BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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

COMMENTS OF COMCAST CORPORATION

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EXECUTIVE SUMMARY

In the *Second Computer Inquiry*, the Commission made two critical decisions that laid the foundation for three decades of incomparable innovation and investment in U.S. communications networks, applications and services, and devices. First, the Commission decided to protect services that offered "enhanced" functionality from the regulatory excesses of Title II, noting that "the very presence of Title II" hinders innovation in these industries. Second, the Commission concluded that attempting to draw a line between enhanced "communications" services and enhanced "data processing" services would be futile and would exacerbate regulatory uncertainty, leading to reduced investment and innovation in enhanced services. This regulatory approach was embraced by Congress in the Telecommunications Act of 1996, and was applied successfully by the Commission to facilities-based and non-facilities-based Internet services in 1998, 2002, 2005, 2006, and 2007.

As a matter of policy and as a matter of law, the Commission should stay on this path. The D.C. Circuit's decision in *Comcast Corp. v. FCC* did not hold that the Commission lacks ancillary authority over broadband Internet services. Rather, the court held that, when an agency exercises ancillary authority, its action must be reasonably ancillary to a statutorily mandated responsibility (not a "policy"), and that the Commission under previous leadership had failed in that particular case to tie its action to a statutorily mandated responsibility. Thus, the Commission today retains a number of legal tools – including both express and ancillary authority – to implement its broadband-related policy agenda, and particularly its plans regarding universal access to broadband. To date, the Commission has used a combination of express and ancillary authority to implement the longstanding, bipartisan, consensus, "light-touch" policy approach to regulating broadband Internet service and other information services. This policy and strategy for its implementation has been a tremendous success – today, about 95 percent of American households have access to robust broadband Internet services that facilitate an ever-growing array of innovative content, applications, and services, and almost 80 percent of Americans use the Internet at home, at work, at school, or even at the local coffee shop. While there is still much work to be done – e.g., only two-thirds of Americans have adopted broadband Internet at home, and that number is even lower in minority and lower-income communities – it would be a mistake to dismiss the successes of the policy decisions that have guided broadband in America for the last 15 years.

Reclassifying broadband Internet service, or any component thereof, as a Title II telecommunications service is unnecessary, and would be contrary to both fact and law. Although some broadband Internet service providers ("ISPs") *choose* to offer their service on a common carrier basis subject to Title II, most ISPs offer (and the vast majority of customers purchase) a single, functionally integrated information service that includes a variety of features and functions that go beyond mere transmission or even the management of the transmission function. E-mail, Web browsing, security, DNS capabilities, and other features form the foundation of the service that many broadband ISPs offer to consumers today, and consumers expect their ISPs to deliver the service in this fashion. Nothing has changed, in this regard, since the Commission's initial decisions in 1998 and 2002. Moreover, unbundling some component of the service and treating it as a telecommunications service would require the Commission to ignore the important lessons of the *Computer Inquiries*: drawing lines between different types of enhanced services only hampers investment and innovation. More importantly, it would be

contrary to the plain meaning of the statutory text and relevant Commission precedent, which establishes telecommunications services and information services as mutually exclusive categories.

Even if reclassifying broadband Internet services was factually or legally feasible, it still would be dangerous public policy. As the Chairman recognizes, there is a very real risk that "excessive regulation" would choke off investment and innovation. And as the Commission has recognized since at least the *Second Computer Inquiry*, the mere potential of applying Title II regulation dramatically exacerbates regulatory uncertainty and hampers innovation and investment. To be sure, the Third Way proposal represents a good-faith effort to limit the risks of excessive regulation even while reclassifying; forbearance from almost all of Title II's requirements and the Commission's regulations based on Title II provisions, as well as preemption of state and local regulation, will be crucial to the success of this plan if the Commission proceeds on this path. In our view, however, the proposed forbearance does not go far enough to maintain the current "light touch" approach to broadband Internet services regulation. The risk that Sections 201 and 202 will form the basis for the imposition of 19th Century common carrier regulation, that any forbearance will be undone by the courts or future Commissions, or that preemption will not be sufficient to prevent states and localities from imposing regulations that hamper the deployment and adoption of broadband Internet service, is too real for the Third Way to move forward without significant "risk of excessive regulation."

As one of the largest broadband Internet service providers, Comcast is committed to delivering a world-class service that allows our customers to enjoy the best the Internet has to offer. Moreover, we are committed to working cooperatively with the Commission to ensure that broadband Internet service is better, faster, ubiquitously available, and widely adopted. We believe that the best way to achieve the Commission's important goals is for it to build on the successes of the past 15 years and maintain its current classification of broadband Internet services as "information services" and maintain its current regulatory approach to broadband Internet services. To the extent Title I proves insufficient to protect the open Internet, the Broadband Internet Technical Advisory Group and other industry and government collaborative efforts can maintain a watchful eye while the Commission seeks any needed authority from Congress.

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COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby responds to the above-captioned Notice of Inquiry ("*Notice*").[1] We commend the Commission for exploring a variety of proposals for the appropriate legal framework that should govern broadband Internet services, and appreciate the opportunity to participate in this open and balanced process. Classification of broadband Internet service as a Title II service, however, even with substantial forbearance and preemption, faces substantial factual and legal hurdles, and poses significant risks to the investment and innovation that will be needed to implement the Commission's broadband Internet agenda. Thus, we urge that the Commission maintain its current classification of broadband Internet services as "information services" and maintain its current "light touch" regulatory approach to broadband Internet services.

I. INTRODUCTION

The last 15 years have seen tremendous growth in deployment, innovation, and investment in broadband networks and the services that are offered via those networks. This is largely due to the deregulatory approach adopted by Congress in the Telecommunications Act of

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[1] *In re Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114 (June 17, 2010) ("*Notice*").

1996 (the "1996 Act"), and the congressional decision to rely on market forces, rather than regulation, to protect the public interest. Comcast, for its part, has invested tens of billions of dollars of private risk capital to upgrade its network and develop and deploy new technologies to deliver an array of services, including broadband Internet services, to consumers throughout the United States. Today, Comcast is one of the largest broadband Internet service providers ("ISPs") in the country, offering our service to over 99 percent of the homes our cable systems pass and serving approximately 16.4 million customers.

The *Notice* proposes three alternatives for regulating broadband Internet service: as an "information service" under Title I; as a "telecommunications service" subject to all of Title II; or as a "telecommunications service" subject only to select portions of Title II (the "Third Way"). The Chairman himself, however, has said that full Title II regulation is "unacceptable."[2] Any proposal that classifies broadband Internet services as Title II services is difficult to square with existing Commission precedent, the plain text of the Communications Act of 1934, as amended (the "Act"), or the factual realities of how broadband Internet services are offered. Moreover, any such proposal, even the Third Way with the proposed levels of forbearance and preemption, unnecessarily raises "the risk of excessive regulation" of broadband networks and broadband Internet services.[3]

The Third Way proposal is articulated as a response to the D.C. Circuit's decision in *Comcast Corp. v. FCC* ("*Comcast*").[4] It is not clear, however, that this particular proposal is necessary as a matter of law or policy. The *Comcast* decision, addressing action by a previous

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[2] *Notice*, Statement of Chairman Julius Genachowski at 3.

[3] *Id.* at 2.

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

Commission, did not eliminate the Commission's ancillary authority. Rather, the D.C. Circuit held that the exercise of such authority must be reasonably ancillary to a statutorily mandated responsibility, and rejected the specific theories the Commission presented in that case for failing to meet that basic requirement. Thus, the Commission's ability to use ancillary authority today is very much alive.

In light of the foregoing, the best path for the Commission to take under current law is to continue under the auspices of Title I of the Act or its express statutory authority in certain circumstances, e.g., universal service. This authority is sufficient to accomplish most, if not all, of the Commission's objectives without having to engage in the legal contortions, or create the "risk of excessive regulation," that would inevitably flow from an effort to implement either of the other two proposals included in the *Notice*. To the extent Title I proves insufficient to protect the open Internet, the Broadband Internet Technical Advisory Group and other industry and government collaborative efforts can maintain a watchful eye while the Commission seeks any additional authority from Congress that narrowly addresses the needs of the Commission without running the regulatory risks of Title II reclassification.

II. PROCEEDING UNDER TITLE I IS THE BEST WAY FOR THE COMMISSION TO ACCOMPLISH ITS BROADBAND-RELATED AGENDA.

The *Notice* gives thorough consideration to the possibility that the Commission may move forward under Title I.[5] We applaud the Commission for its commitment to consider fully all of its options. The *Notice* asks whether, in light of the *Comcast* decision, Title I provides the

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[5] *Notice* ¶¶ 30-31.

Commission with sufficient legal authority to move forward in implementing the Commission's broadband-related agenda.[6] The short answer is, it does.

Despite some of the hyperbolic commentary surrounding the *Comcast* decision, the holding was, in fact, quite narrow. As the *Notice* recognizes, the *Comcast* decision *does not* preclude the Commission from using ancillary authority, either with respect to the issues raised in that case or in other circumstances.[7] To the contrary, the decision actually provides guidance as to how the Commission may use ancillary authority to implement its important broadband-related agenda as set forth in the National Broadband Plan, the *Joint Statement on Broadband*, and the relevant statutes. Importantly, the Commission currently has sufficient authority – ancillary and, in some cases, express – to encourage broadband deployment through reform of universal service and pole attachment rates, as well as to address disabilities access, privacy, and other goals, such as maintaining the open Internet. The Commission's prior reliance on both express grants of authority and ancillary authority within these areas highlights this fact.

A. The *Comcast* Decision Does Not Preclude the Commission from Using Ancillary Authority To Implement Its Broadband Agenda.

Contrary to the claims of some parties, the *Comcast* decision does not close the door on ancillary authority. It simply confirms well-established law that the Commission must explain how a proposed regulation is "reasonably ancillary" to the effective performance of its statutorily mandated responsibilities, not merely to a statutory statement of policy or purpose, and that the agency must do so in a sufficiently particular way supported by substantial record evidence.[8]

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6 *Id.*

7 *Id.* ¶ 31.

8 *Comcast Corp.*, 600 F.3d at 644, 650-51.

Specifically, the Commission must be able to "defend its exercise of ancillary authority on a case-by-case basis,"[9] and "independently justif[y]" that the proposed regulation is "reasonably ancillary" to a statutorily mandated responsibility.[10]

This is not a novel theory. Courts have long recognized that the exercise of ancillary authority is only appropriate when: "(1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations; and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[11] As the *Comcast* court acknowledged, broadband Internet services satisfy the first prong of the ancillary authority test because they fall within the Commission's subject matter jurisdiction.[12] The only remaining question, therefore, was whether the Commission could demonstrate with substantial evidence how each particular rule it would propose is "reasonably ancillary" to a statutorily mandated responsibility.[13] Having failed to point to any such responsibility that was properly presented on appeal, the Commission failed to make that basic showing.

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[9] *Id.* at 651.

[10] *See id.* at 661 ("Because the Commission has failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility,' we grant the petition for review and vacate the *Order*." (citing *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

[11] *Am. Library Ass'n*, 406 F.3d at 700. More recently, in the *Open Internet NPRM*, the Commission recognized that it must establish that the adoption of the proposed rules are "'reasonably ancillary to the [Commission's] effective performance of [its] various responsibilities'" to satisfy the ancillary authority test. *In re Preserving the Open Internet; Broadband Industry Practices*, NPRM, 24 FCC Rcd. 13064 ¶ 83 (2009) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 662 (1972)).

[12] *See Comcast Corp.*, 600 F.3d at 646-47; *see also* 47 U.S.C. § 151 (granting the Commission jurisdiction over "interstate or foreign commerce in communications by wire or radio").

