband Implementation Policy is the responsibility of the government agency, the National IT Council of Malaysia, which has as its mission, strategic management of the information technology interests of the nation of Malaysia.[17]

The International Telecommunications Union ("ITU") recognizes the significance of universal broadband Internet access. The ITU identifies a core part of its institutional mission as working to "facilitate universal access so that people everywhere can participate in, and benefit from, the emerging information society and the global economy."[18] The European Union also understands the significance of broadband Internet access. Through its Universal Service Directive, the EU established the policy requirement that data service rates and terms be appropriate to permit functional Internet access for all users.[19]

In a world where broadband Internet access is critical to the ability of an individual to realize full economic, social, and political benefits, and where more and more traditional telecommunications and communications services (such as telephone service and video delivery) are being shifted to the Internet, the future economic growth of United States – and its competitive position internationally -- will be seriously impaired if it does not more effectively provide broadband access for its citizens. The Commission should have the necessary legal authority to play a lead role in U.S. national efforts to improve the scope of broadband Internet access in this country.

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[16] National IT Council of Malaysia, Broadband Implementation Strategy, at www.nitc.my/index.cfm?&menuid=106&parentid=31.
[17] National IT Council of Malaysia Web site, at www.nitc.my/index.cfm?&menuid=15.
[18] International Telecommunications Union Web site, at www.itu.int/net/about/mission.aspx.
[19] European Commission, Universal Service Directive, Directive 2002/22/EC, 2002, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L002:EN:NOT.

II. Government Policies Play an Important Role in Internet and Broadband Development.

There are a number of reasons why broadband development in the U.S. is lagging, some of which are beyond the government's control. For example, population densities in several of the leading broadband countries, such as South Korea, are considerably higher than in the U.S, making it much easier and more economical to rapidly roll out fixed line broadband. Moreover, as pointed out in "Broadband Leadership," the U.S. has the longest copper loop length of any of the 13 OECD countries with available data, thus making fixed line broadband development and deployment more expensive in the U.S.

Notwithstanding these and other actors, we believe that the lack of an effective regulatory policy designed to promote and protect vigorous broadband development in the U.S. has played a role in helping create, and not overcoming, the existing broadband deficiency in the U.S. versus other countries in the world. In that regard, we believe that some valuable lessons can be learned by looking to best practices in other countries that have had more success than the U.S. in expanding and promoting broadband growth and speed at affordable prices. Among the most important of these "lessons learned" is that effective leadership by one designated governmental agency[20] matters a great deal, and may well be critical, to effective Internet and broadband development.[21]

Presence of a strong and active regulatory authority has been recognized as an essential foundation for effective broadband development. For example, the World Bank, through its Global Information and Communication Technologies Program, emphasizes the need for institutional reform, including reform of telecommunications sector regulation, in order to facilitate the effective development of important Internet-based applications such as electronic

[20] See Broadband Leadership," p. viii ("Leadership matters.")
[21] See "Broadband Leadership," p. viii ("We can learn from best practices in other nations.")

commerce and electronic government.[22] Similarly, the OECD has identified regulatory issues affecting the development of broadband infrastructure and broadband access as critical topics of interest with respect to the expansion of e-commerce and other information-based socio-economic objectives.[23]

III. Recognizing the Significance of Government Involvement in Broadband Deployment, Nations Around the World Have Asserted Broad Regulatory Authority Over Telecommunications and Information Technology.

Today, it is common practice for government regulatory authorities to be granted a broad oversight mandate encompassing both telecommunications and information technology activities. This approach is largely inspired by the widespread recognition that technology, business models, and consumer expectations have combined to create an environment in which the most meaningful way to consider telecommunications and computing activities is as a truly converged sector, the information and communications sector.

Not surprisingly, some of the most economically and technologically advanced nations in the world entrust their telecommunications sector regulatory agency with the authority to oversee Internet and other information technology operations. For instance, the Infocomm Development Authority in Singapore ("IDA") operates under a broad mandate to create an information technology environment that advances the country's economic, social, and political goals.[24] The IDA plays a highly active role in the policy development and implementation process in Singapore, a role spanning technology, economic development, and social reform.

