

expanding array of smartphones, aircard modems, and other devices that enable Internet access; the emergence and rapid growth of dedicated-purpose mobile devices like e-readers; the development of mobile application (“app”) stores and hundreds of thousands of mobile apps; and the evolution of new business models for mobile broadband providers, including usage-based pricing.²⁹¹

95. Moreover, most consumers have more choices for mobile broadband than for fixed (particularly fixed wireline) broadband.²⁹² Mobile broadband speeds, capacity, and penetration are typically much lower than for fixed broadband,²⁹³ though some providers have begun offering 4G service that will enable offerings with higher speeds and capacity and lower latency than previous generations of mobile service.²⁹⁴ In addition, existing mobile networks present operational constraints that fixed broadband networks do not typically encounter.²⁹⁵ This puts greater pressure on the concept of “reasonable network management” for mobile providers,²⁹⁶ and creates additional challenges in applying a broader set of rules to mobile at this time. Further, we recognize that there have been meaningful recent moves toward openness in and on mobile broadband networks, including the introduction of third-party devices and applications on a number of mobile broadband networks, and more open mobile devices. In addition, we anticipate soon seeing the effects on the market of the openness conditions we imposed on mobile providers that operate on upper 700 MHz C Block (“C Block”) spectrum,²⁹⁷ which includes Verizon Wireless, one of the largest mobile wireless carriers in the U.S.²⁹⁸

²⁹¹ Mobile Future PN Reply at 2 (“In less than three years, a mobile applications market has emerged with annualized growth rates exceeding 500%, giving consumers access to well over 300,000 apps from at least 10 stores.”); *see also* Press Release, AT&T, AT&T Announces New Lower-Priced Wireless Data Plans to Make Mobile Internet More Affordable to More People (June 2, 2010), www.att.com/gen/press-room?pid=17991&cdiv=news&newsarticleid=30854 (announcing new usage-based pricing plans). *See generally Fourteenth Wireless Competition Report.*

²⁹² *Compare* National Broadband Plan at 37 (Exh. 4-A) with 39-40 (Exh. 4-E); *see also supra* paras. 32-33. However, in many areas of the country, particularly in rural areas, there are fewer options for mobile broadband. *See Fourteenth Wireless Competition Report* at para. 355, tbl. 39 & chart 48. This may result in some consumers having fewer options for mobile broadband than for fixed.

²⁹³ *See* FCC Internet Status Report, at 30, tbl. 12.

²⁹⁴ Some fixed broadband providers contend that current mobile broadband offerings directly compete with their offerings. *See* Letter from Michael D. Saperstein, Jr., Director of Regulatory Affairs, Frontier Communications, to Marlene Dortch, Secretary, FCC, GN Docket No. 09-191 (filed Dec. 15, 2010) (discussing entry of wireless service into the broadband market and its effect on wireline broadband subscribership) and Attach. at 1 (citing reports that LTE is “a very practical and encouraging substitution for DSL, particularly when you look at rural markets”); Letter from Malena F. Barzilai, Federal Government Affairs, Windstream Communications, Inc., to Marlene Dortch, Secretary, FCC, GN Docket No. 09-191 (filed Dec. 15, 2010). As part of our ongoing monitoring, we will track such competition and any impact these rules may have on it. *See infra* para. 105.

²⁹⁵ *See, e.g.,* AT&T Comments at 156–61; CClA Comments at 15–16; Verizon Comments at 61–63; Leap Reply at 6–8; T-Mobile Reply at 16–23; TIA Reply at 8; CTIA PN Comments at 2–3 (“[W]ireless networks and the devices that operate on them have become increasingly intertwined”), 9–12; ITIF PN Comments at 16. *But see, e.g.,* Free Press Reply at 29; PIC PN Comments at 13–16.

²⁹⁶ *See, e.g.,* IFTA Comments at 20; OIC Comments at 37; Skype Comments at 5–7; NCTA PN Comments at 11–12; Free Press PN Reply at 8; OIC PN Reply at 3.

²⁹⁷ The first network using spectrum subject to these rules has recently started offering service. *See* Press Release, Verizon Wireless, Blazingly Fast: Verizon Wireless Launches The World’s Largest 4G LTE
(continued....)

96. In light of these considerations, we conclude it is appropriate to take measured steps at this time to protect the openness of the Internet when accessed through mobile broadband. We apply certain of the open Internet rules, requiring compliance with the transparency rule and a basic no-blocking rule.²⁹⁹

1. Application of Openness Principles to Mobile Broadband

a. Transparency

97. The wide array of commenters who support a disclosure requirement generally agree that all broadband providers, including mobile broadband providers, should be required to disclose their network management practices.³⁰⁰ Although some mobile broadband providers argue that the dynamic nature of mobile network management makes meaningful disclosure difficult,³⁰¹ we conclude that end users need a clear understanding of network management practices, performance, and commercial terms, regardless of the broadband platform they use to access the Internet. Although a number of mobile broadband providers have adopted voluntary codes of conduct regarding disclosure, we believe that a uniform rule applicable to all mobile broadband providers will best preserve Internet openness by ensuring that end users have sufficient information to make informed choices regarding use of the network; and that content, application, service, and device providers have the information needed to develop, market, and maintain Internet offerings. The transparency rule will also aid the Commission in monitoring the evolution of mobile broadband and adjusting, as appropriate, the framework adopted today.

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Wireless Network On Sunday, Dec. 5 (Dec. 5, 2010), available at news.vzw.com/news/2010/12/pr2010-12-03.html. Specifically, licensees subject to the rule must provide an open platform for third-party applications and devices. See *700 MHz Second Report and Order*, 22 FCC Rcd 15289; 47 C.F.R. § 27.16. The rules we adopt today are independent of those open platform requirements. We expect our observations of how the 700 MHz open platform rules affect the mobile broadband sector to inform our ongoing analysis of the application of openness rules to mobile broadband generally. *700 MHz Second Report and Order*, 22 FCC Rcd at 15364–65, 15374, paras. 205, 229. A number of commenters support the Commission's waiting to determine whether to apply openness rules to mobile wireless until the effects of the C Block openness requirement can be observed. See, e.g., AT&T PN Reply, at 32–37; Cricket PN Reply at 11. We also note that some providers tout openness as a competitive advantage. See, e.g., Clearwire Comments at 7; Verizon Reply at 47–52.

²⁹⁸ *Fourteenth Wireless Competition Report*, 25 FCC Rcd at 11442, para. 31.

²⁹⁹ We note that section 332(a) requires us, “[i]n taking actions to manage the spectrum to be made available for use by the private mobile service,” to consider various factors, including whether our actions will “improve the efficiency of spectrum use and reduce the regulatory burden,” and “encourage competition.” 47 U.S.C. § 332(a)(2), (3). To the extent section 332(a) applies to our actions today, we note that we have considered these factors. See, e.g., *supra* at paras. 35–37, 93–96.

³⁰⁰ See, e.g., Cricket Comments at 4 (a principle of transparency will protect consumers and counterbalance abuses of network management discretion, thereby fostering an open marketplace that promotes innovation and competition); Leap Comments at 22–24; MetroPCS Comments at 64; Qwest Comments at 11; CWA Comments at 12–13; CDT Comments at 31; Bright House Comments at 10–11; PIC PN Comments at 12; Google Comments at iii, 4, 77; NJRC Comments at 25; NATOA Comments at 11; Texas PUC Comments at 8–9; NASUCA Comments at 24; IFTA Comments at 20.

³⁰¹ See, e.g., CTIA Comments at 11, 47; GSM Association (GSM) Comments at 25; Entertainment Software Association (ESA) Comments at 2, 4; Telecom Italia Comments at 12; Verizon Comments, Attach. B at 49; AT&T PN Comments at 70; Verizon PN Comments at 40–42.

98. Therefore, as stated above,³⁰² we require mobile broadband providers to follow the same transparency rule applicable to fixed broadband providers. Further, although we do not require mobile broadband providers to allow third-party devices or all third-party applications on their networks, we nonetheless require mobile broadband providers to disclose their third-party device and application certification procedures, if any; to clearly explain their criteria for any restrictions on use of their network; and to expeditiously inform device and application providers of any decisions to deny access to the network or of a failure to approve their particular devices or applications. With respect to the types of disclosures required to satisfy the rule, we direct mobile broadband providers to the discussion in Part III.B, above. Additionally, mobile broadband providers should follow the guidance the Commission provided to licensees of the upper 700 MHz C Block spectrum regarding compliance with their disclosure obligations, particularly regarding disclosure to third-party application developers and device manufacturers of criteria and approval procedures (to the extent applicable).³⁰³ For example, these disclosures include, to the extent applicable, establishing a transparent and efficient approval process for third parties, as set forth in Rule 27.16(d).³⁰⁴

b. No Blocking

99. We adopt a no blocking rule that guarantees end users' access to the web and protects against mobile broadband providers' blocking applications that compete with their other primary service offering—voice and video telephony—while ensuring that mobile broadband providers can engage in reasonable network management:

A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.

We understand a “provider’s voice or video telephony services” to include a voice or video telephony service provided by any entity in which the provider has an attributable interest.³⁰⁵ We

³⁰² See *supra* at paras. 54–61.

³⁰³ 700 MHz Second Report and Order, 22 FCC Rcd at 15371–72, para. 224 (“[A] C Block licensee must publish [for example, by posting on the provider’s website] standards no later than the time at which it makes such standards available to any preferred vendors (*i.e.*, vendors with whom the provider has a relationship to design products for the provider’s network). We also require the C Block licensee to provide to potential customers notice of the customers’ rights to request the attachment of a device or application to the licensee’s network, and notice of the licensee’s process for customers to make such requests, including the relevant network criteria.”).

³⁰⁴ See 47 C.F.R. 27.16(d) (“Access requests. (1) Licensees shall establish and publish clear and reasonable procedures for parties to seek approval to use devices or applications on the licensees’ networks. A licensee must also provide to potential customers notice of the customers’ rights to request the attachment of a device or application to the licensee’s network, and notice of the licensee’s process for customers to make such requests, including the relevant network criteria. (2) If a licensee determines that a request for access would violate its technical standards or regulatory requirements, the licensee shall expeditiously provide a written response to the requester specifying the basis for denying access and providing an opportunity for the requester to modify its request to satisfy the licensee’s concerns.”).