[13] *See United States v. Sw. Cable Co.*, 392 U.S. 157, 176-77 (1968) (upholding the exercise of ancillary authority to regulate cable television where "there is *substantial evidence* that the Commission cannot 'discharge its overall responsibilities without authority over this important aspect of television service'") (emphasis added); *CCIA v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) (upholding the Commission's assertion of ancillary authority over CPE based on evidence of "direct effect" of CPE on "rates for interstate transmission services" regulated under Title II); *NARUC v. FCC*, 533 F.2d 601, 613-14 (D.C. Cir. 1976) (rejecting the Commission's assertion of ancillary authority because "we find no substantial support in the record for the Commission's view that its long term communications

(footnote continued…)

This Commission has the opportunity to do so this time. The Communications Act includes numerous statutory mandates that provide a proper basis for action that is reasonably ancillary to the Commission's performance of those responsibilities, and the National Broadband Plan provides a solid foundation on which to build a record demonstrating, with substantial evidence, how Commission action is reasonably ancillary to the effective performance of those responsibilities.

B. The Commission Has Sufficient Authority Today To Encourage Further Deployment of Broadband Networks to Unserved Areas.

The Commission's primary broadband-related goal, as outlined by the National Broadband Plan and the *Joint Statement on Broadband*,[14] is to ensure that every American has access to broadband. Two key aspects of implementing this goal are reforming the Universal Service Fund ("USF") and addressing pole attachment rates.[15] The Commission can accomplish both under its existing authority.

1. Universal Service Reform

Within the current Title I framework, the Commission has ample authority to support broadband deployment by reforming the USF. AT&T and the National Cable & Telecommunications Association ("NCTA") both have argued that Section 254 of the Act grants the Commission express authority to do so and also could serve as the statutorily mandated

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(…footnote continued)

goals will be impaired" without the exercise of ancillary authority); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 734 (2d Cir. 1973) (rejecting the Commission's assertion of authority because, unlike *Southwestern Cable*, there was no claim, let alone "*substantial evidence* that [unregulated data processing] would threaten an industry whose growth and development Congress had entrusted to the Commission") (emphasis added).

[14] *See Connecting America: The National Broadband Plan* 3-5 (Mar. 16, 2010) ("National Broadband Plan"), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf; *In re Joint Statement on Broadband*, Joint Statement on Broadband, 25 FCC Rcd. 3420 ¶¶ 1-2 (2010) ("*Joint Statement on Broadband*").

[15] National Broadband Plan at 109, 135-36.

responsibility on which the Commission could base the use of ancillary authority to reform USF.[16] Additionally, it is worth noting that the Commission already has put forward a theory as to how it may properly rely on its ancillary authority to fulfill its statutorily mandated responsibilities related to universal service.[17]

In Section 254(b), Congress gave the Commission express authority to establish the USF and articulated principles upon which universal service policies "shall" be based.[18] The Act explicitly directs the Commission and the Joint Board on Universal Service to ensure that "access to advanced telecommunications and information services . . . be provided in all regions in the Nation."[19] Congress further emphasized this directive by requiring that "consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including . . . advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas."[20]

The language in Section 254 indicates that these principles are not mere statements of policy. Rather, as the Tenth Circuit found, they are a "mandatory duty" for the Commission.[21]

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[16] *See Notice* ¶¶ 32-38; Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, attachment at 1-5 (Jan. 29, 2010) ("*AT&T USF White Paper*"); Letter from Kyle McSlarrow, President & CEO, Nat'l Cable & Telecomm. Ass'n, to Julius Genachowski, Chairman, FCC, GN Docket No. 09-51, Memorandum at 1-3 (Mar. 1, 2010) ("*NCTA USF Letter*").

[17] *See In re Universal Serv. Contribution Methodology*, Report & Order & FNPRM, 21 FCC Rcd. 7518 ¶¶ 46-49 (2006) ("*VoIP Universal Service Contribution Order*"), *aff'd sub nom.*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1241 (D.C. Cir. 2007).

[18] 47 U.S.C. § 254(b).

[19] *Id.* § 254(b)(2).

[20] *Id.* § 254(b)(3).

[21] *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001). As both AT&T and the *Notice* note, there is some "tension" within the text of Section 254. Letter from Gary L. Phillips, General Attorney & Associate General

(footnote continued…)

Section 254(h)(2) contains a similar directive in the education and healthcare contexts.[22] As noted by both AT&T and NCTA,[23] Section 254 grants the Commission authority to reform universal service,[24] and the statutory duties set out therein will go unfulfilled unless certain subsidies are provided for network construction or service.[25]

In addition to relying on its express authority, the Commission could invoke its ancillary authority to provide universal service support for broadband Internet service. Broadband Internet service is a "communication by wire or radio" and is, therefore, within the

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(…footnote continued)

Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, at 2-3 (Apr. 12, 2010) ("*AT&T USF Letter*"); *Notice* ¶ 32. In particular, Section 254(c)(1) states that "[u]niversal service is an evolving level of *telecommunications services*." 47 U.S.C. § 254(c)(1) (emphasis added). In the *Universal Service Order*, the Commission explicitly rejected this argument as a basis for limiting its authority to support information services. *In re Federal-State Joint Bd. on Universal Serv.*, Report & Order, 12 FCC Rcd. 8776 ¶¶ 438-39 (1997) ("*Universal Service Order*") (finding that if Congress had intended to limit the meaning of "additional services," it would have used the more limited term "additional *telecommunications* services") (emphasis added), *aff'd Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 440 (5th Cir. 1999) (affirming the Commission's authority to support Internet service and internal connections and holding that the language in Section 254 is sufficiently ambiguous to require *Chevron* deference to the agency's interpretation of the statute).

[22] *See* 47 U.S.C. § 254(h)(2)(A) (requiring the Commission to establish competitively neutral rules "to enhance . . . access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries"). Section 254(c)(3) gives the Commission the discretion to designate additional services eligible for support for schools, libraries, and healthcare providers, *see id.* § 254(c)(3), and the Commission already has relied on its direct authority to include interconnected VoIP service and text messaging as services eligible for E-rate support. *See In re Schools and Libraries Universal Serv. Support Mechanism*, Report & Order & FNPRM, 25 FCC Rcd. 6562 ¶¶ 11-12, 17 (2009). The Commission noted that it had the authority to do so regardless of whether interconnected VoIP and text messaging ultimately would be classified as telecommunications services or information services. *Id.*

[23] *See AT&T USF White Paper* at 1-5; *NCTA USF Letter*, Memorandum at 2-7.

[24] In addition, Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 note and 47 U.S.C. § 1302), provides the Commission with direct authority to "take immediate action if it finds that advanced telecommunications capability is not being deployed to all Americans." *AT&T USF Letter* at 2; *see* 47 U.S.C. § 1302(b).

[25] In previous comments to the Commission, Comcast has expressed its support both for the goals of broad USF reform to include broadband, and for many of these arguments for how the Commission can approach this reform in light of the Title I status of broadband Internet services. *See* Comcast Corp. Comments, GN Docket No. 09-51, RM-11584, at 1-4 (Jan. 7, 2010); Comcast Corp. Reply Comments, GN Docket No. 09-47 (Dec. 7, 2009); Comcast Corp. Comments, GN Docket No. 09-51, at 53-56 (June 8, 2009).

Commission's subject matter jurisdiction.[26] The Commission, then, need only show that its proposed regulations meet the second prong of the ancillary authority test. NCTA and AT&T lay out two sound arguments that making broadband Internet services eligible for universal service support is "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[27]

First, NCTA argues that the Commission has sufficient authority to expand the E-Rate program and extend support for broadband Internet services to the homes of elementary and secondary school students. Such action is "reasonably ancillary" to the provision of Internet access for classrooms when it is "reasonably likely that such service would be used for educational purposes."[28] NCTA asserts that "the use of broadband in the home has become a critical component of the American education system,"[29] and the record built in the National Broadband Plan proceeding provides substantial evidence supporting this assertion.[30] In addition to the 1.5 million students who are home-schooled, parents and students rely on Internet-based services such as e-mail to receive school-related communications.[31] Because of the learning opportunities available online, students *without* broadband Internet service at home are at a statistical disadvantage.[32]

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

[27] *See NCTA USF Letter*, Memorandum at 4-7; *AT&T USF Letter* at 1-3; *AT&T USF White Paper* at 5-12.

[28] *NCTA USF Letter* at 2; *see also Notice* ¶ 35.

[29] *NCTA USF Letter* at 2.

[30] *See, e.g.*, National Broadband Plan at 257 ("Research shows that home use of computers and broadband technologies for learning can be a significant factor in boosting math and reading achievement. Use of computers and broadband at home for educational purposes has also been shown to motivate students and to increase the relevance of content during school hours – ultimately improving student achievement." (footnotes omitted)).

[31] *NCTA USF Letter*, Memorandum at 4-5.

[32] *Id.* at 5.

Second, according to AT&T, *Comcast* makes clear that the Commission may exercise ancillary authority over matters reasonably related to statements of congressional policy and policy directives *when combined* with an "express delegation of authority."[33] The policies articulated in Section 1 of the Act and Section 706(a) of the 1996 Act properly guide the Commission's exercise of authority under Section 254.[34] Section 1 states that the Commission's "core statutory mission" is "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges."[35] Likewise, under Section 706, the Commission must encourage the deployment of advanced telecommunications capability to all Americans.[36] Section 254(a) requires the Commission to define services eligible for universal support.[37] Congress mandated that the Commission not only consider "advances in telecommunications and information technologies and services,"[38] but also promote universal access to "advanced telecommunications and information services."[39] Under this argument, the inclusion of broadband Internet service is "reasonably ancillary" to the express statutory directives in Section 254 as informed by Section 706 and Section 1.[40]

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33 *AT&T USF Letter* at 2 (citing *Comcast Corp.*, 600 F.3d at 652); *see Comcast Corp.*, 600 F.3d at 654 ("[S]tatements of Congressional policy can help delineate the contours of statutory authority.").

34 *AT&T USF Letter* at 2.

35 47 U.S.C. § 151.

36 1996 Act § 706; 47 U.S.C. § 1302(a).

37 47 U.S.C. § 254(a). As the Commission has emphasized, this provision is not limited to telecommunications services. *Universal Service Order* ¶ 437.

38 47 U.S.C. § 254(c)(1).

39 *Id.* § 254(b)(2)-(3).

40 *AT&T USF Letter* at 2.

Moving forward with the planned USF reform efforts under ancillary authority would not be a novel undertaking. The Commission's previous decision to bring VoIP into the USF fold underscores its broad authority to implement Section 254.[41] Relying on both its permissive authority under Section 254(d) and its ancillary authority, the Commission extended to providers of interconnected VoIP the obligation to contribute to USF.[42] The Commission concluded both that Section 254 expressly permitted the extension of contribution obligations, and that extending the obligation to contribute was "reasonably ancillary" to its duties under this provision to preserve and advance universal service.[43]

2. Pole Attachment Rate Reform

The National Broadband Plan recognizes the important role that pole attachment rates play in the deployment of broadband, particularly to rural areas, and proposes that the Commission establish pole attachment rental rates that are as low and as close to uniform as possible to promote broadband deployment.[44] Congress gave the Commission express authority over pole attachments in Section 224.[45] The Commission thus has sufficient statutory authority to address pole attachment rates without reclassification and has already taken positive steps to do so.[46] The Supreme Court previously upheld the Commission's authority to determine "just and reasonable" rates under Section 224 for attachments that provide high-speed Internet service

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[41] *VoIP Universal Service Contribution Order* ¶ 2

[42] *Id.* ¶¶ 38-49.

[43] *Id.* ¶¶ 46-48. Absent this obligation, the revenue base would have continued to shrink, which would have threatened the stability of the Fund. *See id.* ¶ 48.

[44] National Broadband Plan at 109-11. Lower rates could ultimately result in a material decrease in the monthly price of broadband for some rural consumers, which could increase rural broadband adoption. *Id.*

[45] *See* 47 U.S.C. § 224.

[46] *In re Implementation of Section 224 of the Act*, Order & FNPRM, 25 FCC Rcd. 338 ¶ 7 (2010).

