

OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION: THE NATIONAL BROADBAND PLAN

HEARING BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY, AND THE INTERNET OF THE COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES ONE HUNDRED ELEVENTH CONGRESS

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OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION: THE NATIONAL BROADBAND PLAN

THURSDAY, MARCH 25, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY,
AND THE INTERNET,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:07 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Rick Boucher [Chairman of the Subcommittee] presiding.

Members present: Representatives Boucher, Markey, Rush, Eshoo, Stupak, DeGette, Doyle, Inslee, Weiner, Butterfield, Matsui, Christensen, Castor, Murphy, Space, McNerney, Welch Dingell, Waxman, Stearns, Upton, Shimkus, Blunt, Bono Mack, Terry, Rogers, Blackburn, Griffith, and Barton.

Staff present: Roger Sherman, Chief Counsel; Tim Powderly, Counsel; Greg Guice, Counsel; Shawn Chang, Counsel; Bruce Wolpe, Senior Advisor; Sarah Fisher, Special Assistant; Michiel Perry, Intern; Pat Delgado, Chief of Staff; Elizabeth Letter, Special Assistant; Neil Fried, Minority Counsel; Will Carty, Minority Professional Staff; and Garrett Golding, Minority Legislative Analyst.

OPENING STATEMENT OF HON. RICK BOUCHER, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF VIRGINIA

Mr. BOUCHER. Subcommittee will come to order. Good morning to everyone. This morning, we welcome Chairman Genachowski and the members of the Federal Communications Commission as we hold the first in a series of hearings that focus on the National Broadband Plan. In the Economic Recovery Act of 2009, we directed the Commission to prepare a plan to expand broadband access and increase broadband adoption among those who have access to it.

Today the United States stands sixteenth among developed nations in broadband usage, and for the benefit of our national economy and our quality of life, we simply must do better. The Commission has done a superb job in developing the plan, and I want to commend the members of the Commission and the professional staff who have devoted a year, and I know thousands of hours to listening to public comments and carefully constructing the blueprint before us. I think you have truly done a superb job.

I am going to comment this morning on several core recommendations of the plan and then recognize other members. First I was pleased to observe your proposal to transition the high cost fund in the Federal Universal Service Fund from supporting exclusively basic telephone service, which is what it does today, to also supporting broadband deployment. The Commission's recommendation very closely tracks the provision in the comprehensive universal service reform legislation. That for the last four years, I have been working with our committee colleague, Mr. Terry, in order to advance. We have been through a series of discussion drafts, the most recent of which was the subject of a legislative hearing in the subcommittee.

Today, universal service monies may not be spent for broadband. Our legislation will immediately allow carriers to use their USF monies for broadband deployment. We also have in our bill a mandate that carriers receiving universal service monies to provide broadband throughout their service territories within five years of the measure becoming law. The carriers could no longer receive USF monies if they fail to meet this broadband build-out mandate.

The Commission's recommendation also targets using the high-cost fund for broadband, and I commend the compatibility of the broadband plan and the legislation that we have placed before the committee.

Secondly, I was pleased to note that the plan incorporates the recommendation that we set a high goal for future broadband speeds. Today, the typical broadband service to the home here in the United States is between three and five megabits per second. In countries like South Korea and Japan, today's data rates for the typical subscriber are far higher, often reaching between 50 and 100 megabits per second. The Commission's plan appropriately sets a goal over the coming decade of delivering to 100 million homes in the United States broadband speeds of at least 100 megabits per second. And I commend you for that.

Third, the Commission's proposal for auctioning to commercial builders the D block of the 700-megahertz spectrum without onerous conditions is commendable. The proceeds from the auction could then be applied to helping first responders purchase and install the equipment that is necessary to bring to fire, police, and rescue agencies nationwide a truly interoperable telecommunications capability. It is essential that when they converge from different localities on the scene of a disaster that fire, police, and rescue be able to communicate one with the other. We are 10 years beyond 9/11. That capability does not exist on a nationwide basis today.

I offer to you my support for obtaining the appropriations that will be necessary in addition to the proceeds from the D block auction in order to complete the build-out of first responder communications equipment. I think that on a matter so fundamental to the Nation's security, we will have bipartisan support for the provisions of the money necessary for the purchase of public safety equipment.

Finally I want to commend the approach that you take in your plan to work with television broadcasters to identify the spectrum they now hold that on a consensual basis could be repurposed for

commercial, wireless use. Broadcasters who surrender spectrum would receive compensation in exchange for a voluntary spectrum transfer. That, Mr. Chairman, is the right approach.