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[22] World Bank, Global Information and Communication Technologies Program description at http://go.worldbank.org/RTP5F5XD0.
[23] OECD Working Party on Communication, Infrastructures, and Services Policy, at www.oecd.org/about/0,3347,en_2649_34225_1-1-1-1-1,00.html.
[24] Singapore Infocomm Development Authority Web site, at www.ida.gov.sg/Policies%20and%20Regulation/20060416174257.aspx.

The Japanese government has restructured its ministries as part of an effort to make its regulatory system more appropriate for the information society. Merging several regulatory agencies, Japan established the Ministry of Internal Affairs and Communications, an institution regulating a wide range of sectors and activities, including the telecommunications and information technology fields.[25] The Ministry includes the Information and Communications Bureau, the Telecommunications Bureau, and the Global ICT Strategy Bureau, a regulatory framework designed to reflect more accurately the realities associated with the convergence of the telecommunications and information technology sectors and to address the clear need perceived by the Japanese government for development of a coordinated national ICT policy to support Japan's international competitiveness.[26]

In its Electronic Communications Act of 2002, Sweden identified as a national policy objective universal functional access to the Internet. Sweden determined that the country should be at the "cutting edge" of providing effective and secure Internet access for all its citizens.[27] To that end, the Ministry of Enterprise, Energy, and Communication, acting through the National Post and Telecom Agency assumed the lead role in Sweden's information society initiatives.[28]

The expansion of ICT regulatory authority over the Internet is not limited to world leaders in Internet development and use. Many developing countries also have embraced a regulatory framework that enables their ICT regulators to assert authority expansive enough to have a meaningful impact on broadband Internet access and use. For example, in 2009, Kenya expanded the authority of its Communications Commission to include jurisdiction over information technology as well as telecommunications, as part of a policy effort to make the

[25] Japan Ministry of Internal Affairs and Communications Web site, at www.soumu.go.jp/english/soumu/io.html#link09.
[26] Japan Ministry of Internal Affairs and Communications Web site, at www.soumu.go.jp/english/index.html.
[27] Sweden Electronic Communications Act (2002), at www.sweden.gov.se/content/1/c6/01/84/54/5ae98894.pdf.
[28] Ministry of Enterprise, Energy, and Communication We site, at www.sweden.gov.se/sb/d/2156/a/19950 and National Post and Telecom Agency Web site, at www.pts.se/en-gb.

Commission a "converged regulator."[29] Kenya's converged regulator asserts its regulatory authority to guide the development and use of traditional telecommunications equipment and services, the full range of information technologies, and Internet applications, including electronic commerce. Similarly, the Communication Services Regulatory Agency of Uruguay defines as an important aspect of its mission oversight with regard to digital information of any nature.[30] The nation of Georgia has authorized its telecommunications regulator, the National Communications Commission, to oversee a broad range of electronic communications and information exchange.[31]

Both economically developed and developing countries now widely apply a regulatory scheme that addresses the converged ICT sector and the full range of that sector's applications. There is widespread agreement in the developed and developing worlds that a strong ICT regulator is essential to tap successfully the full range of technical, economic, and social benefits offered by broadband Internet. The Federal Communications Commission should apply a similar perspective in the United States.

Perhaps this regulatory philosophy, that guides many governments of different countries with regard to broadband Internet use, was most clearly expressed in Denmark. The National IT and Telecommunications Agency of Denmark asserts jurisdiction over the entire ICT sector. It describes the mission pursued by the Agency succinctly when it explains that "We create the groundwork for digitization of Denmark. NITA is to ensure that Denmark has optimal conditions for growth as a knowledge society."[32] This mission is readily understood and exceptionally appropriate for the Internet age. A country that adopts a more limited vision of the ICT regulatory mission does so at its own great peril.