– the authority necessary to accomplish this initiative.[47] Although Section 224 sets out two formulas for "just and reasonable rates" for two specific categories of services,[48] neither the text of Section 224 nor the structure of the Act limits the Commission's ability to determine rates for pole attachments used to provide other services.[49] According to the Court, Congress likely preserved the Commission's discretion within the Act to set "just and reasonable rates" for other services because the subject matter is "technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent."[50] The Court explicitly stated the Commission's classification of Internet service as an information service *was immaterial* to its assertion of jurisdiction over pole attachment rates.[51]

C. The Commission Has Sufficient Authority To Implement Other Key Parts of Its Broadband Agenda.

In addition to proposals designed to address the Commission's primary imperative of ensuring widespread deployment of broadband networks, the National Broadband Plan lays out important proposals with respect to the protection of consumer privacy, broadband Internet service for individuals with disabilities, and public safety and homeland security.[52] The Commission's exercise of its ancillary authority already has proven sufficient for implementing key objectives in these areas. Nothing in the *Comcast* decision necessarily undermines or

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[47] *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 337-39 (2002); *see also* 47 U.S.C. § 224(b).

[48] Section 224(d)(3) provides a formula for pole attachments "used by a cable television system *solely* to provide cable services." 47 U.S.C. § 224(d)(3) (emphasis added). Section 224(e)(1) includes a formula for pole attachments "used by telecommunications carrier to provide telecommunications services." *Id.* § 224(e)(1).

[49] *Gulf Power*, 534 U.S. at 335.

[50] *Id.* at 338-39 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

[51] *Id.* at 338 ("If the FCC should reverse its decision that Internet services are not telecommunications, only its choice of rate, and not its assertion of jurisdiction, would be implicated by the reversal.").

[52] National Broadband Plan at 55-57, 167-68, 247-52.

prevents the Commission from using ancillary authority to implement these proposals. Therefore, reclassification does not appear to be necessary to implement these policy goals.

The Commission has long recognized the importance of protecting consumer privacy. The National Broadband Plan correctly identified privacy as critical to encouraging more consumers to adopt and use broadband Internet services.[53] Again, under Section 222, Congress by statute already has conferred regulatory responsibilities in this area to the Commission.[54] Thus, the Commission currently has sufficient statutory authority to adopt rules in this area, provided that it establishes the proper factual basis.

In fact, it has already done so in the context of interconnected VoIP providers, without classifying interconnected VoIP service as a Title II service. In 2007, the Commission relied on its ancillary authority to extend customer proprietary network information ("CPNI") privacy requirements to providers of interconnected VoIP.[55] Section 222 and its respective regulations require telecommunications carriers to protect the confidentiality of CPNI.[56] The Commission was able to develop a record based on substantial evidence that the extension of these requirements to VoIP service providers was reasonably ancillary to the effective performance of its duties under Section 222.[57] Specifically, the Commission noted that a failure to extend these

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[53] *Id.* at 55-57; *see also* Comcast Comments, GN Docket No. 09-51, at 26 (June 8, 2009) ("It is important to make progress toward a coherent privacy framework that incorporates and balances the legitimate expectations of consumers with the needs of website and e-commerce content, application, and service providers and network operators to use information to deliver the online experiences that consumers demand.").

[54] *See* 47 U.S.C. § 222.

[55] *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Report & Order & FNPRM, 22 FCC Rcd. 6927 ¶¶ 54-59 (2007) ("*CPNI Order*"), *aff'd sub nom. Nat'l Cable & Telecomm. Ass'n v. FCC*, 555 F.3d 996 (D.C. Cir. 2009).

[56] 47 U.S.C. § 222(a), (c)(1); *see also* 47 C.F.R. §§ 64.2001-.2011 (2009).

[57] *CPNI Order* ¶¶ 55-58.

regulations could result in an unauthorized disclosure of CPNI and expose a significant number of Americans to a loss of privacy and safety.[58] The Commission already is on solid legal ground in this area.

Disabilities access is another area where Congress has given the Commission statutorily mandated responsibilities.[59] And the Commission *already* has used its ancillary authority to impose rules and regulations on information service providers in this area. The Commission found that the extension of disabilities access obligations to VoIP providers and VoIP equipment providers,[60] as well as the extension of disabilities-related requirements to voicemail and interactive service menus,[61] were "reasonably ancillary" to the implementation of the disabilities safeguards outlined by Congress in Section 255.[62] Similar to the extension of CPNI privacy requirements, the Commission demonstrated that imposing disabilities access obligations on VoIP providers was critical to giving full effect to Section 255's accessibility policies.[63] Again, Commission precedent indicates that the Commission is already on solid legal ground here.

Chairman Genachowski has noted that public safety and homeland security policies are among the most critical of the Commission's priorities.[64] Here, again, ancillary authority has proven sufficient to implement important public safety-related obligations on non-Title II

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58 *Id.* ¶ 58.

59 *See* 47 U.S.C. § 255.

60 *In re IP Enabled Services*, Report & Order, 22 FCC Rcd. 11275 ¶¶ 21-24 (2007) ("*IP Enabled Services Order*").

61 *In re Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, Report & Order & Further Notice of Inquiry, 16 FCC Rcd. 6417 ¶ 106 (1999).

62 47 U.S.C. § 255.

63 *IP Enabled Services Order* ¶ 24.

64 Julius Genachowski, Chairman, FCC, Public Safety Briefing (Feb. 25, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296490A1.pdf.

services. For example, the Commission imposed E-911 requirements on interconnected VoIP providers by relying on its Title I authority in conjunction with the specific numbering authority responsibilities set forth in Section 251(e).[65] The Act directs the Commission to make a nationwide and worldwide wire and radio communication service available "*for the purpose of promoting safety of life and property* through the use of wire and radio communication."[66] Section 251(e) – and particularly Section 251(e)(3) – directs the Commission to establish 911 as the national emergency number.[67] The Commission and Congress had previously recognized 911 to be a crucial communication for the promotion of safety of life and property.[68] The extension of E-911 requirements to VoIP providers, then, was "reasonably ancillary" to the fulfillment of these regulatory responsibilities.[69]

Finally, the Commission also may have sufficient authority to address "harmful practices" by broadband ISPs. As the *Notice* recognizes, the *Comcast* decision does not preclude the Commission from developing a stronger legal argument as to its authority over network management practices.[70] Notably, the *Comcast* decision rejected several of the Commission's theories – including theories based on Sections 201 and 623 of the Act – based primarily on

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[65] *In re IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report & Order & NPRM, 20 FCC Rcd. 10245 ¶ 26 (2005) ("*VoIP E-911 Order*") ("In addition, we conclude that we have authority to adopt these rules under our plenary numbering authority pursuant to section 251(e) of the Act.")

[66] 47 U.S.C. § 151 (emphasis added).

[67] *Id.* § 251(e)(3). This paragraph was added to the Communications Act by the Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286.

[68] *In re Revision of Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, NPRM, 9 FCC Rcd. 6170 ¶ 7 (1994).

[69] *VoIP E-911 Order* ¶ 29. Because the uniform availability of E-911 might spur the demand for VoIP and, in turn, broadband connections, the Commission also noted that its decision was consistent with Section 706, which requires the Commission to encourage the deployment of advanced telecommunications. *Id.* ¶ 31.

[70] *Notice* ¶ 42.

procedural, not substantive, grounds.[71] These and other statutory mandates potentially could provide the legal basis for open Internet regulations under the Commission's ancillary authority, should the Commission conclude that such rules are necessary. The decision does not prevent the Commission from supporting any new regulation based on those theories, if the Commission can build a record that supports the theories.[72]

If the Commission decides that pursuing any of these elements of its National Broadband Plan under ancillary authority is too risky or legally unsustainable, there are a number of other avenues that the Commission could pursue that do not involve reclassification. For example, in the case of the proposed open Internet rules, the Commission could leverage the work being done by third-party organizations, such as the Broadband Internet Technical Advisory Group ("BITAG"), while the Commission seeks any needed authority from Congress.[73] Working

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[71] *See Comcast Corp.*, 600 F.3d at 660 ("Whatever the merits of this position [regarding Section 201], the Commission has forfeited it by failing to advance it here."); *id.* at 661 ("In the *Order*, the Commission does not assert ancillary authority based on this narrow grant of regulatory power [under Section 623].").

[72] In this case, the Commission may have a hard time developing the requisite *factual* basis for adopting such regulations. As Comcast noted in its Reply Comments to the *Open Internet* proceeding, proponents of net neutrality rules have presented *no* evidence of actual harm associated with current broadband ISP practices, let alone *substantial* evidence. *See* Comcast Corp. Reply Comments, GN Docket No. 09-191, at 40-41 (Apr. 26, 2010). Almost no allegations of improper or anticompetitive behavior on the part of broadband ISPs have ever been made through the Commission complaint process. The few that are mentioned in the advocacy of pro-regulatory groups essentially are in most cases simply efforts by broadband ISPs to manage their networks to ensure that all customers have a positive experience – efforts which have been accepted by users. Indeed, as even some petitioners in the Comcast-BitTorrent case have recognized, Comcast "did not block P2P for anticompetitive reasons." Harold Feld, *Evaluation of the Comcast/BitTorrent Filing*, Tales of the Sausage Factory (Sept. 22, 2008), http://www.wetmachine.com/totsf/item/1333.

[73] Legislative efforts already underway may present the Commission with an opportunity to update the Communications Act in a targeted manner. *See* John Eggerton, *Congress Slates Meetings on Communications Policy*, Multichannel News, June 18, 2010, *available at* http://www.broadcastingcable.com/article/453919-Congress_Slates_Meetings_on_Communications_Policy.php.

through such a group could allow the Commission to ensure that consumers' concerns are properly addressed in a timely fashion by all the participants in the Internet ecosystem.[74]

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In short, the *Comcast* decision should be seen for what it is – not as a rebuke of the Commission's ancillary authority in general, but as (1) an affirmation of the long-standing requirement that the exercise of ancillary authority must be reasonably ancillary to a statutorily mandated responsibility, and (2) a reversal of a particular order (adopted by a prior Commission under different leadership) that lacked the necessary legal foundation.

III. THE BROADBAND INTERNET SERVICES OFFERED BY COMCAST ARE PROPERLY CLASSIFIED AS INFORMATION SERVICES, NOT AS TELECOMMUNICATIONS SERVICES.

The *Notice* also seeks comment on whether "legal and policy developments . . . and the facts of today's broadband marketplace suggest a need to classify Internet connectivity as a telecommunications service."[75] Specifically, the *Notice* puts forward two proposals that have as their foundation a theory for a new regulatory classification of broadband Internet services, and asks a number of questions about what, exactly, broadband ISPs are offering to consumers, how consumers perceive that offering, and what that means for the regulatory classification of the service.[76] Classifying broadband Internet service as a telecommunications service, however,

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[74] *See* Press Release, Broadband Internet Tech. Advisory Group, *Initial Plans for Broadband Internet Technical Advisory Group Announced* (June 9, 2010), *available at* http://www.prnewswire.com/news-releases/initial-plans-for-broadband-internet-technical-advisory-group-announced-95950709.html. According to the press release, "[t]he TAG's mission is to bring together engineers and other similar technical experts to develop consensus on broadband network management practices or other related technical issues that can affect users' Internet experience, including the impact to and from applications, content and devices that utilize the Internet." *Id.*

[75] *Notice* ¶ 52.

[76] *Id.* ¶¶ 52-66 (proposing reclassification of broadband Internet service and the application of all Title II provisions to the reclassified service), 67-99 (proposing the reclassification of broadband Internet service and Commission forbearance from all but a few Title II provisions).

would be contrary to the facts, contrary to decades of Commission policy and precedent, contrary to congressional intent, and, ultimately, legally untenable.

A. The Commission's Previous Decisions Classifying Broadband Internet Services as "Information Services" Comported with Both the Plain Meaning of the Statute and Congressional Intent.

Beginning with the *Second Computer Inquiry*, the Commission has consistently recognized the distinction between (1) "basic" services that offer mere transmission and (2) "enhanced" services that offer additional functionality using that transmission.[77] The Commission also expressly recognized that "[i]n enhanced services, communications and data processing technologies have become intertwined so thoroughly as to produce a form different from any explicitly recognized in the Communications Act,"[78] and that imposing Title II regulations on such fledgling services was not only irreconcilable with the Act, but also contrary to the public interest.[79]

That policy approach was given a congressional imprimatur in the 1996 Act when Congress amended the Communications Act to include the three terms at the heart of this discussion – "telecommunications," "telecommunications service," and "information service."[80] Through years of vigorous debate about, and thorough analysis of, the precise meaning of these terms and their applicability to the Internet and broadband Internet services, the Commission has consistently and correctly found that classifying broadband Internet services as information

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[77] *In re Amendment of Section 64.702 of the Comm'n's Rules & Regs, Second Computer Inquiry*, Final Decision, 77 FCC 2d 384 ¶¶ 93-97, 102 (1980) ("*Computer II Final Decision*").

