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

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

NOTICE OF INQUIRY

Adopted: June 17, 2010 **Released: June 17, 2010**

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

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1. This Notice begins an open, public process to consider the adequacy of the current legal framework within which the Commission promotes investment and innovation in, and protects consumers of, broadband Internet service.[1] Until a recent decision of the United States Court of Appeals for the

[1] In this Notice we use the term "broadband Internet service" to refer to the bundle of services that facilities-based providers sell to end users in the retail market. This bundle allows end users to connect to the Internet, and often includes other services such as e-mail and online storage. In prior orders we have referred to this bundle as "broadband Internet access service." We use the term "wired," as in "wired broadband Internet service," to distinguish platforms such as digital subscriber line (DSL), fiber, cable modem, and broadband over power lines (BPL), from platforms that rely on wireless connections to provide Internet connectivity and other services in the last mile. We refer to the service that may constitute a telecommunications service as "Internet connectivity service" or "broadband Internet connectivity service." As discussed below, Internet connectivity service allows users to communicate with others who have Internet connections, send and receive content, and run applications online. For administrative simplicity we incorporate the same distinction between broadband and narrowband that

(continued....)

District of Columbia Circuit,[2] there was a settled approach to facilities-based broadband Internet service, which combined minimal regulation with meaningful Commission oversight. The *Comcast* opinion, however, held that the Commission went too far when it relied on its "ancillary authority" to enjoin a cable operator from secretly degrading its customers' lawful Internet traffic. *Comcast* appears to undermine prior understandings about the Commission's ability under the current framework to provide consumers basic protections when they use today's broadband Internet services. Moreover, the current legal classification of broadband Internet service is based on a record that was gathered a decade ago. Congress, meanwhile, has reaffirmed the Commission's vital role with respect to broadband, and the Commission has developed a National Broadband Plan recommending specific agency actions to encourage deployment and adoption.[3]

2. These developments lead us to seek comment on our legal framework for broadband Internet service. In addition to seeking original suggestions from commenters, we ask questions about three specific approaches. First addressing the wired service offered by telephone and cable companies and other providers, we seek comment on whether our "information service" classification of broadband Internet service remains adequate to support effective performance of the Commission's responsibilities. We then ask for comment on the legal and practical consequences of classifying Internet connectivity service as a "telecommunications service" to which all the requirements of Title II of the Communications Act would apply. Finally, we identify and invite comment on a third way under which the Commission would: (i) reaffirm that Internet information services should remain generally unregulated; (ii) identify the Internet connectivity service that is offered as part of wired broadband Internet service (and only this connectivity service) as a telecommunications service; and (iii) forbear under section 10 of the Communications Act[4] from applying all provisions of Title II other than the small number that are needed to implement the fundamental universal service, competition and small business opportunity, and consumer protection policies that have received broad support. We seek comment on the same issues as they relate to terrestrial wireless and satellite broadband Internet services, as well as on other factual and legal issues specific to these wireless services that bear on their appropriate classification. We further seek comment on discrete issues, including the states' proper role with respect to broadband Internet service.

I. INTRODUCTION

3. This Commission exists "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United

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the Commission applied in the classification orders we revisit here. That is, services with over 200 kbps capability in at least one direction will be considered "broadband" for the particular purposes of these Notices. *See, e.g., Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14860 n.15 (2005) (*Wireline Broadband Report and Order* and *Broadband Consumer Protection Notice*), *aff'd sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

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

[3] *See* American Recovery and Reinvestment Act of 2009 § 6001, 47 U.S.C. § 1305(k)(2)(A), (D) (2010). The Plan contains dozens of recommendations to fulfill the congressional aims articulated in the Recovery Act, including specific proposals to increase access and affordability; maximize utilization of broadband Internet services; and enhance public safety, consumer welfare and education throughout the United States. Roughly half of the Plan's recommendations are directed to the Commission itself. Federal Communications Commission, *FCC Sends National Broadband Plan to Congress* (March 16, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296880A1.pdf.

[4] 47 U.S.C. § 160.

States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, 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."[5] During more than 75 years of technological progress—from the time of tube radios and telephone switchboards to the modern era of converged digital services—the Commission has promoted innovation and investment in new communications services and protected and empowered the businesses and consumers who depend on them.

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

i. The Commission generally does not regulate Internet content and applications;

ii. Access to an Internet service provider via a dial-up connection is subject to the regulatory rules for telephone service; and

iii. For the broadband Internet services that most consumers now use to reach the Internet, the Commission has refrained from regulation when possible, but has the authority to step in when necessary to protect consumers and fair competition.

5. The first element of our consistent approach, preserving the Internet's capacity to enable a free and open forum for innovation, speech, education, and job creation, finds expression in (among other provisions) section 230 of the Communications Act, which states Congress's conclusion that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."[6]

6. The second element, oversight of dial-up access to the Internet under the common carriage framework of Title II of the Communications Act, is a facet of traditional telephone regulation.[7] Although Internet users increasingly depend on broadband communications connections for Internet access, approximately 5.6 million American households still use a dial-up telephone connection.[8]

7. The third element of the framework, restrained oversight of broadband Internet service, was expressed clearly on September 23, 2005, for example, when the Commission released two companion decisions. The first "establishe[d] a minimal regulatory environment for wireline broadband Internet access services."[9] It reclassified telephone companies' broadband Internet service offerings as indivisible "information services" subject only to potential regulation under Title I of the Communications Act and the doctrine of ancillary authority.[10] In that decision, the Commission

[5] 47 U.S.C. § 151.

[6] 47 U.S.C. § 230(a)(4). Section 230 also supports the third element of the historical framework.

[7] *See Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13101, para. 91 n.209 (2009) (*Open Internet NPRM*).

[8] Nat'l Telecomms. & Info. Admin. (NTIA), U.S. Dep't of Commerce, *Digital Nation: 21st Century America's Progress Toward Universal Broadband Internet Access*, 4-5 (2010) (*Digital Nation*).

[9] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14855, para. 1.

[10] "Ancillary authority" refers to the Commission's discretion under the statutory provisions that establish the agency (Title I of the Communications Act) to adopt measures that are "reasonably ancillary to the effective performance of the Commission's various responsibilities." *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1962).

articulated its belief that "the predicates for ancillary jurisdiction are likely satisfied for any consumer protection, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers."[11] The second decision that day adopted principles for an open Internet, again expressing confidence that the Commission had the "jurisdiction necessary to ensure that providers of telecommunications for Internet access . . . are operated in a neutral manner."[12] Earlier this year, the Commission unanimously reaffirmed in a *Joint Statement on Broadband* that "[e]very American should have a meaningful opportunity to benefit from the broadband communications era," and that "[w]orking to make sure that America has world-leading high-speed broadband networks—both wired and wireless—lies at the very core of the FCC's mission in the 21st Century."[13] Together, these and other agency decisions show the Commission's commitment to restrained oversight of broadband Internet service, and its equally strong resolve to ensure universal service and protect consumers and fair competition in this area when necessary.

8. Before the *Comcast* case, most stakeholders—including major communications service providers—shared the Commission's view that the information service classification allowed the Commission to exercise jurisdiction over broadband Internet services when required.[14] But the D.C. Circuit concluded that the Commission lacked authority to prohibit practices of a major cable modem Internet service provider that involved secret interruption of lawful Internet transmissions, which the Commission found were unjustified and discriminatory and denied users the ability to access the Internet content and applications of their choice.[15] Today, in the wake of the *Comcast* decision, the Commission faces serious questions about the legal framework that will best enable it to carry out, with respect to broadband Internet service, the purposes for which Congress established the agency. Meanwhile, Congress has highlighted the importance of broadband networks and Internet-based content and services for economic growth and development and has directed the Commission to develop policies to address

[11] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14914, para. 109.

[12] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986, 14988, para. 4 (2005) (*Internet Policy Statement*).

[13] *Joint Statement on Broadband*, FCC 10-42, GN Docket No. 10-66, paras. 1, 3 (rel. Mar. 16, 2010) (*Joint Statement on Broadband*).

[14] *See, e.g.*, Letter from Jeffry Brueggeman, General Attorney for SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 02-33, 01-337, 95-20, 98-10; CS Docket No. 02-52; GN Docket No. 00-185, attach. at 22 (filed July 31, 2003) ("By regulating broadband Internet access services under Title I instead of Title II, the Commission will give itself the flexibility to allow market forces, not regulation, to shape broadband offerings, while at the same time retaining jurisdiction to intercede at some later point if necessary to protect consumers."); Reply Comments of National Association of Broadcasters, CC Docket Nos. 02-33, 95-20, 98-10, at 3 (July 1, 2002) ("[R]egardless of the regulatory label placed on wireline broadband Internet access services, the Commission has the flexibility to adopt the safeguards necessary to guarantee that consumers have access to the offerings of competing service and content providers." (citations omitted)); Comments of Verizon, CC Docket Nos. 02-33, 95-20, 98-10, at 42 (May 3, 2002) ("Nor should classification of broadband under Title I lead to any erosion of the consumer protection provisions of the Communications Act."); Comments of Cox Communications, GN Docket No. 00-185, at 27 (Dec. 1, 2000) ("[A] Title I classification ensures that the Commission has ample ability and authority to implement rules to correct any market failures or other policy concerns about cable data services that might develop in the future."); *see also Communications, Consumer's Choice, and Broadband Deployment Act of 2006: Hearing on S. 2686 Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. (May 18, 2006) (testimony of Steve Largent, President and CEO, CTIA - The Wireless Association®, at 3) ("The industry agrees with FCC Chairman Martin that the FCC already has the jurisdiction and ability to address any problems in this area . . . .").

