

## STATE REGULATORY AND POLICY IMPLICATIONS OF THE FCC'S NATIONAL BROADBAND PLAN

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### I. INTRODUCTION

- A. Congress ordered the FCC as part of the American Recovery and Rehabilitation Act (ARRA) to develop a National Broadband Plan.
- B. The NBP is just what it's title describes - a plan. No rules were adopted with publication of the plan.
- C. 6 Long Term Goals:
  - GOAL 1: At least 100 million U.S. Homes should have access to actual download speeds of at least 100 Mbps and actual upload speeds of at least 50 Mbps.
  - GOAL 2: The U.S. should lead the world in mobile innovation, with the fastest and most extensive wireless network of any nation.
  - GOAL 3: Every American should have affordable access to robust broadband service, and the means and skills to subscribe if they so chose.
  - GOAL 4: Every American community should have affordable access to at least 1 Gbps broadband service to anchor institutions such as schools, hospitals and government buildings.
  - GOAL 5: To ensure safety of the American people, every first responder should have access to a nationwide, wireless, interoperable broadband public safety network.
  - GOAL 6: To ensure that America leads the world in the clean energy economy, every American should be able to use broadband to track and manage their real-time energy consumption.

### II. THE ROLE OF STATES IN THE NATIONAL BROADBAND PLAN.

- A. State Governments - The Elephant in the Room.
  - 1. The NBP Says Next to Nothing About the Role of State Governments in Implementing the NBP.
  - 2. States Have Been in Limbo About Their Regulatory Role Since the FCC's Order *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning Order of Minnesota Public Utilities Comm'n*, 19 FCC Rcd 22404 (Nov. 12, 2004)(herein "*Vonage Preemption Order*").
  - 3. The FCC has issued a series of orders classifying broadband and IP-enabled services as "information services" regulated under Title II of the Communications Act.

- a. The FCC determined that Pulver.com's "Free World Dial-up (FWD) service was an "unregulated information service subject to the Commission's jurisdiction." *In re Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307 (Feb. 12, 2004).
  - b. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005) (*Brand X*). The U.S. Supreme Court affirmed the FCC's Order in *re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 & CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling and NPRM*). Supreme Court deferred to FCC's determination that cable modem internet service contains a telecommunications component, but that it is functionally integrated into a single offering properly classified as an information service.
  - c. *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005)(*DSL Order*).
4. Out of this line of decisions two important regulatory precepts have shaped recent FCC regulatory policy:
    - a. Broadband and nomadic VoIP services are Title I information services, subject to lighter federal regulation than "telecommunications services."
    - b. As Title I services, the FCC has primary jurisdiction to determine whether and the extent to which states have any regulatory authority over broadband and IP-enabled services. *See, e.g., Vonage Holdings Corp. v. Nebraska Public Service Comm'n*, 564 F. 3d 900 (8<sup>th</sup> Cir. 2009).
  5. *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).
    - a. Challenge to the FCC's so-called "Net Neutrality" order in which the FCC found it had jurisdiction to regulate Comcast's broadband network management practices.
    - b. Court found the FCC had no such jurisdiction.
    - c. FCC argued it had "ancillary jurisdiction" under section 4(i) of the Communications Act of 1934 (47 U.S.C. §154(i)). That provision authorizes the FCC to "perform any and all acts, make such rules and regulations, and issue

- such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."
- d. The FCC may exercise ancillary authority only if it demonstrates its action is "reasonably ancillary to the . . . effective performance of its statutory mandated responsibilities." *American Library Ass'n*, 406 F3d 689, 692 (D.C. Cir. 2005).
  - e. The permissibility of each new exercise of ancillary authority must be evaluated on its own terms. The particular regulation at issue must be reasonably ancillary to the effective performance of the FCC's explicit statutory functions. (e.g. television broadcasting) *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*).
  - f. Nothing in *Midwest Video I* or *Southwestern Cable* even hints that the FCC's ancillary authority over cable television services was plenary.
  - g. The FCC could not leapfrog from the U.S. Supreme Court's recognition in *Brand X* that the FCC may have ancillary authority to require unbundling of the transport component of cable modem service to a determination that it has the authority to regulate the network management practices of cable internet providers.
  - h. FCC's reliance on Congressional policy statements as a source of ancillary authority is insufficient. Administrative agencies may act only pursuant to authority delegated to them by Congress.
  - i. Section 706 of the Telecommunications Act of 1996 (providing the FCC regulatory forbearance authority) is not an independent grant of authority to regulate any service.
  - j. Court reviewed all other FCC arguments for independent statutory grants of authority, and found none justified the FCC's regulation of Comcast's broadband network management practices.
6. In the NBP, released prior to *Comcast*, the FCC acknowledged questions about its authority to implement the NBP recommendations. Absent congressional action, the NBP states, there are two alternative approaches to finding jurisdiction for implementation of the NBP:
- a. Rely on the FCC's ancillary authority under Title I.
  - b. Reclassify broadband as a Title II service.
7. After *Comcast*, FCC Chairman Julius Genachowski proposed what has become known as the "third way."

- a. Restore the regulatory environment to that which existed prior to *Comcast*.
  - b. Acknowledges the *Comcast* decision "casts serious doubt" on the legal theory of ancillary jurisdiction the FCC asserted in its *Comcast* Order. Genachowski worries *Comcast* creates a serious problem that could stand in the way of implementing many of the FCC's goals in the NBP. Specifically, Genachowski believes *Comcast* clouds the FCC's legal authority to: (a) reform the federal Universal Service Fund to fund broadband deployment; (b) implement customer service and consumer protection regulations related to broadband services; (c) implement regulations to protect broadband subscriber privacy; (d) facilitate access to broadband services by persons with disabilities; (e) implement regulations pertaining to cyber-security; and (f) implement regulations regarding "next generation" 911 services.
  - c. Under Genachowski "third way" approach the FCC would classify the "telecommunications component" of broadband as a Title II "telecommunications service."
  - d. However, Genachowski's proposal would specifically limit the application of Title II to only certain sections - Sections 201 (providing jurisdiction over common carrier rates and service), 202 (non-discriminatory common carrier rates and service), 208 (authorizing complaints against common carriers), 222 (protecting common carrier customer proprietary network information or "CPNI"), 254 (universal service), and 255 (access to services by persons with disabilities).
  - e. Genachowski proposes a new FCC rulemaking proceeding to determine the proper regulatory classification for broadband services.
8. Genachowski's "third way" proposal raises several questions, including:
- a. How would the FCC justify such an about face in its recent precedent finding that broadband and IP-based services are information services?
  - b. Under what authority can the FCC assure limited Title II authority (beyond the current administration)?
  - c. Would or could the FCC limit or preempt state regulatory authority over broadband services under a limited Title II regime? Title II provides for extensive state authority over telecommunications services.

- d. How does Genachowski's vision of limited Title II authority square with ambitious plans in the NBP regarding the promotion of broadband competition?

### III. SPECIFIC PROVISIONS IN THE NBP WITH STATE REGULATORY IMPLICATIONS. (Not an exhaustive summary of NBP recommendations. See Appendix for FCC's NBP Executive Summary).

#### A. Chapter 4 - Broadband Competition and Regulation Policy.

1. Data Collection - NBP recommends FCC and U.S. Bureau of Labor Statistics should collect more detailed and accurate data on actual availability, penetration, prices, churn and bundles offered by broadband providers to consumers and businesses, and should publish analyses of this data.
2. Technical broadband performance standards - NBP recommends FCC, in coordination with the National Institute of Standards and Technology (NIST), establish technical broadband performance standards.
3. Broadband Performance Data - NBP recommends FCC continue its efforts to measure and publish data on actual performance of fixed broadband services.
4. Review of Wholesale Competition Regulations - NBP recommends FCC comprehensively review its wholesale competition regulations to develop a "coherent and effective framework and take expedited action based on that framework to ensure widespread availability of inputs for broadband services provided to small businesses, mobile providers, and enterprise customers."
5. Special Access Rates - NBP recommends the FCC ensure special access rates, terms and conditions are just and reasonable.
6. Copper Retirement Policies - NBP recommends FCC ensure ILEC competition retirement policies are "appropriately balanced."
7. Interconnection Obligations - NBP recommends FCC clarify interconnection rights and obligations and encourage shift to IP-to-IP interconnection where efficient.

#### B. Chapter 6 - Infrastructure Recommendations

1. FCC should establish rental rates for pole attachments as low and close to uniform as possible, consistent with 47 U.S.C. §224.
2. FCC should implement rules to lower cost of pole attachment "make ready" process.
3. FCC should reform section 224 access process.
4. FCC should improve collection and availability of information regarding location and availability of poles, ducts, conduits and rights-of-way.

5. FCC should establish joint task force with state and local policy makers to craft guidelines for rates, terms and conditions for access to public rights-of-way.
- C. Chapter 8 - Broadband Availability Recommendations
1. FCC should conduct comprehensive reform of universal service and intercarrier compensation in 3 stages to close the "broadband availability gap":
    - a. Stage 1 - Lay Foundation for Reform (2010-2011)
      - i. Improve USF performance and accountability
      - ii. Create Connect America Fund (CAF)
      - iii. Create Mobility Fund
      - iv. Design new USF funds in a manner that allows recipients to exclude subsidies from taxable income.
      - v. Over next 10 years, shift \$15.5 billion from current high cost program to broadband through "common sense" reforms.
        - i. Implement voluntary commitments of Sprint and Verizon Wireless to reduce high-cost funding they receive as competitive ETCs to zero over a 5-year period as a condition of earlier merger decisions.
        - ii. Require ROR carriers to move to price cap regulation.
        - iii. Redirect Interstate Access Support (IAS) toward broadband deployment.
        - iv. Phase out remaining legacy high-cost support for competitive ETCs.
      - vi. FCC should adopt framework for long-term intercarrier compensation reform to eliminate per minute access charges while providing carriers with adequate cost recovery. Reduce intrastate terminating access to interstate terminating access rate levels.
      - vii. FCC should examine middle-mile costs and pricing.
    - b. Stage 2 - Accelerate Reform (2012-2016)
      - i. Begin making disbursements from CAF.
      - ii. Broaden USF contribution base.
      - iii. Begin staged transition for reducing per minute rates for intercarrier compensation.
    - c. Stage 3 - Complete Transition (2017-2020)
      - i. Manage total size of USF to remain close to its current size (in 2010 dollars) in order to minimize burden of increasing USF contributions on consumers.
      - ii. Eliminate High-Cost program.

- iii. Continue reducing access rates by phasing out per minute of use originating and terminating access.

D. Chapter 9 - Adoption and Utilization - Recommendations

1. FCC should expand Lifeline and Link-Up programs to make broadband available to more households.
2. Federal government should launch a National Digital Literacy Program that creates a Digital Literacy Corps, increases the capacity of digital literacy partners and creates an Online Digital Literacy Portal.
3. Federal support should be expanded for regional capacity-building efforts aimed at improving broadband deployment and adoption.
4. Congress and federal agencies should promote third party evaluation of future broadband adoption programs.

E. Chapter 16 - Public Safety Recommendations

1. Create a nationwide interoperable public safety wireless broadband communications network.
  - a. Flexible spectrum-sharing partnerships with commercial wireless providers.
  - b. Broaden focus beyond D-Block.
  - c. Rulemaking to require CMRS providers to give public safety agencies ability to roam in 700 Mhz and other bands.
  - d. License D-Block for commercial use, with options for public safety partnerships.
  - e. Liability protection for commercial partners.
2. Create Emergency Response Interoperability Center (ERIC) housed at the Dep't of Homeland Security to develop common standards for interoperability for the nationwide broadband public safety network.
3. FEMA should survey state and local deployments of public safety broadband networks, infrastructure and equipment.
4. Nat'l Highway Traffic Safety Administration should prepare a report to identify costs of deploying nationwide NG911 system.
5. Congress should consider enacting a federal 911 regulatory framework.
  - a. Federal and state regulations that focus on legacy 911 systems have hampered NG911 deployment.
  - b. Legislation should remove jurisdictional barriers and inconsistent legacy regulations and provide mechanisms to ensure efficient and accurate transmission of 911-caller information to emergency response agencies.
  - c. Legislation should recognize existing state authority over 911 services but require states to remove regulatory roadblocks to NG911 deployment.
  - d. Legislation should preempt inconsistent state regulations.

- e. Curtail use of 911 fees for non-911 purposes.
  - 6. FCC should address IP-based NG911 communication devices, applications and services. Extend ALI requirements to interconnected VoIP providers.
  - 7. FCC should launch a comprehensive next generation emergency alert inquiry.
- F. The Role of States in the NBP?
- 1. Many states, including Minnesota, have formed broadband task forces or in some cases new state agencies that perform many of the functions described in NBP's specific recommendations.
  - 2. State public utility commissions have also historically been extensively involved in many of the above-discussed issues with respect to intrastate and local telecommunications services.
  - 3. How will the FCC address these historical roles, work already being done by state broadband task forces, and legacy Title II state commission jurisdiction within the context of "limited" Title II authority?

## IV. IMPLEMENTATION.

### A. 2010 FCC Action Items

Proposed 2010 Key Broadband Action Agenda Items\*

|  | Q2 2010 (CY)  | Q3 2010 (CY)  | Q4 2010 (CY)  |
|--|---|---|---|
| Promote World-Leading Mobile Broadband Infrastructure and Innovation             | Mobile Roaming Order and FNPRM (WTB)                                    | AWS Bands Analysis (WTB, OET)                                   | AWS Potential Order (WTB, OET)  |
|  | D Block Order/NPRM (WTB, PSHSB) [Also in Public Safety]                 |   | Secondary Markets Internal Review (WTB)                                 |
|  | Launch Strategic Spectrum Plan and Triennial Assessment (WTB, OET, OSP) | Spectrum Sharing/Wireless Backhaul NPRM/NOI (WTB, OET)          | Spectrum Dashboard 2.0 (WTB, OET, PSHSB, MB, IB)                        |
|  | 2.3 GHz WCS/SDARS Order (OET, WTB, IB)                                  | Oppor. Use of Spectrum NPRM (OET, WTB, IB, MB, PSHSB)           | Recommendation re: Contiguous Unlicensed Spectrum Proceeding (OET, WTB) |
|  |   | TV White Spaces Opinion & Order (OET, MB, WTB)                  | Experimental Licensing NPRM (OET)                                       |
|  |   | MSS NPRM (OET, IB, WTB)   |   |
| Accelerate Universal Broadband Access and Adoption                               | USF Reform NPRM and NOI (WCB, WTB)                                      |   | Mobility Fund NPRM (WTB, WCB)   |
|  | Lifeline/Low-Income Joint Board Referral Order (WCB, WTB)               | Hearing Aid Compat. Second Report & Order/FNPRM (WTB, OET, CGB) | Spectrum on Tribal Lands NPRM (WTB, CGB)                                |
|  | E-Rate FY2011 NPRM (WCB)  |   | E-Rate FY2011 Order (WCB)   |
|  | USF Merger Commitments Order (WCB, WTB)                                 | Rural Health Care Reform NPRM (WCB)                             | USF Transformation NPRM (WCB, WTB)                                      |
|  | Lifeline Pilot Roundtable (WCB, WTB)                                    | Lifeline Flexibility NPRM (WCB, WTB)                            | Intercarrier Compensation NPRM (WCB, WTB)                               |
|  | FCC/FDA Workshop and PN on Converged Devices (OET)                      | Establish Accessibility and Innovation Forum (CGB, WCB, WTB)    | USF Contributions NPRM (WCB, WTB)                                       |
|  | Launch FCC Office of Native American Affairs (CGB)                      | Real-Time Text NOI (CGB, WCB, WTB, OET)                         | Real-Time Text NPRM (CGB, WCB, WTB, OET)                                |
|  | FCC-Native Nations Broadband Task Force (CGB)                           |   | Internet Video and Device Accessibility NOI (CGB, WCB, WTB, MB)         |
| Foster Competition and Maximize Consumer Benefits Across the Broadband Ecosystem | Mobile Wireless Competition Report (WTB, OSP)                           | Interconnection Clarification Order (WCB)                       |   |
|  | Pole Attachments Order and ENPRM (WCB)                                  | Rights-of-Way Task Force (CGB, WCB)                             | Small Business Broadband & Wholesale Comp. NOI (WCB)                    |
|  | Small Business Broadband & Wholesale Comp. PN (WCB)                     |   |   |
|  |   | Special Access Workshop (WCB, WTB, OSP)                         | Special Access NPRM (WCB, WTB, OSP)                                     |
|  | CableCARD NPRM (MB, OET)  |   |   |
|  | Smart Video Devices NOI (MB, OET)                                       |   | Smart Video Devices NPRM (MB, OET)                                      |
| Advance Robust and Secure Public Safety Communications Networks                  |   | Public Safety Roaming & Priority Access NPRM (WTB, PSHSB)       | NG 911 NOI (PSHSB, OET, WCB, WTB)                                       |
|  |   | D Block Order/NPRM (WTB, PSHSB) [Also in Mobile]                | Back-Up Power NOI (PSHSB, OET, WTB)                                     |
|  |   | 700 MHz Waiver Petitions (PSHSB, WTB, OET)                      | Serv. Outage & Homeland Security NPRM (PSHSB, OET, WCB, WTB, IB)        |
|  |   | 700 MHz Public Safety Order/FNPRM (PSHSB, WTB, OET)             |   |
|  |   | Location Accuracy FNPRM (PSHSB, OET, WTB)                       |   |

■ Wireless Telecommunications Bureau (WTB)   
 ■ Wireless Competition Bureau (WCB)   
 ■ Office of Engineering and Technology (OET)   
 ■ Media Bureau (MB)   
 ■ Consumer & Governmental Affairs Bureau (CGB)   
 ■ Public Safety & Homeland Security Bureau (PSHSB)

\* This document reflects only proposed FCC actions, not those of other government agencies, and is not exhaustive of all 2010 FCC actions. The location and timing of actions in this document represents a series of targets that may be adjusted to respond to changing conditions as appropriate. Items that span quarters are expected to occur late in the earlier quarter, or early in the later quarter. Does not include initiatives discussed in Agenda from Q1 2010 and earlier (E-Rate Community Use Order, Rural Health Care Pilot Program Extension Order, Spectrum Dashboard Beta, and Tower Siting Declaratory Ruling).