[78] *Id.* ¶ 120.

[79] *See id.* ¶ 46.

[80] 47 U.S.C. §§ 153(43) (defining "telecommunications"), 153(46) (defining "telecommunications service"), 153(20) (defining "information service").

services comports both with the plain meaning of the statute and congressional intent to keep *the Internet* "unfettered by . . . regulation."[81]

In its 1998 *Universal Service Report*, the Commission provided a thorough analysis and examination of the underlying statutory terms, and their applicability to Internet service providers.[82] Specifically, although several commenters vigorously argued that Internet service providers merely transmit "information of the user's choosing" and, therefore, that Internet services should be considered telecommunications services, the Commission concluded that "Internet access services are appropriately classed as information, rather than telecommunications, services."[83]

The Commission identified a number of features that ISPs typically include as part of Internet service.[84] For example, it noted that e-mail always had been classified as an information or enhanced service,[85] and provided a detailed explanation for why Web browsing also has the characteristics of an information service in and of itself.[86] Moreover, the Commission found that

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[81] *Id.* § 230(b)(2).

[82] *See In re Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501 ¶¶ 33-48, 73-82 (1998) ("*Universal Service Report*").

[83] *Id.* ¶ 73.

[84] *Id.* ¶ 76 (citing World Wide Web browsers, FTP clients, Usenet newsreaders, electronic mail clients, and Telnet applications).

[85] *Id.* ¶ 75.

[86] *Id.* ¶ 76 ("When subscribers utilize their Internet service provider's facilities to retrieve files from the World Wide Web, they are similarly interacting with stored data, typically maintained on the facilities of either their own Internet service provider (via a Web page 'cache') or on those of another. Subscribers can retrieve files from the World Wide Web, and browse their contents, because their service provider offers the 'capability for . . . acquiring, . . . retrieving [and] utilizing . . . information.'"). The Commission concluded that e-mail and Web browsing, along with other features, were data processing features of Internet service, and that Internet service included these features as a *wholly integrated* information service. *See id.* ¶ 80 ("The provision of Internet access service involves data transport elements . . . . But the provision of Internet access service crucially involves information-processing elements as well . . . . As such, we conclude that it is appropriately classed as an 'information service.'").

the statute precludes separation of these component features into individual services and then subjecting each feature to different regulatory treatment.[87]

Building on these conclusions, the Commission in 2002 correctly decided that cable modem service is an information service.[88] The Commission determined that "the fact that cable modem service is provided over the cable operator's own facilities, without more, [does not] necessarily create[] a telecommunications service separate and apart from the cable modem service."[89] The Commission rejected arguments to the contrary, noting that "[o]ur analysis, *like the relevant statutory definitions*, focuses instead on the single, integrated information service that the subscriber to cable modem service receives."[90] The Commission subsequently applied this approach to wireline broadband,[91] broadband over powerline,[92] and wireless broadband.[93]

The Supreme Court upheld this approach in *Brand X*.[94] Even though the decision applied the *Chevron* framework, the Supreme Court expressed agreement with the approach adopted by the Commission: "The question, then, is whether the transmission component of cable modem

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[87] *Id.* ¶ 79 ("[I]t would be incorrect to conclude that Internet access providers offer subscribers separate services – electronic mail, Web browsing, and others – that should be deemed to have separate legal status . . . . The service that Internet access providers offer to members of the public is Internet access. That service gives users a variety of advanced capabilities.").

[88] *In re Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, Declaratory Ruling & NPRM, 17 FCC Rcd. 4798 ¶ 7 (2002) ("*Cable Internet Declaratory Ruling*"), *aff'd sub nom. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[89] *Cable Internet Declaratory Ruling* ¶ 41.

[90] *Id.* (emphasis added).

[91] *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report & Order & NPRM, 20 FCC Rcd. 14853 ¶ 1 (2005) ("*Wireline Broadband Order*").

[92] *In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Mem. Op. & Order, 21 FCC Rcd. 13281 ¶ 1 (2006) ("*BPL Classification Order*").

[93] *In re Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd. 5901 ¶ 1 (2007) ("*Wireless Broadband Declaratory Ruling*").

[94] *Brand X*, 545 U.S. at 989-92.

service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering. . . . We think that they are sufficiently integrated."[95]

In the intervening 12 years since the Commission first looked into the matter in the *Universal Service Report*,[96] the essence of broadband Internet service as an integrated information service, with "no separate offering of telecommunications service,"[97] has not changed. Nor has it changed in the intervening eight years since the Commission definitively decided the matter with respect to cable Internet service, or in the five years since the Supreme Court agreed that it is "a single, integrated offering."[98]

B. The "Information Service" Classification for Broadband Internet Service Remains the Proper Course, as a Matter of Law, as a Matter of Policy, and as a Matter of Fact.

In *Brand X*, the Supreme Court noted that "[t]he entire question is whether the products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes). That question turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided."[99] In 1998, 2002, 2005, 2006, and 2007, the Commission found – correctly – that the "factual particulars" were such that Internet service is a functionally integrated information service.[100] Today, the *Notice* asks whether any "factual

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95 *Id.* at 990.

96 *Universal Service Report* ¶ 39 ("[W]hen an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does not offer telecommunications. Rather, it offers an 'information service' even though it uses telecommunications to do so. We believe that this reading of the statute is most consistent with the 1996 Act's text, its legislative history, and its procompetitive, deregulatory goals.").

97 *Cable Internet Declaratory Ruling* ¶ 7.

98 *Id.*; *Brand X*, 545 U.S. at 990.

99 545 U.S. at 991.

100 *See Universal Service Report* ¶¶ 73, 79-80; *Cable Internet Declaratory Ruling* ¶ 7; *Wireline Broadband Order* ¶ 9; *BPL Classification Order* ¶ 1; *Wireless Broadband Declaratory Ruling* ¶ 1.

particulars" have changed such that the Internet service offered today is different than what was offered in the past.[101] In essence, there is no difference. Comcast and most broadband ISPs still offer a service that "combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications."[102] If anything, further enhancements to Comcast's High-Speed Internet ("HSI") service only confirm that broadband Internet service continues to be properly classified as an information service.

Comcast's HSI service is today, as it was in 2002, properly classified as an information service. As the Commission concluded, "the classification of cable modem service turns on the nature of the functions that the end user is offered."[103] Just as they did in 2002, consumers who purchase Comcast's HSI service receive a number of features and functions beyond mere transmission, including features – e-mail, Web browsing, Domain Name System ("DNS") functionality, etc. – that the Commission and the Supreme Court already have identified as part of a service that "provides consumers with a comprehensive capability for manipulating information using the Internet via high-speed telecommunications."[104]

For example, Comcast includes a number of attractive features in its HSI service, and Comcast's data show that large numbers of customers use those features today:

- **E-mail, Web browsing, and the ability to retrieve information from the Internet:** Comcast's HSI customers constantly use the service to browse the Web and retrieve

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101 *Notice* ¶¶ 53-62.

102 *Cable Internet Declaratory Ruling* ¶ 38.

103 *Id.*

104 *Brand X*, 545 U.S. at 987; *see also id.* at 999; *Cable Internet Declaratory Ruling* ¶ 38.

information from the Internet, and many of them are using their Comcast.net e-mail as well as other features available to them via the Comcast.net site.[105]

- **DNS functionality:** The vast majority of Comcast's customers use Comcast's DNS,[106] and Comcast continuously improves the DNS feature of its HSI service.[107]

- **Comcast Constant Guard Security Suite:** Constant Guard provides a comprehensive, market leading anti-virus program; a dedicated Customer Security Assurance team of highly skilled security professionals that proactively contact customers to respond to issues relating to bots, malware and infected PCs, and other security issues; and a host of end-user and in-network software tools that work together to provide Comcast's customers with a safe and secure Internet experience.[108]

- **Comcast's SmartZone Communications Center:** The SmartZone Communications Center incorporates in a single interface traditional features such as e-mail with features like voicemail access from the Web and an integrated calendar and address book.[109]

- **Comcast Secure Backup & Share:** Secure Backup & Share not only allows customers to securely back up their digital media, but also allows them to access and share that media from any broadband connection.[110]

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[105] Comcast's customers are using approximately 27 million individual e-mail mailboxes, or nearly two per HSI account. The number of mailboxes is higher than the number of HSI customers because Comcast allows its customers to open up to 7 comcast.net e-mail accounts with a single HSI account. Thus, although we are certain that some HSI customers are not using our e-mail, the numbers suggest that there are many more who do.

[106] Comcast uses the DNS feature to optimize each individual subscriber's Internet experience. For example, Comcast provides its customers geographically proximate DNS servers both to ensure rapid responses from the DNS servers to requests from end users and to ensure that the users are directed to the most geographically proximate sources of content. Subscribers who choose other DNS services, such as Google Public DNS or OpenDNS, may lose this geographic proximity and the performance enhancements it yields.

[107] For example, Comcast is implementing DNS Security -- otherwise known as DNSSEC -- throughout its network. This feature will help protect consumers from Internet sites that may have malicious content resulting from DNS poisoning or related domain name security problems and further ensure that Comcast's customers who use Comcast's DNS have a safe and secure Internet experience. For more on DNSSEC, see Internet Society, *Securing the DNS*, http://www.isoc.org/isoc/conferences/dnspanel/dnssec_background.shtml (last visited July 14, 2010) and Comcast.net -- DNSSEC Information, http://www.dnssec.comcast.net/ (last visited July 14, 2010).

[108] *See* Press Release, Comcast Corp., *Comcast Unveils Comprehensive "Constant Guard" Internet Security Program* (Oct. 8, 2009), http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=926. It also includes the Comcast Toolbar; to date in 2010, there have been 3.5 million downloads of the Comcast Toolbar. The tool-bar includes anti-spam software/scanner software, and anti-phishing software to protect end users. For more information about Constant Guard, see Comcast.net Security -- Constant Guard, http://security.comcast.net/constantguard/ (last visited July 14, 2010); *see generally* Comcast.net Security, http://security.comcast.net/ (last visited July 14, 2010).

[109] Comcast.net -- SmartZone Communication Center, http://www.comcast.net/smartzone/ (last visited July 14, 2010).

- **Norton Security Software:** Comcast offers the Norton Security Software as a free enhancement to its HSI customers.[111]

These features are as much a part of Comcast's HSI service as tires, engines, brakes, and radios are functionally integrated into any car that is offered for sale today.[112] While a customer may elect to obtain various parts from another vendor, that does not change the fact that the car is offered to all purchasers with those features already built-in.[113]

The *Notice* also asks whether the existence of alternatives to the various component services – such as alternative providers of e-mail or DNS services – affects the extent to which the Commission should consider it an integrated information service.[114] Again, we think not. In 2002, the Commission noted that cable Internet service is an integrated information service, "*regardless* of whether subscribers use all of the functions provided as part of the service."[115] As

(…footnote continued)

[110] *See* Comcast.net -- Secure Backup & Share, http://security.comcast.net/backup/?cid=NET_33_302 (last visited July 14, 2010). Since being launched this spring, 104,000 customers have chosen to use Comcast Secure Backup & Share.

[111] *See* Comcast.net Security, *Comcast Presents Norton Security Suite*, http://security.comcast.net/norton/resi/?cid=33_230 (last visited July 14, 2010). Since the launch of this feature earlier this year, millions of customers have downloaded the Norton Security Software.

[112] Of course, just as car manufacturers improve the features of their cars, so too broadband ISPs continually are enhancing their services. For example, Comcast is an industry leader in its efforts to deploy IPv6 and currently is trialing IPv6 on its production network. IPv6, in addition to offering significant addressing flexibility over IPv4, holds the potential to enable a new range of IP-based services and applications and to enhance the customer experience. For more information about IPv6 and Comcast's IPv6 trials, see Comcast's IPv6 Information Center, http://www.comcast6.net/ (last visited July 15, 2010).