³⁰⁵ For the purposes of these rules, an attributable interest includes equity ownership interest in or *de facto* control of, or by, the entity that provides the voice or video telephony service. An attributable interest also includes any exclusive arrangement for such voice or video telephony service, including *de facto* exclusive arrangements.

emphasize that the rule protects any and all applications that compete with a mobile broadband provider's voice or video telephony services. Further, degrading a particular website or an application that competes with the provider's voice or video telephony services so as to render the website or application effectively unusable would be considered tantamount to blocking (subject to reasonable network management).³⁰⁶

100. End users expect to be able to access any lawful website through their broadband service, whether fixed or mobile. Web browsing continues to generate the largest amount of mobile data traffic,³⁰⁷ and applications and services are increasingly being provisioned and used entirely through the web, without requiring a standalone application to be downloaded to a device. Given that the mobile web is well-developed relative to other mobile applications and services, and enjoys similar expectations of openness that characterize web use through fixed broadband, we find it appropriate to act here. We also recognize that accessing a website typically does not present the same network management issues that downloading and running an app on a device may present. At this time, a prohibition on blocking access to lawful websites (including any related traffic transmitted or received by any plug-in, scripting language, or other browser extension) appropriately balances protection for the ability of end users to access content, applications, and services through the web and assurance that mobile broadband providers can effectively manage their mobile broadband networks.

101. Situations have arisen in which mobile wireless providers have blocked third-party applications that arguably compete with their telephony offerings.³⁰⁸ This type of blocking confirms that mobile broadband providers may have strong incentives to limit Internet openness when confronted with third-party applications that compete with their telephony services.³⁰⁹ Some commenters express concern that wireless providers could favor their own applications over the applications of unaffiliated developers, under the guise of reasonable network management.³¹⁰ A number of commenters assert that blocking or hindering the delivery of services that compete with those offered by the mobile broadband provider, such as over-the-top VoIP, should be prohibited.³¹¹ According to Skype, for example, there is "a consensus that at a minimum, a 'no blocking' rule should apply to voice and video applications that compete with

³⁰⁶ See *supra* para. 66; see also *supra* para. 67.

³⁰⁷ ALLOT COMMUNICATIONS, ALLOT MOBILETRENDS - GLOBAL MOBILE BROADBAND TRAFFIC REPORT H2/2009 at 9 (2010), www.allot.com/mobiletrends.html.

³⁰⁸ See, e.g., Letter from James W. Cicconi, AT&T Services, Inc., to Ruth Milkman, Chief, Wireless Telecommunications Bureau, FCC, RM-11361, RM-11497 at 6-8 (filed Aug. 21, 2009); DISH PN Reply at 7 ("VoIP operators such as Skype have faced significant difficulty in gaining access across wireless Internet connections."). Mobile providers blocking VoIP services is an issue not only in the United States, but worldwide. In Europe, the Body of European Regulators for Electronic Communications reported, among other issues, a number of cases of blocking or charging extra for VoIP services by certain European mobile operators. See EUROPEAN COMMISSION, INFORMATION SOCIETY AND MEDIA DIRECTORATE-GENERAL REPORT ON THE PUBLIC CONSULTATION ON "THE OPEN INTERNET AND NET NEUTRALITY IN EUROPE" 2, (Nov. 9, 2010), ec.europa.eu/information_society/policy/ecomm/library/public_consult/net_neutrality/index_en.htm.

³⁰⁹ See, e.g., Skype Comments at 8-9; Skype Feb. 20, 2007 Petition, RM-11361, at 13-16.

³¹⁰ See, e.g., ITIC PN Comments at 6; PIC PN Comments at 20-21.

³¹¹ LARIAT Comments at 3; Skype Comments at 9; ITIC PN Comments at 6-7; Public Interest Commenters PN Comments at 20-21.

broadband network operators' own service offerings.³¹² Clearwire argues that the Commission should restrict only practices that appear to have an element of anticompetitive intent.³¹³ Although some commenters support a broader no-blocking rule,³¹⁴ we believe that a targeted prophylactic rule is appropriate at this time,³¹⁵ and necessary to deter this type of behavior in the future.

102. The prohibition on blocking applications that compete with a broadband provider's voice or video telephony services does not apply to a broadband provider's operation of application stores or their functional equivalent. In operating app stores, broadband providers compete directly with other types of entities, including device manufacturers and operating system developers,³¹⁶ and we do not intend to limit mobile broadband providers' flexibility to curate their app stores similar to app store operators that are not subject to these rules.³¹⁷

103. As indicated in Part III.D above, the reasonable network management definition takes into account the particular network architecture and technology of the broadband Internet access service. Thus, in determining whether a network management practice is reasonable, the Commission will consider technical, operational, and other differences between wireless and other broadband Internet access platforms, including differences relating to efficient use of spectrum. We anticipate that conditions in mobile broadband networks may necessitate network management practices that would not be necessary in most fixed networks, but conclude that our definition of reasonable network management is flexible enough to accommodate such differences.

³¹² Skype PN Reply at 6; *see also* Sling Media Comments at 1–2; DISH PN Comments at 22–23 (any limits or caps should apply equally to all application providers to ensure fairness and promote competition); OIC PN Comments at 8–9.

³¹³ Clearwire Comments at 11.

³¹⁴ *See, e.g.*, Free Press Comments at 121; OIC Comments at 36–40; DISH PN Comments at 22–24; Skype Comments at 8–9; Free Press PN Comments at 21–23; PIC PN Comments at 13–16; Skype PN Reply at 6. Other commenters support our more targeted rule. *See, e.g.*, CWA PN Comments at 5.

³¹⁵ *See* Letter from Jonathan Spalter, Chairman, Mobile Future, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-191 & 10-127, at 3 n.16 (filed Dec. 13, 2010) (supporting tailored prohibition on blocking applications), *citing* AT&T Comments at 65; T-Mobile Comments, Declaration of Grant Castle at 4. The no blocking rule that we adopt for mobile broadband involves distinct treatment of applications that compete with the provider's voice and video telephony services, whereas we have adopted a broader traffic-based approach for fixed broadband. *See supra* para. 48. We acknowledge that this rule for mobile broadband may lead in some limited measure to the traffic-identification difficulties discussed with respect to fixed broadband. We find, however, that the reasons for taking our cautious approach to mobile broadband outweigh this concern, particularly in light of our intent to monitor developments involving mobile broadband, including this and other aspects of the practical implementation of our rules.

³¹⁶ For example, app stores are operated by manufacturers and operating system developers such as Nokia, Apple, RIM, Google, Microsoft, and third parties such as GetJar. *See also* AT&T PN Comments at 63–66 (emphasizing the competitiveness of the market for mobile apps, including the variety of sources from which consumers may obtain applications); T-Mobile PN Comments at 21 (“The competitive wireless marketplace will continue to discipline app store owners . . . that exclude third-party apps from their app stores entirely, eliminating the need for Commission action.”). We note, however, that for a few devices, such as Apple's iPhone, there may be fewer options for accessing and distributing apps.

³¹⁷ *See supra* at para. 50; *see also* OIC PN Comments at 9–10 (while consumers have a meaningful choice with respect to applications and the ability to download and use applications on a carrier's network, app stores should not be subject to nondiscrimination or other open Internet principles).

2. Ongoing Monitoring

104. Although some commenters support applying the no unreasonable discrimination rule to mobile broadband,³¹⁸ for the reasons discussed above, we decline to do so, preferring at this time to put in place basic openness protections and monitor the development of the mobile broadband marketplace. We emphasize that our decision to proceed incrementally with respect to mobile broadband at this time should not suggest that we implicitly approve of any provider behavior that runs counter to general open Internet principles. Beyond those practices expressly prohibited by our rules, other conduct by mobile broadband providers, particularly conduct that would violate our rules for fixed broadband, may not necessarily be consistent with Internet openness and the public interest.

105. We are taking measured steps to protect openness for mobile broadband at this time in part because we want to better understand how the mobile broadband market is developing before determining whether adjustments to this framework are necessary. To that end, we will closely monitor developments in the mobile broadband market, with a particular focus on the following issues: (1) the effects of these rules, the C Block conditions, and market developments related to the openness of the Internet as accessed through mobile broadband; (2) any conduct by mobile broadband providers that harms innovation, investment, competition, end users, free expression or the achievement of national broadband goals; (3) the extent to which differences between fixed and mobile rules affect fixed and mobile broadband markets, including competition among fixed and mobile broadband providers; and (4) the extent to which differences between fixed and mobile rules affect end users for whom mobile broadband is their only or primary Internet access platform.³¹⁹ We will investigate and evaluate concerns as they arise. We also will adjust our rules as appropriate. To aid the Commission in these tasks, we will create an Open Internet Advisory Committee, as discussed below in paragraph 162, with a mandate that includes monitoring and regularly reporting on the state of Internet openness for mobile broadband.

106. Further, we reaffirm our commitment to enforcing the open platform requirements applicable to upper 700 MHz C Block licensees.³²⁰ The first networks using this spectrum are now becoming operational.³²¹

F. Other Laws and Considerations

107. Open Internet rules are not intended to expand or contract broadband providers' rights or obligations with respect to other laws or safety and security considerations, including the

³¹⁸ See, e.g., Free Press Comments at 125–26; OIC Comments at 36–39. See also, e.g., Leap Comments at 17–22; Sprint Reply at 24–26. A number of commenters suggest that openness rules should be applied identically to all broadband platforms. See, e.g., CenturyLink Comments at 22–23; Comcast Comments at 32; DISH Network PN Comments at 17; NCTA PN Comments at 11; Qwest PN Comments at 12–19; SureWest PN Comments at 18–20; TWC PN Comments at 33–35; Vonage PN Comments at 10–18; Windstream PN Comments at 6–19.

³¹⁹ We note that mobile broadband is the only or primary broadband Internet access platform used by many Americans. See, e.g., *supra* note 289.

³²⁰ See 700 MHz Second Report and Order, 22 FCC Rcd at 15374–75, paras. 229–30.

³²¹ See Press Release, Verizon Wireless, Blazingly Fast: Verizon Wireless Launches The World's Largest 4G LTE Wireless Network On Sunday, Dec. 5 (Dec. 5, 2010), available at news.vzw.com/news/2010/12/pr2010-12-03.html; Press Release, Verizon, Verizon Launches 4G LTE In 38 Major Metropolitan Areas By The End Of The Year, Oct. 6, 2010, available at news.vzw.com/news/2010/10/pr2010-10-01c.html.

needs of emergency communications and law enforcement, public safety, and national security authorities. Similarly, open Internet rules protect only *lawful* content, and are not intended to inhibit efforts by broadband providers to address unlawful transfers of content. For example, there should be no doubt that broadband providers can prioritize communications from emergency responders, or block transfers of child pornography. To make clear that open Internet protections can and must coexist with these other legal frameworks, we adopt the following clarifying provisions:

Nothing in this part supersedes any obligation or authorization a provider of broadband Internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so.

Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.