- B. List of All FCC Proceedings FCC Intends to Undertake to Implement the NBP is provided in the Appendix to this paper.
  - C. FCC Progress Chart available at: <http://www.broadband.gov/plan/broadband-action-agenda-items.html>
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# APPENDICES

# EXECUTIVE SUMMARY

Broadband is the great infrastructure challenge of the early 21st century.

Like electricity a century ago, broadband is a foundation for economic growth, job creation, global competitiveness and a better way of life. It is enabling entire new industries and unlocking vast new possibilities for existing ones. It is changing how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize and disseminate knowledge.

Fueled primarily by private sector investment and innovation, the American broadband ecosystem has evolved rapidly. The number of Americans who have broadband at home has grown from eight million in 2000 to nearly 200 million last year. Increasingly capable fixed and mobile networks allow Americans to access a growing number of valuable applications through innovative devices.

But broadband in America is not all it needs to be. Approximately 100 million Americans do not have broadband at home. Broadband-enabled health information technology (IT) can improve care and lower costs by hundreds of billions of dollars in the coming decades, yet the United States is behind many advanced countries in the adoption of such technology. Broadband can provide teachers with tools that allow students to learn the same course material in half the time, but there is a dearth of easily accessible digital educational content required for such opportunities. A broadband-enabled Smart Grid could increase energy independence and efficiency, but much of the data required to capture these benefits are inaccessible to consumers, businesses and entrepreneurs. And nearly a decade after 9/11, our first responders still lack a nationwide public safety mobile broadband communications network, even though such a network could improve emergency response and homeland security.

## Fulfilling the Congressional Mandate

In early 2009, Congress directed the Federal Communications Commission (FCC) to develop a National Broadband Plan to ensure every American has “access to broadband capability.” Congress also required that this plan include a detailed strategy for achieving affordability and maximizing use of broadband to advance “consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, employee training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.”

Broadband networks only create value to consumers and businesses when they are used in conjunction with broadband-capable devices to deliver useful applications and content. To fulfill Congress’s mandate, the plan seeks to ensure that the entire broadband ecosystem—networks, devices, content and applications—is healthy. It makes recommendations to the FCC, the Executive Branch, Congress and state and local governments.

## The Plan

Government can influence the broadband ecosystem in four ways:

1. Design policies to ensure robust competition and, as a result maximize consumer welfare, innovation and investment.
2. Ensure efficient allocation and management of assets government controls or influences, such as spectrum, poles, and rights-of-way, to encourage network upgrades and competitive entry.
3. Reform current universal service mechanisms to support deployment of broadband and voice in high-cost areas; and ensure that low-income Americans can afford broadband; and in addition, support efforts to boost adoption and utilization.
4. Reform laws, policies, standards and incentives to maximize the benefits of broadband in sectors government influences significantly, such as public education, health care and government operations.

**1. Establishing competition policies.** Policymakers, including the FCC, have a broad set of tools to protect and encourage competition in the markets that make up the broadband ecosystem: network services, devices, applications and content. The plan contains multiple recommendations that will foster competition across the ecosystem. They include the following:

- **Collect, analyze, benchmark and publish detailed, market-by-market information on broadband pricing and competition,** which will likely have direct impact on competitive behavior (e.g., through benchmarking of pricing across geographic markets). This will also enable the FCC and other agencies to apply appropriate remedies when competition is lacking in specific geographies or market segments.
- **Develop disclosure requirements for broadband service providers** to ensure consumers have the pricing and performance information they need to choose the best broadband

offers in the market. Increased transparency will incent service providers to compete for customers on the basis of actual performance.

- **Undertake a comprehensive review of wholesale competition rules** to help ensure competition in fixed and mobile broadband services.
- **Free up and allocate additional spectrum for unlicensed use**, fostering ongoing innovation and competitive entry.
- **Update rules for wireless backhaul spectrum** to increase capacity in urban areas and range in rural areas.
- **Expedite action on data roaming** to determine how best to achieve wide, seamless and competitive coverage, encourage mobile broadband providers to construct and build networks, and promote entry and competition.
- **Change rules to ensure a competitive and innovative video set-top box market**, to be consistent with Section 629 of the Telecommunications Act. The Act says that the FCC should ensure that its rules achieve a competitive market in video “navigation devices,” or set-top boxes—the devices consumers use to access much of the video they watch today.
- **Clarify the Congressional mandate allowing state and local entities to provide broadband in their communities** and do so in ways that use public resources more effectively.
- **Clarify the relationship between users and their online profiles to enable continued innovation and competition in applications and ensure consumer privacy**, including the obligations of firms collecting personal information to allow consumers to know what information is being collected, consent to such collection, correct it if necessary, and control disclosure of such personal information to third parties.

**2. Ensuring efficient allocation and use of government-owned and government-influenced assets.** Government establishes policies for the use of spectrum and oversees access to poles, conduits, rooftops and rights-of-way, which are used in the deployment of broadband networks. Government also finances a large number of infrastructure projects. Ensuring these assets and resources are allocated and managed efficiently can encourage deployment of broadband infrastructure and lower barriers to competitive entry. The plan contains a number of recommendations to accomplish these goals. They include the following:

- **Spectrum** is a major input for providers of broadband service. Currently, the FCC has only 50 megahertz in inventory, just a fraction of the amount that will be necessary to match growing demand. More efficient allocation and assignment of spectrum will reduce deployment costs, drive

investment and benefit consumers through better performance and lower prices. The recommendations on spectrum policy include the following:

- **Make 500 megahertz of spectrum newly available** for broadband within 10 years, of which 300 megahertz should be made available for mobile use within five years.
- **Enable incentives and mechanisms to repurpose spectrum** to more flexible uses. Mechanisms include incentive auctions, which allow auction proceeds to be shared in an equitable manner with current licensees as market demands change. These would benefit both spectrum holders and the American public. The public could benefit from additional spectrum for high-demand uses and from new auction revenues. Incumbents, meanwhile, could recognize a portion of the value of enabling new uses of spectrum. For example, this would allow the FCC to share auction proceeds with broadcasters who voluntarily agree to use technology to continue traditional broadcast services with less spectrum.
- **Ensure greater transparency** of spectrum allocation, assignment and use through an FCC-created spectrum dashboard to foster an efficient secondary market.
- **Expand opportunities for innovative spectrum access models** by creating new avenues for opportunistic and unlicensed use of spectrum and increasing research into new spectrum technologies.
- **Infrastructure** such as poles, conduits, rooftops and rights-of-way play an important role in the economics of broadband networks. Ensuring service providers can access these resources efficiently and at fair prices can drive upgrades and facilitate competitive entry. In addition, testbeds can drive innovation of next-generation applications and, ultimately, may promote infrastructure deployment. Recommendations to optimize infrastructure use include:
  - **Establish low and more uniform rental rates for access to poles**, and simplify and expedite the process for service providers to attach facilities to poles.
  - **Improve rights-of-way management for cost and time savings**, promote use of federal facilities for broadband, expedite resolution of disputes and identify and establish “best practices” guidelines for rights-of-way policies and fee practices that are consistent with broadband deployment.
  - **Facilitate efficient new infrastructure construction**, including through “dig-once” policies that would make federal financing of highway, road and bridge projects contingent on states and localities allowing joint deployment of broadband infrastructure.

- **Provide ultra-high-speed broadband connectivity to select U.S. Department of Defense installations** to enable the development of next-generation broadband applications for military personnel and their families living on base.

**3. Creating incentives for universal availability and adoption of broadband.** Three elements must be in place to ensure all Americans have the opportunity to reap the benefits of broadband. All Americans should have access to broadband service with sufficient capabilities, all should be able to afford broadband and all should have the opportunity to develop digital literacy skills to take advantage of broadband. Recommendations to promote universal broadband deployment and adoption include the following:

- **Ensure universal access to broadband network services.**
  - **Create the Connect America Fund (CAF)** to support the provision of affordable broadband and voice with at least 4 Mbps *actual* download speeds and shift up to \$15.5 billion over the next decade from the existing Universal Service Fund (USF) program to support broadband. If Congress wishes to accelerate the deployment of broadband to unserved areas and otherwise smooth the transition of the Fund, it could make available public funds of a few billion dollars per year over two to three years.
  - **Create a Mobility Fund to provide targeted funding** to ensure no states are lagging significantly behind the national average for 3G wireless coverage. Such 3G coverage is widely expected to be the basis for the future footprint of 4G mobile broadband networks.
  - **Transition the “legacy” High-Cost component of the USF** over the next 10 years and shift all resources to the new funds. The \$4.6 billion per year High Cost component of the USF was designed to support primarily voice services. It will be replaced over time by the CAF.
  - **Reform intercarrier compensation**, which provides implicit subsidies to telephone companies by eliminating per-minute charges over the next 10 years and enabling adequate cost recovery through the CAF.
  - **Design the new Connect America Fund and Mobility Fund in a tax-efficient manner** to minimize the size of the broadband availability gap and thereby reduce contributions borne by consumers.
  - **Broaden the USF contribution base** to ensure USF remains sustainable over time.
- **Create mechanisms to ensure affordability to low-income Americans.**
- **Expand the Lifeline and Link-Up programs by allowing subsidies provided to low-income Americans to be used for broadband.**
  - **Consider licensing a block of spectrum with a condition to offer free or low-cost service** that would create affordable alternatives for consumers, reducing the burden on USF.
- **Ensure every American has the opportunity to become digitally literate.**
  - **Launch a National Digital Literacy Corps** to organize and train youth and adults to teach digital literacy skills and enable private sector programs addressed at breaking adoption barriers.

**4. Updating policies, setting standards and aligning incentives to maximize use for national priorities.** Federal, Tribal, state and local governments play an important role in many sectors of our economy. Government is the largest health care payor in the country, operates the public education system, regulates many aspects of the energy industry, provides multiple services to its citizens and has primary responsibility for homeland security. The plan includes recommendations designed to unleash increased use, private sector investment and innovation in these areas. They include the following:

- **Health care.** Broadband can help improve the quality and lower the cost of health care through health IT and improved data capture and use, which will enable clearer understanding of the most effective treatments and processes. To achieve these objectives, the plan has recommendations that will:
  - Help ensure health care providers have access to affordable broadband by transforming the FCC's Rural Health Care Program.
  - Create incentives for adoption by expanding reimbursement for e-care.
  - Remove barriers to e-care by modernizing regulations like device approval, credentialing, privileging and licensing.
  - Drive innovative applications and advanced analytics by ensuring patients have control over their health data and ensuring interoperability of data.
- **Education.** Broadband can enable improvements in public education through e-learning and online content, which can provide more personalized learning opportunities for students. Broadband can also facilitate the flow of information, helping teachers, parents, schools and other organizations to make better decisions tied to each student's needs and abilities. To those ends, the plan includes recommendations to:

- Improve the connectivity to schools and libraries by upgrading the FCC's E-Rate program to increase flexibility, improve program efficiency and foster innovation by promoting the most promising solutions and funding wireless connectivity to learning devices that go home with students.
  - Accelerate online learning by enabling the creation of digital content and learning systems, removing regulatory barriers and promoting digital literacy.
  - Personalize learning and improve decision-making by fostering adoption of electronic educational records and improving financial data transparency in education.
- **Energy and the environment.** Broadband can play a major role in the transition to a clean energy economy. America can use these innovations to reduce carbon pollution, improve our energy efficiency and lessen our dependence on foreign oil. To achieve these objectives, the plan has recommendations that will:
  - Modernize the electric grid with broadband, making it more reliable and efficient.
  - Unleash energy innovation in homes and buildings by making energy data readily accessible to consumers.
  - Improve the energy efficiency and environmental impact of the ICT sector.
- **Economic opportunity.** Broadband can expand access to jobs and training, support entrepreneurship and small business growth and strengthen community development efforts. The plan includes recommendations to:
  - Support broadband choice and small businesses' use of broadband services and applications to drive job creation, growth and productivity gains.
  - Expand opportunities for job training and placement through an online platform.
  - Integrate broadband assessment and planning into economic development efforts.
- **Government performance and civic engagement.** Within government, broadband can drive greater efficiency and effectiveness in service delivery and internal operations. It can also improve the quantity and quality of civic engagement by providing a platform for meaningful engagement with representatives and agencies. Through its own use of broadband, government can support local efforts to deploy broadband, particularly in unserved communities. To achieve these goals, the plan includes recommendations to:
  - Allow state and local governments to purchase broadband from federal contracts such as Networx.
  - Improve government performance and operations through cloud computing, cybersecurity, secure authentication and online service delivery.
  - Increase civic engagement by making government more open and transparent, creating a robust public media

ecosystem and modernizing the democratic process.

- **Public safety and homeland security.** Broadband can bolster efforts to improve public safety and homeland security by allowing first responders to send and receive video and data, by ensuring all Americans can access emergency services and improving the way Americans are notified about emergencies. To achieve these objectives, the plan makes recommendations to:
  - Support deployment of a nationwide, interoperable public safety mobile broadband network, with funding of up to \$6.5 billion in capital expenditures over 10 years, which could be reduced through cost efficiency measures and other programs. Additional funding will be required for operating expenses.
  - Promote innovation in the development and deployment of next-generation 911 and emergency alert systems.
  - Promote cybersecurity and critical infrastructure survivability to increase user confidence, trust and adoption of broadband communications.

#### Long-Term Goals

In addition to the recommendations above, the plan recommends that the country adopt and track the following six goals to serve as a compass over the next decade.

**Goal No. 1: At least 100 million U.S. homes should have affordable access to actual download speeds of at least 100 megabits per second and actual upload speeds of at least 50 megabits per second.**

**Goal No. 2: The United States should lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation.**

**Goal No. 3: Every American should have affordable access to robust broadband service, and the means and skills to subscribe if they so choose.**

**Goal No. 4: Every American community should have affordable access to at least 1 gigabit per second broadband service to anchor institutions such as schools, hospitals and government buildings.**

**Goal No. 5: To ensure the safety of the American people, every first responder should have access to a nationwide, wireless, interoperable broadband public safety network.**

**Goal No. 6: To ensure that America leads in the clean energy economy, every American should be able to use**

### **broadband to track and manage their real-time energy consumption.**

Meeting these six goals will help achieve the Congressional mandate of using broadband to achieve national purposes, while improving the economics of deployment and adoption. In particular, the first two goals will create the world's most attractive market for broadband applications, devices and infrastructure and ensure America has the infrastructure to attract the leading communications and IT applications, devices and technologies. The third goal, meanwhile, will ensure every American has the opportunity to take advantage of the benefits broadband offers, including improved health care, better education, access to a greater number of economic opportunities and greater civic participation.