[15] *See Comcast*, 600 F.3d at 651-60.

concerns about the pace of deployment, adoption, and utilization of broadband Internet services in the United States.[16]

9. *Comcast* makes unavoidable the question whether the Commission's current legal approach is adequate to implement Congress's directives. In this Notice, we seek comment on the best way for the Commission to fulfill its statutory mission with respect to broadband Internet service in light of the legal and factual circumstances that exist today. We do so while standing ready to serve as a resource to Congress as it considers additional legislation in this area.[17]

10. We emphasize that the purpose of this proceeding is to ensure that the Commission can act within the scope of its delegated authority to implement Congress's directives with regard to the broadband communications networks used for Internet access. These networks are within the Commission's subject-matter jurisdiction over communication by wire and radio and historically have been supervised by the Commission.[18] We do not suggest regulating Internet applications, much less the content of Internet communications. We also will not address in this proceeding other Internet facilities or services that currently are lightly regulated or unregulated, such as the Internet backbone, content delivery networks (CDNs), over-the-top video services, or voice-over-Internet-Protocol (VoIP) telephony services. Our questions instead are directed toward addressing broadband Internet service in a way that is consistent with the Communications Act, reduces uncertainty that may chill investment and innovation if allowed to continue, and accomplishes Congress's pro-consumer, pro-competition goals for broadband.

II. DISCUSSION

A. Background

11. The Commission has long sought to ensure that communications networks support a robust marketplace for computer services operated over publicly accessible networks, from the early database lookup services to today's social networking sites. To provide context for the later discussion of the Commission's options for a suitable framework for broadband Internet service, we briefly describe this historical backdrop.

1. The Commission's Classification Decisions

12. In 1966, the Commission initiated its *Computer Inquiries* "to ascertain whether the services and facilities offered by common carriers are compatible with the present and anticipated communications requirements of computer users."[19] In *Computer I*, the Commission required "maximum separation" between large carriers that offered data transmission services subject to common carrier requirements and their affiliates that sold data processing services.[20] Refining this approach, in *Computer*

[16] *See infra* para. 25.

[17] *See* Letter from Rep. Henry A. Waxman, Chairman, House Committee on Energy and Commerce, and Sen. John D. Rockefeller, IV, Chairman, Senate Committee on Commerce, Science, and Transportation to Julius Genachowski, Chairman, FCC (May 5, 2010) ("[I]n the near term, we want the agency to use all of its existing authority to protect consumers and pursue the broad objectives of the National Broadband Plan. . . . In the long term, if there is a need to rewrite the law to provide consumers, the Commission, and industry with a new framework for telecommunications policy, we are committed as Committee Chairmen to doing so."). Commenters may wish to address how the Commission should proceed on these issues in light of Congressional developments.

[18] *See Comcast*, 600 F.3d at 646-47.

[19] *Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm. Servs.*, Docket No. 16979, Notice of Inquiry, 7 F.C.C. 2d 11, 11-12, para. 2 (1966) (*Computer I Notice of Inquiry*) (subsequent history omitted).

[20] *Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm. Servs.*, Docket No. 16979, Final Decision and Order, 28 F.C.C. 2d 267, 270, para. 12, 275, para. 24 (1971) (*Computer I Final*

(continued....)

II and *Computer III* the Commission required facilities-based providers of "enhanced services" to separate out and offer on a common carrier basis the "basic service" transmission component underlying their enhanced services.[21]

13. In the Telecommunications Act of 1996, Congress built upon the *Computer Inquiries* by codifying the Commission's distinction between "telecommunications services" used to transmit information (akin to offerings of "basic services") and "information services" that run over the network (akin to "enhanced services").[22] In a 1998 report to Congress, the Commission attempted to indicate how it might apply the new law in the Internet context. Approximately 98 percent of households with Internet connections then used traditional telephone service to "dial-up" their Internet access service provider, which was typically a separate entity from their telephone company.[23] In the report to Congress—widely known as the "*Stevens Report*," after Senator Ted Stevens—the Commission stated that Internet access service as it was then being provided was an "information service."[24] The *Stevens Report* declined to address whether entities that provided Internet connectivity over their own network facilities were

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Decision), *aff'd sub nom. GTE Servs. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 F.C.C. 2d 293 (1972).

[21] *Amendment of Section 64.702 of the Comm'n's Rules & Regs, Second Computer Inquiry*, Final Decision, 77 F.C.C. 2d 384, 417-35, paras. 86-132, 461-75, paras. 201-31 (1980) (*Computer II Final Decision*), *aff'd sub nom. Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *Amendment of Section 64.702 of the Comm'n's Rules & Regs.* (*Third Computer Inquiry*), CC Docket No. 85-229, Phase 1, Report and Order, 104 F.C.C. 2d 958, para. 4 (1986) (*Computer III Phase I Order*) (subsequent history omitted).

[22] Telecommunications Act of 1996, Pub. L. No. 104-104, § 3(a)(2), 110 Stat. 56, 58-60 (1996), *codified at* 47 U.S.C. § 153(20) ("The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."), § 153(43) ("The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."), § 153(46) ("The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.").

[23] *See Inquiry Concerning the Deployment of Advanced Telecommunications Services to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2446, para. 91 (1999); Ind. Anal. & Tech. Div., Wireline Comp. Bur., *Trends in Telephone Service*, 2-10, chart 2.10, 16-3, tbl. 16.1 (Aug. 2008).

[24] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11536, para. 73 (1998) (*Stevens Report*). In a 1997 Report and Order, the Commission had previously concluded that "[w]hen a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's service offering. . . . [I]nformation services are not inherently telecommunications services." *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 9180, para. 789 (1997) (subsequent history and citations omitted). The Commission followed that precedent, without further analysis, in a Report and Order concerning pole attachment rates, to conclude that a cable operator providing Internet service over a facility that also provides cable television service is not a telecommunications carrier. The Commission found it unnecessary at that time to make a decision regarding the best classification of such services. *Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-151, 13 FCC Rcd 6777, 6794-96, paras. 33-34 (1998) (subsequent history omitted). *See also Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 338 (2002) (noting that "the FCC . . . has reiterated that it has not yet categorized Internet service").

offering a separate telecommunications component.[25] The courts, rather than the Commission, first answered that question.

14. In 2000 the United States Court of Appeals for the Ninth Circuit held that cable modem Internet service is a telecommunications service to the extent that the cable operator "provides its subscribers Internet transmission over its cable broadband facility" and an information service to the extent the operator acts as a "conventional [Internet Service Provider (ISP)]."[26] At the time, the Commission's *Computer Inquiry* rules required telephone companies to offer their digital subscriber line (DSL) transmission services as telecommunications services.[27] The Ninth Circuit's decision thus put cable companies' broadband transmission service on a regulatory par with DSL transmission service.

15. In 2002, the Commission exercised its authority to interpret the Act and disagreed with the Ninth Circuit. Addressing the classification of cable modem service, the Commission observed that "[t]he Communications Act does not clearly indicate how cable modem service should be classified or regulated."[28] Based on a factual record that had been compiled largely in 2000,[29] the Commission's *Cable Modem Declaratory Ruling* described cable modem service as "typically includ[ing] many and sometimes all of the functions made available through dial-up Internet access service, including content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet, including access to the World Wide Web."[30] The Commission

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[25] *Stevens Report*, 13 FCC Rcd at 11530, para. 60 ("[T]he matter is more complicated when it comes to offerings by facilities-based providers."), 11535 n.140 ("We express no view in this Report on the applicability of this analysis to cable operators providing Internet access service."), 11540, para. 81 ("In essential aspect, Internet access providers look like other enhanced—or information—service providers. Internet access providers, typically, own no telecommunications facilities."); *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, 4824, para. 41 (2002) (*Cable Modem Declaratory Ruling*) ("The [*Stevens Report*] did not decide the statutory classification issue in those cases where an ISP provides an information service over its own transmission facilities."), *aff'd sub nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*); *Appropriate Framework for Broadband Access to Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3027-28, paras. 14-16 (2002) ("[In the *Stevens Report*, t]he Commission recognized . . . that its analysis focused on ISPs as entities procuring inputs from telecommunications service providers. Thus, classifying Internet access as an information service in this context left open significant questions regarding the treatment of Internet (and information) service providers that own their own transmission facilities and that engage in data transport over those facilities to provide an information service. In addition, the Commission did not explicitly address the regulatory classification of wireline broadband Internet access services." (citation omitted)).