[113] *See Brand X*, 545 U.S. at 990.

[114] *Notice* ¶ 56.

[115] *Cable Internet Declaratory Ruling* ¶ 38 (emphasis added). The Commission also has spoken of this in terms of what consumers "expect to receive" based on what is offered. *Wireline Broadband Order* ¶¶ 104-105. The Commission noted that users "expect to receive (and pay for) a finished, functionally integrated service that provides access to the Internet. End users do not expect to receive (and pay for) two distinct services--both Internet access service and a distinct *transmission* service." *Id.* ¶ 104; *see also Wireless Broadband Declaratory Ruling* ¶ 31; *BPL Classification Order* ¶ 12.

the Supreme Court affirmed, the statutory definitions (which remain unchanged since 1996) and analysis turn on what the provider "offers."[116]

The relevant statutory language focuses on what the provider "offers," not what other vendors in the marketplace offer. As the Commission has explained, "[c]onsistent with the analysis in the Universal Service Report, we conclude that the classification of cable modem service turns on the nature of the functions *that the end user is offered*."[117] In Comcast's experience, consumers want and place significant value on an integrated service that includes multiple features when they purchase a broadband Internet service, and so that is how Comcast and the vast majority of other ISPs offer their service.[118] This is borne out by third-party consumer survey results.[119]

Finally, the *Notice* asks whether any of these features fit into the "management exceptions" in the definition of information service.[120] While these exceptions may be applicable to some of the functions that Comcast and other broadband ISPs perform to ensure

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[116] *Brand X*, 545 U.S. at 990-92. The fact that other parties offer similar services that are not integrated in the same way as broadband ISPs' Internet services is not new; in 1998, 2002, 2005, 2006, and 2007, there were other vendors that offered services similar to various features in an integrated Internet service, yet the Commission still determined that Internet service is an information service.

[117] *Cable Internet Declaratory Ruling* ¶ 38 (emphasis added); *see Brand X*, 545 U.S. at 989-90.

[118] Comcast's internal marketplace research shows that large percentages of consumers consistently express that the features Comcast offers are an important consideration in their decision of which broadband Internet service to purchase. As reflected in the small sampling of marketing materials included in appendix A, many of our bill inserts, Web and newspaper ads, and other advertising materials highlight the numerous features of the HSI service.

[119] *See* Leichtman Research Group, *Broadband Internet Access & Services in the Home 2010* slides 127-128 (2d Quarter 2010) (finding that "61% [of consumer respondents] are very interested in anti-virus software and security *included* with their broadband service" and "33% are very interested in the ability to store or back up files remotely" while "34% of cable broadband subs are interested in sharing electronic files" (emphasis added)).

[120] *Notice* ¶ 59. Although the Commission has not offered its opinion on the exact statutory interpretation of this language, the *Notice* suggests that these exceptions ought to be viewed as analogous to the concept of "adjunct-to-basic" that arose out of the *Second Computer Inquiry*, under which the Commission would treat as a basic service those features which, though literally fitting the definition of an enhanced service, did not fundamentally alter the character of the underlying transmission. *Id.*; *see also Computer II Final Decision* ¶ 98.

that the service works as our customers expect and deserve, they do not apply to any of the features listed here or in any of the previous Commission decisions regarding broadband ISPs' services. For example, Web browsing fundamentally alters the transmission because it allows the user to interact with computers and other users at other points in the Internet. Another example is DNS – particularly when DNSSEC is enabled, as Comcast is doing today[121] – which fundamentally alters the underlying transmission because it helps consumers reach the content they are seeking as efficiently as possible (i.e., it actually chooses the points with which the customer is communicating rather than merely facilitating the customer's communication with an end point of the customer's choosing) and helps protect consumers from Internet sites that may have malicious content resulting from DNS poisoning or related domain name security problems. Nothing about any of the services listed here is "adjunct-to-basic."

C. As a Legal and Marketplace Matter, There Is No Separable Telecommunications Component of Broadband Internet Service.

The *Notice* seeks comment on how to define that aspect of the "broadband Internet service bundle" that it would classify as a telecommunications service.[122] Essentially, the *Notice* is asking whether there is some way to distinguish between different types of information services – those that include what the *Notice* calls "Internet connectivity," and those that do not.[123] Since the *Second Computer Inquiry*, however, the Commission consistently has found that such an approach would be bad policy and contrary to the public interest. There has been no

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121 Comcast.net -- DNSSEC Information, http://www.dnssec.comcast.net/ (last visited July 14, 2010).

122 *Notice* ¶ 63.

123 *Id.* ¶¶ 64-65.

change in law or facts to suggest that a contrary conclusion today would be any better as a matter of policy, or any more consistent with the statute.

One of the critical conclusions that the Commission made in the *Second Computer Inquiry*, and that it has reinforced through the years since then, is that there is *not* a separable transmission or telecommunications component to an enhanced or information service.[124]

> After three attempts to delineate a distinction between communications and data processing services and failing to arrive at any satisfactory demarcation point, we conclude that further attempts to so distinguish enhanced services would be ultimately futile, inconsistent with our statutory mandate and contrary to the public interest.[125]

The Commission concluded that "the public interest would not be served by any classification scheme that attempts to distinguish enhanced services based on the communications or data processing nature of the computer processing activity performed."[126]

Although the terms being used in the *Notice* are different from those used in the *Second Computer Inquiry*, the matter at issue is the same: the *Notice* essentially is trying to determine how to treat one set of information service providers (i.e., those whose services include an "Internet connectivity" aspect) from another set of information service providers (i.e., those whose services do *not* include "Internet connectivity"). In the *Second Computer Inquiry*, the Commission decided that such an approach was not in the public interest because it exacerbated the regulatory uncertainty that is inherent in any industry, particular one that is so closely

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[124] This was exactly the line that the Commission was grappling with in the *Second Computer Inquiry*. *Computer II Final Decision* ¶¶ 102-107.

[125] *Id.* ¶ 107. The Commission learned from its experience after the *First Computer Inquiry* that trying to establish some point of demarcation between enhanced services that provided communications and enhanced services that provided data processing merely led to confusion and regulatory uncertainty that hindered investment and innovation, to the detriment of the public interest. *Id.* ("It is apparent that, over the long run, any attempt to distinguish enhanced services will not result in regulatory certainty.").

[126] *Id.* ¶ 113.

monitored by government agencies; this uncertainty hampered investment and innovation. Those lessons are still relevant today.

Perhaps more importantly, even if the Commission decided that it would be in the public interest today to create different classes of information service providers, it is hard to see how that can be accomplished within the confines of the existing statutory framework. After passage of the 1996 Act, some parties, including Senators Ted Stevens and Conrad Burns, contended that an information service provider necessarily offered a telecommunications service as well.[127] The Commission rejected this interpretation, concluding instead that the two terms are mutually exclusive.[128] The Commission found that the Senators' proposed interpretation was "inconsistent with the language Congress used" in its definition of "telecommunications."[129] Rather, when an entity offers an information service, "it does not *provide* telecommunications; it is *using* telecommunications."[130] The Commission also found support for this plain language interpretation of the statute in the legislative history.[131]

Moreover, as noted above, it makes no difference whether the entity that provides the information service is using its own facilities: "The cable operator providing cable modem service over its own facilities . . . is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service."[132]

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127 *Universal Service Report* ¶ 34-35.

128 *Id.* ¶ 39.

129 *Id.* ¶ 40.

130 *Id.* ¶ 41 (emphases added).

131 *See id.* ¶¶ 42-43, 45.

132 *Cable Internet Declaratory Ruling* ¶ 41.

The Commission's analysis throughout these decisions focused on the plain text of the statute.[133] The Supreme Court noted in affirming the Commission's conclusions that the relevant definitions "do not distinguish [between] facilities-based and non-facilities-based carriers."[134]

In light of this precedent and the plain text of the statute, the only recourse left for the Commission to consider, if it intends to reclassify only the "Internet connectivity" aspect of the broadband Internet service, appears to be to compel facilities-based broadband ISPs to "offer" that "Internet connectivity" on a standalone basis. Of course, the Commission already has considered – and rejected – this approach, too.[135] Importantly for today's purposes, the *Notice* points to no source of authority by which the Commission could compel facilities-based broadband ISPs to unbundle the "Internet connectivity" or any other portion of the broadband Internet service bundle and offer it as a standalone Title II-regulated service.[136]

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[133] *Id.* ¶ 39 ("Consistent with the statutory definition of information service, cable modem service provides the capabilities described above 'via telecommunications.' That telecommunications component is not, however, separable from the data-processing capabilities of the service.").

[134] *Brand X*, 545 U.S. at 997. This also has been cited by parties as one reason why the logical outgrowth of reclassifying broadband Internet services would be the imposition of mandatory common carriage regulation on all information service providers that use telecommunications as an input. *See, e.g.*, AT&T Reply Comments, GN Docket No. 09-191, at 152-53 (Apr. 26, 2010). *But see Notice* ¶¶ 10, 107-08 (noting that any reclassification would not affect the regulatory status of other Internet services, including Internet backbone services).

[135] *Cable Internet Declaratory Ruling* ¶ 43. As the Commission saw it, proponents of this idea urged the Commission "to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act." *Id.* The Commission recognized, however, that it "has applied these obligations only to traditional wireline services and facilities, and has never applied them to information services provided over cable facilities." *Id.* ¶ 44.

[136] *See, e.g.*, Verizon Reply Comments, GN Docket No. 09-191, at 98-99 (Apr. 26, 2010). In fact, a conclusion to the contrary cannot be squared with the Commission's express rejection of the idea that the Third Way will force broadband ISPs to unbundle their services. *See* Julius Genachowski, Chairman, FCC, *The Third Way: A Narrowly Tailored Broadband Framework* 5 (May 6, 2010) ("*Genachowski Third Way Statement*") (The "Third Way" approach "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."), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf; Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework for Addressing the* Comcast *Dilemma* 7 (May, 6, 2010) ("*Schlick Third Way Framework*") ("[I]dentifying a separate telecommunications component of broadband access service [would not] afford competing ISPs any new rights to the incumbents' networks on a wholesale basis under the old Computer Inquiry rules."), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf; John

(footnote continued…)

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In sum, reclassification of broadband Internet service (or even a connectivity portion of that service) as a telecommunications service would be contrary to decades of Commission policy and precedent in five separate proceedings, contrary to congressional intent, and contrary to the text of the statute. Broadband Internet services offered today continue to be properly classified as an information service.

IV. TITLE II CLASSIFICATION CREATES SUBSTANTIAL RISKS TO CONTINUED INVESTMENT AND INNOVATION WITHOUT ACCOMPLISHING THE COMMISSION'S GOALS.

Comcast was among the first to the marketplace when it introduced broadband Internet service to consumers in 1996. Since then, as the broadband marketplace has evolved and as Comcast invested tens of billions of dollars in private risk capital to build its broadband network, we have become one of the broadband Internet industry's leaders. And Comcast was not the only one growing and investing and improving our service and features; other broadband ISPs also invested tens of billions in building competing broadband networks. The result has been vigorous competition for customers.

Yet, despite all this investment, there is widespread consensus that America can do better and "broadband in America is not all it needs to be."[137] The National Broadband Plan sets forth

(…footnote continued)

Eggerton, *Cable Show 2010: Genachowski: Rate Regs, Unbundling Off the Table*, Multichannel News, May 13, 2010, *available at* http://www.multichannel.com/article/452614-Cable_Show_2010_Genachowski_Rate_Regs_Unbundling_Off_The_Table.php.

[137] National Broadband Plan at xi.

an ambitious vision for broadband in America that is largely dependent on private sector investment.[138] The question, therefore, should be how best to promote private sector investment.