### **Budget Impact of Plan**

Given the plan's goal of freeing 500 megahertz of spectrum, future wireless auctions mean the overall plan will be revenue neutral, if not revenue positive. The vast majority of recommendations do not require new government funding; rather, they seek to drive improvements in government efficiency, streamline processes and encourage private activity to promote consumer welfare and national priorities. The funding requests relate to public safety, deployment to unserved areas and adoption efforts. If the spectrum auction recommendations are implemented, the plan is likely to offset the potential costs.

### **Implementation**

The plan is in beta, and always will be. Like the Internet itself, the plan will always be changing—adjusting to new developments in technologies and markets, reflecting new realities, and evolving to realize the unforeseen opportunities of a particular time.

As such, implementation requires a long-term commitment to measuring progress and adjusting programs and policies to improve performance.

Half of the recommendations in this plan are offered to the FCC. To begin implementation, the FCC will:

- ▶ Quickly publish a timetable of proceedings to implement plan recommendations within its authority.
- ▶ Publish an evaluation of plan progress and effectiveness as part of its annual 706 Advanced Services Inquiry.
- ▶ Create a Broadband Data Depository as a public resource for broadband information.

The remaining half of the recommendations are offered to the Executive Branch, Congress and state and local governments. Policymakers alone, though, cannot ensure success. Industry, non-profits, and government together with the American people, must now act and rise to our era's infrastructure challenge.



# BROADBAND ACTION AGENDA

THIS BROADBAND ACTION AGENDA lists more than 60 key actions, proceedings, and initiatives the Commission intends to undertake over the next year and beyond to implement the recommendations of the National Broadband Plan.<sup>1</sup>

All dates refer to calendar (not fiscal) years and quarters, and are targets, partially contingent on external factors. Parentheticals following the title of each item provide the lead (in bold) and supporting FCC Bureaus and Offices responsible for that item (CGB = Consumer and Governmental Affairs Bureau, IB = International Bureau, MB = Media Bureau, OET = Office of Engineering and Technology, OSP = Office of Strategic Planning and Policy Analysis, PSHSB = Public Safety and Homeland Security Bureau, WCB = Wireline Competition Bureau, WTB = Wireless Telecommunications Bureau).

**COMMON FCC REGULATORY PROCEEDINGS:** The Agenda discusses a number of common FCC regulatory proceedings, including:

- **Public Notice (PN):** A PN is issued by the Commission or by one of its Bureaus and Offices to notify the public of an action taken or of the occurrence of an event, or to seek public comment on a matter the Commission is considering.
- **Notice of Inquiry (NOI):** A NOI is issued by the Commission to ask the public for information on, or to generate ideas about, a topic. A NOI is often followed by a Notice of Proposed Rulemaking.
- **Notice of Proposed Rulemaking (NPRM):** A NPRM is issued when the Commission is considering a change to its rules and regulations. The NPRM asks the public to comment on whether they agree with the proposed changes or to propose alternatives.
- **Further Notice of Proposed Rulemaking (FNPRM):** A FNPRM is issued by the Commission to seek further comment from the public when new issues arise in a proceeding after an NPRM has been issued, or the Commission desires additional public comment on issues raised in an NPRM.
- **Order:** An order is a decision of the Commission or one of its Bureaus and Offices.
- **Report and Order (R&O):** A R&O is a decision issued by the Commission to conclude a rulemaking proceeding. R&Os may adopt new rules, amend existing rules, or announce that rules will remain unchanged.

The Agenda includes four major categories of actions: (1) Promoting World-Leading Mobile Broadband Infrastructure

<sup>1</sup> The Agenda focuses on 2010 items but discusses 2011 items where appropriate; it principally addresses formal notice-and-comment proceedings and generally does not include informal actions the Commission will take to implement Plan recommendations. The Agenda is not a comprehensive agenda for the Commission and does not include key ongoing and upcoming FCC initiatives that lie beyond the scope of the Plan's recommendations.

and Innovation; (2) Accelerating Universal Broadband Access and Adoption, and Advancing National Purposes Such as Education and Health Care; (3) Fostering Competition and Maximizing Consumer Benefits Across the Broadband Ecosystem; and (4) Advancing Robust and Secure Public Safety Communications Networks.

**A. PROMOTE WORLD-LEADING MOBILE BROADBAND INFRASTRUCTURE AND INNOVATION:** The Plan recommends making an additional 500 megahertz (MHz) of spectrum available for mobile broadband within the next ten years.

To achieve this and other key spectrum goals—including improving the transparency of spectrum allocation and utilization, increasing opportunities for unlicensed devices and innovative spectrum access models, and expanding incentives and mechanisms to reallocate or repurpose spectrum to higher-valued uses—the Commission intends to conduct more than a dozen actions, proceedings, and initiatives over the next year.

**Unleash More Spectrum for Mobile Broadband**

The Plan recommends that the FCC make 500 MHz of spectrum newly available for broadband use within the next ten years, of which 300 MHz of high-value spectrum between 225 MHz and 3.7 gigahertz (GHz) should be made newly available for mobile use within five years.

| Band                            | Key Actions and Timing  | Max. MHz Made Available for Terrestrial Broadband |
|---------------------------------|---|---|
| WCS                             | 2010-- Order  | 20  |
| AWS 2/3 <sup>2</sup>            | 2010-- Order<br>2011--Auction   | 60  |
| D Block                         | 2010-- Order<br>2011--Auction   | 10  |
| Mobile Satellite Services (MSS) | 2010--NPRM<br>2010--L-Band and Big Leo Orders<br>2011--S-Band Order     | 90  |
| Broadcast TV <sup>3</sup>       | 2010--NPRM<br>2011-- Order<br>2012/13--Auction<br>2015--Band transition | 120   |
| <b>Total</b>                    |   | <b>300</b>  |

<sup>2</sup> Timing and quantity depends on outcome of

the investigation into possibility of reallocating federal spectrum in the 1755–1850 MHz band.

<sup>3</sup> Timing and quantity depends on Congressional action to grant incentive auction authority as well as voluntary participation of broadcasters in an auction.

1. *2.3 GHz WCS/SDARS Order (Rec. 5.8.1) (OET, WTB, IB)*: To enable robust mobile broadband use of 20 MHz of spectrum in the 2.3 GHz Wireless Communications Service (WCS) band while protecting neighboring incumbent operations, in Q2 2010 adopt an order revising technical rules.

2. *D Block Order/NPRM (Recs. 5.8.2, 16.1) (WTB, PSHSB)*: To unleash spectrum for mobile broadband while fostering the deployment of a nationwide, interoperable, public safety wireless broadband network, in late Q2 or early Q3 2010 adopt an order and NPRM to pave the way for an auction of the 10 MHz of spectrum in the Upper 700 MHz D Block in the first half of 2011.

3. *MSS NPRM (Rec. 5.8.4) (OET, IB, WTB)*: To promote investment and innovation in mobile broadband, in Q3 2010 propose rules that accelerate terrestrial broadband deployment in up to 90 MHz of Mobile Satellite Spectrum (MSS).

4. *Broadcast TV Spectrum Innovation NPRM (Rec. 5.8.5) (OET, MB, WTB)*: To maximize value and promote innovative use of broadcast TV spectrum while preserving free, over-the-air broadcasting; protecting against interference; and ensuring vibrant and diverse media ownership, in Q3 2010 seek comment on proposals to increase spectrum efficiency and innovation.

5. *AWS Bands Analysis and Potential Order (Rec. 5.8.3) (WTB, OET)*: To increase spectrum in the Advanced Wireless Services (AWS) bands for mobile broadband, by October 1, 2010 conclude a process with the National Telecommunications and Information Administration (NTIA), to determine whether a portion of the 1.7 GHz band currently used for federal government purposes can be paired with 20 MHz of spectrum in the AWS-3 band. Along with AWS-2 spectrum, this would make an additional 60 MHz of spectrum available for mobile broadband. If at the end of this inquiry there is not a strong possibility of reallocating federal spectrum, adopt final rules in Q4 2010 to auction the AWS-3 spectrum on a stand-alone basis in Q2 2011.

### ***Increase Opportunities for Innovative Spectrum Access Models***

Past FCC decisions to allow new spectrum access models have unleashed tremendous innovation, including technologies using unlicensed spectrum, such as WiFi, Bluetooth, and wireless smart meters. Building on these successes, the Plan recommends a series of steps to enable the next generation of spectrum access technologies to take root.

6. *TV White Spaces Reconsideration and Database Opinion and Order (Rec. 5.12) (OET, MB, WTB)*: To accelerate the introduction of innovative products and services that access the “white spaces” spectrum between TV channels without interfering with other spectrum uses, in Q3 2010 complete the final rules

for TV white space devices by resolving outstanding challenges to rules and selecting a device database manager.

7. *Identification of Contiguous Spectrum for Unlicensed Use (Rec. 5.11) (OET, WTB)*: In conjunction with ongoing work on the strategic spectrum plan and triennial assessments, in Q2 2010 begin meetings with stakeholders to collect initial ideas regarding candidate bands to make more spectrum available for unlicensed use, and by the end of 2010 make a recommendation regarding initiating a proceeding to free up a new, contiguous nationwide band for unlicensed use within the next ten years.

8. *Opportunistic Use of Spectrum NPRM (Rec. 5.13) (OET, WTB, IB, MB, PSHSB)*: To enable more efficient use of spectrum by increasing opportunities for dynamic spectrum access technologies in different bands, in Q3 2010 propose rules to facilitate the use of smart radios in spectrum held by the FCC (such as in certain license areas where spectrum was not successfully auctioned) that would otherwise be unused.

9. *Experimental Licensing NPRM (Rec. 5.14) (OET)*: To establish more flexible experimental licensing rules for spectrum, in Q4 2010 propose rules to facilitate R&D and help accelerate spectrum innovation.

### ***Remove Barriers to Spectrum Utilization***

The Plan recommends a number of other steps to remove barriers to efficient and productive spectrum use.

10. *Mobile Roaming Order and FNPRM (Rec. 4.11) (WTB)*: To promote competition among mobile broadband providers, encourage investment, and increase consumer choice, in Q2 2010 adopt an order implementing rules to ensure the availability of reasonable automatic roaming arrangements for voice service and a Further Notice of Proposed Rulemaking seeking comment on roaming arrangements for mobile broadband services.

11. *Spectrum Sharing/Wireless Backhaul NPRM/NOI (Recs. 5.9, 5.10) (WTB, OET)*: To enable more cost-effective use of spectrum and to help increase wireless broadband availability in both rural and urban areas, in Q3 2010 propose revising rules to allow for increased spectrum sharing among compatible point-to-point microwave services and greater flexibility in deploying wireless backhaul.

12. *Secondary Markets Internal Review (Rec. 5.7) (WTB)*: To identify ways to increase incentives and mechanisms to reallocate or repurpose unused and underutilized spectrum, by the end of 2010 complete internal assessment of barriers to using secondary markets, including transferring, licensing, and leasing spectrum by existing licensees to third parties. The outcome of the review will determine whether further action is required in 2011.

### ***Improve Data and Transparency Regarding Spectrum Allocation and Utilization***

Spectrum policy depends on data and transparency around spectrum allocations, licensing, and utilization. The Plan lays out concrete recommendations for increasing the quality of data and analysis that undergirds informed spectrum policy-making, including by enabling outside parties—such as citizens, companies, investors, and other government agencies—to better understand and to provide more effective input into spectrum allocation decisions.

*13. Spectrum Dashboard (Rec. 5.1) (WTB, OET, PSHSB, MB, IB):* To improve the transparency of spectrum allocation, support spectrum policy planning, and promote a secondary market in spectrum, in March 2010 the FCC launched a beta Spectrum Dashboard (<http://reboot.fcc.gov/reform/systems/spectrum-dashboard>). By early Q4 2010 improve and augment the beta release and launch Spectrum Dashboard 2.0.

*14. Strategic Spectrum Plan and Triennial Assessment (Rec. 5.3) (WTB, OET, OSP):* To ensure the FCC maintains and regularly publishes an up-to-date strategic plan for the nation's spectrum, beginning immediately and in coordination with NTIA maintain and continually update the strategic spectrum plan described in Chapter 5 of the Plan, preparing and publishing assessments of the supply, usage, and demand for spectrum—including potential sources of new spectrum—every three years.

**B. ACCELERATE UNIVERSAL BROADBAND ACCESS AND ADOPTION, AND ADVANCE NATIONAL PURPOSES SUCH AS EDUCATION AND HEALTH CARE:** The Plan provides an array of recommendations to accelerate universal broadband access and adoption—including for rural America; low-income Americans; schools and libraries; hospitals, clinics, doctors, and patients; Americans with disabilities; and Native Americans—and to advance national purposes such as education, health care, and energy efficiency.

#### ***Connecting Rural America***

To accelerate broadband access and adoption in rural America, the Plan recommends that the FCC comprehensively reform both contributions to and disbursements from the Universal Service Fund (USF) to support universal access to broadband service, including through creation of the Connect America Fund (CAF).

*15. USF Reform NPRM and NOI (Rec. 8.2) (WCB, WTB):* To

begin the process of reforming the USF High-Cost Fund, in Q2 2010 propose specific common-sense reforms to the existing high-cost support mechanisms to identify funds that can be refocused toward broadband, and seek comment on the use of a model to determine efficient and targeted support levels for broadband deployment in high-cost areas.

*16. USF Merger Commitments Order (Rec. 8.6) (WCB, WTB):* To recover funds necessary for future broadband support, in Q2 2010 adopt an order resolving open issues and implementing longstanding commitments by Sprint and Verizon Wireless to eliminate—over multiple years—the substantial funding they receive for telephone service from the USF High Cost Fund.

*17. Mobility Fund NPRM (Rec. 8.3) (WTB, WCB):* To bring all states to a baseline level of 3G (or better) mobile availability, in late Q3 or early Q4 2010 propose rules creating a Mobility Fund to provide for one-time support for deployment of 3G (or better) networks in states that significantly lag the national average.

*18. USF Transformation NPRM (Recs. 8.2, 8.4-8.6, 8.12) (WCB, WTB):* To continue the process of reforming the USF High-Cost Fund, in Q4 2010 propose rules to expedite deployment of broadband to unserved areas and establish the framework of the CAF to shift from supporting phone service to advancing access to broadband as well as voice.

*19. USF Contributions NPRM (Rec. 8.10) (WCB, WTB):* To stabilize support mechanisms for universal service programs, in Q4 2010 propose rules to reform the process for collecting contributions to the USF.

In addition, and closely related to reform of the USF High Cost Fund, the Plan recommends overhauling intercarrier compensation—the system of rules regulating payments among telecommunications carriers for exchanging traffic across networks—to rationalize and increase the system's efficiency, foster competition, and facilitate the transition from traditional circuit-switched voice networks to all-IP networks, ultimately benefiting consumers.

*20. Intercarrier Compensation NPRM (Rec. 8.7, 8.11, 8.14) (WCB, WTB):* To address inefficient and outmoded intercarrier payment rules, in Q4 2010 propose rules for long-term intercarrier compensation reform, including implementation of a glide path for reducing per-minute charges, establishment of appropriate cost-recovery mechanisms, and implementation of interim solutions to address arbitrage.

### **Connecting Low-Income Americans**

The Plan recommends increasing broadband adoption among low-income Americans by promoting affordability through reforms of the USF's Lifeline and Link-Up programs.

*21. Lifeline/Low-Income Joint Board Referral Order (Rec. 9.1) (WCB, WTB):* To make broadband more affordable for low-income households by facilitating expansion and integration of the Lifeline and Link-Up programs with state and local e-government efforts, in Q2 2010 refer certain program issues—including consumer eligibility, verification, and outreach—to the Federal-State Joint Board on Universal Service for specific recommendations to improve Lifeline and Link-Up in partnership with the states.

*22. Lifeline Pilot Roundtable (Rec. 9.1) (WCB, WTB):* To facilitate pilot programs to identify the most efficient and effective long-term broadband support mechanism for low-income Americans, in Q2 2010 hold a roundtable discussion on broadband Lifeline pilots.

*23. Lifeline Flexibility NPRM (Rec. 9.1) (WCB, WTB):* To give flexibility to low-income Americans eligible for Lifeline benefits, in Q3 2010 propose rules to require carriers to permit Lifeline customers to apply Lifeline discounts toward service offerings that include broadband as well as telephone service.

### **Connecting Schools and Libraries**

The Plan recommends upgrading the E-rate program, which has successfully connected public libraries and K-12 classrooms, to make broadband more accessible.

*24. E-rate Community Use Order (Rec. 11.14) (WCB):* To bolster use of broadband in schools, in February 2010 the FCC adopted an order and proposed rules enabling schools that receive funding through the USF's E-rate program for schools and libraries in funding years 2009 and 2010 to allow members of the general public to use the schools' Internet access during non-operating hours.