1. Emergency Communications and Safety and Security Authorities

108. Commenters are broadly supportive of our proposal to state that open Internet rules do not supersede any obligation a broadband provider may have—or limit its ability—to address the needs of emergency communications or law enforcement, public safety, or homeland or national security authorities (together, “safety and security authorities”).³²² Broadband providers have obligations under statutes such as the Communications Assistance for Law Enforcement Act,³²³ the Foreign Intelligence Surveillance Act,³²⁴ and the Electronic Communications Privacy Act³²⁵ that could in some circumstances intersect with open Internet protections, and most commenters recognize the benefits of clarifying that these obligations are not inconsistent with open Internet rules. Likewise, in connection with an emergency, there may be federal, state, tribal, and local public safety entities; homeland security personnel; and other authorities that need guaranteed or prioritized access to the Internet in order to coordinate disaster relief and other emergency response efforts, or for other emergency communications.³²⁶ In the *Open Internet NPRM* we proposed to address the needs of law enforcement in one rule and the needs of emergency communications and public safety, national, and homeland security authorities in a separate rule.³²⁷ We are persuaded by the record that these rules should be combined, as the interests at issue are substantially similar.³²⁸ We also agree that the rule should focus on the needs of “law enforcement . . . authorities” rather than the needs of “law enforcement.”³²⁹ The purpose of the safety and security provision is first to ensure that open Internet rules do not restrict broadband providers in addressing the needs of law enforcement

³²² See, e.g., Intrado Comments at 1, 3.

³²³ See 47 U.S.C. § 1002(a).

³²⁴ See 50 U.S.C. §§ 1802(a)(4), 1804, 1805(c)(2).

³²⁵ See 18 U.S.C. §§ 2518, 2705.

³²⁶ *Open Internet NPRM*, 24 FCC Rcd at 13115–16, para 145.

³²⁷ *Open Internet NPRM*, 24 FCC Rcd at 13115–16, paras. 143, 146.

³²⁸ See PIC Comments at 42–44. We intend the term “national security authorities” to include homeland security authorities.

³²⁹ See PIC Comments at 52–53; CCIA/CEA Comments at 27–29; EFF Comments at 19–23.

authorities, and second to ensure that broadband providers do not use the safety and security provision without the imprimatur of a law enforcement authority, as a loophole to the rules.³³⁰ As such, application of the safety and security rule should be tied to invocation by relevant authorities rather than to a broadband provider's independent notion of law enforcement.

109. Some commenters urge us to limit the scope of the safety and security rule, or argue that it is unnecessary because other statutes give broadband providers the ability and responsibility to assist law enforcement.³³¹ Several commenters urge the Commission to revise its proposal to clarify that broadband providers may not take any voluntary steps that would be inconsistent with open Internet principles, beyond those steps required by law.³³² They argue, for example, that a broad exception for voluntary efforts could swallow open Internet rules by allowing broadband providers to cloak discriminatory practices under the guise of protecting safety and security.³³³

110. We agree with commenters that the safety and security rule should be tailored to avoid the possibility of broadband providers using their discretion to mask improper practices. But it would be a mistake to limit the rule to situations in which broadband providers have an obligation to assist safety and security personnel. For example, such a limitation would prevent broadband providers from implementing the Cellular Priority Access Service (also known as the Wireless Priority Service (WPS)), which allows for but does not legally require the prioritization of public safety communications on wireless networks.³³⁴ We do not think it necessary or advisable to provide for pre-deployment review by the Commission, particularly because time may be of the essence in meeting safety and security needs.³³⁵

2. Transfers of Unlawful Content and Unlawful Transfers of Content

111. In the *NPRM*, we proposed to treat as reasonable network management “reasonable practices to . . . prevent the transfer of unlawful content; or . . . prevent the unlawful transfer of content.” For reasons explained above we decline to include these practices within the scope of “reasonable network management.” However, we conclude that a clear statement that open Internet rules do not prohibit broadband providers from making reasonable efforts to address the transfer of unlawful content or unlawful transfers of content is helpful to ensure that open Internet rules are not used as a shield to enable unlawful activity or to deter prompt action against such activity. For example, open Internet rules should not be invoked to protect copyright infringement, which has adverse consequences for the economy, nor should they protect child pornography. We emphasize that open Internet rules do not alter copyright laws and are not

³³⁰ See, e.g., EFF Comments at 11; CDT Reply at 33.

³³¹ See EFF Comments at 21; OIC Comments at 64–66.

³³² See EFF Comments at 20–22; CCIA/CEA Comments at 23, 30; PIC Comments at 43–44.

³³³ See EFF Comments at 20–22. EFF would require a pre-deployment waiver from the Commission if the needs of law enforcement would require broadband providers to act inconsistently with open Internet rules. *Id.* at 22.

³³⁴ See 47 C.F.R., Part 64, App.B.

³³⁵ The National Emergency Number Association (NENA) would encourage or require network managers to provide public safety users with advance notice of changes in network management that could affect emergency services. See NENA Comments at 5–6. Although we do not adopt such a requirement, we encourage broadband providers to be mindful of the potential impact on emergency services when implementing network management policies, and to coordinate major changes with providers of emergency services when appropriate.

intended to prohibit or discourage voluntary practices undertaken to address or mitigate the occurrence of copyright infringement.³³⁶

G. Specialized Services

112. In the *Open Internet NPRM*, the Commission recognized that broadband providers offer services that share capacity with broadband Internet access service over providers' last-mile facilities, and may develop and offer other such services in the future.³³⁷ These "specialized services," such as some broadband providers' existing facilities-based VoIP and Internet Protocol-video offerings, differ from broadband Internet access service and may drive additional private investment in broadband networks and provide end users valued services, supplementing the benefits of the open Internet.³³⁸ At the same time, specialized services may raise concerns regarding bypassing open Internet protections, supplanting the open Internet, and enabling anticompetitive conduct.³³⁹ For example, open Internet protections may be weakened if broadband providers offer specialized services that are substantially similar to, but do not meet the definition of, broadband Internet access service, and if consumer protections do not apply to such services.³⁴⁰ In addition, broadband providers may constrict or fail to continue expanding network capacity allocated to broadband Internet access service to provide more capacity for specialized services. If this occurs, and particularly to the extent specialized services grow as substitutes for the delivery of content, applications, and services over broadband Internet access service, the Internet may wither as an open platform for competition, innovation, and free expression.³⁴¹ These concerns may be exacerbated by consumers' limited choices for broadband providers, which may leave some end users unable to effectively exercise their preferences for broadband Internet access service (or content, applications, or services available through broadband Internet access service) over specialized services.³⁴²

113. We agree with the many commenters who advocate that the Commission exercise its authority to closely monitor and proceed incrementally with respect to specialized services,³⁴³ rather than adopting policies specific to such services at this time.³⁴⁴ We will

³³⁶ See, e.g., Stanford University—DMCA Complaint Resolution Center; User Generated Content Principles, www.ugcprinciples.com (cited in Letter from Linda Kinney, MPAA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-191, 10-137, WC Docket No. 07-52 at 1 (filed Nov. 29, 2010)). Open Internet rules are not intended to affect the legal status of cooperative efforts by broadband Internet access service providers and other service providers that are designed to curtail infringement in response to information provided by rights holders in a manner that is timely, effective, and accommodates the legitimate interests of providers, rights holders, and end users.

³³⁷ *Open Internet NPRM*, 24 FCC Rcd at 13116–17, paras. 148–53.

³³⁸ See, e.g., Comcast Comments at 60–61, 64–66; Motorola Comments at 14–16; Sprint Reply at 2–5; Verizon PN Comments at 48.

³³⁹ See *Open Internet PN*, 25 FCC Rcd at 12638–39; *Open Internet NPRM*, 24 FCC Rcd at 13116, para. 149; CCIA/CEA PN Comments at 3–4; CDT PN Comments at 1–2; Various Advocates for the Open Internet PN Reply at 5.

³⁴⁰ See, e.g., Netflix Comments at 9–10; CDT Comments at 46–48; Vonage Comments at 27; Dish Network Reply at 12; XO Reply at 20–21.

³⁴¹ See, e.g., CDT Comments at 46–49; IFTA Comments at 18–19; Sony Reply at 6–7.

³⁴² See *supra* paras. 32–33; see also Free Press Comments at 14; Vonage Comments at 7–8; OIC Comments at 71–73.

³⁴³ See, e.g., *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1815 (2009) ("Nothing prohibits federal agencies from moving in an incremental manner."); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet* (continued....)

carefully observe market developments to verify that specialized services promote investment, innovation, competition, and end-user benefits without undermining or threatening the open Internet.³⁴⁵ We note also that our rules define broadband Internet access service to encompass “any service that the Commission finds to be providing a functional equivalent of [broadband Internet access service], or that is used to evade the protections set forth in these rules.”³⁴⁶

114. We will closely monitor the robustness and affordability of broadband Internet access services, with a particular focus on any signs that specialized services are in any way retarding the growth of or constricting capacity available for broadband Internet access service. We fully expect that broadband providers will increase capacity offered for broadband Internet access service if they expand network capacity to accommodate specialized services. We would be concerned if capacity for broadband Internet access service did not keep pace. We also expect broadband providers to disclose information about specialized services’ impact, if any, on last-mile capacity available for, and the performance of, broadband Internet access service. We may consider additional disclosure requirements in this area in our related proceeding regarding consumer transparency and disclosure.³⁴⁷ We would also be concerned by any marketing, advertising, or other messaging by broadband providers suggesting that one or more specialized services, taken alone or together, and not provided in accordance with our open Internet rules, is “Internet” service or a substitute for broadband Internet access service. Finally, we will monitor the potential for anticompetitive or otherwise harmful effects from specialized services, including from any arrangements a broadband provider may seek to enter into with third parties to offer such services.³⁴⁸ The Open Internet Advisory Committee will aid us in monitoring these issues.

IV. THE COMMISSION’S AUTHORITY TO ADOPT OPEN INTERNET RULES

115. Congress created the Commission “[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 States . . . a rapid, efficient, Nation-wide, and world-wide wire and

(...continued from previous page)

Servs., 545 U.S. 967, 1002 (2005) (*Brand X*) (“The Commission need not immediately apply the policy reasoning” underlying its classification of broadband Internet services to other categories of providers to which that reasoning might apply).

³⁴⁴ See, e.g., Free Press Comments at 111; OIC Comments at 92; PIC Comments at 32; Frontier PN Comments at 4; OIC PN Comments at 5; PAETEC PN Comments at 2–3; PIC PN Comments at 6–7.

³⁴⁵ Our decision not to adopt rules regarding specialized services at this time involves an issue distinct from the regulatory classification of services such as VoIP and IPTV under the Communications Act, a subject we do not address in this Order. Likewise, the Commission’s actions here do not affect any existing obligation to provide interconnection, unbundled network elements, or special access or other wholesale access under §§ 201, 251, 256, and 271 of the Act. 47 U.S.C. §§ 201, 251, 256, 271.