[26] *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-79 (9th Cir. 2000); *but see Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275-78 (11th Cir. 2000) (holding that Internet service is neither a cable service nor a telecommunications service), *rev'd sub nom. Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002); *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000) (concluding that cable modem service is a cable service), *aff'd on other grounds*, 257 F.3d 356 (4th Cir. 2001).

[27] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24030-31, paras. 36-37 (1998); *see generally Wireline Broadband Report and Order*, 20 FCC Rcd at 14867-75, paras. 23-40.

[28] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4819, para. 32.

[29] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry, 15 FCC Rcd 19287 (2000).

[30] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4804, para. 10 (footnotes omitted).

noted that cable modem providers often consolidated these functions "so that subscribers usually do not need to contract separately with another Internet access provider to obtain discrete services or applications, such as an e-mail account or connectivity to the Internet, including access to the World Wide Web."[31]

16. The Commission identified a portion of the cable modem service it called "Internet connectivity," which it described as establishing a physical connection to the Internet and interconnecting with the Internet backbone, and sometimes including protocol conversion, Internet Protocol (IP) address number assignment, domain name resolution through a domain name system (DNS), network security, caching, network monitoring, capacity engineering and management, fault management, and troubleshooting.[32] The *Ruling* also noted that "[n]etwork monitoring, capacity engineering and management, fault management, and troubleshooting are Internet access service functions that are generally performed at an ISP or cable operator's Network Operations Center (NOC) or back office and serve to provide a steady and accurate flow of information between the cable system to which the subscriber is connected and the Internet."[33] The Commission distinguished these functions from "Internet applications [also] provided through cable modem services," including "e-mail, access to online newsgroups, and creating or obtaining and aggregating content," "home pages," and "the ability to create a personal web page."[34]

17. The Commission found that cable modem service was "an offering . . . which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications."[35] The Commission further concluded that, "as it [was] currently offered,"[36] cable modem service as a whole met the statutory definition of "information service" because its components were best viewed as a "single, integrated service that enables the subscriber to utilize Internet access service," with a telecommunications component that was "not . . . separable from the data processing capabilities of the service."[37] The Commission thus concluded that cable modem service "does not include an offering of telecommunications service to subscribers."[38]

18. When the United States Supreme Court considered the *Cable Modem Declaratory Ruling* in the *Brand X* case,[39] all parties agreed that cable modem service either *is* or *includes* an information service.[40] The Court therefore focused, in pertinent part, on whether the Commission permissibly interpreted the Communications Act in concluding that cable modem service providers offer only an information service, rather than a separate telecommunications service and information service.[41] The

[31] *Id.* at 4806, para. 11 (footnotes omitted). The Commission defined cable modem service as "a service that uses cable system facilities to provide residential subscribers with high-speed Internet access, as well as many applications or functions that can be used with high-speed Internet access." *Id.* at 4818-19, para. 31.

[32] *Id.* at 4809-11, paras. 16-17 (citations omitted).

[33] *Id.* at 4810-11, para. 17 (citations omitted).

[34] *Id.* at 4811, para. 18 (citation omitted).

[35] *Id.* at 4822, para. 38.

[36] *Id.* at 4802, para. 7.

[37] *Id.* at 4823, paras. 38-39.

[38] *Id.* at 4832, para. 39.

[39] *See Brand X*, 545 U.S. 967.

[40] *See id.* at 987.

[41] *See id.* at 986-87.

Court's opinion reaffirms that courts must defer to the implementing agency's reasonable interpretation of an ambiguous statute. Justice Thomas, writing for the six-Justice majority, recited that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts."[42] Furthermore, "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis."[43]

19. Turning specifically to the Communications Act, Justice Thomas wrote: "[T]he statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission."[44] "The questions the Commission resolved in the order under review," Justice Thomas summed up, "involve a subject matter [that] is technical, complex, and dynamic. The Commission is in a far better position to address these questions than we are."[45] Justice Breyer concurred with Justice Thomas, stating that he "believe[d] that the Federal Communications Commission's decision falls within the scope of its statutorily delegated authority," although "perhaps just barely."[46]

20. In dissent, Justice Scalia, joined by Justices Souter and Ginsburg, expressed the view that the Commission had adopted "an implausible reading of the statute[,] . . . thus exceed[ing] the authority given it by Congress."[47] Justice Scalia reasoned that "the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on offer—especially when seen from the perspective of the consumer or end user."[48]

21. After the Supreme Court affirmed the Commission's authority to classify cable modem service, the Commission eliminated the resulting regulatory asymmetry between cable companies and other broadband Internet service providers by issuing follow-on orders that extended the information service classification to broadband Internet services offered over DSL and other wireline facilities,[49] power lines,[50] and wireless facilities.[51] The Commission nevertheless allowed these providers, at their own discretion, to offer the broadband transmission component of their Internet service as a separate telecommunications service.[52] Exercising that flexibility, providers—including more than 840 incumbent

[42] *Id.* at 980 (discussing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

[43] *Id.* at 981 (quoting *Chevron*).

[44] *Id.* at 991.

[45] *Id.* at 1002-03 (internal citation and quotation marks omitted).

[46] *Id.* at 1003 (Breyer, J., concurring).

[47] *Id.* at 1005 (Scalia, J., dissenting).

[48] *Id.* at 1008.

[49] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14863-65, paras. 14-17, 14909-12, paras. 103-06.

[50] *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13281-82, paras. 1-2 (2006) (*BPL-Enabled Broadband Order*).

[51] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5909-110, paras. 19-26, 5912-14, paras. 29-33 (2007) (*Wireless Broadband Order*).

[52] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14858, para. 5, 14900-03, paras. 89-95, 14909-10, para. 103; *BPL-Enabled Broadband Order*, 21 FCC Rcd at 13289, para. 15; *Wireless Broadband Order*, 22 FCC Rcd at

(continued....)

local telephone companies[53]—currently offer broadband transmission as a telecommunications service expressly separate from their Internet information service.[54]

2. The Commission's Established Policy Goals

22. In the 1996 Act, Congress made clear its desire that the Commission promote the widespread availability of affordable Internet connectivity services, directing the Commission to adopt universal service mechanisms to ensure that "[a]ccess to advanced telecommunications and information services . . . [is] provided in all regions of the Nation."[55] Congress also instructed the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[56] The Commission's classification decisions in the *Cable Modem Declaratory Ruling* and the later follow-on orders were intended to support the policy goal of encouraging widespread deployment of broadband.[57] The Commission's hypothesis was that classifying all of broadband Internet service as an information service, outside the scope of any specific regulatory duty in the Act, would help achieve Congress's aims.[58]

23. At the same time, the Commission acted with the express understanding that its information service classifications would not impair the agency's ability to protect the public interest. For example, when the Commission permitted telephone companies to offer broadband Internet service as solely an information service, it emphasized that this new classification would not remove the agency's "ample" Title I authority to accomplish policy objectives related to consumer protection, network

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5913-14, para. 33. In the 2005 order, the Commission also eliminated the *Computer Inquiry* requirements for wireline broadband Internet service. *Wireline Broadband Report and Order*, 20 FCC Rcd at 14875-98, paras. 41-85.

[53] Of those, approximately 800 incumbent local exchange carriers participate in the National Exchange Carrier Association, Inc. (NECA) DSL Access Service Tariff. National Exchange Carrier Association, Tariff F.C.C. No. 5, pages 17-80 to 17-87.3, Section 17.6 (NECA DSL Tariff). NECA is a non-profit association that files tariffs on behalf of typically smaller rate-of-return carriers so those carriers do not have to file individual tariffs. *See, e.g.*, 47 C.F.R. §§ 69.601, 69.603. Through that voluntary tariff, NECA members offer retail end users and wholesale Internet service providers a DSL access service that "enables data traffic generated by a customer-provided modem to be transported to a DSL Access Service Connection Point using the Telephone Company's local exchange service facilities." NECA DSL Tariff at page 8-1, Section 8.1.1.

[54] *See* Comments of Organization for the Promotion and Advancement of Small Telecommunications Companies, GN Docket No. 09-51, at 30-31 (June 8, 2009) ("[A]ll RoR[rate of return]-regulated carriers (which encompasses most rural ILECs) offer broadband transmission on a stand-alone Title II common carrier basis. This 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 (ISPs)." (citation omitted)).

[55] 47 U.S.C. § 254(b)(2).

[56] Telecommunications Act of 1996 § 706, *codified as amended at* 47 U.S.C. § 1302.

[57] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4801, para. 4 ("[C]onsistent with statutory mandates, the Commission's primary policy goal is to 'encourage the ubiquitous availability of broadband to all Americans.'") (citing 47 U.S.C. § 157 nt (section 706)); *Wireline Broadband Report and Order*, 20 FCC Rcd at 14855, para. 1, 14865, para. 17, 14894-96, paras. 77-79; *BPL-Enabled Broadband Order*, 21 FCC Rcd at 13281-82, para. 2, 13287, para. 10; *Wireless Broadband Order*, 22 FCC Rcd at 5902, para. 2, 5911, para. 27.