*25. E-rate Funding Year 2011 NPRM & Order (Recs. 11.18, 11.19) (WCB):* To cut red tape and make broadband more accessible, in Q2 2010 propose rules reforming the E-rate program and indexing the E-rate funding cap to inflation for funding year 2011 (July 1, 2011 – June 30, 2012). In Q3 or early Q4 2010 adopt rules to implement reforms proposed in Q2, benefiting students across the country.

*26. E-rate Funding Year 2012 NPRM (Recs. 8.20, 11.15-17, 11.20-21, 11.23-24) (WCB):* To continue the reform process initiated during funding year 2011, in Q1 2011 propose rules further reforming the E-rate program for funding year 2012 (July 1, 2012 – June 30, 2013).

### **Connecting Hospitals, Clinics, Doctors, and Patients**

The Plan includes a series of recommendations to connect more public health facilities to high-speed Internet; foster telemedicine devices, applications, and services; and create a Health Care Infrastructure Fund to support deployment of dedicated health care networks to underserved areas.

*27. Rural Health Care Pilot Program Extension Order (Rec. 10.7) (WCB):* To ensure that each program participant can provide the full consumer benefits of its project, which include robust e-health services and the exchange of electronic health records, the FCC extended Rural Health Care Pilot Program deadlines earlier this year.

*28. Rural Health Care Reform NPRM & Order (Recs. 8.20, 10.6, 10.7) (WCB):* To enable patients in rural, Tribal, and remote areas to have access to world-class healthcare without leaving their communities, in Q3 2010 propose rules to create a Health Care Infrastructure Fund to support deployment of dedicated health care networks to underserved areas and a Health Care Access Fund to connect hospitals and doctors. In Q4 2010 or early 2011, recommend adopting rules to implement these reforms.

*29. FCC/FDA Workshop and Public Notice on Converged Devices (Rec. 10.3) (OET):* To facilitate innovation and protect public health in the continued development of safe and effective “converged devices” (devices used for both communications and health care), the FCC has begun working with the Food and Drug Administration (FDA) to address and clarify the appropriate policy framework for these devices. In Q2 2010 the FCC and FDA will hold a joint staff workshop and issue a public notice seeking input on these issues.

### **Connecting People with Disabilities**

To better enable Americans with disabilities to experience the benefits of broadband, the Plan includes a number of recommendations to make hardware, software, services, and digital content more accessible and to make assistive technologies more affordable.

*30. Real-Time Text NOI, NPRM, and Order (Rec. 9.10) (CGB, WCB, WTB, OET):* To ensure that people with hearing or speech disabilities can naturally conduct conversations over communications networks to the same extent that voice users do and effectively communicate with 911 services, and to facilitate a transition away from outmoded analog-based services, in Q3 2010 issue a Notice of Inquiry to identify a reliable, interoperable, real-time text standard allowing users to see and receive text as it is

typed in a digital and Internet-based environment. Following the inquiry, propose rules in Q4 2010 and adopt rules in early 2011.

*31. Internet Video and Device Accessibility NOI and NPRM (Rec. 9.10) (CGB, WCB, WTB, MB):* To ensure that people with hearing and vision disabilities have full access to video content distributed over the Internet, in Q4 2010 launch an inquiry into the accessibility of Internet video programming and devices used to display such programming with closed captioning and video description, to be followed by proposed rules in 2011.

*32. Service and Equipment Accessibility NOI & NPRM (Rec. 9.10) (CGB, WCB, WTB, OET):* To ensure that people with disabilities have equal access to emerging broadband and digital products and services, in the first half of 2011 launch an inquiry into extending Section 255 accessibility rules to providers of advanced services and manufacturers of equipment used with these services, to be followed by proposed rules later in 2011.

*33. TRS Broadband NPRM (Rec. 9.10) (CGB, WCB, WTB, OET):* To ensure that people with hearing and speech disabilities have the tools, services, and assistive technology to achieve full and equal communication over distances, in the first half of 2011 propose rules to establish a new program for broadband services and assistive technologies under the Telecommunications Relay Services (TRS) program, and determine whether additional IP-enabled TRS services, such as Video Assisted Speech-to-Speech Service, could benefit people with disabilities.

*34. Accessibility and Innovation Forum (Rec. 9.9) (CGB, WCB, WTB):* To encourage and facilitate the ability of companies and independent inventors to develop products, services, and applications that are accessible to people with disabilities, in July 2010 establish an Accessibility and Innovation Forum, which will use a number of tools—including workshops, product demonstrations, and an information-sharing website—to share best practices and demonstrate new products, applications, and assistive technologies.

*35. Hearing Aid Compatibility Second Report and Order/FNPRM (Rec. 9.10) (WTB, OET, CGB):* To ensure that consumers who use hearing aids are able to effectively use new wireless broadband technologies that offer voice service, in Q3 2010 address outstanding issues in the ongoing Hearing Aid Compatibility rulemaking and seek comment on additional proposals to further extend Hearing Aid Compatibility rules to all devices that provide voice communications via a built-in speaker and are typically held to the ear, to the extent technologically feasible.

### **Connecting Native American Communities**

The Plan offers recommendations for ensuring effective coordination and consultation between Native American

governments and multiple federal agencies and departments on a wide range of programs related to broadband issues.

*36. FCC-Native Nations Broadband Task Force (Rec. 9.14) (CGB):* To promote government-to-government relations with Native American governments, in Q2 2010 launch a task force to assist in developing and executing an FCC consultation policy, ensure that Native American concerns are considered in all FCC proceedings related to broadband, and develop additional recommendations for promoting broadband deployment and adoption on Native American lands. The task force will initially consist of senior FCC staff and then be expanded to include elected leaders or their appointees from Native Nations.

*37. FCC Office of Native American Affairs (Rec. 9.14) (CGB):* To more effectively address Native American issues, in Q2 2010 establish an FCC Office of Native American Affairs with the requisite personnel, resources, and authority to consult regularly with Native American leaders and work with other FCC bureaus and offices, as well as other Federal agencies and departments, on policies, programs, and initiatives impacting Native Americans and Native American interests.

*38. Spectrum on Tribal Lands NPRM (Rec. 5.17) (WTB, CGB):* To increase mobile opportunities for Tribal communities, in Q4 2010 propose rules to promote greater use of spectrum on Tribal lands, in coordination with Tribal governments.

**C. FOSTER COMPETITION AND MAXIMIZE CONSUMER BENEFITS ACROSS THE BROADBAND ECOSYSTEM:** The Plan contains several recommendations to promote competition and empower consumers across the markets that make up the broadband ecosystem: network services, devices, and applications. These recommendations include removing barriers to key broadband inputs; improving consumer disclosures and FCC data collection to better monitor and promote broadband competition; and promoting consumer choice in video navigation devices, such as smart video devices.

### **Remove Barriers to Entry by Streamlining Access to Key Broadband Inputs**

The Plan recommends developing a coherent and effective policy framework for taking expedited action to ensure widespread availability of key broadband inputs and achieve the FCC's goal of robust competition in business and consumer broadband markets.

*39. Special Access Workshop and NPRM (Rec. 4.8) (WCB, WTB, OSP):* To promote greater broadband deployment, competition, and investment, in late Q2 or early Q3 2010 hold a staff workshop to discuss the analytical framework the FCC should use to assess the effectiveness of its existing special

access rules. These rules generally govern the terms under which certain dedicated, high-capacity links may be purchased from incumbent carriers to serve business locations and cell phone towers. In late Q3 or early Q4 2010, propose a framework for assessing the effectiveness of the existing special access rules and identify any associated data collection requirements—critical steps toward ensuring that rates, terms, and conditions for special access services are just and reasonable, as required by law.

*40. Small Business Broadband and Wholesale Competition PN and NOI (Recs. 4.7, 4.9) (WCB):* To promote broadband affordability and choice for small businesses and other users, in Q2 2010, issue a public notice initiating development of a coherent, comprehensive framework for addressing a number of wireline wholesale competition policy issues that affect the small business market, including wholesale obligations raised in pending proceedings. By the end of 2010, adopt an NOI seeking comment on application of an analytical framework for these wholesale competition issues.

*41. Tower Siting Declaratory Ruling (WTB):* To speed the deployment of next-generation wireless networks while preserving local control over zoning and land use policies, in 2009 the FCC established timeframes of 90 days for collocations and 150 days for all other tower siting applications reviewed by state and local governments.

*42. Pole Attachments Order and FNPRM (Recs. 6.1-6.4) (WCB):* To promote broadband deployment and new broadband entrants, in Q2 2010, recommend adopting an order and FNPRM to clarify and streamline broadband network operators' ability to obtain just, reasonable, and nondiscriminatory access to utility poles for the build out of their networks.

*43. Rights-of-Way Task Force (Recs. 6.4, 6.6) (CGB, WCB):* To streamline and facilitate broadband providers' access to rights of way, in July 2010 begin work on a rights-of-way task force with state, Tribal, and local policymakers to inventory current practices and policies and recommend fair practices and fees for broadband network operators' access to rights of way. Use recommendations from the task force in a subsequent formal proceeding to seek industry-wide comment on collecting and making available more information about rights of way and setting guidelines for rights-of-way access.

*44. Interconnection Clarification Order (Rec. 4.10) (WCB):* In Q3 2010, recommend adopting an order clarifying the rights of competitive carriers to obtain a key input: interconnection with rural incumbent telephone companies in order to provide voice service, often as part of a bundle with broadband and/or pay television service. This action will increase regulatory certainty and enhance the economic viability of broadband entry that depends on capturing voice revenues from subscribers, which

will benefit rural consumers in particular.

### ***Improve Data Collection, Analysis, and Disclosure to Promote Broadband Competition and Protect and Empower Consumers***

The Plan seeks to bolster competition and consumer benefits by developing data-driven competition policies for broadband services and ensuring that consumers have the information they need to make decisions that maximize benefits from these services.

*45. Technical Advisory Group on Speed and Performance (Recs. 4.3, 4.4, 4.6) (CGB, OET, WCB):* To develop guidelines for measuring actual broadband speed and performance and for disclosing information to consumers, in Q2 2010 launch a technical advisory group on speed and performance, including representatives from industry and consumer groups.

*46. Speed and Performance Measurement (Rec. 4.2, 4.4) (CGB, WTB, WCB, OET):* To empower and protect consumers by collecting and reporting more accurate data on actual broadband speeds and performance, in Q2 2010 launch a voluntary 3rd party measurement program to sample broadband performance for 10,000 households nationwide, which will inform the Transparency and Disclosure NPRM and culminate in the first "State of Broadband Report" in Q3 2010.

*47. Transparency and Disclosure NPRM (Rec. 4.5, 4.6) (CGB, WCB, WTB, OET):* To empower consumers to make informed choices among broadband providers and plans, understand their bills, and decide whether to switch broadband providers, in late Q3 or early Q4 2010 propose rules regarding disclosure requirements for broadband service providers.

*48. Broadband Data NPRM (Recs. 4.2, 9.14) (WCB, WTB, OSP):* To better monitor and promote broadband competition, in Q4 2010 propose rules to collect and analyze more detailed and accurate industry-wide data on several key broadband metrics, including subscribership, actual availability, penetration, performance, prices, churn, and bundles, for both consumers and business customers. Propose methods by which collected data can be made available to the public, academic researchers, and others to enable more detailed market and competition analyses. These efforts will include coordination with Tribal governments regarding improved data collection.

*49. Mobile Wireless Competition Report (Rec. 4.2) (WTB, OSP):* To better assess the state of competition in the mobile wireless industry, in Q2 2010 issue the 14th edition of the Mobile Wireless Competition Report, which will expand upon previous FCC analyses by considering the broader mobile wireless ecosystem, including how upstream and downstream segments affect competition in the provision of mobile wireless services

to consumers.

*50. Broadband Map (Rec. 4.2) (OSP, WCB, WTB):* To improve visibility into the availability of consumer broadband across America, the FCC is assisting NTIA in developing the National Broadband Map, including by providing ongoing help to assemble data from state and territory partners and to generate an online, searchable, interactive version of the Map no later than Q1 2011.

\* Spectrum Dashboard (Rec. 5.1) (WTB, OET, PSHSB, MB, IB) [See #13 above]

### ***Unleash Innovation and Competition in Video Devices***

As online video becomes increasingly important for driving broadband usage and adoption, the Plan recommends steps that will foster increased innovation in smart video devices to bring more competition and choice for consumers.

*51. Smart Video Devices NOI & NPRM (Rec. 4.10) (MB, OET):* To spur innovation and driving increased broadband adoption and utilization, in Q2 2010 seek comment on best approaches to assure the commercial availability of smart video devices and other equipment used to access the services of multi-channel video programming distributors. Propose rules in Q4 2010 providing an approach, to be implemented by the end of 2012, to enable consumers to buy smart video devices at retail that can be used with any MVPD and that can fully integrate pay television services, including two-way services, with video received over the Internet.

*52. CableCARD NPRM (Recs. 4.9, 4.11) (MB, OET):* To facilitate the provision and use of CableCARD devices while a more fundamental revision of the FCC's rules for smart video devices is under way, in Q2 2010 propose rules to address a number of issues to improve the working of the CableCARD framework.

**D. ADVANCE ROBUST AND SECURE PUBLIC SAFETY COMMUNICATIONS NETWORKS:** The Plan recommends a series of actions to help ensure that broadband can support public safety and homeland security, respond swiftly when emergencies occur, and provide the public with better ways of calling for help and receiving emergency information. These recommendations include facilitating creation of a nationwide interoperable public safety mobile broadband network; ensuring our broadband networks are safe and secure; and modernizing our emergency communications and alerting systems.

### ***Facilitate Creation of a Nationwide Interoperable Public Safety Mobile Broadband Network***

The Plan recommends supporting the deployment of a nation-

wide, interoperable public safety mobile network, and ensuring that public safety has priority access to commercial wireless networks during times of emergency.

*53. ERIC Public Safety Interoperability Order (Rec. 16.1) (PSHSB):* To develop and coordinate common standards for interoperability and operating procedures (including roaming, priority access, authentication, and encryption)—enabling the seamless exchange of public safety communications across a nationwide broadband network—in Q2 2010 release an order creating an Emergency Response Interoperability Center (ERIC) within the FCC's Public Safety and Homeland Security Bureau.

*54. 700 MHz Waiver Petitions (PSHSB, WTB, OET):* To enable early deployment of local and regional public safety wireless broadband networks, in late Q2 or early Q3 2010 recommend adopting orders resolving pending waiver petitions from various public safety entities seeking early deployment of networks in the 700 MHz public safety broadband spectrum.

*55. 700 MHz Public Safety Order/FNPRM (Rec. 16.1) (PSHSB, WTB, OET):* To accelerate deployment of a nationwide, interoperable broadband network using spectrum already licensed for public safety, in Q3 2010, adopt an order and Further Notice of Proposed Rulemaking resolving outstanding issues and establishing final rules governing build out and operating obligations for public safety spectrum.

\* D Block Order/NPRM (Recs. 5.8.2, 16.1) (WTB, PSHSB) [See #2, above]

*56. Public Safety Roaming and Priority Access NPRM (Rec. 16.1) (WTB, PSHSB):* To enable public safety communications in areas where public safety broadband wireless networks are unavailable or at capacity, in late Q2 or early Q3 2010 propose rules to provide public safety with roaming and priority access service at reasonable rates on commercial networks.

### ***Promote Cybersecurity and Protect Critical Communications Infrastructure***

The Plan recommends safeguards for protecting against cyberattacks and ensuring that our nation's communications infrastructure is robust and able to withstand physical failure.

*57. Service Outage and Homeland Security Workshop and NPRM (Rec. 16.6) (PSHSB, OET, WCB, WTB, IB):* To help ensure a better response to service outages affecting IP-based networks and prevent future outages, in Q2 2010 hold a staff workshop regarding critical infrastructure and information collection and issue a subsequent public notice. In Q4 2010 propose rules to extend the FCC's Part 4 outage reporting rules (currently applicable to communications service providers) to

broadband Internet service providers and interconnected VoIP providers.

*58. Cybersecurity Certification NOI (Rec. 16.7) (PSHSB, WTB, OET, WCB):* To promote more vigilant network security and provide consumers with more information about their providers' cybersecurity practices, in Q2 2010, initiate a proceeding to create a voluntary cybersecurity certification program that creates market incentives for communications service providers to upgrade their network cybersecurity. This proceeding will also examine additional voluntary incentives that could improve cybersecurity and improve education about cybersecurity issues, and may be followed by a rulemaking in 2011.