We will soon pass here in the House our bipartisan bill to direct you and the NTIA to conduct a comprehensive inventory of the entire spectrum that could be used for commercial purposes. That inventory will offer a clear path for the next steps in making available adequate wireless spectrum. And that spectrum will be necessary to meet our Nation's rising demand for wireless services.

You have done an outstanding job in preparing the plan, and we want to thank you for joining us here this morning in order to discuss your recommendations. That concludes my statement, and I am now pleased to recognize the ranking Republican member of our subcommittee and our partner in so many telecommunications initiatives, the gentleman from Florida, Mr. Stearns.

[The prepared statement of Mr. Boucher follows:]

Opening Remarks

FCC Broadband Plan Roll Out

March 25, 2010

Thank you Mr. Chairman, and Ranking Member Stearns for holding this hearing this morning. Myself, along with my colleagues on the committee and every representative from the telecommunications industry as a whole have anxiously anticipated the unveiling the new National Broadband Plan for quite some time now and I appreciate you coming before us today to share your insights on the plan as well as the path forward in accomplishing it. Before we go any further, though I would like to commend you all for the hard work that you and your staffs have undoubtedly put into compiling and completing this finished product, and also for the work ahead of all of us as we work to implement these ambitious goals.

I was very pleased to see some of the Commission's proposals as they relate to extending broadband out to un-served areas of our population as well as your proposal to help re-focus and cut waste from the Universal Service Fund. As a member of Congress who represents vast swaths of rural areas, it was good to hear that the initial focus of the plan's broadband expansion will be to get broadband access to the 5% of the population that is completely without it, who live in areas where it has simply be uneconomical for private industry to expand into.

The rapid expansion of broadband subscribers over the past decade has been a great success and truly represents what free-market principles partnered with limited government regulations can accomplish. I am glad that the commission recognized the need to help facilitate expanding broadband access to that last segment of the un-served left in our country, and this plan seems to strike the right balance between what the market can accomplish and where the government might need to supplement the private sector.

I strongly believe that the deregulatory policies that have helped expand the reach of broadband in our country today can also help us hit and even surpass the plan's ambitious goals, most specifically the goal of making 100 megabits per second service available to 100 million homes by 2020.

As this plan is being implemented, I look forward to working with the commission to build upon the successful expansions we have achieved across the telecommunications industry as we look to achieve the framework of goals you have laid before us. Thank you and I yield back the balance of my time.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Good morning and thank you, Mr. Chairman, and let me welcome all the witnesses and let you know how much we appreciate you taking your time to come here. It is a very important hearing. We do this regularly, but this is, I think, very appropriate considering we just got the broadband plan from all of you.

I have a lot of ideas. I haven't been through the whole plan. My staff has been through it. We have marked up and done an analysis. I think all of us would agree that broadband is critical to our economic growth, and certainly the goals outlined in the plan are encouraging.

You know on page 10, it mentions goal number four, Mr. Chairman, which I think is really exciting to think that every American community should have affordable access to at least one-gigabyte-per-second broadband. Service to anchor institutions such as schools, hospitals, and government buildings, and you mentioned this, but I think all of us in America would not even comprehend what would happen in this country to its productivity and to the innovation and technology if we had one gigabyte. So, as you mentioned, oftentimes we get less than five megabytes through our broadband today. So I think this goal is outstanding.

It is important for the Commission to recognize that much about our broadband market is working well, and that perhaps is my theme this morning, and that the plan should complement what is working rather than scrapping it. Key findings, according to the report now, that 290 million Americans, 95 percent of the population today have access to at least four-megabytes-per-second broadband service and two-thirds of adults subscribe. So approximately 200 million subscribers have broadband at home today, representing a 25-fold increase in the last 10 years, up from 8 million.

By comparison—I just asked the staff to look at this—it took 90 years to go from 8 million voice subscribers to 200 million under the old Title Two Common Carrier regulations. So that should tell you something. This plan confirms that the free market, pro-investment, national plan we already have in place for broadband has worked, considering how quickly we have moved.

All the FCC need do then is remain focused on the five percent of households that otherwise may be uneconomic for the private sector to serve. What Congress and the FCC must not do is revert to failed regulatory ideas that were designed for old technologies and a monopoly marketplace, such as imposing network neutrality for forcing access to facilities and regulating rates are the surest way to deter the investment we need to reach this new broadband plan and ultimately the goal of one gigabyte here in America.