[58] *See, e.g., Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4801, para. 4; *Wireline Broadband Report and Order*, 20 FCC Rcd at 14856, para. 3 ("We are confident that the regulatory regime we adopt in this Order will promote the availability of competitive broadband Internet access services to consumers, via multiple platforms, while ensuring adequate incentives are in place to encourage the deployment and innovation of broadband platforms consistent with our obligations and mandates under the Act.").

reliability, and national security.[59] The *Wireline Broadband Report and Order* thus was accompanied by a *Broadband Consumer Protection Notice*, in which the Commission sought comment on "a framework that ensures that consumer protection needs are met by *all* providers of broadband Internet access service, regardless of the underlying technology."[60] The Commission stressed that its ancillary jurisdiction was "ample to accomplish the consumer protection goals we identify."[61] The Commission similarly referenced the *Broadband Consumer Protection Notice* when it extended the information service classification to broadband Internet services offered over power lines[62] and wireless facilities.[63]

24. On the same day it adopted the *Wireline Broadband Report and Order* and *Broadband Consumer Protection Notice*, moreover, the Commission unanimously adopted the *Internet Policy Statement*.[64] In this *Statement*, the Commission articulated four principles "[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet," and to "foster creation adoption and use of Internet broadband content, applications, services and attachments, and to insure consumers benefit from the innovation that comes from competition."[65] The principles are:

- consumers are entitled to access the lawful Internet content of their choice;
- consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;
- consumers are entitled to connect their choice of legal devices that do not harm the network; and
- consumers are entitled to competition among network providers, application and service providers, and content providers.[66]

The Commission expressed confidence that it had the "jurisdiction necessary to ensure that providers of telecommunications for Internet access . . . are operated in a neutral manner."[67]

3. Legal Developments

25. Recent legislative and judicial developments suggest a need to revisit the Commission's approach to broadband Internet service. Since 2008, Congress has passed three significant pieces of legislation that reflect its strong interest in ubiquitous deployment of high speed broadband communications networks and bear on the Commission's policy goals for broadband: the 2008 Farm Bill directing the Chairman to submit to Congress "a comprehensive rural broadband strategy," including recommendations for the rapid buildout of broadband in rural areas and for how federal resources can

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[59] *See Wireline Broadband Report and Order*, 20 FCC Rcd at 14914, para. 109, 14930, para. 146

[60] *Id.* at 14929-30, para. 146 (emphasis in original).

[61] *Id.* at 14930, para. 146.

[62] *See BPL-Enabled Broadband* Order, 21 FCC Rcd at 13290-91, para. 16.

[63] *See Wireless Broadband Order*, 22 FCC Rcd at 5925, para. 70.

[64] *Internet Policy Statement*, 20 FCC Rcd 14986.

[65] *Id.* at 14988, paras. 4-5.

[66] *Id.* at 14988, para. 4. All principles are subject to reasonable network management. *Id.* at 14988, para. 4 n.15.

[67] *Id.* at 14988, para. 4. Twice since, the Commission has sought comment on the need to expand on the *Internet Policy Statement*. *See Broadband Industry Practices*, WC Docket No. 07-52, Notice of Inquiry, 22 FCC Rcd 7894 (2007); *Open Internet NPRM*, 24 FCC Rcd 13064.

"best . . . overcome obstacles that impede broadband deployment";[68] the Broadband Data Improvement Act, to improve data collection and "promote the deployment of affordable broadband services to all parts of the Nation";[69] and the Reeovery Act, which, among other things, appropriated up to $7.2 billion to evaluate, develop, and expand access to and use of broadband services,[70] and required the Commission to develop the National Broadband Plan to ensure that every American has "access to broadband capability and . . . establish benchmarks for meeting that goal."[71] In the Recovery Act, Congress further directed the Commission to produce a "detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public," and a "plan for [the] use of broadband structure and services" to advance national goals such as public safety, consumer welfare, and education.[72] These three pieces of legislation, passed within a span of nine months, make clear that the Commission must retain its focus on implementing broadband policies that encourage investment, innovation, and competition, and promote the interests of consumers.

26. Even more recently, the D.C. Circuit's rejection of the Commission's attempt to address a broadband Internet service provider's unreasonable traffic disruption practices has cast a shadow over the Commission's prior understanding of its authority over broadband Internet services. In late 2007, the Commission received a complaint alleging that Comcast was blocking peer-to-peer traffic in violation of the *Internet Policy Statement*. In 2008, the Commission granted the complaint and directed Comcast to disclose specific information about its network management practices to the Commission, submit a compliance plan detailing how it would transition away from unreasonable network management practices, and disclose to the public the network management practices it intends to use going forward.[73] Comcast challenged that decision in the D.C. Circuit, arguing (among other things) that the Commission lacks authority to prohibit a broadband Internet service provider from engaging in discriminatory practices that violate the four principles the Commission announced in 2005.[74]

27. On April 6, 2010, the D.C. Circuit granted Comcast's petition for review and vacated the Commission's enforcement decision, holding that the Commission had "failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility.'"[75] The Commission had argued that ending Comcast's secret practices was ancillary to the statutory objectives Congress established for the Commission in sections 1 and 230(b) of the Act. The court rejected that argument on the ground that those sections are merely statements of policy by Congress—as opposed to grants of regulatory authority—and thus were not sufficient to support Commission action against Comcast.[76] The court also rejected the Commission's position that various other statutory provisions

[68] Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 6112, 122 Stat. 923, 1966 (2008) (2008 Farm Bill). Acting Chairman Copps transmitted the report to Congress on May 22, 2009. *See Rural Broadband Report Published in the FCC Record*, GN Docket No. 09-29, Public Notice, 24 FCC Rcd 12791 (2009).

[69] Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (codified at 47 U.S.C. § 1301 *et seq.*).

[70] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

[71] 47 U.S.C. § 1305(k)(2).

[72] *Id.* § 1305(k)(2)(B), (D).

[73] *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices et al.*, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008) (*Comcast Order*), *vacated sub nom. Comcast*, 600 F.3d 642.

[74] *See* Brief for Comcast Corp. at 41-54, *Comcast*, 600 F.3d 642.

[75] *Comcast*, 600 F.3d at 661 (quoting *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

[76] *Id.* at 651-58.

supported ancillary authority. As to section 706 of the Telecommunications Act of 1996, the court noted that the agency had previously interpreted section 706 as not constituting a grant of authority and held that the Commission was bound by that interpretation for purposes of the case.[77] The court also rejected the agency's reliance on sections 201, 256, 257, and 623 of the Communications Act.[78]

B. Approaches to Classification

28. In light of the legislative and judicial developments described above, we seek comment on whether our existing legal framework adequately supports the Commission's previously stated policy goals for broadband. First, we ask whether the current information service classification of broadband Internet service can still support effective performance of the Commission's core responsibilities. Second, we ask for comment on the legal and practical consequences of classifying the Internet connectivity component of broadband Internet service as a "telecommunications service" to which the full weight of Title II requirements would apply, and whether such a classification would accurately reflect the current market facts. Finally, we identify and invite comment on a third way, under which the Commission would classify the Internet connectivity portion of broadband Internet service as a telecommunications service but would simultaneously forbear, using the section 10 authority Congress delegated to us,[79] from all but a small handful of provisions necessary for effective implementation of universal service, competition and small business opportunity, and consumer protection policies.

29. The Commission has frequently expressed its commitment to protecting consumers and promoting innovation, investment, and competition in the broadband context.[80] We reaffirm that commitment here and ask commenters to address—in general terms, as well as in response to the specific questions posed below—which of the three alternative regulatory frameworks for broadband Internet service (or what other framework) will best position the Commission to advance these fundamental goals. We note that because the broadband Internet service classification questions posed in this part II.B involve an interpretation of the Communications Act, the notice and comment procedures we follow here are not required under the Administrative Procedure Act.[81] In order to provide the greatest possible opportunity for public comment, however, we are soliciting initial and reply comments via the traditional filing mechanisms, as well as input through our recently expanded online participation tools.[82]

1. Continued Information Service Classification and Reliance on Ancillary Authority

30. In this part, we seek comment on maintaining the current classification of wired broadband Internet service as a unitary information service. Under this approach, we would rely primarily on our ancillary authority to implement the Commission's broadband policies. We seek comment on whether our ancillary authority continues to provide an adequate legal foundation. Throughout the last decade, the Commission has stated its consistent understanding that Title I provided

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[77] *Id.* at 658-60.

[78] *Id.* at 660-61.

[79] 47 U.S.C. § 160.

[80] *See, e.g., Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4801-02, paras. 4-6; *Wireline Broadband Report and Order*, 20 FCC Rcd at 14855, para. 1, 14929-30, para. 146.