*59. Survivability NOI (Rec. 16.10) (PSHSB, OET, WTB, WCB):* To ensure the resiliency of broadband networks in times of disaster, in Q2 2010, seek comment on the present state of survivability and potential measures to reduce vulnerability to network failures, and issue further requests for comment as required in 2011.

*60. Back-Up Power NOI (PSHSB, OET, WTB):* To ensure survivability of service during large-scale disasters, in Q4 2010 begin an inquiry to examine ways to ensure that commercial communications service providers, including broadband providers, have adequate measures in place, such as back-up power. Based on the record developed in the inquiry, the FCC will initiate further proceedings in 2011 as necessary.

*61. Network Reliability NOI (Rec. 16.12) (PSHSB, OET, WTB, WCB):* To determine what actions, if any, the FCC should take to bolster the reliability of broadband infrastructure, in Q1 2011 begin an inquiry to better understand the reliability standards used in broadband networks. The proceeding will examine the standards and practices applied to broadband infrastructure at all layers, from facilities to applications, and may lead to further inquiries in 2011 as necessary.

### ***Promote Development and Implementation of Next-Generation 911 (NG911) and Alerting Systems***

The Plan recommends steps to help enable the nation's 911 and emergency alert systems use new communications technologies and devices beyond traditional phone and broadcast platforms.

*62. Location Accuracy FNPRM (Rec. 16.15) (PSHSB, OET, WTB):* To improve location accuracy and automatic location identification requirements for next-generation 911, in Q3 2010 adopt a Further Notice of Proposed Rulemaking to consider how NG911—the next step for the nation's emergency communications system, incorporating text messaging, photos and videos, and other data communications—affects location accuracy and automatic location identification requirements. The FNPRM will be followed by further proceedings in 2011 as

necessary.

*63. NG911 NOI (Rec. 16.15) (PSHSB, OET, WCB, WTB):* To promote the effective development of next-generation 911, in Q4 2010 begin an inquiry to address how NG911 can accommodate communications technologies, networks, and architectures beyond traditional voice-centric devices, and how public expectations will evolve regarding the communications platforms the public will rely on to request emergency services. The NOI will be followed by further proceedings in 2011 as necessary.

*64. Alerting NOI (Rec. 16.16) (PSHSB, WTB, WCB, OET):* To promote the effective development and implementation of a next-generation alerting system, in Q1 2011 begin an inquiry examining issues regarding development of a multiple-platform, redundant, next-generation alert system that includes delivery of emergency alerts throughout the nation via broadband. After this proceeding, the FCC will initiate further proceedings as required, as well as pursuing follow-on work with our federal partners.



United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued January 8, 2010

Decided April 6, 2010

No. 08-1291

COMCAST CORPORATION,  
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED  
STATES OF AMERICA,  
RESPONDENTS

NBC UNIVERSAL, ET AL.,  
INTERVENORS

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On Petition for Review of an Order  
of the Federal Communications Commission

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*Helgi C. Walker* argued the cause for petitioner. With her on the briefs were *Eve Klindera Reed*, *Elbert Lin*, *David P. Murray*, *James L. Casserly*, and *David H. Solomon*.

*Howard J. Symons* argued the cause for intervenors National Cable & Telecommunications Association and NBC Universal. With him on the briefs were *Neal M. Goldberg*, *Michael S. Schooler*, and *Margaret L. Tobey*. *Richard Cotton* entered an appearance.

*Kyle D. Dixon* was on the brief for *amici curiae* Professors James B. Speta and Glen O. Robinson and The Progress and Freedom Foundation in support of petitioner.

*Austin C. Schlick*, General Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *Catherine G. O'Sullivan* and *Nancy C. Garrison*, Attorneys, U.S. Department of Justice, *Joseph R. Palmore*, Deputy General Counsel, Federal Communications Commission, *Richard K. Welch*, Deputy Associate General Counsel, and *Joel Marcus*, Counsel. *Daniel M. Armstrong III*, Associate General Counsel, entered an appearance.

*Marvin Ammori* argued the cause for intervenors Free Press, et al. in support of respondents. With him on the brief were *Henry Goldberg*, *Harold Feld*, and *Andrew Jay Schwartzman*.

*John F. Blevins* was on the brief for *amici curiae* Professors Jack M. Balkin, et al. in support of respondents.

Before: SENTELLE, *Chief Judge*, TATEL, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: In this case we must decide whether the Federal Communications Commission has authority to regulate an Internet service provider's network management practices. Acknowledging that it has no express statutory authority over such practices, the Commission relies on section 4(i) of the Communications Act of 1934, which authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not

inconsistent with this chapter, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i). The Commission may exercise this “ancillary” authority only if it demonstrates that its action—here barring Comcast from interfering with its customers’ use of peer-to-peer networking applications—is “reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.” *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005). The Commission has failed to make that showing. It relies principally on several Congressional statements of policy, but under Supreme Court and D.C. Circuit case law statements of policy, by themselves, do not create “statutorily mandated responsibilities.” The Commission also relies on various provisions of the Communications Act that do create such responsibilities, but for a variety of substantive and procedural reasons those provisions cannot support its exercise of ancillary authority over Comcast’s network management practices. We therefore grant Comcast’s petition for review and vacate the challenged order.

## I.

In 2007 several subscribers to Comcast’s high-speed Internet service discovered that the company was interfering with their use of peer-to-peer networking applications. See Peter Svensson, *Comcast Blocks Some Internet Traffic*, ASSOCIATED PRESS, Oct. 19, 2007. Peer-to-peer programs allow users to share large files directly with one another without going through a central server. Such programs also consume significant amounts of bandwidth.

Challenging Comcast’s action, two non-profit advocacy organizations, Free Press and Public Knowledge, filed a complaint with the Federal Communications Commission and, together with a coalition of public interest groups and law professors, a petition for declaratory ruling. Compl. of

Free Press & Public Knowledge Against Comcast Corp., File No. EB-08-IH-1518 (Nov. 1, 2007) (“Compl.”); Pet. of Free Press et al. for Decl. Ruling, WC Docket No. 07-52 (Nov. 1, 2007) (“Pet.”). Both filings argued that Comcast’s actions “violat[ed] the FCC’s Internet Policy Statement.” Compl. at 1; Pet. at i. Issued two years earlier, that statement “adopt[ed] the . . . principles” that “consumers are entitled to access the lawful Internet content of their choice . . . [and] to run applications and use services of their choice.” *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14,986, 14,988, ¶ 4 (2005). Comcast defended its interference with peer-to-peer programs as necessary to manage scarce network capacity. Comments of Comcast Corp. at 14, WC Docket No. 07-52 (Feb. 12, 2008).

Following a period of public comment, the Commission issued the order challenged here. *In re Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13,028 (2008) (*Order*). The Commission began by concluding not only that it had jurisdiction over Comcast’s network management practices, but also that it could resolve the dispute through adjudication rather than through rulemaking. *Id.* at 13,033–50, ¶¶ 12–40. On the merits, the Commission ruled that Comcast had “significantly impeded consumers’ ability to access the content and use the applications of their choice,” *id.* at 13,054, ¶ 44, and that because Comcast “ha[d] several available options it could use to manage network traffic without discriminating” against peer-to-peer communications, *id.* at 13,057, ¶ 49, its method of bandwidth management “contravene[d] . . . federal policy,” *id.* at 13,052, ¶ 43. Because by then Comcast had agreed to adopt a new system for managing bandwidth demand, the Commission simply ordered it to make a set of disclosures

describing the details of its new approach and the company's progress toward implementing it. *Id.* at 13,059–60, ¶ 54. The Commission added that an injunction would automatically issue should Comcast either fail to make the required disclosures or renege on its commitment. *Id.* at 13,060, ¶ 55.

Although Comcast complied with the *Order*, it now petitions for review, presenting three objections. First, it contends that the Commission has failed to justify exercising jurisdiction over its network management practices. Second, it argues that the Commission's adjudicatory action was procedurally flawed because it circumvented the rulemaking requirements of the Administrative Procedure Act and violated the notice requirements of the Due Process Clause. Finally, it asserts that parts of the *Order* are so poorly reasoned as to be arbitrary and capricious. We begin—and end—with Comcast's jurisdictional challenge.

## II.

Through the Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended over the decades, 47 U.S.C. § 151 *et seq.*, Congress has given the Commission express and expansive authority to regulate common carrier services, including landline telephony, *id.* § 201 *et seq.* (Title II of the Act); radio transmissions, including broadcast television, radio, and cellular telephony, *id.* § 301 *et seq.* (Title III); and “cable services,” including cable television, *id.* § 521 *et seq.* (Title VI). In this case, the Commission does not claim that Congress has given it express authority to regulate Comcast's Internet service. Indeed, in its still-binding 2002 *Cable Modem Order*, the Commission ruled that cable Internet service is neither a “telecommunications service” covered by Title II of the Communications Act nor a “cable service” covered by Title VI. *In re High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802, ¶ 7

(2002), *aff'd Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). The Commission therefore rests its assertion of authority over Comcast's network management practices on the broad language of section 4(i) of the Act: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions," 47 U.S.C. § 154(i). *Order*, 23 F.C.C.R. at 13,036, ¶ 15.

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

In the first case, *Southwestern Cable*, the Supreme Court considered a challenge to a Commission order restricting the geographic area in which a cable company could operate. 392 U.S. at 160. At that time, cable television, then known as "community antenna television" (CATV), functioned quite differently than it does today. Employing strategically located antennae, these early cable systems simply received over-the-air television broadcasts and retransmitted them by cable to their subscribers. *Id.* at 161–62. Although they rarely produced their own programming, they improved

reception and allowed subscribers to receive television programs from distant stations. *Id.* at 162–63. Seeking to protect Commission-licensed local broadcasters, the Commission adopted rules limiting the extent to which cable systems could retransmit distant signals and, in the order at issue in *Southwestern Cable*, applied this policy to a particular company. The Supreme Court sustained that order, explaining that even though the then-existing Communications Act gave the Commission no express authority over cable television, the Commission could nonetheless regulate cable television to the extent “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.” *Id.* at 178. Four years later, in *Midwest Video I*, the Court again sustained the Commission’s use of its ancillary authority, this time to support issuance of a regulation that required cable operators to facilitate the creation of new programs and to transmit them alongside broadcast programs they captured from the air. 406 U.S. at 670. In *Midwest Video II*, the Court rejected the Commission’s assertion of ancillary authority, setting aside regulations that required cable systems to make certain channels available for public use. 440 U.S. at 708–09.

We recently distilled the holdings of these three cases into a two-part test. In *American Library Ass’n v. FCC*, we wrote: “The 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.” 406 F.3d at 691–92; *see also Order*, 23 F.C.C.R. at 13,035, ¶ 15 n.64 (citing the *American Library* test). Comcast concedes that the Commission’s action here

satisfies the first requirement because the company's Internet service qualifies as "interstate and foreign communication by wire" within the meaning of Title I of the Communications Act. 47 U.S.C. § 152(a). Whether the Commission's action satisfies *American Library's* second requirement is the central issue in this case.

### III.

Before addressing that issue, however, we must consider two threshold arguments the Commission raises. First, it asserts that given a contrary position Comcast took in a California lawsuit, the company should be judicially estopped from challenging the Commission's jurisdiction over the company's network management practices. Second, the Commission argues that even if Comcast's challenge can proceed, we need not go through our usual ancillary authority analysis because a recent Supreme Court decision, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, makes clear that the Commission had authority to issue the *Order*.

#### A.

Courts may invoke judicial estoppel "[w]here a party assumes a certain position in a legal proceeding, . . . succeeds in maintaining that position, . . . [and then,] simply because his interests have changed, assume[s] a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotation marks omitted). For judicial estoppel to apply, however, "a party's later position must be 'clearly inconsistent' with its earlier position." *Id.* at 750 (quoting *United States v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999)). "Doubts about inconsistency often should be resolved by assuming there is no disabling inconsistency, so that the second matter may be resolved on the merits." 18B CHARLES

ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §4477, at 594 (2d ed. 2002).

The Commission's estoppel argument rests on the position Comcast took while defending against a civil action in a California federal court. In that case, one of Comcast's Internet customers challenged the company's interference with peer-to-peer programs at the same time Free Press and Public Knowledge were pressing their own challenges before the Commission. Comcast responded by moving to stay the litigation pending resolution of the Commission proceedings. In support, it invoked the "primary jurisdiction doctrine," arguing that "a court is 'obliged to defer' to an agency where the 'issue brought before a court is in the process of litigation through procedures originating in the [agency].'" Def.'s Mem. of Law in Supp. of Mot. for J. on Pleadings at 10, *Hart v. Comcast of Alameda, Inc.*, No. 07-6350 (N.D. Cal. 2008) ("Comcast Cal. Mem.") (quoting *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 647 (1972)). In language the Commission now emphasizes, Comcast continued: "Any inquiry into whether Comcast's [peer-to-peer] management is unlawful falls squarely within the FCC's subject matter jurisdiction." *Id.* Persuaded, the district court granted the requested stay.

According to the Commission, when Comcast argued that the Commission has "subject matter jurisdiction" over its disputed network management practices, it was saying that any action by the Commission to prohibit those practices would satisfy both elements of the *American Library* test and thus lie within the Commission's ancillary authority. "Because Comcast prevailed . . . on [that] theory," the Commission contends, "it should be estopped from arguing the opposite here." Resp't's Br. 30. For its part, Comcast

insists it never argued that the Commission could justify exercising ancillary authority over its network management practices. Instead, it claims that in saying that the Commission possesses “subject matter jurisdiction” over those practices, it was arguing no more than what it concedes here, namely that its Internet service constitutes “communication by wire” within the meaning of *American Library*’s first requirement. Interpreted that way, Comcast’s California position does not conflict with the argument it makes here, which rests on *American Library*’s second requirement: that the Commission must show that its regulation of Comcast’s Internet service is “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.” 406 F.3d at 692.

Although the parties’ competing interpretations of Comcast’s California argument are both plausible, Comcast’s is more so. For one thing, its interpretation comports with the overall primary jurisdiction argument it advanced in that case. As a leading administrative law treatise explains, “The question of whether an issue is within [an] agency’s primary jurisdiction is different from the question of whether the agency actually has exclusive statutory jurisdiction to resolve an issue.” 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 14.1, at 1162 (5th ed. 2010). Specifically, for an issue to fall within an agency’s primary jurisdiction, the agency need not possess definite authority to resolve it; rather, there need only be “sufficient statutory support for administrative authority . . . that the agency should at least be requested to . . . proceed[]” in the first instance. *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 304, 300 (1973) (holding that a dispute fell within the Commodity Exchange Commission’s primary jurisdiction where the Commodity Exchange Act “at least arguably protected or prohibited” the conduct at issue). Given this standard, and given that then, as

now, the Commission claimed ancillary authority over Comcast's network management practices, the company could plausibly argue in the California case (as it claims it did) that deference to the Commission's primary jurisdiction was appropriate merely because the disputed practices involved "communication by wire"—*American Library*'s first requirement. And as Comcast emphasized in the California case, the Commission was already "actively investigating" the company's network management practices, Comcast Cal. Mem. at 11, increasing the risk that the civil case could disrupt the regulatory process. See PIERCE, ADMINISTRATIVE LAW TREATISE § 14.1, at 1162 ("[D]etermination of the agency's primary jurisdiction involves a . . . pragmatic evaluation of the advantages and disadvantages of allowing the agency to resolve an issue in the first instance."). Therefore, the California court could have fairly concluded under the primary jurisdiction doctrine that the Commission should determine in the first instance whether regulating Comcast's network management practices would be "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities"—*American Library*'s second requirement. 406 F.3d at 692.

Reinforcing Comcast's interpretation, the Commission itself generally uses "subject matter jurisdiction" to refer only to the first part of the *American Library* test rather than the test as a whole. For example, in an earlier Internet-related order (cited by Comcast in its California brief), the Commission wrote that it "may exercise its ancillary jurisdiction when Title I of the Act gives the Commission *subject matter jurisdiction* over the service to be regulated *and* the assertion of jurisdiction is reasonably ancillary to the effective performance of its various responsibilities." *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14,853, 14,913–14,

¶ 109 (2005) (emphasis added) (internal quotation marks and alteration omitted); *accord In re Consumer Information and Disclosure*, 24 F.C.C.R. 11,380, 11,400, ¶ 62 (2009); *In re IP-Enabled Services*, 24 F.C.C.R. 6039, 6044–45, ¶ 9 (2009); *In re High-Cost Universal Service Support*, 24 F.C.C.R. 6475, 6540, ¶ 101 (2008).