³⁴⁶ See *supra* III.A. Some commenters, including Internet engineering experts and analysts, emphasize the importance of distinguishing between the open Internet and specialized services and state that “this distinction must continue as a most appropriate and constructive basis for pursuing your policy goals.” Various Advocates for the Open Internet PN Reply at 3; see also *id.* at 2.

³⁴⁷ See *Consumer Information and Disclosure et al.*, Notice of Inquiry, 24 FCC Rcd 11380 (2009).

³⁴⁸ See, e.g., AICC PN Reply at 2 (noting concerns regarding potential exclusive arrangements between broadband providers and third parties for the provision of specialized services); Clearwire PN Comments at 13 (noting the risk of anticompetitive conduct from specialized services that involve arrangements between broadband providers and affiliates and arguing “that those types of arrangements should be subject to particular scrutiny”).

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 communication.”³⁴⁹ Section 2 of the Communications Act grants the Commission jurisdiction over “all interstate and foreign communication by wire or radio.”³⁵⁰ As the Supreme Court explained in the radio context, Congress charged the Commission with “regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding” and therefore intended to give the Commission sufficiently “broad” authority to address new issues that arise with respect to “fluid and dynamic” communications technologies.³⁵¹ Broadband Internet access services are clearly within the Commission’s subject matter jurisdiction³⁵² and historically have been supervised by the Commission. Furthermore, as explained below, our adoption of basic rules of the road for broadband providers implements specific statutory mandates in the Communications Act and the Telecommunications Act of 1996.

116. Congress has demonstrated its awareness of the importance of the Internet and advanced services to modern interstate communications. In Section 230 of the Act, for example, Congress announced “the policy of the United States” concerning the Internet, which includes “promot[ing] the continued development of the Internet” and “encourag[ing] the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet,” while also “preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services” and avoiding unnecessary regulation.³⁵³ Other statements of congressional policy further confirm the Commission’s statutory authority. In Section 254 of the Act, for example, Congress charged the Commission with designing a federal universal program that has as one of several objectives making “[a]ccess to advanced telecommunications and information services” available “in all regions of the Nation,” and particularly to schools, libraries, and health care providers.³⁵⁴ To the same end, in Section 706 of the 1996 Act, Congress instructed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms)” and, if it finds that advanced telecommunications capability is not being deployed to all Americans “on a reasonable and timely basis,” to “take immediate action to accelerate deployment of such capability.”³⁵⁵ This mandate provides the Commission both “authority” and “discretion” “to settle on the best regulatory or deregulatory approach to broadband.”³⁵⁶ As the legislative history of the 1996 Act confirms, Congress believed that the laws it drafted would compel the Commission to protect and promote the Internet, while allowing the agency sufficient flexibility

³⁴⁹ 47 U.S.C. § 151.

³⁵⁰ *Id.* § 152(a).

³⁵¹ *Nat’l Broad. Co., Inc. v. United States*, 319 U.S. 190, 219–20 (1943) (Congress did not “attempt[] an itemized catalogue of the specific manifestations of the general problems” that it entrusted to the Commission); *see also FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137, 138 (1940) (the Commission’s statutory responsibilities and authority amount to “a unified and comprehensive regulatory system” for the communications industry that allows a single agency to “maintain, through appropriate administrative control, a grip on the dynamic aspects” of that ever-changing industry).

³⁵² *See Comcast Corp. v. FCC*, 600 F.3d 642, 646–47 (D.C. Cir. 2010).

³⁵³ 47 U.S.C. § 230(b).

³⁵⁴ 47 U.S.C. § 254(b)(2), (6).

³⁵⁵ 47 U.S.C. § 1302(a), (b).

³⁵⁶ *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 906–07 (D.C. Cir. 2009).

to decide how to do so.³⁵⁷ As explained in detail below, Congress did not limit its instructions to the Commission to one section of the communications laws. Rather, it expressed its instructions in multiple sections which, viewed as a whole, provide broad authority to promote competition, investment, transparency, and an open Internet through the rules we adopt today.

A. Section 706 of the 1996 Act Provides Authority for the Open Internet Rules

117. As noted, Section 706 of the 1996 Act directs the Commission (along with state commissions) to take actions that encourage the deployment of “advanced telecommunications capability.”³⁵⁸ “[A]dvanced telecommunications capability,” as defined in the statute, includes broadband Internet access.³⁵⁹ Under Section 706(a), the Commission must encourage the deployment of such capability by “utilizing, in a manner consistent with the public interest, convenience, and necessity,” various tools including “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”³⁶⁰ For the reasons stated in Parts II.A, II.D and III.B, above, our open Internet rules will have precisely that effect.

118. In *Comcast*, the D.C. Circuit identified Section 706(a) as a provision that “at least arguably . . . delegate[s] regulatory authority to the Commission,” and in fact “contain[s] a direct mandate—the Commission ‘shall encourage.’”³⁶¹ The court, however, regarded the Commission as “bound by” a prior order³⁶² that, in the court of appeals’ understanding, had held that Section

³⁵⁷ S. Rep. No. 104-23, at 51 (1995) (“The goal is to accelerate deployment of an advanced capability that will enable subscribers in all parts of the United States to send and receive information in all its forms—voice, data, graphics, and video—over a high-speed switched, interactive, broadband, transmission capability.”).

³⁵⁸ 47 U.S.C. § 1302.

³⁵⁹ 47 U.S.C. § 1302(d)(1) (defining “advanced telecommunications 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”). See *National Broadband Plan for our Future*, Notice of Inquiry, 24 FCC Rcd 4342, 4309, App. para. 13 (2009) (“advanced telecommunications capability” includes broadband Internet access); *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable and Timely Fashion*, 14 FCC Rcd 2398, 2400, para. 1 (Section 706 addresses “the deployment of broadband capability”), 2406 para. 20 (same). Even when broadband Internet access is provided as an “information service” rather than a “telecommunications service,” see *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 977–78 (2005), it involves “telecommunications.” 47 U.S.C. § 153(24). Given Section 706’s explicit focus on deployment of broadband access to voice, data, and video communications, it is not important that the statute does not use the exact phrase “Internet network management.”

³⁶⁰ 47 U.S.C. § 1302(a).

³⁶¹ See *Comcast*, 600 F.3d at 658; see also 47 U.S.C. § 1302(a) (“The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”). Because Section 706 contains a “direct mandate,” we reject the argument pressed by some commenters (see, e.g., AT&T Comments at 217–18; Verizon Comments at 100–01; Qwest Comments at 58–59; Letter from Rick Chessen, Senior Vice President, Law and Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-191 & 10-127, WC Docket No. 07-52, at 7 (filed Dec. 10, 2010) (NCTA Dec. 10, 2010 *Ex Parte* Letter)) that Section 706 confers no substantive authority.

³⁶² *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability et al.*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 (1998) (*Advanced Services Order*).

706(a) is not a grant of authority.³⁶³ In the *Advanced Services Order*, to which the court referred, the Commission held that Section 706(a) did not permit it to encourage advanced services deployment through the mechanism of forbearance without complying with the specific requirements for forbearance set forth in Section 10 of the Communications Act.³⁶⁴ The issue presented in the 1998 proceeding was whether the Commission could rely on the broad terms of Section 706(a) to trump those specific requirements. In the *Advanced Services Order*, the Commission ruled that it could not do so, noting that it would be “unreasonable” to conclude that Congress intended Section 706(a) to “allow the Commission to eviscerate [specified] forbearance exclusions after having expressly singled out [those exclusions] for different treatment in section 10.”³⁶⁵ The Commission accordingly concluded that Section 706(a) did not give it independent authority—in other words, authority over and above what it otherwise possessed³⁶⁶—to forbear from applying other provisions of the Act.³⁶⁷ The Commission’s holding thus honored the interpretive canon that “[a] specific provision . . . controls one[] of more general application.”³⁶⁸

119. While disavowing a reading of Section 706(a) that would allow the agency to trump specific mandates of the Communications Act, the Commission nonetheless affirmed in the *Advanced Services Order* that Section 706(a) “gives this Commission an affirmative obligation to encourage the deployment of advanced services” using its existing rulemaking, forbearance and adjudicatory powers, and stressed that “this obligation has substance.”³⁶⁹ The *Advanced Services Order* is, therefore, consistent with our present understanding that Section 706(a) authorizes the Commission (along with state commissions) to take actions, within their subject matter jurisdiction and not inconsistent with other provisions of law, that encourage the deployment of advanced telecommunications capability by any of the means listed in the provision.³⁷⁰

120. In directing the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment,”³⁷¹ Congress necessarily invested the Commission with the statutory authority to carry out those acts. Indeed, the relevant Senate Report explained that the provisions of Section 706 are “intended to ensure that one of the primary objectives of the [1996 Act]—to accelerate deployment of advanced telecommunications capability—is achieved,” and stressed that these provisions are “a necessary fail-safe” to guarantee that Congress’s objective is reached.³⁷² It

³⁶³ See *Comcast*, 600 F.3d at 659.

³⁶⁴ See 47 U.S.C. § 160; see also *Advanced Services Order*, 13 FCC Rcd at 24046, para. 73.

³⁶⁵ *Advanced Services Order*, 13 FCC Rcd at 24046, para. 73.

³⁶⁶ Consistent with longstanding Supreme Court precedent, we have understood this authority to include our ancillary jurisdiction to further congressional policy. See, e.g., *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384, 474 (1980), *aff’d*, *Computer & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, 211–14 (D.C. Cir. 1982) (*CCLA*).

³⁶⁷ *Advanced Services Order*, 13 FCC Rcd at 24046–48, paras. 74–77.

³⁶⁸ *Bloate v. United States*, 130 S. Ct. 1345, 1354 (2010) (citation and internal quotation marks omitted).

³⁶⁹ *Advanced Services Order*, 13 FCC Rcd at 24046, para. 74.

³⁷⁰ To the extent the *Advanced Services Order* can be construed as having read Section 706(a) differently, we reject that reading of the statute for the reasons discussed in the text.

³⁷¹ 47 U.S.C. § 1302(a).

³⁷² S. Rep. No. 104-23, at 50–51 (1995).

would be odd indeed to characterize Section 706(a) as a “fail-safe” that “ensures” the Commission’s ability to promote advanced services if it conferred no actual authority. Here, under our reading, Section 706(a) authorizes the Commission to address practices, such as blocking VoIP communications, degrading or raising the cost of online video, or denying end users material information about their broadband service, that have the potential to stifle overall investment in Internet infrastructure and limit competition in telecommunications markets.