[81] *See* 5 U.S.C. § 553(b) (notice and comment requirements "do[] not apply" to "interpretive rules"); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (change in interpretation of statute does not require notice and comment procedures).

[82] *See infra* para **Error! Reference source not found.**114.

the Commission adequate authority to support effective performance of its core responsibilities.[83] Commissioners, including the two former Chairmen who urged the information service approach,[84] as well as cable and telephone companies and other interested parties,[85] individually expressed this understanding. In *Brand X*, the Supreme Court appeared to confirm this widely held view, stating that "the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction."[86] The *Comcast* decision, however, causes us to reexamine our ability to rely on Title I as the legal basis for implementing broadband policies.

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

a. Universal Service

32. Can the Commission reform its universal service program to support broadband Internet service by asserting direct authority under section 254, combined with ancillary authority under Title I? AT&T, for example, observes that section 254 provides that "[a]ccess to advanced telecommunications *and information services* should be provided in all regions of the nation," and that the Commission's universal service programs "shall" be based on this and other enumerated principles.[87] AT&T notes that the Commission's information service classification for broadband Internet service creates "tension" with "the text of Section 254(c)(1), which states that '[u]niversal service is an evolving level of

[83] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4840-42, paras. 73-79; *Broadband Consumer Protection Notice*, 20 FCC Rcd at 14929-30, para. 146; *Internet Policy Statement*, 20 FCC Rcd at 14987-88, para. 4.

[84] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4867 (Sep. Stmt. of Chmn. Powell) ("The Commission is not left powerless to protect the public interest by classifying cable modem service as an information service. Congress invested the Commission with ample authority under Title I."); *Wireline Broadband Report and Order*, 20 FCC Rcd at 14977-78 (Stmt. of Comm'r Abernathy) ("When the Commission first issued its tentative conclusion that [wireline broadband Internet] services were outside the scope of Title II, I emphasized my commitment to preserving any specific regulatory requirements that are necessary for the furtherance of critical policy objectives. In June, the *Brand X* majority made clear that the Commission retains the prerogative to exercise its Title I 'ancillary jurisdiction' to do just that."); *id.* at 14981 (Stmt. of Comm'r Copps, concurring) ("[T]he Commission's ancillary authority can accommodate our work on homeland security, universal service, disabilities access, competition, and Internet discrimination protections—and more."); Hearing on the Future of the Internet Before the S. Comm. on Commerce, Science and Transportation, 110th Cong. (April 22, 2008) (written stmt. of the Hon. Kevin J. Martin, Chairman, FCC, at 3) ("As the expert communications agency, it was appropriate for the Commission to adopt, and it is the Commission's role to enforce, this Internet Policy Statement. In fact, the Supreme Court in its *Brand X* decision specifically recognized the Commission's ancillary authority to impose regulations as necessary to protect broadband internet access.").

[85] *See supra* note 14.

[86] *Brand X*, 545 U.S. at 996.

[87] *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, attachment at 2 (Jan. 29, 2010) (*AT&T USF White Paper*) (quoting and citing 47 U.S.C. § 254(b)(2) (emphasis added)); 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*).

telecommunications services that the Commission shall establish periodically under this section.'"[88] But, AT&T suggests, "[o]ther evidence in the statutory text makes clear that Congress did not intend to disable the Commission from using universal service to support information services."[89] For example,

- "Section 254(b) *requires* the Commission to use universal service to promote access to 'advanced telecommunications and information services,'"
- "Section 254(c) . . . [refers] to an '*evolving* level of telecommunications services that the Commission shall establish periodically under this section[,]'" and
- Section 254(c)(2) "expressly authoriz[es] the Joint Board and the Commission to 'modif[y] . . . the definition of the *services* that are supported by Federal universal support mechanisms.'"[90] The reference to "services" in section 254(c)(2) may suggest that Congress intended universal service policies to support information services, even though the definition of universal service in section 254(c)(1) is explicitly limited to "telecommunications services."[91]

AT&T explains that section 254 "contains competing directives," but asserts that "the schizophrenic nature of Section 254 is simply another example of the many ways in which the 1996 Act is not a 'model of clarity.'"[92]

33. We seek comment on whether we may interpret section 254 to give the Commission authority to provide universal service support for broadband Internet service if that service is classified as a unitary information service. Could we provide support to information service providers consistent with section 254(e), which says that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support,"[93] and 214(e), which sets forth the framework for designating "telecommunications carrier[s] . . . eligible to receive universal service support"?[94]

34. AT&T posits that even after the *Comcast* decision, the Commission could bolster its reliance on section 254 by also relying on several other provisions of the Act.[95] First, the "necessary and proper clause" in section 4(i) of the Act allows the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[96] Second, the Act makes clear that the Commission's "core statutory mission"

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[88] *AT&T USF White Paper* at 2-3 (quoting 47 U.S.C. § 254(c)(1) (emphasis added)).

[89] *Id.*

[90] *Id.* at 3 (quoting 47 U.S.C. §§ 254(c)(1), (c)(2) (emphasis added)).

[91] *Id.* (emphasis added to quoted statutory provisions). *See also* Letter from Brita D. Strandberg, Counsel to Vonage Holdings Corp., to Marlene Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137, at 5 (Jan. 27, 2010) ("It would be contrary to the express will of Congress to view section 254(c)(1)'s use of the term 'telecommunications service' in this context as somehow overriding the remainder of section 254, limiting the services eligible for support to old technologies, prohibiting support for advanced services commonly available to consumers in urban areas.").

[92] *AT&T USF White Paper* at 5 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999)).

[93] 47 U.S.C. § 254(e).

[94] *Id.* § 214(e).

[95] *AT&T USF White Paper* at 5-13; *AT&T USF/Comcast Letter.*

[96] 47 U.S.C. § 154(i).

is to "make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges."[97] Third, the text of 254, as described above, suggests that Congress intended the Commission to support universal broadband Internet service.[98] Finally, the policy directive in section 706 of the 1996 Act instructs the Commission to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.[99] AT&T contends that section 706's directive supports the view that section 254 provides authority for supporting broadband Internet services with monies from the Universal Service Fund.[100] We seek comment on AT&T's analysis.

35. The National Cable and Telecommunications Association (NCTA) has put forward a similar legal theory rooted in section 254(h)(2) of the Communications Act.[101] That section gives the Commission authority "to enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries."[102] NCTA contends that because "the use of broadband in the home has become a critical component of the American education system . . . it is entirely reasonable to read the statutory directive to support Internet access for classrooms to include support for residential broadband service to households where it is reasonably likely that such service would be used for educational purposes."[103] Could the Commission interpret section 254(h)(2) to permit this type of support for broadband Internet service? Is this approach a permissible extension of the Commission's existing E-Rate program?[104] Would this approach enable the Commission to provide support for broadband Internet service only to households with school-aged children, or could the Commission provide support for adult education as well?

36. Another legal theory for promoting broadband deployment under the Commission's current classification of broadband Internet service rests directly on section 706 of the 1996 Act. Section 706(a) states that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[105] Section 706(c) defines "advanced telecommunications

[97] 47 U.S.C. § 151.

[98] *AT&T USF White Paper* at 6-7.

[99] 47 U.S.C. § 1302.

[100] *AT&T USF/Comcast Letter* at 2.

[101] *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*).

[102] 47 U.S.C. § 254(h)(2).

[103] *NCTA USF Letter* at 2. On May 20, 2010, the Commission adopted a Notice of Proposed Rulemaking that proposes "to revise our rules to allow schools with residential areas on their grounds to receive E-rate funding for priority one and priority two services in those residential areas in circumstances where the students do not have access to comparable schooling or training if they were to reside at home." *Schools and Libraries Universal Service Support Mechanism*; *A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Notice of Proposed Rulemaking, FCC 10-83, para. 57 (rel. May 20, 2010).

[104] *See NCTA USF Letter* attachment at 4 (citing *Schools and Libraries Universal Service Support Mechanism*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 02-6, 18 FCC Rcd 9202, 9207, para. 15 (2003)).

[105] 47 U.S.C. § 1302(a).

capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."[106] The D.C. Circuit rejected section 706(a) as a basis for the Commission's *Comcast* order because "[i]n an earlier, still-binding order . . . the Commission ruled that section 706 'does not constitute an independent grant of authority,'"[107] and "agencies 'may not . . . depart from a prior policy *sub silentio*.'"[108] We seek comment on whether the Commission should revisit and change its conclusion that section 706(a) is not an independent grant of authority.[109] What findings would be necessary to reverse that interpretation? If the Commission were to find that section 706(a) is an independent grant of authority, would that subsection, read in conjunction with sections 4(i) and 254, provide a firm basis for the Commission to provide universal service support for broadband Internet services?

37. Some parties have suggested that the Commission could rely on section 706(b) as a source of authority to support broadband Internet service with Universal Service Fund money.[110] That section provides that:

> [t]he Commission shall . . . annually . . . initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans . . . . In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.[111]

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

38. For each of these legal theories, the Commission seeks comment on the administrative record that would be needed to successfully defend against a legal challenge to implementation of the

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[106] 47 U.S.C. § 1302(d).