We thus do not interpret Comcast’s California argument as “inconsistent” with its argument here, let alone “clearly” so. *New Hampshire*, 532 U.S. at 750 (internal quotation marks omitted). Because Comcast never clearly argued in the California litigation that the Commission’s assertion of authority over the company’s network management practices would be “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities” (*American Library*’s second requirement), 406 F.3d at 692, that question remains for us to answer.

## B.

The Commission’s second threshold argument is that the Supreme Court’s decision in *Brand X* “already decided the jurisdictional question here.” Resp’t’s Br. 20. In that case, the Court reviewed the Commission’s 2002 *Cable Modem Order*, *supra* at 5–6, which removed cable Internet service from Title II and Title VI oversight by classifying it as an “information service.” *See Brand X*, 545 U.S. at 978. Challenging that determination, *Brand X* argued that cable Internet actually comprises a bundle of two services: an “information service” not subject to Commission regulation and a “telecommunications service” subject to mandatory Title II regulation. *Id.* at 990–91. *Brand X* pressed this argument because if Title II applied to cable Internet, then, under its view, cable companies would have to unbundle the components of their Internet services, thus allowing *Brand X* and other independent Internet service providers (ISPs) to use

the telecommunications component of those bundles to offer competing Internet service over cable company wires. *Brand X Resp'ts' Br.* at 10, *Brand X*, 545 U.S. 967 (No. 04-277) (“[I]f the telecommunications component of cable modem service is a ‘telecommunications service,’ and hence common carriage, . . . [c]ustomers then will be able to choose their provider of Internet services.”).

Although the Supreme Court acknowledged that cable Internet service does contain a telecommunications “component,” it deferred to the Commission’s determination that this component is “functionally integrated” into a single “offering” properly classified as an “information service.” 545 U.S. at 991. Using language the Commission now emphasizes, the Court went on to say that “the Commission remains free to impose special regulatory duties on [cable Internet providers] under its Title I ancillary jurisdiction.” *Id.* at 996. In particular, the Court suggested that the Commission could likely “require cable companies to allow independent ISPs access to their facilities” pursuant to its ancillary authority, rather than using Title II as *Brand X* urged. *Id.* at 1002. According to the Commission, this means that “the FCC has authority over [information service providers] under its Title I ancillary jurisdiction.” *Resp’t’s Br.* 20.

Comcast insists that the references to ancillary jurisdiction in *Brand X* are dicta: “*Brand X* presented the question whether the FCC had permissibly classified cable Internet services as ‘information services,’ not whether any particular regulation of such services was within the agency’s statutory authority.” *Pet’r’s Br.* 53. Although Comcast may well be correct, “carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.” *United States v. Oakar*, 111 F.3d

146, 153 (D.C. Cir. 1997) (internal quotation marks and alteration omitted). In the end, however, we need not decide whether the Court's discussion of ancillary authority in *Brand X* qualifies as "authoritative," for even if it does the Commission stretches the Court's words too far. By leaping from *Brand X*'s observation that the Commission's ancillary authority may allow it to impose *some* kinds of obligations on cable Internet providers to a claim of plenary authority over such providers, the Commission runs afoul of *Southwestern Cable* and *Midwest Video I*.

In *Southwestern Cable*, in which the Court first recognized the Commission's ancillary authority, it expressly reserved for future cases the question whether particular regulations fall within that power. Although the Court upheld the cable television order at issue, it declined "to determine in detail the limits of the Commission's authority to regulate CATV." 392 U.S. at 178. Then in *Midwest Video I*, the Court made clear that the permissibility of each new exercise of ancillary authority must be evaluated on its own terms. That is, the Court asked whether the particular regulation at issue was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 406 U.S. at 670 (plurality opinion) (internal quotation marks omitted); *see also id.* at 675 (Burger, C.J., concurring). Contrary to the kind of inference the Commission would have us draw from *Brand X*, nothing in *Midwest Video I* even hints that *Southwestern Cable*'s recognition of ancillary authority over one aspect of cable television meant that the Commission had plenary authority over all aspects of cable.

We made just this point in *National Ass'n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (*NARUC II*). There we reviewed a series of Commission

orders that preempted state regulation of non-video uses of cable systems, including precursors to modern cable modem service. *See id.* at 616 (“[T]he point-to-point communications . . . involve one computer talking to another . . .”). Leaning on its recent victories in *Southwestern Cable* and *Midwest Video I*, the Commission argued—similar to the way it uses *Brand X* here—that the combined force of those two “affirmances of FCC powers over cable must be seen as establishing a jurisdiction over all activities of cable operators.” *Id.* at 611. We rejected that argument, explaining that *Southwestern Cable* and *Midwest Video I* foreclosed the Commission’s broad view of ancillary authority. We pointed out that in *Southwestern Cable* the Court “stated explicitly that its holding was limited to . . . reasonably ancillary activities, and expressly declined to comment on ‘the Commission’s authority, if any, to regulate CATV under any other circumstances or for any other purposes.’” *Id.* at 612–13 (quoting *Southwestern Cable*, 392 U.S. at 178). We similarly noted that in *Midwest Video I* the plurality “relied explicitly on the *Southwestern* reasoning, and devoted substantial attention to establishing the requisite ‘ancillariness’ between the Commission’s authority over broadcasting and the particular regulation before the Court.” *Id.* at 613. Neither case, we concluded, “recogniz[ed] any sweeping authority over [cable] as a whole.” *Id.* at 612. Instead, they “command[ed] that each and every assertion of jurisdiction over cable television must be *independently justified* as reasonably ancillary to the Commission’s power over broadcasting.” *Id.* (emphasis added).

Echoing this interpretation, the Supreme Court in *Midwest Video II* described *Southwestern Cable* “as conferring on the Commission a circumscribed range of power to regulate cable television,” a determination “reaffirmed” in *Midwest Video I*. 440 U.S. at 696. “The

question now before us,” the Court continued, “is whether the [Communications] Act, as construed in these two cases, authorizes the capacity and access regulations that are here under challenge.” *Id.* The Court ultimately concluded that it did not, thus reinforcing the principle that the Commission must defend its exercise of ancillary authority on a case-by-case basis.

To be sure, *Brand X* dealt with the Internet, not cable television. Nothing in *Brand X*, however, suggests that the Court was abandoning the fundamental approach to ancillary authority set forth in *Southwestern Cable*, *Midwest Video I*, and *Midwest Video II*. Accordingly, the Commission cannot justify regulating the network management practices of cable Internet providers simply by citing *Brand X*’s recognition that it may have ancillary authority to require such providers to unbundle the components of their services. These are altogether different regulatory requirements. *Brand X* no more dictates the result of this case than *Southwestern Cable* dictated the results of *Midwest Video I*, *NARUC II*, and *Midwest Video II*. The Commission’s exercise of ancillary authority over Comcast’s network management practices must, to repeat, “be independently justified.” *NARUC II*, 533 F.2d at 612. It is to that issue that we now turn.

#### IV.

The Commission argues that the *Order* satisfies *American Library*’s second requirement because it is “reasonably ancillary to the Commission’s effective performance” of its responsibilities under several provisions of the Communications Act. These provisions fall into two categories: those that the parties agree set forth only congressional policy and those that at least arguably delegate regulatory authority to the Commission. We consider each in turn.

**A.**

The Commission relies principally on section 230(b), part of a provision entitled “Protection for private blocking and screening of offensive material,” 47 U.S.C. § 230, that grants civil immunity for such blocking to providers of interactive computer services, *id.* § 230(c)(2). Setting forth the policies underlying this protection, section 230(b) states, in relevant part, that “[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services” and “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet.” *Id.* § 230(b). In this case the Commission found that Comcast’s network management practices frustrated both objectives. *Order*, 23 F.C.C.R. at 13,052–53, ¶ 43.

In addition to section 230(b), the Commission relies on section 1, in which Congress set forth its reasons for creating the Commission in 1934: “For 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 the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . at reasonable charges, . . . there is created a commission to be known as the ‘Federal Communications Commission’ . . . .” 47 U.S.C. § 151. The Commission found that “prohibiting unreasonable network discrimination directly furthers the goal of making broadband Internet access service both ‘rapid’ and ‘efficient.’” *Order*, 23 F.C.C.R. at 13,036–37, ¶ 16.

Comcast argues that neither section 230(b) nor section 1 can support the Commission’s exercise of ancillary authority because the two provisions amount to nothing more than congressional “statements of policy.” Pet’r’s Br. 46. Such

statements, Comcast contends, “are not an operative part of the statute, and do not enlarge or confer powers on administrative agencies. As such, they necessarily fail to set forth ‘statutorily mandated responsibilities’” within the meaning of *American Library*. *Id.* at 47 (citations, internal quotation marks, and alteration omitted).

The Commission acknowledges that section 230(b) and section 1 are statements of policy that themselves delegate no regulatory authority. Still, the Commission maintains that the two provisions, like all provisions of the Communications Act, set forth “statutorily mandated responsibilities” that can anchor the exercise of ancillary authority. “The operative provisions of statutes are those which *declare the legislative will*,” the Commission asserts. Resp’t’s Br. 39 (internal quotation marks and alteration omitted). “Here, the legislative will has been declared by Congress in the form of a policy, along with an express grant of authority to the FCC to perform all actions necessary to execute and enforce all the provisions of the Communications Act.” *Id.*

In support of its reliance on congressional statements of policy, the Commission points out that in both *Southwestern Cable* and *Midwest Video I* the Supreme Court linked the challenged Commission actions to the furtherance of various congressional “goals,” “objectives,” and “policies.” *See, e.g., Southwestern Cable*, 392 U.S. at 175; *Midwest Video I*, 406 U.S. at 665, 669 (plurality opinion). In particular, the Commission notes that in *Midwest Video I*, the plurality accepted its argument that the Commission’s “concern with CATV carriage of broadcast signals . . . extends . . . to requiring CATV affirmatively to further statutory *policies*.” 406 U.S. at 664 (plurality opinion) (emphasis added) (internal quotation marks omitted). According to the Commission, since congressional statements of policy were sufficient to

support ancillary authority over cable television, it may likewise rely on such statements—section 230(b) and section 1—to exercise ancillary authority over the network management practices of Internet providers.

We read *Southwestern Cable* and *Midwest Video I* quite differently. In those cases, the Supreme Court relied on policy statements not because, standing alone, they set out “statutorily mandated responsibilities,” but rather because they did so in conjunction with an express delegation of authority to the Commission, i.e., Title III’s authority to regulate broadcasting. In *Southwestern Cable*, the Commission argued that restricting the geographic reach of cable television was necessary to fulfill its Title III responsibility to foster local broadcast service. The Court agreed, explaining that “Congress has imposed upon the Commission the ‘obligation of providing a widely dispersed radio and television service,’ with a ‘fair, efficient, and equitable distribution’ of service among the ‘several States and communities.’ The Commission has, for this and other purposes, been granted authority to allocate broadcasting zones or areas, and to provide regulations ‘as it may deem necessary’ to prevent interference among the various stations.” 392 U.S. at 173–74 (citation and footnote omitted) (quoting S. REP. NO. 86-923, at 7 (1959), 47 U.S.C. § 307(b), 303(f)). The Court concluded that “the Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems.” *Id.* at 177. Nonetheless, the Court “emphasize[d] that the authority which we recognize today . . . is restricted to that reasonably ancillary to the effective performance of the Commission’s various responsibilities for the *regulation of television broadcasting.*” *Id.* at 178 (emphasis added).

In *Midwest Video I*, the Court again made clear that it was sustaining the challenged regulation—requiring cable companies to originate their own programming—only because of its connection to the Commission’s Title III authority over broadcasting. A four-Justice plurality agreed with the Commission that the challenged rule would “further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public’s choice of programs and types of services.” 406 U.S. at 667–68 (plurality opinion) (internal quotation marks omitted). Because the regulation “preserve[d] and enhance[d] the integrity of broadcast signals” it satisfied *Southwestern Cable*, i.e., it was “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.” *Id.* at 670 (emphasis added) (internal quotation marks omitted). Chief Justice Burger made the same point in a controlling concurring opinion: “CATV is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act.” *Id.* at 675 (Burger, C.J., concurring). That said, he warned, “candor requires acknowledgment . . . that the Commission’s position strains the outer limits of” its authority. *Id.* at 676.

The Commission exceeded those “outer limits” in both *NARUC II* and *Midwest Video II*. In *NARUC II*, the Commission defended its exercise of ancillary authority over non-video cable communications (as it does here with respect to Comcast’s network management practices) on the basis of section 1’s “overall statutory mandate to make available, so far as possible, to all the people of the United States a rapid, efficient, [N]ation-wide, and world-wide wire and radio communications service.” 533 F.2d at 606 (internal quotation marks and alteration omitted). The Commission “reasoned

that this language called for the development of a nationwide broadband communications grid in which cable systems should play an important part.” *Id.* (internal quotation marks omitted). We rejected that argument. Relying on *Southwestern Cable* and *Midwest Video I*, we began by explaining that the Commission’s ancillary authority “is really incidental to, and contingent upon, *specifically delegated powers under the Act.*” *Id.* at 612 (emphasis added). Applying that standard, we found it “difficult to see how any action which the Commission might take concerning two-way cable communications could have as its primary impact the furtherance of any broadcast purpose.” *Id.* at 615. Because the regulations had not been “justified as reasonably ancillary to the Commission’s power over *broadcasting,*” *id.* at 612, we vacated them.

In *Midwest Video II*, the Supreme Court rejected the Commission’s assertion of ancillary authority to impose a public access requirement on certain cable channels because doing so would “relegate[] cable systems . . . to common-carrier status.” 440 U.S. at 700–01. Pointing out that the Communications Act expressly prohibits common carrier regulation of *broadcasters*, *id.* at 702, the Court held that given the derivative nature of ancillary jurisdiction the same prohibition applied to the Commission’s regulation of *cable providers*. The Commission had opposed this logic, arguing that it could regulate “so long as the rules promote statutory objectives.” *Id.* The Court rejected that broad claim and, revealing the flaw in the argument the Commission makes here, emphasized that “without reference to the provisions of the Act *directly governing broadcasting*, the Commission’s [ancillary] jurisdiction . . . would be unbounded.” *Id.* at 706 (emphasis added). “Though afforded wide latitude in its supervision over communication by wire,” the Court added,

“the Commission was not delegated unrestrained authority.”  
*Id.*

The teaching of *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II*—that policy statements alone cannot provide the basis for the Commission’s exercise of ancillary authority—derives from the “axiomatic” principle that “administrative agencies may [act] only pursuant to authority delegated to them by Congress.” *Am. Library*, 406 F.3d at 691. Policy statements are just that—statements of policy. They are not delegations of regulatory authority. To be sure, statements of congressional policy can help delineate the contours of statutory authority. Consider, for example, the various services over which the Commission enjoys express statutory authority. When exercising its Title II authority to set “just and reasonable” rates for phone service, 47 U.S.C. § 201(b), or its Title III authority to grant broadcasting licenses in the “public convenience, interest, or necessity,” *id.* § 307(a), or its Title VI authority to prohibit “unfair methods of competition” by cable operators that limit consumer access to certain types of television programming, *id.* § 548(b), the Commission must bear in mind section 1’s objective of “Nation-wide . . . wire and radio communication service . . . at reasonable charges,” *id.* § 151. In all three examples, section 1’s policy goal undoubtedly illuminates the scope of the “authority delegated to [the Commission] by Congress,” *Am. Library*, 406 F.3d at 691—though it is Titles II, III, and VI that do the delegating. So too with respect to the Commission’s section 4(i) ancillary authority. Although policy statements may illuminate that authority, it is Title II, III, or VI to which the authority must ultimately be ancillary.

In this case the Commission cites neither section 230(b) nor section 1 to shed light on any express statutory delegation of authority found in Title II, III, VI, or, for that matter,

anywhere else. That is, unlike the way it successfully employed policy statements in *Southwestern Cable* and *Midwest Video I*, the Commission does not rely on section 230(b) or section 1 to argue that its regulation of an activity over which it concededly has no express statutory authority (here Comcast's Internet management practices) is necessary to further its regulation of activities over which it does have express statutory authority (here, for example, Comcast's management of its Title VI cable services). In this respect, this case is just like *NARUC II*. On the record before us, we see "no relationship whatever," *NARUC II*, 533 F.2d at 616, between the *Order* and services subject to Commission regulation. Perhaps the Commission could use section 230(b) or section 1 to demonstrate such a connection, but that is not how it employs them here.