When the *Notice* was adopted, the Chairman said that "there is no question that we need to pursue a framework and policy initiatives that encourage and unlock massive private investment."[139] The *Notice*, however, acknowledges that, "[i]f we were to classify Internet connectivity service as a telecommunications service and take no further action, that service would be subject to all the requirements of Title II that apply to telecommunications service or common carrier service."[140] Such a regulatory framework is inappropriate for today's broadband marketplace, and would directly conflict with Congress's express policy that "the Internet [remain] unfettered by Federal or State regulation."[141] As the Chairman has acknowledged, "applying the full suite of Title II obligations[] has serious drawbacks" and "would subject the providers of broadband communications services to extensive regulations ill-suited to broadband."[142] It was these concerns that led the Chairman to offer the proposed Third Way, not only as a possible route to provide the Commission with the authority needed to implement the important public policy goals of the National Broadband Plan, but also to protect the critical private investment incentives so essential to those same policy goals. While the Third Way is creative and obviously offered in good faith, we are concerned that it may have some "serious

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138 *See Joint Statement on Broadband* ¶ 3 ("Continuous private sector investment in wired and wireless networks and technologies, and competition among providers, are critical to ensure vitality and innovation in the broadband ecosystem and to encourage new products and services that benefit American consumers and businesses of every size.").

139 *Notice*, Statement of Chairman Julius Genachowski at 2.

140 *Notice* ¶ 66.

141 47 U.S.C. § 230(b)(2).

142 *Genachowski Third Way Statement* at 4.

drawbacks" that the Commission must consider in evaluating an appropriate broadband framework. Moreover, even if the Commission does strike the right balance between reclassification and forbearance, there remains the risk that forbearance cannot be guaranteed and could be short-lived.

A. Title II Reclassification Is Anachronistic in Today's Vibrantly Competitive Broadband Marketplace.

The essence of Title II of the Act has its origins in the Interstate Commerce Act of 1887, which was enacted to regulate railroads in order to ensure that they charged "reasonable and just" prices and did not unreasonably discriminate against particular customers (e.g., farmers or customers in small markets) in the prices charged.[143] In 1934, Congress borrowed many of the principles (and much of the language) from the Interstate Commerce Act in crafting the Communications Act sections that would become what we know today as Title II.[144] Like the railroads in 1887, the telephone companies in 1934 were geographic monopolies utilizing mature and stable technology and exercising significant market power. "Monopoly was . . . the clear premise of the 1934 Act."[145] The same cannot be said for broadband Internet service.

The dynamic and rapidly evolving broadband Internet marketplace today is not analogous to the static marketplace that dominated the railroads at the time of the Interstate Commerce Act, or the monopolistic marketplace that dominated long distance telephony until the mid-1980s and local telephony until very recently. Significantly, broadband Internet service is a little over a

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[143] *See* Interstate Commerce Act of 1887, Pub. L. No. 49-41, 24 Stat. 379.

[144] *See Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 49 (2007) ("In authorizing [common carrier] regulation, Congress copied into the 1934 Communications Act language from the earlier Interstate Commerce Act of 1887, 24 Stat. 379, which (as amended) authorized federal railroad regulation.").

[145] Peter W. Huber et al., *Federal Telecommunications Law* § 1.3.4, at 21 (2d ed. 1999). "The monopoly telephone company was to provide service to all customers at 'just and reasonable' prices." *Id.*

decade old, and has evolved (and continues to evolve) at breakneck speeds.[146] In that time, competition among broadband ISPs has flourished and continues to grow with new competitors utilizing new technologies entering the marketplace.[147] As a result, "most parts of the country have been able to choose from two wireline, facilities-based broadband platforms for many years," and there are other types of fixed broadband providers such as "satellite-based broadband service [which] is available in most areas of the country from two providers, while hundreds of small fixed wireless [ISPs] offer service to more than 2 million people and Clearwire offers WiMAX service in a number of cities."[148]

Even if the Commission were to ignore the impact wireless broadband has on today's marketplace – as well as the significance the Commission is attributing to (and substantial resources it is dedicating to promoting) wireless broadband – at a minimum, 80 percent of Americans have a choice between a cable broadband ISP and a wireline telephone company broadband ISP.[149] The following chart demonstrates that, in the fixed wireline segment of the marketplace, for the past five years cable operators' and telcos' market shares have been trending towards 50 percent.

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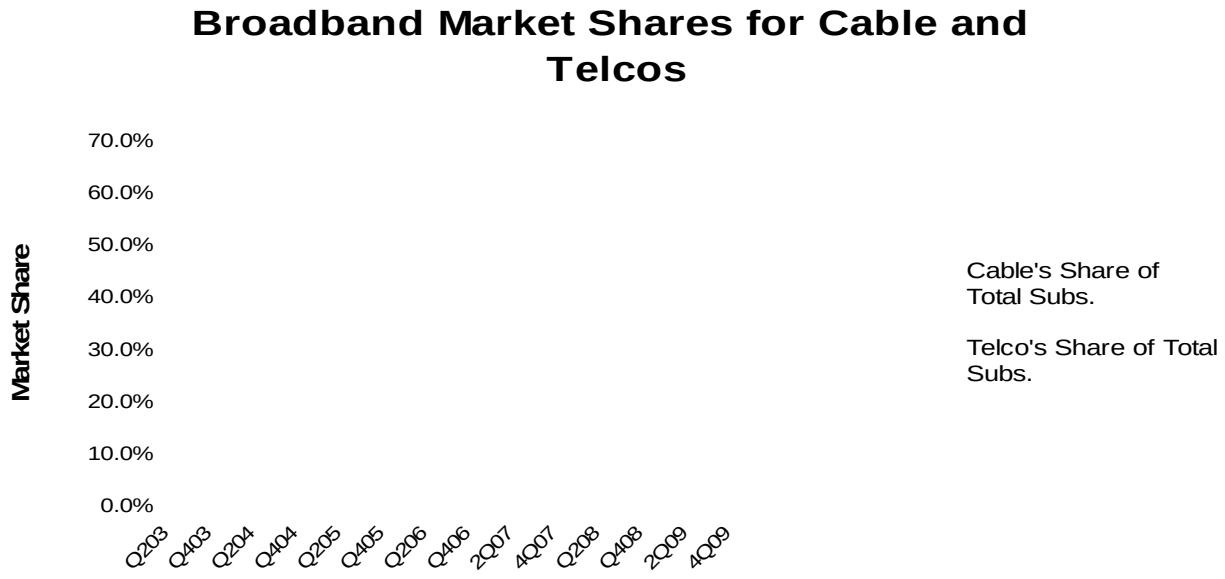
[146] U.S. Dep't of Justice Ex Parte, GN Docket No. 09-51, at 6 (Jan. 4, 2010) ("DoJ Broadband Plan Ex Parte") ("In any industry subject to significant technological change, it is important that the evaluation of competition be forward-looking rather than based on static definitions of products and services. . . . In the case of broadband services, it is clear that the market is shifting generally in the direction of faster speeds and additional mobility.").

[147] As the National Broadband Plan explained, "The United States is distinct in many ways. For example, many countries have a single, dominant nationwide fixed telecommunications provider; the United States has numerous providers. Cable companies play a more prominent role in our broadband system than [in] other countries." National Broadband Plan at 4.

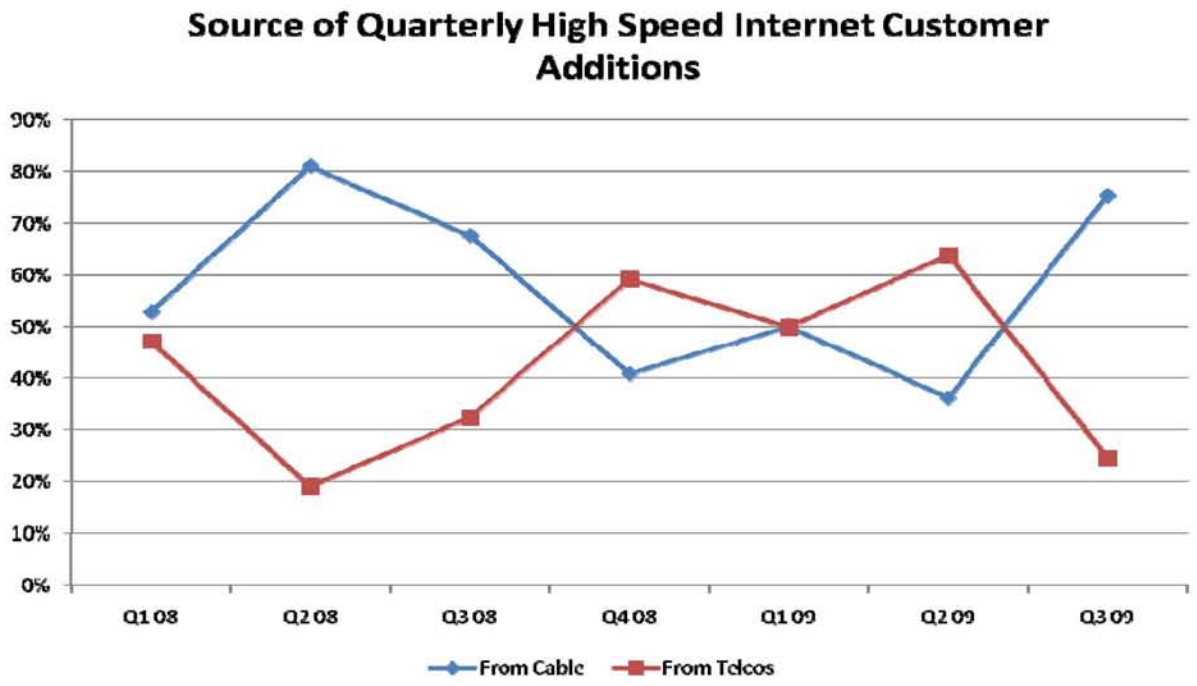
[148] *Id.* at 37; *see also* Gloria Park & Kim Hart, *Next Wave in Wireless Hits D.C.*, Politico, July 15, 2010 (discussing efforts made by Clearwire to deliver 4G wireless services in 44 cities and drive even more competition in the broadband marketplace), *available at* http://www.politico.com/news/stories/0710/39755.html.

[149] *See* National Broadband Plan at 20. "The lack of a large number of wireline, facilities-based providers does not necessarily mean competition among broadband providers is inadequate." *Id.* at 37 (noting that "modern analyses find that markets with a small number of participants can perform competitively").



Source: BNA's Pike & Fischer Cable-Telco HSD Subscriber Counts as of March 10, 2010

More telling is the quarter-to-quarter data regarding customer additions.



These data demonstrate the dynamic and intensely competitive nature of the broadband Internet service marketplace.[150]

Although currently not as robust as the most advanced wireline broadband Internet services, wireless broadband technologies also are delivering broadband Internet services to consumers. Consumers' increasing appetite for mobility has resulted in significant deployment of wireless broadband technology, and CTIA asserts that "[c]onsumers are even showing interest in wireless broadband as a competitive alternative to traditional wireline Internet access."[151]

The National Broadband Plan, the Commission, and President Obama all have placed substantial faith in the benefits of wireless broadband. As the National Broadband Plan notes, "Whether wireless competition is sustainable in driving innovation, investment and consumer welfare will depend on the evolution of technology and consumer behavior among many other factors."[152] President Obama recently recognized the central role that mobile wireless plays in this marketplace and endorsed the Commission's efforts to dedicate more spectrum to mobile broadband.[153] If past is prologue, technology combined with a concerted effort to dedicate more

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[150] *See* Comcast Corp. et al., Applications and Public Interest Statement, MB Docket No. 10-56, at 125-126 & n.275 (Jan. 28, 2010) (citing Jessica Reif Cohen & David W. Barden, Bank of Am. Merrill Lynch, *Battle for the Bundle: Cable Routs Bell Broadband* 5 (Nov. 20, 2009)).

[151] CTIA-The Wireless Ass'n Comments, WT Docket No. 09-66, at 66 (Sept. 30, 2009). CTIA reports that "[m]obile broadband Internet access is the fastest growing segment of the U.S. broadband market." *Id.* at 65.

[152] National Broadband Plan at 36-37; *see* DOJ Broadband Plan Ex Parte at 10 ("It is premature to predict whether the wireless broadband firms will be able to discipline the behavior of the established wireline providers, but early developments are mildly encouraging. Notably, the fact that some customers are willing to abandon the established wireline providers for a wireless carrier suggests that the two offerings may become part of a broader marketplace.").