[107] *Comcast*, 600 F.3d at 658 (quoting *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 FCC Rcd 24012, 24047, para. 77 (1998)).

[108] *Id.* at 659 (quoting *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)).

[109] *But see* Reply Comments of Verizon & Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52, at 86 (April 26, 2010) ("Even apart from [the Commission's] prior conclusion, because 706(a) on its face is merely a general statement of policy, '. . . the Commission is seeking to use its ancillary authority to pursue a stand-alone policy objective, rather than to support its exercise of a specifically delegated power.'" (quoting *Comcast*, 600 F.3d at 659)).

[110] *See* Reply Comments of Verizon & Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52, at 89-90 (April 26, 2010); Letter from Jonathan E. Nuechterlein, Counsel for AT&T, Inc., to Marlene Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-191, WC Docket No. 07-52 (April 14, 2010).

[111] 47 U.S.C. § 1302(b).

theory. Would adopting these theories be consistent with the federal Anti-Deficiency Act and Miscellaneous Receipts Act?[112] What other issues should the Commission consider in evaluating these legal theories? Are there other legal frameworks that would allow us to promote universal service in the broadband context without revisiting our classification decisions?

b. Privacy

39. The Commission has long supported protecting the privacy of users of broadband Internet services. In 2005, the Commission emphasized in the *Wireline Broadband Report and Order* that "[c]onsumers' privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on [telephone] services."[113] The Commission believed at the time that it had jurisdiction to enforce privacy requirements, and "note[d] that long before Congress enacted section 222 of the Act," which requires providers of telecommunications services to protect confidential information, "the Commission had recognized the need for privacy requirements associated with the provision of enhanced services."[114] In 2007, the Commission extended the privacy protections of section 222 to interconnected VoIP services without resolving whether interconnected VoIP services are telecommunications services or information services.[115] More recently, the National Broadband Plan recommended that the Commission work with the Federal Trade Commission (FTC) to protect consumers' privacy in the broadband context.[116] Indeed, we fully intend that our efforts with regard to privacy complement those of the FTC. We seek comment on the best approach for ensuring privacy for broadband Internet service users under the Commission's current information service classification, and any legal obstacles to protecting privacy that may exist if the Commission retains that classification.

c. Access for Individuals with Disabilities

40. Section 255 requires telecommunications service providers and equipment manufacturers to make their services and equipment accessible to individuals with disabilities, unless not readily achievable.[117] Section 251(a)(2) requires telecommunications carriers "not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to

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[112] The Anti-Deficiency Act prohibits the Commission from making or authorizing an expenditure or obligation that exceeds the amount available for it in an appropriation or fund. *See* 31 U.S.C. § 1341. Congress enacted the original Miscellaneous Receipts Act in 1849 to ensure that federal monies are deposited into the United States Treasury, from which they may be removed only pursuant to the congressional appropriation process. *See* 31 U.S.C. § 3302(b).

[113] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14930, para. 148.

[114] *Id.* at 14930, para. 146, 14931, para. 149.

[115] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6954-57, paras. 54-59 (2007) (concluding that CPNI obligations are reasonably ancillary to the Commission's statutory responsibilities under sections 1, 222 and 706), *aff'd sub nom. Nat'l Cable & Telecom. Ass'n v. FCC*, 555 F.3d 996 (D.C. Cir. 2009).

[116] FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN at 55-57 (NATIONAL BROADBAND PLAN); *see also* Comments of Electronic Privacy Information Center, GN Docket No. 09-51, at 3 (June 8, 2009) ("[T]he Commission should exercise its ancillary jurisdiction to ensure that the national broadband plan includes robust privacy safeguards, lest consumers' critical broadband privacy interests go unaddressed.").

[117] 47 U.S.C. § 255.

section 255."[118] In the 2005 *Wireline Broadband Report and Order*, the Commission committed to exercise its authority "to ensure achievement of important policy goals of section 255" in the broadband context.[119] In 2007, the Commission exercised its ancillary authority to extend section 255 to interconnected VoIP providers,[120] and in 1999 the Commission similarly relied on ancillary authority to extend disability-related requirements to voicemail and interactive menu services.[121] More recently, a unanimous Commission stated its belief that disabilities should not stand in the way of Americans' "opportunity to benefit from the broadband communications era."[122] The Commission has also announced its intent to consider how "[t]o better enable Americans with disabilities to experience the benefits of broadband."[123] We seek comment on the best legal approaches to extending disability-related protections to broadband Internet service users under the Commission's current information service classification. Could we exercise ancillary authority to ensure access for people with disabilities? Could the Commission rely on the mandate in section 706(a) to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to *all* Americans,"[124] or the similar directive in section 706(b)?[125]

d. Public Safety and Homeland Security

41. As noted above, Congress created the Commission, in part, "for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire

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[118] *Id.* § 251(a)(2).

[119] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14921, para. 123.

[120] *IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, WC Docket No. 04-36, WT Docket No. 96-198, CG Dockct No. 03-123, CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275, 11286-89, paras. 21-24 (2007) (concluding that disability access regulations for interconnected VoIP are reasonably ancillary to the Commission's statutory responsibilities under sections 1 and 255) (subsequent history omitted). The Commission also exercised ancillary authority to extend section 225 telecommunications relay service obligations under the Commission's rules to providers of interconnected VoIP. *See id.* at 11291, para. 32.

[121] *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6461, para. 106 (1999) (*Section 255 Order*) ("Where, as here, we have subject matter jurisdiction over the services and equipment involved, and the record demonstrates that implementation of the statute will be thwarted absent use of our ancillary jurisdiction, our assertion of jurisdiction is warranted. Our authority should be evaluated against the backdrop of an expressed congressional policy favoring accessibility for persons with disabilities.").

[122] *Joint Statement on Broadband* at 1; *see also* Comments of Rehabilitation Engineering Research Center on Telecommunications Access, GN Docket Nos. 09-47, 09-51, 09-137, at 11 (Oct. 6, 2009) ("In order to ensure that individuals who use hearing aids and cochlear implants are not left out again, it is critical for the FCC to use its ancillary jurisdiction to carry over the protections now afforded under existing [Hearing Aid Compatibility] laws to handsets used with broadband communication technologies.").

[123] Federal Communications Commission, *Broadband Action Agenda* at 3, 4-5 (April 8, 2010), *available at* http://www.broadband.gov/plan/national-broadband-plan-action-agenda.pdf.

[124] 47 U.S.C. § 1302(a) (emphasis added).

[125] *See id.* 1302(b).

and radio communications."[126] *Comcast* did not address questions of national defense, public safety, homeland security, or national security. Are there bases for asserting ancillary authority over broadband Internet service providers for purposes of advancing such vital and clearly enumerated Congressional purposes? Could the Commission use its ancillary authority as a legal foundation for protecting cyber security and other public safety initiatives, such as 911 emergency and public warning and alerting services, with respect to broadband Internet service? Specifically, could the Commission rely on provisions in Title I either alone or in combination with provisions in Title II or Title III to support these public safety purposes, as well as data reporting and/or network reliability and resiliency standards with respect to broadband Internet services? As noted below, Title III contains several provisions that enable the Commission to impose on spectrum licensees obligations that are in the public interest.[127] With the convergence of the various modes of communications networks, many broadband Internet services incorporate wireline and wireless elements. What would be the effect if the Commission employed its Title III authority to achieve public safety goals with respect to wireless elements of such converged services? Could the Commission also regulate wireline elements of such services through its Title III and Title I authority because of the wireless elements incorporated into these services, or in the interests of ensuring regulatory parity and predictability? Could the Commission rely on the mandate in section 706(a) to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"[128] to ensure the security, reliability and resiliency of wired broadband Internet services, or to advance other public safety and homeland security initiatives?

e. Addressing Harmful Practices by Internet Service Providers

42. Although the D.C. Circuit rejected the legal theory the Commission relied on to address Comcast's interference with its customers' peer-to-peer transmissions, some have suggested that other theories of ancillary authority could support Commission action to protect against harmful practices of this sort. For example, one commentator has proposed that the Commission assert ancillary authority pursuant to sections 251(a) and 256 of the Act, which address interconnection by telecommunications carriers.[129] Although these provisions apply specifically to telecommunications carriers, the proposal asserts that they are not explicitly limited to the telecommunications services provided by such carriers.[130]

43. Section 251(a) requires each carrier "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[131] Reading section 251(a) as limited to telecommunication services, it has been suggested, "would make [the Commission's] rules promoting interconnection irrelevant" as the major carriers move increasingly toward providing services over broadband Internet networks.[132] Likewise, "[i]n a world where traditional public telecommunications networks and newer Internet-data-transmission networks are pervasively interconnected," it has been asserted, "it makes no sense to preclude the FCC's interoperability efforts [pursuant to section 256] from affecting information services."[133]

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[126] *Id.* § 151.

[127] *See infra* part II.D.

[128] *See* 47 U.S.C. § 1302(a).