Instead, the Commission maintains that congressional policy by itself creates "statutorily mandated responsibilities" sufficient to support the exercise of section 4(i) ancillary authority. Not only is this argument flatly inconsistent with *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II*, but if accepted it would virtually free the Commission from its congressional tether. As the Court explained in *Midwest Video II*, "without reference to the provisions of the Act" expressly granting regulatory authority, "the Commission's [ancillary] jurisdiction . . . would be unbounded." 440 U.S. at 706. Indeed, Commission counsel told us at oral argument that just as the *Order* seeks to make Comcast's Internet service more "rapid" and "efficient," *Order*, 23 F.C.C.R. 13,036-37, ¶ 16, the Commission could someday subject Comcast's Internet service to pervasive rate regulation to ensure that the company provides the service at "reasonable charges," 47 U.S.C. § 151. Oral Arg. Tr. 58-59. Were we to accept that theory of ancillary authority, we see no reason why the Commission would have to stop there, for

we can think of few examples of regulations that apply to Title II common carrier services, Title III broadcast services, or Title VI cable services that the Commission, relying on the broad policies articulated in section 230(b) and section 1, would be unable to impose upon Internet service providers. If in *Midwest Video I* the Commission “strain[ed] the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts,” 406 U.S. at 676 (Burger, C.J., concurring), and if in *NARUC II* and *Midwest Video II* it exceeded those limits, then here it seeks to shatter them entirely.

Attempting to avoid this conclusion, the Commission argues that in several more recent cases we upheld its use of ancillary authority on the basis of policy statements alone. In each of those cases, however, we sustained the exercise of ancillary authority because, unlike here, the Commission had linked the cited policies to express delegations of regulatory authority.

The Commission places particular emphasis on *Computer and Communications Industry Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (*CCIA*). There we considered a challenge to the Commission’s landmark 1980 *Computer II Order*, in which the Commission set forth regulatory ground rules for common carriers that provided so-called enhanced services, i.e., precursors to modern information services like cable Internet. See *In re Amend. of § 64.702 of the Comm’n’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 385–89, ¶¶ 1–13 (1980). The petitioners argued that two aspects of the *Computer II Order* exceeded the Commission’s ancillary authority. First, the Commission had ruled that AT&T, then the monopoly telephone provider throughout most of the nation, could offer enhanced services only through a separate subsidiary. *CCIA*, 693 F.2d at 205.

Second, the Commission had mandated that all common carriers unbundle charges for “consumer premises equipment” (CPE)—i.e., telephones, computer terminals, and other similar devices—from their regulated tariffs. *Id.* We sustained both requirements. Emphasizing, as we do here, that *Southwestern Cable* “limited the Commission’s jurisdiction to that which is reasonably ancillary to the effective performance of the Commission’s various responsibilities,” we explained that “[o]ne of those responsibilities is to assure a nationwide system of wire communications services at reasonable prices.” *Id.* at 213 (internal quotation marks omitted). According to the Commission, this latter language demonstrates that section 1 describes “statutorily mandated responsibilities.” But the Commission reads our statement out of context.

The crux of our decision in *CCIA* was that in its *Computer II Order* the Commission had linked its exercise of ancillary authority to its Title II responsibility over common carrier rates—just the kind of connection to statutory authority missing here. Thus, with respect to the AT&T component of the order, we relied on the Commission’s finding that “[r]egulation of enhanced services was . . . necessary to prevent AT&T from burdening its basic transmission service customers with part of the cost of providing competitive enhanced services.” *Id.* “Given [the] potentially symbiotic relationship between competitive and monopoly services,” we concluded that “the agency charged with ensuring that monopoly rates are just and reasonable can legitimately exercise jurisdiction over the provision of competitive services.” *Id.* We made the same point with respect to the order’s CPE component: “[E]xercising jurisdiction over CPE was necessary to carry out [the Commission’s] duty to assure the availability of transmission services at reasonable rates.” *Id.* So, when we wrote that

“[o]ne of [the Commission’s] responsibilities is to assure a nationwide system of wire communications services at reasonable prices,” *id.*, we were using section 1’s language in just the way required by *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II*: for the light it sheds on the Commission’s Title II ratemaking power. In other words, we viewed the Commission’s *Computer II Order*—like the Supreme Court had viewed the regulations at issue in *Southwestern Cable*—as regulation of services otherwise beyond the Commission’s authority in order to prevent frustration of a regulatory scheme expressly authorized by statute.

The Commission’s reliance on *Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988), fares no better. There we upheld the Commission’s creation of a Universal Service Fund to provide subsidies for telephone service in rural and other high-cost areas. Again borrowing the language of section 1, we held that “[a]s the Universal Service Fund was proposed in order to further the objective of making communication service available to all Americans at reasonable charges, the proposal was within the Commission’s statutory authority.” *Id.* at 1315. Contrary to the Commission’s argument, however, *Rural Telephone*, like *CCIA*, rested not on section 1 alone, but on the fact that creation of the Universal Service Fund was ancillary to the Commission’s Title II responsibility to set reasonable interstate telephone rates. True, as the Commission observes, our discussion of ancillary authority never cites Title II. But any such citation would simply have restated the obvious given that the Commission established the Universal Service Fund for the very purpose of “ensur[ing] that *telephone rates* are within the means of the average subscriber in all areas of the country.” *Id.* at 1311–12 (emphasis added) (quoting *In re*

*Amend. of Pt. 67 of the Comm'n's Rules and Establishment of a Joint Bd.*, 96 F.C.C.2d 781, 795, ¶ 30 (1984)).

Next the Commission cites *New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984), in which we considered a challenge to a Commission order preempting state regulation of early satellite television. Because petitioner there never argued that the Commission's exercise of ancillary authority lacked sufficient grounding in express statutory authority, *New York State Commission* did not address the issue we now face. *See id.* at 808 (describing petitioner's challenge). Still, in sustaining the Commission's action, we noted that "[i]n its preemption order the Commission based its authority over [satellite television] upon the federal interest in 'the unfettered development of interstate transmission of satellite signals.'" *Id.* at 808 (quoting *In re Earth Satellite Commc'ns, Inc.*, 95 F.C.C.2d 1223, 1230, ¶ 16 (1983)). According to the Commission, this language demonstrates that ancillary authority may be grounded in policy alone. Not so. Our statement does nothing more than clearly and accurately describe what the Commission actually did, i.e., supply a policy justification for its decision. Significantly for the issue before us here, the Commission's preemption order also expressly linked its exercise of ancillary authority over satellite television to its Title III authority over users of radio spectrum. The Commission noted that the reception facilities that states sought to regulate (satellite dishes on hotel and apartment building roofs) "initially were subject to Commission licensing," calling these receivers "absolutely essential instrumentalities of radio broadcasting." *Earth Satellite Commc'ns*, 95 F.C.C.2d at 1231, ¶ 17 (internal quotation marks omitted). The Commission also cited section 303, which provides that "the Commission . . . as public convenience, interest, or necessity requires, shall . . .

[c]lassify radio stations; . . . [p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class; . . . [a]ssign bands of frequencies to the various classes of stations,” and so on. 47 U.S.C. § 303. These express delegations of authority contrast sharply with the general policies set forth in section 230(b) and section 1.

The Commission next relies on *National Ass’n of Regulatory Utility Commissioners v. FCC*, 880 F.2d 422 (D.C. Cir. 1989) (*NARUC III*), in which we considered a challenge to its decision to preempt state regulation of “inside wiring”—“telephone wires within a customer’s home or place of business.” *Id.* at 425. The Commission had found inside wiring to be beyond the scope of its Title II regulation and simultaneously preempted state regulation of such wiring. We held that the Commission had authority to issue the preemption orders insofar as necessary “to encourage competition in the provision, installation, and maintenance of inside wiring.” *Id.* at 429–30. Although we did “agree with the FCC that this policy [was] consistent with the goals of the Act, and that it [had] the authority to implement this policy with respect to interstate communications,” *id.* (citation omitted), petitioners in that case had conceded that “inside wiring installation and maintenance . . . are integral to *telephone communication*,” *id.* at 427 (emphasis added)—a fact critical to the Commission’s exercise of preemption authority. In its orders, the Commission had emphasized that “[o]ur prior preemption decisions have generally been limited to activities that are closely related to the provision of services and which affect the provision of interstate services.” *In re Detariffing the Installation and Maintenance of Inside Wiring*, 1 F.C.C.R. 1190, 1192, ¶ 17 (1986). The term “services” referred to “common carrier communication services” within the scope of the Commission’s Title II jurisdiction. *Id.* “In

short,” the Commission explained, “the *interstate telephone network* will not function as efficiently as possible without the preemptive detariffing of inside wiring installation and maintenance.” *Id.* (emphasis added). The Commission’s preemption of state regulation of inside wiring was thus ancillary to its regulation of interstate phone service, precisely the kind of link to express delegated authority that is absent in this case.

The Commission cites several additional cases, but none support its expansive view of ancillary authority. Two decisions, like the many we have already discussed, upheld the Commission’s exercise of ancillary authority because, unlike here, the Commission had linked its action to a statutory delegation of regulatory authority. *See United Video, Inc. v. FCC*, 890 F.2d 1173, 1182–83 (D.C. Cir. 1989) (upholding rules that, like those upheld in *Southwestern Cable*, limited the ability of cable companies to import programming into a broadcaster’s market); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 729–30 (2d Cir. 1973) (upholding Commission regulation of “data processing activities of common carriers” based on the Commission’s concern “that the statutory obligation of the communication common carrier to provide adequate and reasonable services could be adversely affected”). In another case, we rejected the Commission’s argument, similar to the one it makes here, that it could exercise ancillary authority on the basis of policy alone. *Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 806–07 (D.C. Cir. 2002) (finding the Commission’s “argument that [its] video description rules are obviously a valid communications policy goal and in the public interest” insufficient to justify its exercise of ancillary authority (internal quotation marks omitted)). And in two decisions, ancillary authority was either never addressed, *Nat’l Broad. Co. v. United States*, 319 U.S. 190 (1943) (reviewing the

Commission's exercise of its express licensing power over broadcasting stations under section 303, 47 U.S.C. § 303), or addressed only in passing, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379–80 (1999) (mentioning the existence of the Commission's ancillary authority in the course of interpreting another provision of the Act).

### B.

This brings us to the second category of statutory provisions the Commission relies on to support its exercise of ancillary authority. Unlike section 230(b) and section 1, each of these provisions could at least arguably be read to delegate regulatory authority to the Commission.

We begin with section 706 of the Telecommunications Act of 1996, which provides that “[t]he 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.” 47 U.S.C. § 1302(a). As the Commission points out, section 706 does contain a direct mandate—the Commission “shall encourage . . . .” In an earlier, still-binding order, however, the Commission ruled that section 706 “does not constitute an independent grant of authority.” *In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, 24,047, ¶ 77 (1998) (*Wireline Deployment Order*). Instead, the Commission explained, section 706 “directs the Commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services.” *Id.* at 24,045, ¶ 69.

The Commission now insists that this language refers only “to whether section 706(a) supported *forbearance* authority,” Resp’t’s Br. 41, i.e., the Commission’s authority to free regulated entities from their statutory obligations in certain circumstances, *see* 47 U.S.C. § 160. According to the Commission, it “was not opining more generally on the effect of section 706 on ancillary authority.” Resp’t’s Br. 41. But the order itself says otherwise: “[S]ection 706(a) does not constitute an independent grant of forbearance authority *or of authority to employ other regulating methods.*” *Wireline Deployment Order*, 13 F.C.C.R. at 24,044, ¶ 69 (emphasis added). Because the Commission has never questioned, let alone overruled, that understanding of section 706, and because agencies “may not . . . depart from a prior policy *sub silentio*,” *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009), the Commission remains bound by its earlier conclusion that section 706 grants no regulatory authority.

Implying that this court has done what the Commission has not, the Commission points to a recent decision in which we wrote, “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.” *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 906–07 (D.C. Cir. 2009). In that case, however, we cited section 706 merely to support the Commission’s choice between regulatory approaches clearly within its statutory authority under other sections of the Act, and upheld the Commission’s refusal to forbear from certain regulation of business broadband lines as neither arbitrary nor capricious. Nowhere did we question the Commission’s determination that section 706 does not delegate any regulatory authority. The Commission’s reliance on section 706 thus fails. As in the

case of section 230(b) and section 1, the Commission is seeking to use its ancillary authority to pursue a stand-alone policy objective, rather than to support its exercise of a specifically delegated power.

The Commission's attempt to tether its assertion of ancillary authority to section 256 of the Communications Act suffers from the same flaw. Section 256 directs the Commission to "establish procedures for . . . oversight of coordinated network planning . . . for the effective and efficient interconnection of public telecommunications networks." 47 U.S.C. § 256(b)(1). In language unmentioned by the Commission, however, section 256 goes on to state that "[n]othing in this section shall be construed as expanding . . . any authority that the Commission" otherwise has under law, *id.* § 256(c)—precisely what the Commission seeks to do here.

The Commission next cites section 257. Enacted as part of the Telecommunications Act of 1996, that provision gave the Commission fifteen months to "complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services." 47 U.S.C. § 257(a). Although the section 257 proceeding is now complete, that provision also directs the Commission to report to Congress every three years on any remaining barriers. *See In re § 257 Proceeding to Identify and Eliminate Mkt. Entry Barriers for Small Bus.*, 12 F.C.C.R. 16,802 (1997) (completing original proceeding); 47 U.S.C. § 257(c) (requiring ongoing reports). We readily accept 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. But the Commission's attempt to dictate the operation of an otherwise unregulated service based on nothing more than its obligation to issue a report defies any plausible notion of "ancillariness." *See Motion Picture Ass'n of Am.*, 309 F.3d at 801–02 (holding that an order requiring that broadcasters incorporate "video descriptions" into certain television programs fell outside the Commission's ancillary authority even though it had been directed to produce a report on the subject).

Next the Commission argues that its exercise of authority over Comcast's network management practices is ancillary to its section 201 common carrier authority—though the section 201 argument the Commission sets forth in its brief is very different from the one appearing in the *Order*. As indicated above, section 201 provides that "[a]ll charges, practices, classifications, and regulations for and in connection with [common carrier] service shall be just and reasonable." 47 U.S.C. § 201(b). In the *Order*, the Commission found that by blocking certain traffic on Comcast's Internet service, the company had effectively shifted the burden of that traffic to other service providers, some of which were operating their Internet access services on a common carrier basis subject to Title II. *Order*, 23 F.C.C.R. at 13,037–38, ¶ 17. By marginally increasing the variable costs of those providers, the Commission maintained, Comcast's blocking of peer-to-peer transmissions affected common carrier rates. *Id.* Whatever the merits of this position, the Commission has forfeited it by failing to advance it here. *See United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004) ("Ordinarily, arguments that parties do not make on appeal are deemed to have been waived.").

Instead, the Commission now argues that voice over Internet Protocol (VoIP) services—in essence, telephone services using Internet technology—affect the prices and practices of traditional telephony common carriers subject to section 201 regulation. According to the Commission, some VoIP services were disrupted by Comcast’s network management practices. We have no need to examine this claim, however, for the Commission must defend its action on the same grounds advanced in the *Order*. *SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943).

The same problem undercuts the Commission’s effort to link its regulation of Comcast’s network management practices to its Title III authority over broadcasting. The Commission contends that Internet video “has the potential to affect the broadcast industry” by influencing “local origination of programming, diversity of viewpoints, and the desirability of providing service in certain markets.” Resp’t’s Br. 43. But the Commission cites no source for this argument in the *Order*, nor can we find one.

Finally, the Commission argues that the *Order* is ancillary to its section 623 authority over cable rates. 47 U.S.C. § 543. Although the *Order* never mentions section 623, and although, as far as we can tell, no commenter suggested section 623 as a basis for the Commission’s exercise of ancillary authority, the Commission argues that its reliance on this provision is implicit in its section 1 finding. That finding included the following explanation:

[E]xercising jurisdiction over the complaint would promote [section 1’s] goal of achieving “reasonable charges.” For example, if cable companies such as Comcast are barred from inhibiting consumer access to high-definition on-line video content, then, as

discussed above, consumers with cable modem service will have available a source of video programming (much of it free) that could rapidly become an alternative to cable television. The competition provided by this alternative should result in downward pressure on cable television prices, which have increased rapidly in recent years.

*Order*, 23 F.C.C.R. at 13,037, ¶ 16. Laying the foundation for this theory earlier in the *Order*, the Commission found that “video distribution poses a particular competitive threat to Comcast’s video-on-demand (‘VOD’) service. VOD operates much like online video, where Internet users can select and download or stream any available program without a schedule and watch it any time . . . .” *Id.* at 13,030, ¶ 5 (internal quotation marks and alteration omitted).