[153] Office of the Press Secretary, The White House, *Presidential Memorandum: Unleashing the Wireless Broadband Revolution* (June 28, 2010) ("Few technological developments hold as much potential to enhance America's economic competitiveness, create jobs, and improve the quality of our lives as wireless high-speed access to the Internet. . . . This new era in global technology leadership will only happen if there is adequate spectrum available to support the forthcoming myriad of wireless devices, networks, and applications that can drive the new

(footnote continued…)

spectrum to wireless broadband will expand the role of wireless in the broadband marketplace: "Given enough spectrum, . . . a variety of engineering techniques . . . may make wireless a viable price/performance competitor to wired solutions at far higher speeds than are possible today, further increasing consumer choice."[154]

In such a vibrant and evolving marketplace, regulation is a liability, not an asset. Over a decade ago, then-FCC Chairman William Kennard counseled:

> We need an intentional restraint born of humility. Humility that we can't predict where this market is going. . . . In a market developing at these speeds, the FCC must follow a piece of advice as old as Western Civilization itself: first, do no harm. Call it a high-tech Hippocratic Oath.[155]

Title II reclassification, with or without forbearance, could very well break that Oath.

B. Title II Has "Serious Drawbacks" That Could Result in Decreased Innovation and Investment.

Reclassifying broadband Internet services as Title II services would subject broadband ISPs to extensive regulations designed to control monopoly market power, regulations that would increase the costs of providing and using broadband. Title II was simply not crafted to apply to fast-paced, innovative technology and a marketplace as dynamic as the broadband Internet marketplace.[156] The likely effects of Title II regulation on investment and innovation in

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(…footnote continued)

economy."), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution.

154 National Broadband Plan at 41.

155 William E. Kennard, Chairman, FCC, Remarks Before the Federal Communications Bar Northern California Chapter, San Francisco, CA (July 20, 1999), *available at* http://www.fcc.gov/Speeches/Kennard/spwek924.html.

156 *Genachowski Third Way Statement* at 4 (noting that reclassification "would also subject the providers of broadband communications services to extensive regulations ill-suited to broadband"); Michael L. Katz, *Economic Arguments in the Network Neutrality Proceeding* ¶ 72 (Apr. 6, 2010) (attached as Attachment B to Verizon and Verizon Wireless Reply Comments, GN Docket No. 09-191 (Apr. 26, 2010)) ("Applications of [full Title II] regulations to markets with multiple suppliers can harm consumers by distorting competition and weakening

(footnote continued…)

the broadband marketplace would be devastating, which is probably why the Chairman has made clear that "applying full Title II to broadband [is] an approach that is unacceptable."[157] But even the proposed Third Way potentially has "serious drawbacks" that the Commission should consider in evaluating an appropriate broadband framework.

In the *Second Computer Inquiry*, the Commission recognized "that even when the Commission's stated policies are in favor of open entry, *the very presence of Title II requirements inhibits a truly competitive, consumer responsive market*."[158] This will likely prove true whether the Commission applies the full panoply of Title II regulations or only the "small number of provisions" proposed in the *Notice*.[159] Thus, unfortunately, it is not at all clear that the Third Way's proposed forbearance from all but a handful of provisions of Title II will ameliorate "the risk of excessive regulation." [160]

The "core statutory provisions – sections 201, 202, 208, and 254" – themselves pose significant risks to the investment and innovation necessary to move American broadband forward.[161] For example, Sections 201 and 202 provided the foundation for almost all of the common carrier regulations that the Commission has adopted over the years, and could easily serve that role again. At a minimum, under the Third Way as currently proposed, broadband

(…footnote continued)

investment and innovation incentives. For this reason, such regulations are best suited to situations in which there is a monopoly provider and relatively stable technology.").

157 *Notice*, Statement of Chairman Julius Genachowski at 2.

158 *Computer II Final Decision* ¶ 109 (emphasis added).

159 *Notice* ¶ 66.

160 *Notice*, Genachowski Statement at 3.

161 And certain parties already are lobbying for the Commission to further narrow the scope of its forbearance and, in their words, "not lightly set aside statutory provisions that may prove essential for future policymaking." Ex Parte Letter from Chris Riley, Policy Counsel, Free Press to Marlene H. Dortch, Secretary, FCC, GN Docket No. 10-127, at 1 (July 2, 2010).

ISPs will be subject to the regulations and obligations that are expressly set forth in Sections 201 and 202. Thus, the Third Way's proposal to forbear from the more specific provisions that would impose such obligations would not prevent consumers (or, more likely, competitors whose interests may not coincide with those of consumers) from filing complaints challenging broadband ISPs' pricing and practices. Both Chairman Genachowski and General Counsel Schlick have indicated that rate regulation and unbundling are inappropriate for broadband and that the Third Way is intended to forbear from imposing statutory provisions that would impose such obligations.[162] But our concern is that the Third Way may not forbear sufficiently to foreclose the "risk of excessive regulation."

Title II classification of broadband Internet service, in and of itself and with or without forbearance, is likely to result in decreased innovation and investment in networks and services, the very innovation and investment needed to increase speeds and deploy broadband to all Americans.[163] Such an approach would stand in marked contrast to "the status quo light-touch framework,"[164] and nobody benefits with this result.

C. Effective Forbearance from – and Foreclosure of – Regulation Is a Critical Component of the Third Way; If Forbearance Fails, So Will the Third Way.

In 1999, then-FCC Chairman Kennard recognized the link between innovation and regulation: "The fertile fields of innovation across the communications sector and around the country are blooming because from the get-go we have taken a deregulatory, competitive

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[162] *See Notice*, Statement of Chairman Julius Genachowski at 2-3; *Genachowski Third Way Statement* at 5-6; *see also Schlick Third Way Framework* at 7-8.

[163] *See Joint Statement on Broadband* ¶ 3.

[164] *Notice*, Statement of Chairman Julius Genachowski at 2.

approach to our communications structure – especially the Internet."[165] This "deregulatory, competitive approach" has been the status quo for broadband Internet services since they were first deployed. We fear that Title II reclassification will endanger that approach, no matter how carefully it is crafted.

If the Commission decides to reclassify broadband Internet service or some component thereof as a telecommunications service, the only potential for salvaging some remnant of the Commission's consensus, deregulatory, competitive approach flows from the Third Way's proposal to "forbear[] from applying the vast majority of Title II's 48 provisions to broadband access services [and] making the classification change effective upon the completion of forbearance."[166] Chairman Genachowski has explained that, under the Third Way, the Commission would "renounce – that is, forbear from – application of the many sections of the Communications Act that are unnecessary and inappropriate for broadband" and "take steps to give providers and their investors confidence and certainty that this renunciation of regulatory overreach will not unravel."[167]

Because of the risks and costs of regulation, effective and permanent forbearance would be absolutely essential to maintaining some semblance of the deregulatory status quo if the Commission decides to reclassify broadband Internet services as Title II services. In addition, the Commission would need to expressly preempt state and local regulation. States currently play a significant role in regulating Title II services, and although broadband Internet service is undoubtedly an interstate service, certain states (and even localities) will not hesitate to attempt

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165 Kennard, *supra* note 155.

166 *Schlick Third Way Framework* at 4.

167 *Genachowski Third Way Statement* at 5.

to impose their own visions of appropriate regulation on broadband ISPs once the Commission opens the Title II door.[168]

Forbearance, of course, would be eminently prudent and reasonable in light of the marketplace conditions and the benefits that have accrued to the public interest so far *without* heavy-handed Title II regulation. There remain concerns, however, about: (1) whether the Commission's forbearance goes far enough; (2) what happens if the Commission's decision to forbear is not sustained on judicial review; and (3) what happens if a future Commission "changes its mind."

With respect to the first concern, as explained above, Title II reclassification, even with forbearance from the vast majority of Title II's provisions, still poses significant potential risks. Subjecting broadband ISPs to even a limited number of Title II provisions could result in substantial new regulatory burdens. If the Third Way is to succeed in maintaining the "light-touch" regulatory status quo, the Commission also must forbear from certain discrete parts of the "core statutory provisions" (and corresponding Commission regulations) the *Notice* proposes to keep in place – for example, the rate regulation, interconnection, and wholesale access provisions of Sections 201 and 202. Without forbearing from discrete parts of these sections, the Commission will leave in place the foundation upon which to replicate the entire regulatory structure that the Chairman already has deemed "unacceptable." This is not conducive to reinforcing the kind of regulatory certainty that the Commission has recognized, since the

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[168] *See, .e.g.*, Pub. Util. Comm'n of Ohio Comments, GN Docket No. 10-127, at 3-4 (July 14, 2010) (proposing that states should be able to, among other things, "maintain basic consumer protections such as truth-in-billing," "provide a local venue for [resolving] intercarrier disputes and consumer-to-company disputes," and "investigate and take enforcement actions where necessary for the protection, welfare and safety of the public"). At a minimum, should the Commission classify broadband Internet service as a Title II service, the Commission should ensure that broadband ISPs can seek to have the Commission preempt state and local barriers to entry under Section 253. *See* 47 U.S.C. § 253.

Second Computer Inquiry, to be critical for the growth and development of innovative new products and services.

Unfortunately, identifying and protecting against all the potential regulatory landmines that may lead to significant litigation over broadband ISPs' pricing and practices is not easy. "In theory, the Commission might forbear from some elements of full Title II regulation, although whether the Commission would find that the statutory standards for forbearance were satisfied – and how quickly and for which particular provisions of Title II – inherently creates uncertainty."[169] And no matter how many precautions the Commission takes, forbearance may never really close the Pandora's box of Title II.[170]

With respect to concerns about what may happen if the Commission's decision to forbear is not sustained on judicial review, there does not appear to be any legal precedent for conditioning the regulatory classification of a communications service on whether the Commission's desire to regulate that service (or not regulate it) is upheld on judicial review. Although Comcast truly hopes that the Chairman's view as characterized by Commissioner Clyburn – that, "without forbearance there is no reclassification" – would prevail,[171] there does not appear to be any precedent that would allow "the Commission [to] provide that in the event of an adverse court decision on forbearance the old unitary information service classification would spring back."[172] Therefore, it seems questionable whether a court would permit the

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[169] Katz, *supra* note 156, ¶ 74.

[170] *See Schlick Third Way Framework* at 8-9.

[171] Mignon L. Clyburn, Commissioner, FCC, *Broadband Authority and the Illusion of Regulatory Certainty*, Remarks at the Media Institute 2 (June 3, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298599A1.pdf.

[172] *Schlick Third Way Framework* at 9.

Commission to freely jump back and forth between statutory definitions solely on the basis of how the Commission wants to regulate a service. Moreover, this seems to inflame the already heightened regulatory uncertainty that can harm investment and innovation.

The risk of reclassification without forbearance is exacerbated further by the fact that, as General Counsel Schlick has acknowledged,[173] any subsequent Commission could change its mind and reverse the decision to forbear (much like the Commission seeks to do now as it proposes the regulatory classification of broadband Internet service). Certain parties already are advocating that the Commission needs to apply more burdensome Title II regulations to broadband ISPs,[174] and nothing will stand in their way in pursuing an appeal of any Commission decision to forbear.[175] Although the Commission has never changed its mind about a prior forbearance decision, nor has a court reversed such a decision, basing the entire Third Way strategy on the politics of future Commissions and the legal sustainability of an unprecedented procedural and policy mechanism seems far riskier, and potentially even more burdensome and

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[173] *See id.* at 8.

[174] *See, e.g.*, Press Release, Pub. Knowledge, *Public Knowledge "Generally Pleased" with FCC Announcement* (May 6, 2010) ("[W]e are not pleased to read that the Commission at the outset is foreclosing the possibility of requiring line sharing."); Press Release, Free Press, *Free Press Encouraged by New FCC Plan: Concerns Linger over Competition and Affordability; Don't Take Away the Tools Congress Gave the FCC* (May 6, 2010); *cf.* Statement of Commissioner Michael J. Copps on Chairman Genachowski's Announcement To Reclassify Broadband (May 6, 2010) ("[I]t is clear that broadband will merit some forbearance from certain Title II stipulations, but we must avoid another forbearance binge. . . . We must also understand that the world of technology changes at warp speed and we must protect against any unintended consequences of forbearance or closing other doors that may need to be opened down the road."), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297946A1.pdf.