[129] Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535, 571-98 (2010).

[130] *Id.*

[131] 47 U.S.C. § 251(a)(1).

[132] Werbach, *supra* note 129, at 589.

[133] Werbach, *supra* note 129, at 591 (citation omitted). *See* 47 U.S.C. § 256. The 2005 *Wireline Broadband Report and Order* stated that section 256 "affords the Commission adequate authority to continue overseeing broadband

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44. We seek comment on this reasoning. What factual findings would the Commission have to make to support reliance on sections 251(a) and/or 256 with respect to broadband Internet service? Would those facts support exercise of authority sufficient to implement the Commission's broadband policies in full, or in part? Under this approach, could the Commission address conduct by broadband Internet service providers that are not also telecommunications carriers? Does reliance on sections 251(a) and 256 limit Commission authority to protect competition and consumers to only those networks that are interconnected with the public telephone network? If so, what are the practical implications of this limitation? What is the significance of the *Comcast* decision, which held that "[t]he Commission's attempt to tether its assertion of ancillary authority to section 256" was flawed in that context because section 256 states that "[n]othing in this section shall be construed as expanding or limiting any authority that the Commission" otherwise has under law?[134] What else should the Commission consider as it evaluates the significance of sections 251(a) and 256 in this proceeding?

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

> unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.[135]

It has been suggested that "[i]f network operators are allowed the option of offering broadband Internet access services on a completely unregulated basis, that option could enable them to end run Section 202(a)" as carriers move toward providing services over broadband Internet networks, "and render that provision a dead letter."[136] We seek comment on the factual and legal assumptions underlying this argument, and whether this reasoning provides the Commission authority to address practices of broadband Internet service providers that endanger competition or consumer welfare.

46. As the Commission argued to the D.C. Circuit in the *Comcast* case, section 706(a) might also provide a basis for prohibiting harmful practices of Internet service providers. As noted above, the D.C. Circuit gave no weight to section 706(a) because the Commission had determined in a prior order that section 706(a) is not an independent grant of authority. We seek comment on the best reading of section 706(a). We also seek comment on whether section 706(b) could provide a legal foundation for rules addressing harmful practices by Internet service providers. If so, could the Commission adopt such rules on a national basis, or would it have to tailor its rules to particular geographic areas?[137] Would its rules depend on continued negative determinations in the annual broadband availability report?

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interconnectivity and reliability issues, regardless of the legal classification of wireline broadband Internet access service." *Wireline Broadband Report and Order*, 20 FCC Rcd at 14919, para. 120.

[134] *Comcast*, 600 F.3d at 659; 47 U.S.C. § 256(c).

[135] 47 U.S.C. § 202(a).

[136] Reply Comments of Center for Democracy & Technology, GN Docket No. 09-191, WC Docket No. 07-52, at 12 (April 26, 2010).

[137] *See* Reply Comments of Verizon & Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52, at 86 (April 26, 2010) ("While [706(b)] may well provide authority for universal service support for broadband deployment, it does not provide a statutory basis for the sweeping [open Internet] rules proposed here – which are not targeted to particular geographic areas or particular customers that lack advanced telecommunications capabilities and, far from accelerating infrastructure deployment, would deter infrastructure investment.").

47. The *Comcast* opinion also rejected arguments that other provisions of Titles II, III, and VI of the Communications Act supported the Commission's action against Comcast because Internet-enabled communications services that depend on broadband Internet service—such as VoIP and Internet video services—may affect the regulated operations of telephony common carriers, broadcasters, and cable operators. The court did not address the merits of these theories, but rather rejected them because they were not sufficiently articulated in the underlying Commission order.[138] Could such theories provide sufficient support for the Commission to address harmful practices of Internet service providers? What type of factual record would be required to support such theories? If the Commission relied on these theories, could it prohibit behavior—such as the covert blocking of online gaming or e-commerce services, perhaps—that does not obviously affect services clearly addressed by Titles II, III, or VI? Could the Commission rely on sections 624 or 629 of the Act to establish broadband policy related to cable modem service?[139]

48. We also invite comment on whether the portions of section 214(a) addressing discontinuance, reduction, and impairment of service provide a potential basis for an assertion of ancillary authority regarding harmful Internet service provider practices. That provision mandates that a common carrier may not "impair service to a community" without prior Commission approval.[140] Impairment, in the section 214(a) context, refers to both "the adequacy" and "quality" of the service provided.[141]

49. Are there other statutory provisions that could support the Commission's exercise of ancillary authority in this area? Do any statutory provisions preclude such action if the Commission retains its information service classification?[142]

50. Other harmful practices by broadband Internet service providers may involve a failure to disclose practices to consumers.[143] For instance, one problem identified by the Commission in the

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[138] *Comcast*, 600 F.3d at 660-61 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943)).

[139] *See, e.g.*, 47 U.S.C. § 544(e) ("Within one year after October 5, 1992, the Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality. The Commission shall update such standards periodically to reflect improvements in technology."), § 549(a) ("The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.").

[140] 47 U.S.C. § 214(a).

[141] *See id.* ("[N]othing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.").

[142] *See, e.g.*, Reply Comments of AT&T, GN Docket No. 09-191, WC Docket No. 07-52, at 141 (April 26, 2010) ("[T]he more intrusive aspects of the proposed rules would contradict specific provisions of the Communications Act no matter what the source of the Commission's jurisdictional authority. . . . *First*, Section 3(44) bars the Commission from regulating an entity as a common carrier when it is providing information services, yet the broad 'nondiscrimination' requirement proposed in the NPRM would do just that." (citations omitted)); Reply Comments of Verizon & Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52, at 82 (April 26, 2010) ("As an initial matter, a regulation by definition cannot be ancillary to the Commission's authority if it is *inconsistent* with the Act. . . . Here, the proposed rules would be squarely contrary to the Act to the extent they would impose the equivalent of core common carriage obligations (or worse) on information services.").

[143] *See* Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, at 5 (Feb. 8, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf ("Fourth, consumers should receive

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Comcast case was Comcast's failure to identify to customers its practice of degrading peer-to-peer traffic.[144] If the Commission maintains its information services framework for broadband Internet services, will it have sufficient authority to address these concerns?

f. Other Approaches to Oversight

51. Finally, we ask for public input on whether there are other approaches to fulfilling our role for broadband Internet services that would provide meaningful oversight consistent with maintaining robust incentives for innovation and investment. For instance, in a number of proceedings commenters have suggested that the Commission should pursue policies based on standards set by third parties and enforced by the Commission. In the Open Internet proceeding, Verizon and Google suggest that the Commission could create technical advisory groups "comprised of a range of stakeholders with technical expertise" to develop best practices, resolve disputes, issue advisory opinions, and coordinate with standards-setting bodies.[145] Although Verizon and Google "may not necessarily agree on which federal agency does or should have authority over these matters," they "do recognize as a policy matter that there should be some backstop role for federal authorities to prevent harm to competition and consumers if or when bad actors emerge anywhere in the Internet space, and . . . agree that involvement should occur only where necessary on a case-by-case base basis."[146] Commenters in other proceedings have suggested similar approaches.[147] We ask commenters to address whether the Commission should pursue a regime in which one or more third parties play a major role in setting standards and best practices relative to maintaining our policy goals for broadband Internet service. Pursuant to what authority could the Commission create a third party advisory group? What authority could the Commission delegate to such a third party or third parties? Would it be appropriate for other federal governmental entities, such as the

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meaningful information regarding their service plans. Simply put, such information is necessary to ensure that the market is working. Providers have every right to offer a variety of service tiers with varying bandwidth and feature options. Consumers need to know about these choices as well as whether and how their service plans protect them against spam, spyware and other potential invasions of privacy."); *Wireline Broadband Report and Order*, 20 FCC Rcd at 14933, para. 153 ("We seek comment on whether we should exercise our Title I authority to impose requirements on broadband Internet access service providers that are similar to our truth-in-billing requirements or are otherwise geared toward reducing slamming, cramming, or other types of telecommunications-related fraud. For example, during 2005, the Commission's Consumer and Governmental Affairs Bureau has received complaints about the billing practices of broadband Internet access services providers.").

[144] *Comcast Order*, 23 FCC Rcd at 13028, para. 1 ("Comcast's failure to disclose the company's practice to its customers has compounded the harm."), 13058-59, paras. 52-53.

[145] Joint Comments of Google & Verizon, GN Docket No. 09-191, WC Docket No. 07-52, at 4-7 (Jan. 14, 2010).

[146] *Id.* at 6.