The Commission’s argument that we should read its invocation of section 1 as a reference to its section 623 authority over cable rates fails because, unlike its Title II authority over common carrier rates, its section 623 authority is sharply limited. Indeed, section 623 expressly prohibits the Commission from regulating rates for “video programming offered on a . . . per program basis,” i.e., video-on-demand service. 47 U.S.C. § 543(l)(2), (a)(1). Although the Commission once enjoyed broader authority over cable rates, *see id.* § 543(c)(4), its current authority is limited to setting standards for and overseeing local regulation of rates for “basic tier” service on certain cable systems. *See id.* § 543(b). In the *Order*, the Commission does not assert ancillary authority based on this narrow grant of regulatory power. Instead, the *Order* rests on the premise that section 1 gives the Commission ancillary authority to ensure reasonable rates for *all* communication services, including those, like video-on-demand, over which it has no express regulatory authority.

As explained above, *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II* bar this expansive theory of ancillary authority.

## V.

It is true that “Congress gave the [Commission] broad and adaptable jurisdiction so that it can keep pace with rapidly evolving communications technologies.” Resp’t’s Br. 19. It is also true that “[t]he Internet is such a technology,” *id.*, indeed, “arguably the most important innovation in communications in a generation,” *id.* at 30. Yet notwithstanding the “difficult regulatory problem of rapid technological change” posed by the communications industry, “the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer . . . Commission authority.” *NARUC II*, 533 F.2d at 618 (internal quotation marks and footnote omitted). Because the Commission has failed to tie its assertion of ancillary authority over Comcast’s Internet service to any “statutorily mandated responsibility,” *Am. Library*, 406 F.3d at 692, we grant the petition for review and vacate the *Order*.

*So ordered.*



## **THE THIRD WAY: A NARROWLY TAILORED BROADBAND FRAMEWORK**

**Chairman Julius Genachowski**  
**Federal Communications Commission**  
**May 6, 2010**

Many have asked about the FCC's next steps in view of the recent decision in the *Comcast* case. I'll describe here a path forward, which will begin with seeking public comment on a post-*Comcast* legal foundation for the FCC's approach to broadband communications services. The goal is to restore the broadly supported status quo consensus that existed prior to the court decision on the FCC's role with respect to broadband Internet service.

This statement describes a framework to support policies that advance our global competitiveness and preserve the Internet as a powerful platform for innovation, free speech, and job creation. I remain open to all ideas on the best approach to achieve our country's vital goals with respect to high-speed broadband for all Americans, and the Commission proceeding to follow will seek comment on multiple legal theories and invite new ideas.

### **The FCC's Mission**

More than 75 years ago, Congress created the Federal Communications Commission with an explicit mission: "to make available, so far as possible, to all people of the United States . . . A rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges, for the purpose of the national defense, [and] for the purpose of promoting the safety of life and property through the use of wire and radio communication."

In the decades since, the technologies of communications have changed and evolved—from telephone, radio, and broadcast TV to cable, satellite, mobile phones, and now broadband Internet. With the guidance of Congress, the Commission has tailored its approach to each of these technologies. But the basic goals have been constant: to encourage private investment and the building of a communications infrastructure that reaches all Americans wherever they live; to pursue meaningful access to that infrastructure for economic and educational opportunity and for full participation in our democracy; to protect and empower consumers; to promote competition; to foster innovation, economic growth, and job creation; and to protect Americans' safety.

### **The Consensus Understanding of the FCC's Role with Respect to Broadband**

A challenge for the FCC in recent years has been how to apply the time-honored purposes of the Communications Act to our 21<sup>st</sup> Century communications platform—broadband Internet—access to which is generally provided by the same companies that provide telephone and cable television services.

Broadband is increasingly essential to the daily life of every American. It is fast becoming the primary way we as Americans connect with one another, do business, educate ourselves and our children, receive health care information and services, and express our opinions. As a unanimous FCC said a few weeks ago in our *Joint Statement on Broadband*, "Working to make sure that America has world-leading high-speed broadband networks—both wired and wireless—lies at the very core of the FCC's mission in the 21<sup>st</sup> Century."

Over the past decade and a half, a broad consensus in the public and private sectors has developed about the proper role and authority for the FCC regarding broadband communications. This bipartisan consensus, which I support, holds that the FCC should adopt a restrained approach to broadband

communications, one carefully balanced to unleash investment and innovation while also protecting and empowering consumers.

It is widely understood—and I am of the view—that the extreme alternatives to this light-touch approach are unacceptable. Heavy-handed prescriptive regulation can chill investment and innovation, and a do-nothing approach can leave consumers unprotected and competition unpromoted, which itself would ultimately lead to reduced investment and innovation.

The consensus view reflects the nature of the Internet itself as well as the market for access to our broadband networks. One of the Internet's greatest strengths—its unprecedented power to foster technological, economic, and social innovation—stems in significant part from the absence of any central controlling authority, either public or private. The FCC's role, therefore should *not* involve regulating the Internet itself.

Consumers do need basic protection against anticompetitive or otherwise unreasonable conduct by companies providing the broadband access service (e.g., DSL, cable modem, or fiber) to which consumers subscribe for *access* to the Internet. It is widely accepted that the FCC needs backstop authority to prevent these companies from restricting lawful innovation or speech, or engaging in unfair practices, as well as the ability to develop policies aimed at connecting all Americans to broadband, including in rural areas.

### **The Broadband Policy Agenda**

Consistent with this consensus view of the FCC's role, Congress last year directed the FCC to develop America's first National Broadband Plan, which we delivered in March. And I have described over the past months the policy initiatives I believe are of crucial importance to our global competitiveness, job creation, and broad opportunity. These include:

- Extending broadband communications to all Americans, in rural and urban America and in between, by transforming the \$9 billion Universal Service Fund from supporting legacy telephone service to supporting broadband communications service;
- Protecting consumers and promoting healthy competition by, for example, providing greater transparency regarding the speeds, services, and prices consumers receive, and ensuring that consumers—individuals as well as small businesses—are treated honestly and fairly;
- Empowering consumers to take control of their personal information so that they can use broadband communications without unknowingly sacrificing their privacy;
- Lowering the costs of investment—for example, through smart policies relating to rights-of-way—in order to accelerate and extend broadband deployment;
- Advancing the critical goals of protecting Americans against cyber-attacks, extending 911 coverage to broadband communications, and otherwise protecting the public's safety; and
- Working to preserve the freedom and openness of the Internet through high-level rules of the road to safeguard consumers' right to connect with whomever they want; speak freely online; access the lawful products and services of their choice; and safeguard the Internet's boundless promise as a platform for innovation and communication to improve our education and health care, and help deliver a clean energy future.

At the same time, I have been clear about what the FCC should *not* do in the area of broadband communications: For example, FCC policies should not include regulating Internet content, constraining reasonable network management practices of broadband providers, or stifling new business models or managed services that are pro-consumer and foster innovation and competition. FCC policies should also recognize and accommodate differences between management of wired networks and wireless networks,

including the unique congestion issues posed by spectrum-based communications. The Internet has flourished and must continue to flourish because of innovation and investment throughout the broadband ecosystem: at the core of the network, at its edge, and in the cloud.

These policies reflect an essential underlying regulatory philosophy:

- A strong belief in the free market and in private investment as essential and powerful engines of economic growth;
- An embrace of the view that a healthy return on investment is a necessary and desirable incentive to risk-taking and deployment of capital;
- A recognition of the powerful role entrepreneurs, innovators, startups and small businesses must play in fueling American economic success; and
- An understanding that government has a vital but limited role in advancing common goals, for example by helping tackle core infrastructure and public safety challenges; providing basic rules of the road to enable markets to work fairly; acting in a properly calibrated way when necessary to protect consumers and promote competition, investment, and innovation—and otherwise getting out of the way of the entrepreneurial genius and free market that is America’s greatest competitive advantage.

### **Implications of *Comcast v. FCC***

The recent court opinion in *Comcast v. FCC* does not challenge the longstanding consensus about the FCC’s important but restrained role in protecting consumers, promoting competition, and ensuring that all Americans can benefit from broadband communications. Nor does it challenge the commonsense policies we have been pursuing.

But the opinion does cast serious doubt on the particular legal theory the Commission used for the past few years to justify its backstop role with respect to broadband Internet communications. The opinion therefore creates a serious problem that must be solved so that the Commission can implement important, commonsense broadband policies, including reforming the Universal Service Fund to provide broadband to all Americans, protecting consumers and promoting competition by ensuring transparency regarding broadband access services, safeguarding the privacy of consumer information, facilitating access to broadband services by persons with disabilities, protecting against cyber-attacks, ensuring next-generation 911 services for broadband communications, and preserving the free and open Internet.

The legal theory that the *Comcast* opinion found inadequate has its roots in a series of controversial decisions beginning in 2002 in which the Commission decided to classify broadband Internet access service not as a “telecommunications service” for purposes of the Communications Act, but as something different—an “information service.”

As a result of these decisions, broadband became a type of service over which the Commission could exercise only indirect “ancillary” authority, as opposed to the clearer direct authority exercised over telecommunications services. Importantly, at the time, supporters of this “information services” approach clearly stated that the FCC’s so-called “ancillary” authority would be more than sufficient for the Commission to play its backstop role with respect to broadband access services and pursue all sensible broadband policies.

The Commission’s General Counsel and many other lawyers believe that the *Comcast* decision reduces sharply the Commission’s ability to protect consumers and promote competition using its “ancillary” authority, and creates serious uncertainty about the Commission’s ability, under this approach, to perform

the basic oversight functions, and pursue the basic broadband-related policies, that have been long and widely thought essential and appropriate.

This undermining of settled understandings about the government’s role in safeguarding our communications networks is untenable. Since the decision, lawyers from every quarter of the communications landscape have been debating a difficult and technical legal question: What is the soundest and most appropriate legal grounding to let the FCC carry out what almost everyone agrees to be necessary functions regarding broadband communications?

### **The Conventional Options**

Two primary options have been debated since the *Comcast* decision:

One, the Commission could continue relying on Title I “ancillary” authority, and try to anchor actions like reforming universal service and preserving an open Internet by *indirectly* drawing on provisions in Title II of the Communications Act (e.g., sections 201, 202, and 254) that give the Commission direct authority over entities providing “telecommunications services.”

Two, the Commission could fully “reclassify” Internet communications as a “telecommunications service,” restoring the FCC’s direct authority over broadband communications networks but also imposing on providers of broadband access services dozens of new regulatory requirements.

I have serious reservations about both of these approaches.

The FCC General Counsel advises that under the first option, continuing to pursue policies with respect to broadband Internet access under the ancillary authority approach has a serious risk of failure in court. It would involve a protracted, piecemeal approach to defending essential policy initiatives designed to protect consumers, promote competition, extend broadband to all Americans, pursue necessary public safety measures, and preserve the free and open Internet.

The concern is that this path would lead the Commission straight back to its current uncertain situation—and years will have passed without actually implementing the key policies needed to improve broadband in America and enhance economic growth and broad opportunity for all Americans.

Meanwhile, the second option, fully reclassifying broadband services as “telecommunications services” and applying the full suite of Title II obligations, has serious drawbacks. While it would clarify the legal foundation for broadband policy, it would also subject the providers of broadband communications services to extensive regulations ill-suited to broadband. Title II, for example, includes measures that, if implemented for broadband, would fail to reflect the long-standing bipartisan consensus that the Internet should remain unregulated and that broadband networks should have only those rules necessary to promote essential goals, such as protecting consumers and fair competition.

Accordingly, I directed the FCC General Counsel and staff to identify an approach that would restore the status quo—that would allow the agency to move forward with broadband initiatives that empower consumers and enhance economic growth, while also avoiding regulatory overreach. In short, I sought an approach consistent with the longstanding consensus regarding the limited but essential role that government should play with respect to broadband communications.

I am pleased the General Counsel and staff have identified a third-way approach—a legal anchor that gives the Commission only the modest authority it needs to foster a world-leading broadband

infrastructure for all Americans while definitively avoiding the negative consequences of a full reclassification and broad application of Title II.

### **A Third Way**

As General Counsel Austin Schlick explains more fully in his statement today, under this narrow and tailored approach, the Commission would:

- Recognize the transmission component of broadband access service—and only this component—as a telecommunications service;
- Apply only a handful of provisions of Title II (Sections 201, 202, 208, 222, 254, and 255) that, prior to the *Comcast* decision, were widely believed to be within the Commission’s purview for broadband;
- Simultaneously renounce—that is, forbear from—application of the many sections of the Communications Act that are unnecessary and inappropriate for broadband access service; and
- Put in place up-front forbearance and meaningful boundaries to guard against regulatory overreach.

This approach has important virtues.

*First, it will place federal policy regarding broadband communications services, including the policies recommended in the National Broadband Plan, on the soundest legal foundation, thereby eliminating as much of the current uncertainty as possible.* From reorienting the Universal Service Fund to support broadband in rural America, to adopting focused consumer protection and competition policies, to promoting public safety in a broadband world, this approach would provide a solid legal basis. In particular, it would allow broadband policies to rest on the Commission’s direct authority over telecommunications services while also using ancillary authority as a fallback.

*Second, the approach is narrow.* It will treat only the transmission component of broadband access service as a telecommunications service while preserving the longstanding consensus that the FCC should not regulate the Internet, including web-based services and applications, e-commerce sites, and online content.

*Third, this approach would restore the status quo.* It would not change the range of obligations that broadband access service providers faced pre-*Comcast*. It would not give the FCC greater authority than the Commission was understood to have pre-*Comcast*. And it would not change established policy understandings at the FCC, such as the existing approach to unbundling or the practice of not regulating broadband prices or pricing structures. It would merely restore the longstanding deregulatory—as opposed to “no-regulatory” or “over-regulatory”—compact.

*Fourth, the approach would establish meaningful boundaries and constraints to prevent regulatory overreach.* The FCC would invoke only the few provisions necessary to achieve its limited but essential goals. Notably, these are the very same provisions (sections 201, 202, and 254, for example) that telephone and cable companies agree the FCC should invoke, albeit indirectly under an “ancillary authority” approach. The Commission would take steps to give providers and their investors confidence and certainty that this renunciation of regulatory overreach will not unravel while also giving consumers, small businesses, entrepreneurs and innovators the confidence and certainty they need and deserve. Since Congress gave the Commission forbearance authority 17 years ago, the Commission has never reversed or undone a forbearance decision.

*Fifth, the approach is familiar and has worked well in an analogous context—wireless communications.* In its approach to wireless communications, Congress mandated that the FCC subject wireless communications to the same Title II provisions generally applicable to telecommunications services while also directing that the FCC consider forbearing from the application of many of these provisions to the wireless marketplace. The Commission did significantly forbear, and the telecommunications industry has repeatedly and resoundingly lauded this approach as well-suited to an emerging technology and welcoming to investment and innovation. In short, the proposed approach is already tried and true.

*Sixth, this approach would allow the Commission to move forward on broadband initiatives that are vital for global competitiveness and job creation, even as it explores with Congress and stakeholders the possibility of legislative clarification of the Communications Act.* The Communications Act as amended in 1996 anticipated that the FCC would have an ongoing duty to protect consumers and promote competition and public safety in connection with broadband communications. Should congressional leaders decide to take up legislation in the future to clarify the statute and the agency's authority regarding broadband, the agency stands ready to be a resource to Congress as it considers any such legislative measures. In the interim, however, this approach would ensure that key initiatives to address pressing national challenges can move forward.

I will ask my Commission colleagues to join me in soon launching a public process seeking comment on this narrow and tailored approach. The proceeding will seek comment regarding the Title I and Title II options discussed above, will seek input on important questions such as whether wired and wireless broadband access should be treated differently in this context, and will invite new ideas. As we move forward, my focus will be on the best method for restoring the shared understanding of FCC authority that existed before the *Comcast* decision and for putting in place a solid legal foundation for achieving the policy goals that benefit consumers and our economy in the most effective and least intrusive way.

The state of our economy and recent events are reminders both of the need to be cautious and the necessity of a regulatory backstop to protect the American people. I stand ready to explore all constructive ideas and expect those who engage with us to do so constructively as well. The issues presented by the *Comcast* decision are a test of whether Washington can work—whether we can avoid straw-man arguments and the descent into hyperbole that too often substitute for genuine engagement.

The *Comcast* decision has created a serious problem. I call on all stakeholders to work with us productively to solve the problem the *Comcast* decision has created in order to ensure a solid legal foundation for protecting consumers, promoting innovation and job creation, and fostering a world-leading broadband infrastructure for all Americans.

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