121. This reading of Section 706(a) obviates the concern of some commenters that our jurisdiction under the provision could be “limitless” or “unbounded.”³⁷³ To the contrary, our Section 706(a) authority is limited in three critical respects. First, our mandate under Section 706(a) must be read consistently with Sections 1 and 2 of the Act, which define the Commission’s subject matter jurisdiction over “interstate and foreign commerce in communication by wire and radio.”³⁷⁴ As a result, our authority under Section 706(a) does not, in our view, extend beyond our subject matter jurisdiction under the Communications Act. Second, the Commission’s actions under Section 706(a) must “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”³⁷⁵ Third, the activity undertaken to encourage such deployment must “utilize[e], in a manner consistent with the public interest, convenience, and necessity,” one (or more) of various specified methods.³⁷⁶ These include: “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”³⁷⁷ Actions that do not fall within those categories are not authorized by Section 706(a). Thus, as the D.C. Circuit has noted, while the statutory authority granted by Section 706(a) is broad, it is “not unfettered.”³⁷⁸

³⁷³ See, e.g., CenturyLink Comments at 18; Esbin Comments at 72.

³⁷⁴ 47 U.S.C. §§ 151, 152. The Commission historically has recognized that services carrying Internet traffic are jurisdictionally mixed, but generally subject to federal regulation. See, e.g., *Nat’l Ass’n of Regulatory Util. Comm’rs Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data*, Memorandum Opinion and Order, 25 FCC Rcd 5051, 5054, paras. 8–9 & n.24 (2010). Where, as here, “it is not possible to separate the interstate and intrastate aspects of the service,” the Commission may preempt state regulation where “federal regulation is necessary to further a valid federal regulatory objective, i.e., state regulation would conflict with federal regulatory policies.” *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007); see also *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 375 n.4 (1986). Except to the extent a state requirement conflicts on its face with a Commission decision herein, the Commission will evaluate preemption in light of the fact-specific nature of the relevant inquiry, on a case-by-case basis. We recognize, for example, that states play a vital role in protecting end users from fraud, enforcing fair business practices, and responding to consumer inquiries and complaints. See, e.g., *Vonage Order*, 19 FCC Rcd at 22404–05, para. 1. We have no intention of impairing states’ or local governments’ ability to carry out these duties unless we find that specific measures conflict with federal law or policy. In determining whether state or local regulations frustrate federal policies, we will, among other things, be guided by the overarching congressional policies described in Section 230 of the Act and Section 706 of the 1996 Act. 47 U.S.C. §§ 230, 1302.

³⁷⁵ 47 U.S.C. § 1302(a).

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Ad Hoc Telecomms. Users Comm.*, 572 F.3d at 906–07 (“The general and generous phrasing of § 706 means that the FCC possesses significant albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband.”).

122. Section 706(a) accordingly provides the Commission a specific delegation of legislative authority to promote the deployment of advanced services, including by means of the open Internet rules adopted today. Our understanding of Section 706(a) is, moreover, harmonious with other statutory provisions that confer a broad mandate on the Commission. Section 706(a)'s directive to "encourage the deployment [of advanced telecommunications capability] on a reasonable and timely basis" using the methods specified in the statute is, for example, no broader than other provisions of the Commission's authorizing statutes that command the agency to ensure "just" and "reasonable" rates and practices, or to regulate services in the "public interest."³⁷⁹ Indeed, our authority under Section 706(a) is generally consistent with—albeit narrower than—the understanding of ancillary jurisdiction under which this Commission operated for decades before the *Comcast* decision.³⁸⁰ The similarities between the two in fact explain why the Commission has not heretofore had occasion to describe Section 706(a) in this way: In the particular proceedings prior to *Comcast*, setting out the understanding of Section 706(a) that we articulate in this Order would not meaningfully have increased the authority that we understood the Commission already to possess.³⁸¹

³⁷⁹ See, e.g., 47 U.S.C. §§ 201(b) & 309(a).

³⁸⁰ See *supra* note 366. In *Comcast*, the court stated that "[t]he Commission . . . may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." 600 F.3d at 646 (quoting *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691–92 (D.C. Cir. 2005)) (alterations in original). The court further ruled that the second prong of this test requires the Commission to rely on specific delegations of statutory authority. 600 F.3d at 644, 654.

³⁸¹ Ignoring that Section 706(a) expressly contemplates the use of "regulating methods" such as price regulation, some commenters read prior Commission orders as suggesting that Section 706 authorizes only deregulatory actions. See AT&T Comments at 216 (citing *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecomm. Nor A Telecomms. Serv.*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3319, para. 19 n.69 (2004) (*Pulver Order*)); Esbin Comments at 52 (citing *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities et al*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4801, 4826, 4840, paras. 4, 47, 73, (2002) (*Cable Modem Declaratory Ruling*) and *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14894 para. 77 (2005) (*Wireline Broadband Report and Order*)). They are mistaken. The *Pulver Order* stated only that Section 706 did not contemplate the application of "economic and entry/exit regulation inherent in Title II" to information service Internet applications. *Pulver Order*, 19 FCC Rcd at 3379, para. 19 n.69 (emphasis added). The open Internet rules that we adopt today do not regulate Internet applications, much less impose Title II (*i.e.*, common carrier) regulation on such applications. Moreover, at the same time the Commission determined in the *Cable Modem Declaratory Ruling* and the *Wireline Broadband Report and Order* that cable modem service and wireline broadband services (such as DSL) could be provided as information services not subject to Title II, it proposed new regulations under other sources of authority including Section 706. See *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4840, para. 73; *Wireline Broadband Report and Order*, 20 FCC Rcd at 14929–30, 14987, para. 146. On the same day the Commission adopted the *Wireline Broadband Report and Order*, it also adopted the *Internet Policy Statement*, which rested in part on Section 706. 20 FCC Rcd 14986, para. 2 (2005). Our prior orders therefore do not construe Section 706 as exclusively deregulatory. And to the extent that any prior order does suggest such a construction, we now reject it. See *Ad Hoc Telecomms. Users Comm.*, 572 F.3d at 908 (Section 706 "direct[s] the FCC to make the major policy decisions and to select the mix of regulatory and deregulatory tools the Commission deems most appropriate in the public interest to facilitate broadband deployment and competition") (emphasis added).

123. Section 706(b) of the 1996 Act³⁸² provides additional authority to take actions such as enforcing open Internet principles. It directs the Commission to undertake annual inquiries concerning the availability of advanced telecommunications capability to all Americans and requires that, if the Commission finds that such capability is not being deployed in a reasonable and timely fashion, 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.*”³⁸³ In July 2010, the Commission “conclude[d] that broadband deployment to *all* Americans is not reasonable and timely” and noted that “[a]s a consequence of that conclusion,” Section 706(b) was triggered.³⁸⁴ Section 706(b) therefore provides express authority for the pro-investment, pro-competition rules we adopt today.

B. Authority to Promote Competition and Investment In, and Protect End Users of, Voice, Video, and Audio Services

124. The Commission also has authority under the Communications Act to adopt the open Internet rules in order to promote competition and investment in voice, video, and audio services. Furthermore, for the reasons stated in Part II, above, even if statutory provisions related to voice, video, and audio communications were the *only* sources of authority for the open Internet rules (which is not the case), it would not be sound policy to attempt to implement rules concerning only voice, video, or audio transmissions over the Internet.³⁸⁵

1. The Commission Has Authority to Adopt Open Internet Rules to Further Its Responsibilities Under Title II of the Act

125. Section 201 of the Act delegates to the Commission “express and expansive authority”³⁸⁶ to ensure that the “charges [and] practices . . . in connection with” telecommunications services are “just and reasonable.”³⁸⁷ As described in Part II.B, interconnected VoIP services, which include some over-the-top VoIP services, “are increasingly being used as a substitute for traditional telephone service.”³⁸⁸ Over-the-top services therefore do, or will, contribute to the marketplace discipline of voice telecommunications services regulated under Section 201.³⁸⁹ Furthermore, companies that provide both voice communications

³⁸² 47 U.S.C. § 1302(b).

³⁸³ *Id.* (emphasis added).

³⁸⁴ *Sixth Broadband Deployment Report*, 25 FCC Rcd at 9558, paras. 2–3.

³⁸⁵ See *supra* para. 48. Many broadband providers offer their service on a common carriage basis under Title II of the Act. See *Framework for Broadband Internet Serv.*, Notice of Inquiry, 25 FCC Rcd 7866, 7875, para. 21 (2010). With respect to these providers, the rules we adopt today are additionally supported on that basis. With the possible exception of transparency requirements, however, the open Internet rules are unlikely to create substantial new duties for these providers in practice.

³⁸⁶ *Comcast*, 600 F.3d at 645.

³⁸⁷ 47 U.S.C. § 201(b).

³⁸⁸ *Tel. No. Requirements for IP-Enabled Servs. Providers*, Report and Order, Declaratory Ruling, Order on Remand, and NPRM, 22 FCC Rcd 19531, 19547, para. 28 (2007). By definition, interconnected VoIP services allow calls to and from traditional phone networks. See *supra* note 48.

³⁸⁹ See NCTA Dec. 10, 2010 *Ex Parte* Letter (arguing that the Commission could exercise authority ancillary to several provisions of Title II of the Act, including Sections 201 and 202, “to ensure that common carrier services continue to be offered on just and reasonable terms and conditions” and to “facilitate consumer access to broadband-based alternatives to common carrier services such as Voice over Internet Protocol”); Vonage Comments at 11–12 (“The Commission’s proposed regulations would help

(continued....)

and broadband Internet access services (for example, telephone companies that are broadband providers) have the incentive and ability to block, degrade, or otherwise disadvantage the services of their online voice competitors.³⁹⁰ Because the Commission may enlist market forces to fulfill its Section 201 responsibilities,³⁹¹ we possess authority to prevent these anticompetitive practices through open Internet rules.³⁹²

126. Section 251(a)(1) of the Act imposes a duty on all telecommunications carriers “to interconnect directly or indirectly with the facilities of other telecommunications carriers.”³⁹³ Many over-the-top VoIP services allow end users to receive calls from and/or place calls to