[175] Certain parties even urge the Commission to ensure that any reclassification order not foreclose reconsideration of a grant of forbearance. *See, e.g.*, PAETEC Holding Corp. et al. Ex Parte Letter, GN Docket No. 10-127, at 2 (June 29, 2010) ("PAETEC expressed concern that language in the Notice could be read to suggest that forbearance is unlikely ever to be 'undone'" and argued that "[a]ny reclassification order should not inadvertently foreclose the possibility that forbearance granted in [prior] orders would be revised under a more appropriate, data-driven market-specific forbearance analysis . . . .").

time-consuming, than reliance on the Commission's judicially-recognized and approved Title I ancillary authority.

V. CONCLUSION

Comcast is committed to delivering to its customers a world-class broadband Internet service that allows them to enjoy the full panoply of content, applications, and services available on the Internet. We are committed to working cooperatively with the Commission to offer better, faster, ubiquitously available, and widely adopted broadband Internet service. But Title II regulation, with or without forbearance, poses significant risks to the investment and innovation that will be needed to achieve these goals. Instead, we believe the Commission should build on the successes of the past 15 years and maintain its current classification of broadband Internet services as "information services" and maintain its current regulatory approach to broadband Internet services.

Respectfully submitted,

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July 15, 2010

APPENDIX A

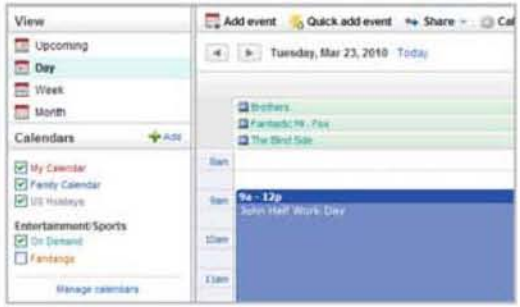
SAMPLE OF COMCAST'S HSI MARKETING MATERIALS

Life's easier with the SmartZone® Communications Center.

Featuring an enhanced calendar for you!

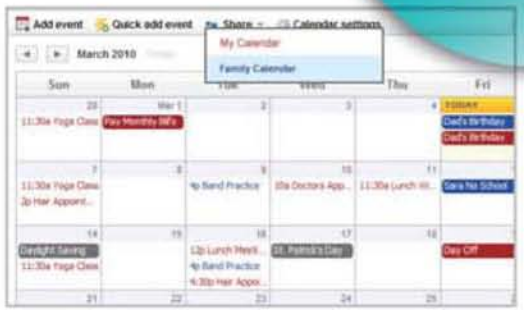
Added Convenience.

Access your calendar from any computer connected to the Internet.



Better Planning.

Get reminders for appointments, birthdays and holidays — plus, get new movie theater releases and On Demand updates.



Easier Sharing.

Share your schedule with family and friends, send e-cards for special occasions and more.

See the enhanced calendar and more at: comcast.net/smartzonetour

Restrictions apply. Not available in all areas. Voicemail feature requires subscription to Comcast Digital Voice®. Other advertised features require Comcast High-Speed Internet. Must have voicemail to check voicemail online. Call for restrictions and complete details. ©2010 Comcast. All rights reserved.

Life moves so fast.

Organize it the smart and easy way.

comcast. dream big.

Connect with your family and friends using the SmartZone® Communications Center.

You'll gain the convenience of one easy location to:

- Check e-mail and listen to voicemails in the same place
- Combine different online address books into the Universal Address Book
- **ENHANCED CALENDAR!** Access your calendar away from home, share your plans with everyone and set reminders for appointments and special events; plus, get new movie theater releases and On Demand updates

Learn more at:

comcast.net/smartzonetour

SmartZone® communications center

Don't have [Comcast High-Speed Internet or Comcast Digital Voice®] yet? Call 1-800-COMCAST.

Life is better when your Comcast services work together.

Introducing SmartZone® Communications Center.

Another innovative feature from Comcast.

- Check your email & voice mail in one convenient place on comcast.net.
- Forward voice mail messages in email.
- Combine contacts from multiple email accounts and computers into one simple Universal Address Book. Never waste time searching for contacts again.

Finally, all your emails & voice mails can live together in

one online happy place.

The best part—SmartZone® Communications Center is yours just for being a Comcast customer.

Sign up for the NEW Comcast HD Triple Play with SmartZone® Communications Center today at comcast.com. Or call 1-888-Comcast.

The NEW Comcast HD Triple Play with FREE HD.

It's a whole lot. For a whole lot less.

Comcast Digital Cable with Channel One On Demand

- Includes FREE HD service.
- Thousands of On Demand Choices.
- Premium channels like HBO, Starz, Cinemax and Showtime.

Comcast High-Speed Internet

- Lightning-fast Internet that's way faster than DSL.
- Internet speeds up to 12Mbps with Powerboost.
- Includes highly-acclaimed McAfee Security Suite to help protect against identity-theft, viruses and hackers. Plus parental controls to help keep kids safe. An exceptional $120 value included.

Comcast Digital Voice®

- Rated #1 in call clarity. So no word goes unheard.
- Unlimited local and long distance calling.
- 12 popular calling features, like Caller ID and Call Waiting, plus voice mail.
- Keep your current phone number.

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Photos saved. Music secured. Files backed up. **Chances avoided.**

How do we thank valued customers like you? Simple. We're giving you 2 gigabytes (GB) of Secure Backup & Share, included with your Comcast High-Speed Internet service.

Save and share your important files with the protection of Secure Backup & Share, and you'll also have remote access to your precious photos, music and more using any Web connection.

Activate your 2 GB of online storage today — for no additional charge. And if you need additional space, choose from our other affordable options. It's that easy, and it's just one more benefit of your Comcast High-Speed Internet service.

Sharing made easy!

You'll receive a personalized Web site and enjoy access to files using any Internet-connected computer or compatible mobile phone.

Secure Backup&Share

Quick & Easy Backup

- Download once and files can be identified and backed up automatically
- Restore files easily in a few quick steps — save the time and avoid the hassle of burning CDs or using other external storage devices

Secure, Reliable Protection

- Protect yourself against hackers with advanced encryption technology that helps keep files secure day or night
- Copy your valuable files to a secure location that's always available to you

Remote Access & Sharing™

- Get your own Web site to share files with family and friends
- Remotely access files from any Internet connection — including your compatible Web-enabled phone

Get started today — just pick your plan.

Storage Size/Capacity for Typical Files	Monthly Plan	Annual Plan
Standard — 2 GB 200 photos or 500 music files **or** 1 video or 10,000 documents	Included*	Included*
Preferred — 50 GB 5,000 photos or 12,500 music files **or** 25 videos or 250,000 documents	$4.99	$49.99
Premier — 200 GB 20,000 photos or 50,000 music files **or** 100 videos or 1,000,000 documents	$9.99	$99.99

Above examples based on the following file sizes: photo = 10 MB, music file = 4 MB, video = 2 GB, document = 200 KB.

*Not available in all areas. Comcast High-Speed Internet service subscription required. Limited to residential customers. Secure Backup & Share is operated by a third party. Rates, its Terms, etc., where your data may be hosted. Pricing subject to change. Users who select a paid storage plan will be billed by Mozy. Applicable taxes apply. Windows 2000 or later operating system required. Not compatible with certain systems. "Using Secure Backup & Share is violation of copyright or other laws prohibited. Call 1-866-COMCAST for restrictions and complete details, or visit www.comcast.net/backup. ©2010 Comcast. All trademarks are property of their respective owners. All rights reserved.

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Virus hits.
Files vanish.
Memories lost.

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Service Announcement

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As a valued Comcast High-Speed Internet customer, you have access to comprehensive tools to help keep your family safer while surfing online.

Get Protected Now ▶ **It's Included!**

Get Norton™ Now »

Plus get even more protection with other great security features from Comcast:

- Comcast Toolbar with Anti-Spyware and Anti-Phishing Scanner helps your computer run even faster!
- Protect valuable files, like photos, with 2GB of storage from Secure Backup & Share

Get Protected with Norton™ Security Suite ($160 value): superior protection, fast performance!

Identity Theft Protection
Norton 360™ technology protects your identity when you buy, bank and browse online.

Smart Parental Controls
Help protect your kids online—even when you're not there.

Super Speed
Starts up and scans quickly without slowing your PC down.

Norton™ Security Suite value based on retail price of products sold separately.

Not all features compatible with Macintosh systems.

Download product; image for illustrative purposes only.

*Based on Antivirus, Internet Security and Total Security Performance Benchmarking, Edition 4, by PassMark Software Pty., Ltd.(March 2009)

You'll need your Comcast net user name and password.

This is a service-related email. Comcast will occasionally send you service-related emails to inform you of service upgrades or new benefits to your Comcast High-Speed Internet service. $160 Norton™ value based on retail price of product sold separately.

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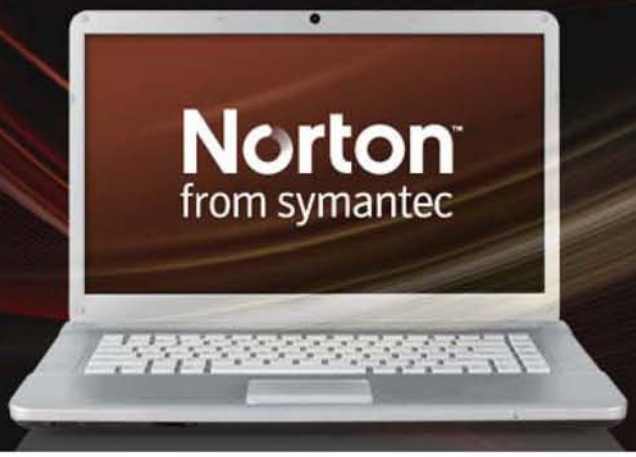
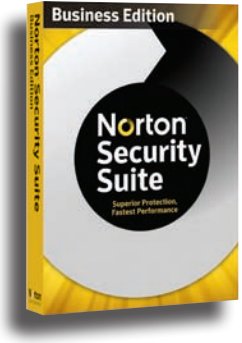
Top Security

Norton Security Suite gives XFINITY Internet customers superior around-the-clock protection for PC, online activities and identity theft. Plus, there's no additional charge.





Great News for Comcast Business Class Customers

The top-rated Norton™ Security Suite Business Edition is here!

This new security suite is powered by Norton 360™ and provides the most comprehensive and effective security tools available to protect your business from spam, hackers, fraud and theft. It covers up to 25 computers, both PCs and MACs. It is included with your Comcast Business Class Internet – **a $490 value** available to you at no additional cost!

With Norton Security Suite, Business Class Internet customers will be protected with important security features including:

- **Virus scan** – protects against viruses, bots, spyware, Trojan horses, worms and rootkits
- **Networking** – helps secure and monitor your office network and automatically secures your PC when connecting to public wireless networks
- **Two-way firewall protection** – stops threats at point of entry
- **Spam Blocker** – automatically filters out annoying, dangerous or fraudulent emails from your inbox.
- **Identity theft protection** – blocks phishing Web sites and guards against keyloggers
- **Windows protection** – cleans and repairs Windows registry
- **PC tune up** – finds and fixes problems that slow your computer
- **PC and Macintosh support** – 24/7 e-mail, chat or phone support

Attention McAfee Users! If you are currently using McAfee, it's time to switch to Norton. McAfee subscriptions will end on May 20, 2010. Switching to Norton is easy. Simply log in to your account at **http://businessclass.comcast.net** and you will be able to download Norton Security Suite right away.

Need Help? Call 1-877-272-7149 to speak to a live Norton technician!

Comcast Business Class

Limited offer. Comcast Business Class Internet subscription and Internet access required. Some restrictions apply. Norton Security Suite is a downloadable product–box image for illustrative purposes only. Norton security software provides protection for up to 25 PCs (Windows or Macintosh). May not be available in all areas. Call 800-391-3000 for restrictions and complete details. © 2010. Comcast. All rights reserved. Norton and Symantec are registered trademarks of Symantec Corporation or its affiliates in the U.S. and other countries. All trademarks are properties of their respective owners.

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