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[29] Communications Commission of Kenya Web site, at www.cck.go.ke/about/what_we_do.html.
[30] Communication Services Regulatory Agency of Uruguay Web site, at www.ursec.gub.uy.
[31] Georgian National Communications Commission Web site, at www.gncc.ge/lang_id=ENG.
[32] National IT and Telecommunications Agency of Denmark Web site, at http://en.itst.dk.

IV. Lack of Adequate Authority Over Broadband Access and Operations by the Commission Will Have an Adverse Impact on the U.S. Relative to Other Nations.

The United States will be adversely affected on the global scene if the Commission fails to possess regulatory jurisdiction adequate to ensure that it can have a meaningful impact on the evolution of broadband Internet access in this country. As noted previously, the United States is, at present, not among the leading nations in the world with regard broadband Internet. Numerous other countries are already implementing national broadband development and access strategies, and are creating regulatory systems that will accelerate broadband deployment and use.

The United States will likely fall further behind other countries if the U.S. fails to create a regulatory climate sufficient to ensure that national broadband policies are effectively implemented. Application of the full scope of its regulatory authority by the Commission is essential in order to help the United States develop and implement the type of comprehensive broadband Internet policy that will enable the U.S. to gain ground on its competitors – countries that are themselves already well on the road to implementing their own versions of such a policy.

Failure to assert the Commission's full regulatory authority in the context of broadband access will also undermine the prospects of success for national broadband and Internet policies and strategies. Although numerous federal government departments and agencies must be actively involved in the development and execution of U.S. national plans associated with promoting broadband use, it is essential that one federal agency lead the national effort. That agency should be the Commission, based on its legal mandate and its expertise. In order to

perform that lead role effectively, the Commission must retain at its disposal the full range of its legal regulatory authority.

V. Reasoned Decision-making Requires that the Commission Consider International Best Practices in Determining its Authority With Respect to Broadband Internet Access.

In order to exercise reasoned decision-making with respect to regulation associated with broadband Internet access, the Commission must consider best practices in other jurisdictions. As discussed above, a significant number of countries have implemented regulatory schemes governing broadband services. Developed and developing nations alike have opted for a framework of regulation that provides their leading telecommunications sector regulator with the authority and the responsibility to cultivate a technical, economic, social, and political climate conducive to widespread public Internet access. This type of regulatory framework has been constructed in various nations by broadly interpreting the authority of the regulatory entity and, when necessary, expanding that authority through legislative action. The Commission should examine and implement this same type of regulatory approach.

As the Commission conducts this broadband Internet policy analysis, it should also consider regulatory lessons recently learned from the financial services sector. Dramatic deregulation of financial services oversight contributed to development of a weak regulatory environment. In that environment, regulatory institutions were unable to protect the public interest. Reservation of regulatory authority need not translate into application of burdensome regulations. Instead, reservation of authority provides the regulator with the tools to necessary to protect the public interest as circumstances change. Rational decision-making requires that the Commission consider the potential adverse consequences of its failure to assert or possess adequate authority over broadband Internet access services and operations.

VI. Conclusion

The Commission must have regulatory authority adequate to ensure that it can effectively oversee development and execution of a national broadband Internet policy for the United States. We believe that this requires that the Commission possess Title II common carrier jurisdiction over broadband Internet.

Important guidance regarding the scope and content of such regulatory authority can be synthesized by examination of the experiences of other nations. Review and analysis of best regulatory practices in other countries demonstrates the importance of broadband Internet and the need for the lead regulatory agency to possess broad authority over the converging telecommunications and information technology sectors. We submit that the Commission's failure to consider these international regulatory trends and to apply the lessons from those international experiences to the context in the United States would constitute an arbitrary and capricious omission from its decision-making process.

Respectfully submitted,

ALLIANCE LAW GROUP LLC

By: /s/ Craig J. Blakeley
/s/ Jeffrey H. Matsuura

Alliance Law Group LLC
7700 Leesburg Pike, Suite 229
Tysons Corner, Virginia 22043-2623
(703) 848-8263

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