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preserve the competitive balance between providers electing to operate under Title II and those operating under Title I.”); Google Comments at 45–46 (“The widespread use of VoIP and related services as cheaper and more feature-rich alternatives to Title II services has significant effects on traditional telephone providers’ practices and pricing, as well [as] on network interconnection between Title II and IP networks that consumers use to reach each other, going to the heart of the Commission’s Title II responsibilities.”) (footnotes and citations omitted); Letter from Devendra T. Kumar, Counsel to Skype Communications S.A.R.L., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191, WC Docket No. 07-52 (filed Nov. 30, 2010) (arguing that the Commission has authority ancillary to Section 201 to protect international VoIP calling); XO Comments at 20 (noting the impact of, *inter alia*, VoIP on the Commission’s “traditional framework” for regulating voice services under Title II); Letter from Alan Inouye et al., on behalf of ALA, ARL and EDUCAUSE, to Chairman Julius Genachowski et al., GN Docket No. 09-191, WC Docket No. 07-52 at 4-5 (filed Dec. 13, 2010) (citing examples of how libraries and higher education institutions are using broadband services, including VoIP, to replace traditional common carrier services). In previous orders, the Commission has embraced the use of VoIP to avoid or constrain high international calling rates. *See Universal Serv. Contribution Methodology et al.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7546, para. 55 & n.187 (2006) (“[I]nterconnected VoIP service is often marketed as an economical way to make interstate and international calls, as a lower-cost substitute for wireline toll service.”), *rev’d in part sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007); *Reporting Requirements for U.S. Providers of Int’l Telecomms. Servs.*, Notice of Proposed Rulemaking, 19 FCC Rcd 6460, 6470, para. 22 (2004) (“Improvements in the packet-switched transmission technology underlying the internet now allow providers of VoIP to offer international voice transmission of reasonable quality at a price lower than current IMTS rates.”) (footnote omitted); *Int’l Settlements Policy Reform*, Notice of Proposed Rulemaking, 17 FCC Rcd 19954, 19964, para. 13 (2002) (“This ability to engage in least-cost routing, as well as alternative, non-traditional services such as IP Telephony or Voice-Over-IP, in conjunction with the benchmarks policy have created a market dynamic that is pressuring international settlement rates downward.”). In addition, NCTA has explained that, “[b]y enabling consumers to make informed choices regarding broadband Internet access service,” the Commission could conclude that transparency requirements “would help promote the competitiveness of VoIP and other broadband-based communications services” and “thereby facilitate the operation of market forces to discipline the charges and other practices of common carriers, in fulfillment of the Commission’s obligations under sections 201 and 202” of the Act. NCTA Dec. 10, 2010 *Ex Parte* Letter at 2–3.

³⁹⁰ *See supra* Part II.B.

³⁹¹ *See CCIA*, 693 F.2d at 212; *see also Orloff v. FCC*, 352 F.3d 415, 418–19 (D.C. Cir. 2003).

³⁹² We reject the argument asserted by some commenters (*see, e.g.*, AT&T Comments at 218–19; Verizon Comments at 98–99) that the various grants of rulemaking authority in the Act, including the express grant of rulemaking authority in Section 201(b) itself, do not authorize the promulgation of rules pursuant to Section 201(b). *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (“We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act.’”).

³⁹³ 47 U.S.C. § 251(a)(1).

traditional phone networks operated by telecommunications carriers.³⁹⁴ The Commission has not determined whether any such VoIP providers are telecommunications carriers. To the extent that VoIP services are information services (rather than telecommunications services), any blocking or degrading of a call from a traditional telephone customer to a customer of a VoIP provider, or vice-versa, would deny the traditional telephone customer the intended benefits of telecommunications interconnection under Section 251(a)(1). Over-the-top VoIP customers account for a growing share of telephone usage.³⁹⁵ If calls to and from these VoIP customers were not delivered efficiently and reliably by broadband providers, all users of the public switched telephone network would be limited in their ability to communicate, and Congress's goal of "efficient, Nation-wide, and world-wide" communications³⁹⁶ across interconnected networks would be frustrated. To the extent that VoIP services are telecommunications services, a broadband provider's interference with traffic exchanged between a provider of VoIP telecommunications services and another telecommunications carrier would interfere with interconnection between two telecommunications carriers under Section 251(a)(1).³⁹⁷

2. The Commission Has Authority to Adopt Open Internet Rules to Further Its Responsibilities Under Titles III and VI of the Act

127. "The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting,"³⁹⁸ which arise from the Commission's more general public interest obligation to "ensure the larger and more effective use of radio."³⁹⁹ Similarly, the Commission has broad jurisdiction to oversee MVPD services, including direct-broadcast satellite (DBS).⁴⁰⁰ Consistent with these mandates, our jurisdiction

³⁹⁴ See *supra* Part II.B.

³⁹⁵ See *id.*

³⁹⁶ 47 U.S.C. § 151.

³⁹⁷ See also 47 U.S.C. § 256(b)(1) (directing the Commission to "establish procedures for . . . oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications service for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications service"); *Comcast*, 600 F.3d at 659 (acknowledging Section 256's objective, while adding that Section 256 does not "'expand[] . . . any authority that the Commission' otherwise has under law") (quoting 47 U.S.C. § 256(c)).

³⁹⁸ See *United States v. Sw. Cable Co.*, 392 U.S. 157, 177 (1968); see also *id.* at 174 ("[T]hese obligations require for their satisfaction the creation of a system of local broadcasting stations, such that 'all communities of appreciable size (will) have at least one television station as an outlet for local self-expression.'"); 47 U.S.C. §§ 307(b) (Commission shall "make such distribution of licenses, . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same"), 303(f) & (h) (authorizing the Commission to allocate broadcasting zones or areas and to promulgate regulations "as it may deem necessary" to prevent interference among stations) (cited in *Sw. Cable*, 392 U.S. at 173-74).

³⁹⁹ *Nat'l Broad. Co.*, 319 U.S. at 216 (public interest to be served is the "larger and more effective use of radio") (citation and internal quotation marks omitted).

⁴⁰⁰ See 47 U.S.C. § 303(v); see also *N.Y. State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 807-12 (D.C. Cir. 1984) (upholding the Commission's exercise of ancillary authority over satellite master antenna television service); 47 U.S.C. § 548 (discussed below).

over video and audio services under Titles III and VI of the Communications Act provides additional authority for open Internet rules.⁴⁰¹

128. First, such rules are necessary to the effective performance of our Title III responsibilities to ensure the “orderly development . . . of local television broadcasting”⁴⁰² and the “more effective use of radio.”⁴⁰³ As discussed in Parts II.A and II.B, Internet video distribution is increasingly important to all video programming services, including local television broadcast service.⁴⁰⁴ Radio stations also are providing audio and video content on the Internet.⁴⁰⁵ At the same time, broadband providers—many of which are also MVPDs—have the incentive and ability to engage in self-interested practices that may include blocking or degrading the quality of online programming content, including broadcast content, or charging unreasonable additional fees for faster delivery of such content. Absent the rules we adopt today, such practices jeopardize broadcasters’ ability to offer news (including local news) and other programming over the Internet, and, in turn, threaten to impair their ability to offer high-quality broadcast content.⁴⁰⁶

129. The Commission likewise has authority under Title VI of the Act to adopt open Internet rules that protect competition in the provision of MVPD services. A cable or telephone company’s interference with the online transmission of programming by DBS operators or stand-alone online video programming aggregators that may function as competitive alternatives to traditional MVPDs⁴⁰⁷ would frustrate Congress’s stated goals in enacting Section 628 of the Act, which include promoting “competition and diversity in the multichannel video programming market”; “increase[ing] the availability of satellite cable programming and satellite broadcast

⁴⁰¹ See, e.g., Google Comments at 45 & n.142; Vonage Comments at 13–15; Vonage Reply Comments at 25; XO Comments at 20–21.

⁴⁰² *Sw. Cable*, 392 U.S. at 177; see 47 U.S.C. § 303(f) & (h) (establishing Commission’s authority to allocate broadcasting zones or areas and to promulgate regulations “as it may deem necessary” to prevent interference among stations) (cited in *Sw. Cable*, 392 U.S. at 173–74).

⁴⁰³ *Nat’l Broad. Co.*, 319 U.S. at 216; see also 47 U.S.C. §§ 303(g) (establishing Commission’s duty to “generally encourage the larger and more effective use of radio in the public interest”), 307(b) (“[T]he Commission shall make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”).

⁴⁰⁴ See *supra* Parts II.A and II.B.

⁴⁰⁵ See *supra* Part II.A.

⁴⁰⁶ See Parts II.A. and II.B. NCTA has noted that “[t]he Commission could decide that, based on the growing importance of broadcast programming distributed over broadband networks to both television viewers and the business of broadcasting itself, ensuring that broadcast video content made available over broadband networks is not subject to unreasonable discrimination or anticompetitive treatment is necessary to preserve and strengthen the system of local broadcasting.” NCTA Dec. 10, 2010 *Ex Parte* Letter at 3; see also *id.* (“Facilitating the availability of broadcast content on the Internet may also help to foster more efficient and intensive use of spectrum, thereby supporting the Commission’s duty in section 303(g) to ‘generally encourage the larger and more effective use of radio in the public interest.’”) (quoting 47 U.S.C. § 303(g)).

⁴⁰⁷ See *supra* paras. 16-17, 22-23. The issue whether online-only video programming aggregators are themselves MVPDs under the Communications Act and our regulations has been raised in pending program access complaint proceedings. See, e.g., *VDC Corp. v. Turner Network Sales, Inc.*, Program Access Complaint (Jan. 18, 2007); *Sky Angel U.S., LLC v. Discovery Commc’ns LLC*, Program Access Complaint (Mar. 24, 2010). Nothing in this Order should be read to state or imply any determination on this issue.

programming to persons in rural and other areas not currently able to receive such programming”;
and “spur[ring] the development of communications technologies.”⁴⁰⁸

130. When Congress enacted Section 628 in 1992, it was specifically concerned about the incentive and ability of cable operators to use their control of video programming to impede competition from the then-nascent DBS industry.⁴⁰⁹ Since that time, the Internet has opened a new competitive arena in which MVPDs that offer broadband service have the opportunity and incentive to impede DBS providers and other competing MVPDs—and the statute reaches this analogous arena as well. Section 628(b) prohibits cable operators from engaging in “unfair or deceptive acts or practices the purpose or effect of which is to prevent or hinder significantly the ability of an MVPD to deliver satellite cable programming or satellite broadcast programming to consumers.”⁴¹⁰ An “unfair method of competition or unfair act or practice” under Section 628(b) includes acts that can be anticompetitive.⁴¹¹ Thus, Section 628(b) proscribes practices by cable operators that (i) can impede competition, and (ii) have the purpose or effect of preventing or significantly hindering other MVPDs from providing consumers their satellite-delivered programming (*i.e.*, programming transmitted to MVPDs via satellite for retransmission to subscribers).⁴¹² Section 628(c)(1), in turn, directs the Commission to adopt rules proscribing

⁴⁰⁸ 47 U.S.C. § 548(a). The Act defines “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.” 47 U.S.C. § 522(20). Although the Commission stated nearly a decade ago that video “‘streamed’ over the Internet” had “not yet achieved television quality” and therefore did not constitute “video programming” at that time, *see Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4834, para. 63 n.236, intervening improvements in streaming technology and broadband availability enable such programming to be “comparable to programming provided by . . . a television broadcast station,” 47 U.S.C. § 522(20). *See supra* Part II.A–II.B. (discussing increasing use of, and end-user demand for, online streaming of video content, including broadcast content). This finding is consistent with our prediction more than five years ago that “[a]s video compression technology improves, data transfer rates increase, and media adapters that link TV to a broadband connection become more widely used, . . . video over the Internet will proliferate and improve in quality.” *Ann. Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming*, Notice of Inquiry, 19 FCC Rcd 10909, 10932, para. 74 (2004) (citation omitted).