[147] *See, e.g.*, Comments of Verizon & Verizon Wireless, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, at 3-5 (Oct. 13, 2009) ("[P]roviders must have the flexibility necessary to tailor their communications with consumers in response to changing customer needs. Thus, the appropriate model for meeting consumers' needs in today's competitive communications marketplace is to rely upon providers' strong incentives to satisfy consumers, supplemented by voluntary industry guidelines to promote the use of 'best practices' . . . ."); Comments of National Cable & Telecommunications Association, GN Docket Nos. 09-47, 09-51, 09-137, at 5 (Jan. 22, 2010) ("Since consumer concerns vary and new services and technologies must respond in these unique contexts, [the government] should rely on competitive market forces, existing safeguards and industry self-regulation to protect consumers' privacy interests rather than further regulatory mandates."); Reply Comments of AT&T, Inc., CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, at 24-25 (Oct. 28, 2009) ("To be sure, some commenters question the value of a voluntary code, on the basis that such codes lack teeth. But AT&T has recommended that there be some mechanism to enforce providers' commitment to the proposed consumer disclosure and protection framework." (citations omitted)).

FTC, to have a role in such an approach? Would the Commission have sufficient ancillary authority under its information service framework to serve as a backstop if the third party is unable to resolve a dispute or implement a necessary policy?

2. Application of All Title II Provisions

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

a. Current Facts in the Broadband Marketplace

53. In the *Cable Modem Declaratory Ruling*, the Commission observed that "the cable modem service business is still nascent, and the shape of broadband deployment is not yet clear,"[148] and nearly a decade has passed since the Commission examined the facts surrounding broadband Internet service in the *Cable Modem Declaratory Ruling*. In this part we therefore ask whether or not the facts of today's broadband marketplace support a conclusion that providers now offer Internet connectivity as a separate telecommunications service.[149] In addition to the specific questions we ask below, we seek comment on what facts are most relevant to this inquiry. The Commission has explained that because the Act defines "telecommunications service" as "'the *offering* of telecommunications for a fee directly *to the public*[,]' . . . whether a telecommunications service is being provided turns on what the entity is 'offering . . . to the public,' and customers' understanding of that service."[150] Similarly, in *Brand X*, the majority opinion noted that "[i]t is common usage to describe what a company 'offers' to a consumer as what the consumer perceives to be the integrated finished product."[151] The *Brand X* dissent asserted that "[t]he relevant question is whether the individual components in a package being offered still possess sufficient identity to be described as separate objects of the offer, or whether they have been so changed by their combination with the other components that it is no longer reasonable to describe them in that way."[152] The *Brand X* majority opinion and the dissent examined consumers' understanding of the services, analogies to other services, and technical characteristics of the services being provided. What factors should the Commission consider in order to assess the proper classification of broadband Internet connectivity service?

54. *Status of Current Offerings*. Is wired broadband Internet service (or any telecommunications component thereof) held out "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public," for instance through a tariff such as the NECA DSL Access Service Tariff[153] or through facilities-based Internet service providers' public websites?[154] If

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[148] *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4843-44, para. 83.

[149] We seek comment separately in part II.D on terrestrial wireless and satellite services.

[150] *Wireline Broadband Report and Order*, 20 FCC Rcd at 14910, para. 104 (quoting 47 U.S.C. § 153(46)) (citing *Brand X*, 545 U.S. at 989-90).

[151] *Brand X*, 545 U.S. at 970.

[152] *Id.* at 1006-07 (Scalia, J., dissenting).

[153] *See supra* note 53.

so, we seek specific examples of such offerings. If not, does the Commission have legal authority to compel the offering of a broadband Internet telecommunications service that is not currently offered? If legal authority exists, would it be appropriate for the Commission to exercise such authority? Are there First Amendment constraints on the Commission's ability to compel the offering of such a service? Would such a compulsion raise any concerns under the Takings Clause of the Fifth Amendment?

55. *Services Offered Today.* When the Commission gathered the record for its classification orders,[155] broadband Internet service was offered with various services—such as e-mail, newsgroups, and the ability to create and maintain a web page—that we described as "Internet applications."[156] The Commission understood that subscribers to broadband Internet services "usually d[id] not need to contract separately" for "discrete services or applications" such as e-mail.[157] We seek comment on whether this remains the case. To what extent are these and other applications and services sold with wired broadband Internet service today? Are providers offering the same applications and services that they did when the Commission began building the record in 2000, or have their offerings changed? Are these applications and services always packaged with Internet connectivity, or can consumers choose not to purchase them? What test(s) should the Commission use to evaluate whether particular features are today integrated with the underlying Internet connectivity?

56. *Consumer Use and Perception.* Next, we seek comment on how consumers use and perceive broadband Internet service. Do customers today perceive that they are receiving one unitary service comprising Internet connectivity as well as features and functionalities, or Internet connectivity as the main service, with additional features and functionalities simultaneously offered and provided?[158] To

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[154] 47 U.S.C. § 153(46). A provider is engaged in common carriage if it "make[s] capacity available to the public indifferently"; it can be compelled to offer a common carriage service if "the public interest requires common carrier operation of the proposed facility." *Cable & Wireless PLC*, Memorandum Opinion and Order, 12 FCC Rcd 8516, 8522, paras. 14-15 (1997); *see also 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.'" (citation omitted)); *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("*NARUC II*"); *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("*NARUC I*"). Whether a provider has made a common carriage offering "must be determined on a case-by-case basis." *Bright House Networks, LLC, et al. v. Verizon California, Inc., et al.*, Memorandum Opinion and Order, 23 FCC Rcd 10704, 10717-19, paras. 37-40 (2008) (finding carriers offered common carriage service despite lacking a tariff, website posting, or any other advertisement, because providers self-certified themselves as common carriers, entered into publicly available interconnection agreements, and obtained state certificates of public convenience and necessity), *aff'd sub nom. Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 275-76 (D.C. Cir. 2009).

[155] *See supra* note 29.

[156] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4811, para. 18.

[157] *Id.* at 4806, para. 11 (footnotes omitted).

[158] We note that under Commission precedent, services composing a single bundle at the point of sale—for instance, local telephone service packaged with voice mail—can retain distinct identities as separate offerings for classification purposes. *See, e.g., Stevens Report*, 13 FCC Rcd at 11530, para. 60 ("It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail." (citation omitted)); *Regulation of Prepaid Calling Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, 7291, para. 3, 7295 (2006) (finding that menus allowing users to access information did not convert the telecommunications service offered by prepaid calling cards into an information service), *vacated in part sub nom. Qwest Servs. Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007); *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that*

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what extent do consumers continue to rely on the features and applications that are provided as part of their broadband Internet service package, and to what extent have they increased their use of applications and services offered by third party providers? For instance, some users now rely on free e-mail services provided by companies such as Yahoo and Microsoft,[159] social networking sites including Facebook and MySpace,[160] public message boards like those found in the Google Groups service,[161] web portals like Netvibes,[162] web hosting services like Go Daddy,[163] and blog hosting services like TypePad.[164] How does the use of these third party services compare with the use of similar services offered by broadband Internet service providers? To what extent do consumers rely on their Internet service provider or other providers for security features and spam filtering? To what extent do consumers rely on their Internet service provider, as opposed to alternative providers, for content such as news and medical advice? To the extent broadband Internet service providers offer applications to consumers, do consumers view them as an integrated part of the Internet connectivity offering? To what extent do consumers today use "the high-speed wire always in connection with the information-processing capabilities provided by Internet access"?[165]

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

58. *Technical and Functional Characteristics.* In addition, to aid our understanding of what carriers offer to consumers, we seek to develop a current record on the technical and functional characteristics of broadband Internet service, and whether those characteristics have changed materially in the last decade. For example, DNS lookup is now offered to consumers on a standalone basis,[166] and web

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AT&T's Interspan Frame Relay Service Is a Basic Service et al., DA 95-2190, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13721, paras. 29-32, 13722-23, paras. 40-46 (1995) (*Frame Relay Order*) (finding that AT&T's InterSpan frame relay service could not avoid *Computer II* and *Computer III* unbundling and tariffing requirements by combining basic and enhanced services).

[159] Yahoo! Inc., Yahoo! Mail, https://login.yahoo.com/config/login_verify2 (last visited June 16, 2010); Microsoft Corp., Windows Live Hotmail, http://mail.live.com (last visited June 16, 2010).

[160] Facebook, Inc., Welcome to Facebook, http://www.facebook.com (last visited June 16, 2010); MySpace.com, MySpace, http://www.myspace.com (last visited June 16, 2010).

[161] Google Inc., Google Groups, http://groups.google.com (last visited June 16, 2010).

[162] Netvibes, Netvibes, http://www.netvibes.com (last visited June 16, 2010).

[163] GoDaddy.com, Domain Names, Web Hosting and SSL Certificates – Go Daddy, http://www.godaddy.com (last visited June 16, 2010).

[164] TypePad.com, Free Blogs, Pro Blogs & Business Blogs | TypePad.com, http://www.typepad.com (last visited June 16, 2010).

[165] *See Brand X*, 545 U.S. at 990 (concluding that "the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering," because a "consumer uses the high-speed wire always in connection with the information processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access").

[166] *See, e.g.*, Google Inc., Google Public DNS, http://code.google.com/speed/public-dns (last visited June 16, 2010); OpenDNS, OpenDNS > Solutions > Household, http://www.opendns.com/solutions/household (last visited June 16,
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