⁴⁰⁹ *See* Cable Act of 1992, Pub. L. No. 102-385, § 2(a)(5), 106 Stat. 1460, 1461 (“Vertically integrated program suppliers . . . have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.”); H.R. Rep. No. 102-862, at 93 (1992) (Conf. Rep.), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275 (“In adopting rules under this section, the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies.”); S. Rep. No. 102-92, at 26 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1159 (“[C]able programmers may simply refuse to sell to potential competitors. Small cable operators, satellite dish owners, and wireless cable operators complain that they are denied access to, or charged more for, programming than large, vertically integrated cable operators.”).

⁴¹⁰ *See* 47 U.S.C. § 548(b); *see Nat’l Cable & Telecomms. Ass’n v. FCC*, 567 F.3d 659, 662 (D.C. Cir. 2009) (*NCTA*).

⁴¹¹ *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 779, para. 48 & n.190 (2010) (citing *Exclusive Contracts for Provision of Video Serv. in Multiple Dwelling Units and Other Real Estate Devs.*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20255, para. 43, *aff’d*, *NCTA*, 567 F.3d 659); *see also NCTA*, 567 F.3d at 664–65 (referring to “unfair dealing” and “anticompetitive practices”).

⁴¹² *See* 47 U.S.C. § 548(b); *NCTA*, 567 F.3d at 664. In *NCTA*, the court held that the Commission reasonably concluded that the “broad and sweeping terms” of Section 628(b) authorized it to ban exclusive
(continued...)

unfair practices by cable operators and their affiliated satellite cable programming vendors.⁴¹³ Section 628(j) provides that telephone companies offering video programming services are subject to the same rules as cable operators.⁴¹⁴

131. The open Internet rules directly further our mandate under Section 628. Cable operators, telephone companies, and DBS operators alike are seeking to keep and win customers by expanding their MVPD offerings to include online access to their programming.⁴¹⁵ For example, in providing its MVPD service, DISH (one of the nation's two DBS providers) relies significantly on online dissemination of programming, including video-on-demand and other programming, that competes with similar offerings by cable operators.⁴¹⁶ As DISH explains, "[a]s more and more video consumption moves online, the competitive viability of stand-alone MVPDs depends on their ability to offer an online video experience of the same quality as the online video offerings of integrated broadband providers."⁴¹⁷ The open Internet rules will prevent practices by cable operators and telephone companies, in their role as broadband providers, that have the purpose or effect of significantly hindering (or altogether preventing) delivery of video

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agreements between cable operators and building owners that prevented other MVPDs from providing their programming to residents of those buildings. The court observed that "the words Congress chose [in Section 628(b)] focus not on practices that prevent MVPDs from *obtaining* satellite cable or satellite broadcast programming, but on practices that prevent them from 'providing' that programming 'to subscribers or consumers.'" *NCTA*, 567 F.3d at 664 (emphasis in original).

⁴¹³ 47 U.S.C. § 548(c)(1).

⁴¹⁴ 47 U.S.C. § 548(j).

⁴¹⁵ DISH Reply at 4–5 ("Pay-TV services continue to evolve at a rapid pace and providers increasingly are integrating their vast offerings of linear channels with online content," while "consumers are adopting online video services as a complement to traditional, linear pay-TV services" and "specifically desire Internet video as a complement to . . . [MVPDs'] traditional TV offerings.") (footnotes and citations omitted). We find unpersuasive the contention that this Order fails to "grapple with the implications of the market forces that are driving MVPDs . . . to add Internet connectivity to their multichannel video offerings." McDowell Statement at *24 (footnote omitted). Our analysis takes account of these developments, which are discussed at length in Part II.A, above.

⁴¹⁶ *Id.* at 5–8 & n.20 (discussing "DishOnline service," which "allows DISH to offer over 3,000 movies and TV shows through its 'DishOnline' Internet video service," and noting that "the success of DishOnline is critically dependent on broadband access provided and controlled by DISH's competitors in the MVPD market"); DISH PN Comments at 2–3; DISH Network, Watch Live TV Online OR Recorded Programs with DishOnline, www.dish-systems.com/products/dish_online.php ("DISHOnline.com integrates DISH Network's expansive TV programming lineup with the vast amount of online video content, adding another dimension to our 'pay once, take your TV everywhere' product platform."); *see also supra* Part II.A. Much of the regular subscription programming that DISH offers online is satellite-delivered programming. *See* DISH Network, Watch Live TV Online OR Recorded Programs with DishOnline, www.dish-systems.com/products/dish_online.php (noting that customers can watch content from cable programmers such as the Discovery Channel and MTV). Thus, we reject NCTA's argument that "[t]here is no basis for asserting that any cable operator or common carrier's practices with respect to Internet-delivered video could . . . 'prevent or significantly hinder' an MVPD from providing satellite cable programming." NCTA Dec. 10, 2010 *Ex Parte* Letter at 5.

⁴¹⁷ DISH Reply at 7.

programming protected under Section 628(b).⁴¹⁸ The Commission therefore is authorized to adopt open Internet rules under Section 628(b), (c)(1), and (j).⁴¹⁹

132. Similarly, open Internet rules enable us to carry out our responsibilities under Section 616(a) of the Act,⁴²⁰ which confers additional express statutory authority to combat discriminatory network management practices by broadband providers. Section 616(a) directs the Commission to adopt regulations governing program carriage agreements “and related practices” between cable operators or other MVPDs and video programming vendors.⁴²¹ The program carriage regulations must include provisions that prevent MVPDs from “unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution,” on the basis of a vendor’s affiliation or lack of affiliation with the MVPD, in the selection, terms, or conditions of carriage of the vendor’s programming.⁴²² MVPD practices that discriminatorily impede competing video programming vendors’ online delivery of programming to consumers affect the vendors’ ability to “compete fairly” for viewers,⁴²³ just as surely as MVPDs’ discriminatory selection of video programming for carriage on cable systems has this effect. We find that discriminatory practices by MVPDs in their capacity as broadband providers, such as blocking or charging fees for termination of online video programming to end users, are “related” to program carriage agreements and within our mandate to adopt regulations under Section 616(a).⁴²⁴

C. Authority to Protect the Public Interest Through Spectrum Licensing

133. Open Internet rules for wireless services are further supported by our authority, under Title III of the Communications Act, to protect the public interest through spectrum

⁴¹⁸ Notwithstanding suggestions to the contrary, the Commission is not required to wait until anticompetitive harms are realized before acting. Rather, the Commission may exercise its ancillary jurisdiction to “plan in advance of foreseeable events, instead of waiting to react to them.” *Sw. Cable*, 392 U.S. at 176-77 (citation and internal quotation marks omitted); *see also Star Wireless, LLC v. FCC*, 522 F.3d at 475.

⁴¹⁹ *See Open Internet NRPM*, 24 FCC Rcd at 13099, para. 85 (discussing role of the Internet in fostering video programming competition and the Commission’s authority to regulate video services).

⁴²⁰ 47 U.S.C. § 536(a).

⁴²¹ *Id.* An MVPD is “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.” 47 U.S.C. § 522(13). A “video programming vendor” is any “person engaged in the production, creation, or wholesale distribution of video programming for sale.” 47 U.S.C. § 536(b); *see also supra* note 408 (discussing definition of “video programming”). A number of video programming vendors make their programming available online. *See, e.g.,* Hulu.com, www.hulu.com/about; Biography Channel, www.biography.com; Hallmark Channel, www.hallmarkchannel.com. *See also supra* Part II.A.

⁴²² 47 U.S.C. § 536(a)(1)–(3); *see also* 47 C.F.R. § 76.1301 (implementing regulations to address practices specified in Section 616(a)(1)–(3)).

⁴²³ 47 U.S.C. § 536(a)(3).

⁴²⁴ The Act does not define “related practices” as that phrase is used in Section 616(a). Because the term is neither explicitly defined in the statute nor susceptible of only one meaning, we construe it, consistent with dictionary definitions, to cover practices that are “akin” or “connected” to those specifically identified in Section 616(a)(1)–(3). *See Black’s Law Dictionary* 1158 (5th ed. 1979); *Webster’s Third New Int’l Dictionary* 1916 (1993). The argument that Section 616(a) has no application to Internet access service overlooks that the statute expressly covers these “related practices.”

licensing.⁴²⁵ Congress has entrusted the Commission with “maintain[ing] the control of the United States over all the channels of radio transmission.”⁴²⁶ Licensees hold Commission-granted authorizations to use that spectrum subject to conditions the Commission imposes on that use.⁴²⁷ In considering whether to grant a license to use spectrum, therefore, the Commission must “determine . . . whether the public interest, convenience, and necessity will be served by the granting of such application.”⁴²⁸ Likewise, when identifying classes of licenses to be awarded by auction and the characteristics of those licenses, the Commission “shall include safeguards to protect the public interest” and must seek to promote a number of goals, including “the development and rapid deployment of new technologies, products, and services.”⁴²⁹ Even after licenses are awarded, the Commission may change the license terms “if in the judgment of the Commission such action will promote the public interest, convenience, and necessity.”⁴³⁰ The Commission may exercise this authority on a license-by-license basis or through a rulemaking,⁴³¹ even if the affected licenses were awarded at auction.⁴³²

134. The Commission previously has required wireless licensees to comply with open Internet principles, as appropriate in the particular situation before it. In 2007, when it modified the service rules for the 700 MHz band, the Commission took “a measured step to encourage additional innovation and consumer choice at this critical stage in the evolution of wireless broadband services.”⁴³³ Specifically, the Commission required C block licensees “to allow customers, device manufacturers, third-party application developers, and others to use or develop the devices and applications of their choosing in C Block networks, so long as they meet all applicable regulatory requirements and comply with reasonable conditions related to management of the wireless network (*i.e.*, do not cause harm to the network).”⁴³⁴ The open Internet conditions we adopt today likewise are necessary to advance the public interest in innovation and investment.⁴³⁵

135. AT&T contends that the Commission cannot apply “neutrality” regulations to wireless broadband services outside the upper 700 MHz C Block spectrum because any such regulations “would unlawfully rescind critical rulings in the Commission’s 700 MHz *Second*

⁴²⁵ See, e.g., NCTA Dec. 10, 2010 *Ex Parte* Letter at 3 (discussing authority ancillary to Title III).

⁴²⁶ 47 U.S.C. § 301.

⁴²⁷ 47 U.S.C. §§ 304, 316(a)(1). We thus disagree with commenters who suggest in general that there is nothing in Title III to support the imposition of open Internet rules. See, e.g., EFF Comments at 6 n.13.

⁴²⁸ 47 U.S.C. § 309(a); see also 47 U.S.C. § 307(a) (“The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this [Act], shall grant to any applicant therefor a station license provided for by this [Act].”).

⁴²⁹ 47 U.S.C. § 309(j)(3).

⁴³⁰ 47 U.S.C. § 316(a)(1).

⁴³¹ See *WBEN Inc. v. United States*, 396 F.2d 601, 618 (2d Cir. 1968).

⁴³² See 47 U.S.C. § 309(j)(6); *Celtronix Telemetry v. FCC*, 272 F.3d 585 (D.C. Cir. 2001).

⁴³³ 700 MHz *Second Report and Order*, 22 FCC Rcd at 15363, para. 201.

⁴³⁴ *Id.* at 15365, para. 206.

⁴³⁵ See *supra* Part III.E. In addition, the use of mobile VoIP applications is likely to constrain prices for CMRS voice services, similar to what we described earlier with regard to VoIP and traditional phone services. See *supra* para. 125.

Report and Order on which providers relied in making multi-billion dollar investments,⁴³⁶ and that adopting these regulations more broadly to all mobile providers would violate the Administrative Procedure Act.⁴³⁷ We disagree. As explained above, the Commission retains the statutory authority to impose new requirements on existing licenses beyond those that were in place at the time of grant, whether the licenses were assigned by auction⁴³⁸ or by other means.⁴³⁹ In this case, parties were made well aware that the agency might extend openness requirements beyond the C Block, diminishing any reliance interest they might assert.⁴⁴⁰ To the extent that AT&T argues that application of openness principles reduced auction bids on the C Block spectrum,⁴⁴¹ we find that the reasons for the price differences between the C Block and other 700 MHz spectrum blocks are far more complex. A number of factors, including unique auction dynamics and significant differences between the C Block spectrum and other blocks of 700 MHz spectrum⁴⁴² contributed to these price differences. In balancing the public interest factors we are required to consider, we have determined that adopting a targeted set of rules that apply to all mobile broadband providers is necessary at this time.⁴⁴³

D. Authority to Collect Information to Enable the Commission to Perform Its Reporting Obligations to Congress

136. Additional sections of the Communications Act provide authority for our transparency requirement in particular. Section 4(k) provides for an annual report to Congress that “shall contain . . . such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of interstate . . . wire and radio communication” and provide “recommendations to Congress as to additional legislation which the Commission deems necessary or desirable.”⁴⁴⁴ The Commission

⁴³⁶ AT&T PN Reply at 32. AT&T asserts that winners of non-C-Block licenses paid a premium for licenses not subject to the open platform requirements that applied to the upper 700 MHz C Block licenses. *Id.* at 33–34.

⁴³⁷ AT&T Comments at 233–34.

⁴³⁸ *Celtronix*, 272 F.3d at 589.

⁴³⁹ The Commission may act by rulemaking to modify or impose rules applicable to all licensees or licensees in a particular class; in order to modify specific licenses held by particular licensees, however, the Commission generally is required to follow the modification procedure set forth in 47 U.S.C. § 316. *See Comm. for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1319–20 (D.C. Cir. 1995).

⁴⁴⁰ *See generally*, 700 MHz *Second Report and Order*, 22 FCC Rcd at 15358–65. In the 700 MHz *Second Report and Order*, the Commission stated that its decision to limit open-platform requirements to the C Block was based on the record before it “at this time,” *id.* at 15361, and noted that openness issues in the wireless industry were being considered more broadly in other proceedings. *Id.* at 15363. The public notice setting procedures for the 2008 auction advised bidders that the rules governing auctioned licenses would be subject to “pending and future proceedings” before the Commission. *See Auction of 700 MHz Band Licenses Scheduled for January 24, 2008*, Public Notice, 22 FCC Rcd 18141, 18156, para. 42 (2007).

⁴⁴¹ *See, e.g.*, AT&T PN Reply at 34–35.

⁴⁴² *See, e.g.*, 47 C.F.R. §§ 27.5(b)–(c), 27.6(b)–(c), 27.14, 27.53(c)–(e).

⁴⁴³ *See supra* Part III.E.

⁴⁴⁴ 47 U.S.C. § 154(k). In a similar vein, Section 257 of the Act directs the Commission to report to Congress every three years on “market entry barriers” that the Commission recommends be eliminated, including “barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.” 47 U.S.C. § 257(a) & (c); *see also Comcast*, 600 (continued....)

has previously relied on Section 4(k), among other provisions, as a basis for its authority to gather information.⁴⁴⁵ The *Comcast* court, moreover, “readily accept[ed]” that “certain assertions of Commission authority could be ‘reasonably ancillary’ to the Commission’s statutory responsibility to issue a report to Congress. For example, the Commission might impose disclosure requirements on regulated entities in order to gather data needed for such a report.”⁴⁴⁶ We adopt such disclosure requirements here.

137. Finally, the Commission has broad authority under Section 218 of the Act to obtain “full and complete information” from common carriers and their affiliates.⁴⁴⁷ To the extent broadband providers are affiliated with communications common carriers, Section 218 allows the Commission to require the provision of information such as that covered by the transparency rule we adopt today.⁴⁴⁸ We believe that these disclosure requirements will assist us in carrying out our reporting obligations to Congress.

E. Constitutional Issues

138. Some commenters contend that open Internet rules violate the First Amendment and amount to an unconstitutional taking under the Fifth Amendment. We examine these constitutional arguments below, and find them unfounded.

1. First Amendment

139. Several broadband providers argue that open Internet rules are inconsistent with the free speech guarantee of the First Amendment.⁴⁴⁹ These commenters generally contend that because broadband providers distribute their own and third-party content to customers, they are

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F.3d at 659; NCTA Dec. 10, 2010 *Ex Parte* Letter at 3 (“[S]ection 257’s reporting mandate provides a basis for the Commission to require providers of broadband Internet access service to disclose the terms and conditions of service in order to assess whether such terms hamper small business entry and, if so, whether any legislation may be required to address the problem.”) (footnote omitted).

⁴⁴⁵ See, e.g., *New Part 4 of the Commission’s Rules Concerning Disruptions to Commc’ns*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 16830, 16837, paras. 1, 12 (2004) (extending Commission’s reporting requirements for communications disruptions to certain providers of non-wireline communications, in part based on Section 4(k)); *DTV Consumer Educ. Initiative*, Report & Order, 23 FCC Rcd 4134, 4147, paras. 1, 2, 28 (2008) (requiring various entities, including broadcasters, to submit quarterly reports to the Commission detailing their consumer education efforts related to the DTV transition, in part based on section 4(k)); *Review of the Commission’s Broad. Cable and Equal Emp’t Opportunity Rules and Policies*, Second Report and Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd 24018, 24077, paras. 5, 195 (2002) (promulgating recordkeeping and reporting requirements for broadcast licensees and other regulated entities to show compliance with equal opportunities hiring rules, in part based on section 4(k)).

⁴⁴⁶ 600 F.3d at 659. All, or nearly all, providers of broadband Internet access service are regulated by the Commission insofar as they operate under certificates to provide common carriage service, or under licenses to use radio spectrum.

⁴⁴⁷ 47 U.S.C. § 218.

⁴⁴⁸ Cf. *US West, Inc. v. FCC*, 778 F.2d 23, 26–27 (D.C. Cir. 1985) (acknowledging Commission’s authority under Section 218 to impose reporting requirements on holding companies that owned local telephone companies).

⁴⁴⁹ See, e.g., AT&T Comments at 235–44; AT&T Reply at 167–73; Verizon Comments at 111–18; Verizon Reply at 108–17; TWC Comments at 44–50; TWC Reply at 51–56.

speakers entitled to First Amendment protections.⁴⁵⁰ Therefore, they argue, rules that prevent broadband providers from favoring the transmission of some content over other content violate their free speech rights. Other commenters contend that none of the proposed rules implicate the First Amendment, because providing broadband service is conduct that is not correctly understood as speech.⁴⁵¹

140. In arguing that broadband service is protected by the First Amendment, AT&T compares its provision of broadband service to the operation of a cable television system, and points out that the Supreme Court has determined that cable programmers and cable operators engage in speech protected by the First Amendment.⁴⁵² The analogy is inapt. When the Supreme Court held in *Turner I* that cable operators were protected by the First Amendment, the critical factor that made cable operators “speakers” was their production of programming and their exercise of “editorial discretion over which programs and stations to include” (and thus which to exclude).⁴⁵³

141. Unlike cable television operators, broadband providers typically are best described not as “speakers,” but rather as conduits for speech. The broadband Internet access service at issue here does not involve an exercise of editorial discretion that is comparable to cable companies’ choice of which stations or programs to include in their service. In this proceeding broadband providers have not, for instance, shown that they market their services as benefiting from an editorial presence.⁴⁵⁴ To the contrary, Internet end users expect that they can obtain access to all or substantially all content that is available on the Internet, without the editorial intervention of their broadband provider.⁴⁵⁵

142. Consistent with that understanding, broadband providers maintain that they qualify for statutory immunity from liability for copyright violations or the distribution of offensive material precisely because they lack control over what end users transmit and receive.⁴⁵⁶

⁴⁵⁰ See AT&T Comments at 235; Verizon Comments at 112.

⁴⁵¹ See, e.g., Google Reply at 28; PK Reply at 23; Free Press Comments at 137–38.

⁴⁵² AT&T Comments at 235.

⁴⁵³ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (*Turner I*) (internal quotation marks omitted); see also *Los Angeles v. Preferred Commc’ns, Inc.*, 476 U.S. 488, 494 (1986).

⁴⁵⁴ See, e.g., AT&T, AT&T U-verse, www.att-services.net/att-u-verse.html (AT&T U-verse: “Customers can get the information they want, when they want it”); Verizon, FiOS Internet, www2.verizon.com/Residential/FiOSInternet/Overview.htm and Verizon, High Speed Internet, www2.verizon.com/Residential/HighSpeedInternet (Verizon FiOS and High Speed Internet: “Internet, plus all the free extras”).

⁴⁵⁵ See Verizon Comments at 117 (“[B]roadband providers today provide traditional Internet access services that offer subscribers access to *all lawful content* and have strong economic incentives to continue to do so.”) (emphasis added).

⁴⁵⁶ See 17 U.S.C. § 512(a) (a “service provider shall not be liable . . . for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for” material distributed by others on its network); 47 U.S.C. § 230(c)(1) (“[N]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”); see also *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1234 (D.C. Cir. 2003) (discussing in context of subpoena issued to Verizon under the Digital Millennium Copyright Act Section 512(a)’s “four safe harbors, each of which immunizes ISPs from liability from copyright infringement”), *cert. denied*, 543 U.S. 924 (2004). For example “Verizon.net, the home page for Verizon Internet customers, contains a notice explicitly claiming copyright over the contents of the page. In

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