If we don't impose regulation of broadband providers that discourage private sector investment, we can meet the FCC chairman's goal of making 100-megabyte-per-second service available to 100 million households by the year 2020. So we must carefully avoid any investment killing and government interventions and avoid any attempt to reclassify broadband as a Title Two service.

I think the plan, as we went through it obviously has some very good points, and I want to thank the chairman for answering my letter I sent to him. And it was nice to get the letter before the

hearing, and we appreciate his response. As he pointed out, that the plan costs \$20 million to create, and I am concerned that we had to spend \$20 million to confirm what a lot of us knew was working. But I think it is worthwhile to get this perspective in this report.

It could end up saving us more money as we move forward if the pro-investment approach continues and we refrain, as I mentioned, from putting burdensome regulations in place.

Now, of course, this does not mean that the government has no role, and the plan can help us in this way. Two approaches in this plan show particular promise. The chairman mentioned this. The plan proposed to cut the waste in the universal service program and refocus it on the five percent of the country that does not have access to at least four-megabytes-per-second broadband. If we are going to subsidize broadband, concentrating on the seven million homes that are uneconomic for the private sector to serve makes sense.

Second, the plan seeks to make 500 megahertz of spectrum available for wireless broadband within 10 years. That is good so long as the FCC does not give the spectrum away or rig auctions with conditions. Then we will advance, I think, our broadband goals while generating needed federal revenue. I hope that the broadband spectrum on the part of the broadcasters will be looked at carefully. And if they have to relinquish anything, it will be on a voluntary basis so we let that work itself out.

So, Mr. Chairman, I thank very much for this hearing, and I look forward to the testimony of our Commissioner.

Mr. BOUCHER. Thank you very much, Mr. Stearns. The chairman of the Energy and Commerce Committee, the gentleman from California, Mr. Waxman, is recognized for five minutes.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you, Chairman Boucher, for scheduling this important hearing. The release of the National Broadband Plan was eagerly anticipated over the last several months, and I am pleased that the committee is examining its recommendations today.

The National Broadband Plan is the most significant ambitious infrastructure program for America since the interstate highway system. Our competitiveness and prosperity depend on meeting its core objectives. America cannot settle for the second best in the digital age. Writing this detailed blueprint was a massive undertaking, and I commend Chairman Genachowski, the broadband team, the FCC staff, and the open transparent and data-driven process they used in preparing this report.

Now comes the hard part. The real test of the plan's success will be in its implementation. Congress, the FCC and the Administration all have a role to play. One important aspect of the plan is the recommendation to enhance public safety by building a new interoperable broadband network. According to the chairs of the 9/11 Commission, "the FCC's plan offers a realistic framework to move

forward, and we hope that all stakeholders will work with the Commission to refine the plan as needed and make it a reality.”

I have asked my staff to begin drafting legislation to implement the public safety recommendations. We will work in close consultation with Subcommittee Chairman Boucher, Ranking Members Barton and Stearns, and other members of the committee.

Significant funding will be needed to effectuate the concepts outlined in the plan, but I believe we must find a way to move forward on a bipartisan basis to meet the needs of the public safety community. The plan identifies a looming shortage of spectrum as a major problem facing the expansion of wireless broadband. Members of the committee will have different ideas about how to address this issue. As we will hear today, the broadband plan makes a series of recommendations for freeing up spectrum. These deserve our serious consideration.

As the plan recognizes, there is a pending legal challenge to the Commission’s ability to regulate broadband networks. The outcome of that issue could have serious implications for the Commission’s ability to protect consumers and implement the plan. Whatever the court rules, the Commission should take the steps it deems necessary to ensure it can implement the plan and to assure that broadband consumers are protected.

There are other key recommendations in this plan. We need to take steps to safeguard consumer privacy, ensure transparent and accurate billing, provide access for disabled Americans and reform the Universal Service Fund. I hope today’s hearing will be only the first in a series of hearings on the future of broadband. We can benefit from additional hearings that will focus on individual aspects of the plan, including creating a public safety broadband network, reform the universal service, improving spectrum policy, providing better access to persons with disabilities, eliminating barriers to deployment and promoting broadband adoption throughout the country.

I look forward to working with Chairman Boucher and other members of the subcommittee as we move forward. I thank our distinguished panel for being here today and appearing before the committee. And I look forward to your testimony.

Mr. BOUCHER. Thank you, Chairman Waxman. The gentleman from Texas, Mr. Barton, ranking member of the Energy and Commerce Committee, is recognized for five minutes.

Mr. BARTON. I thank the distinguished subcommittee chairman. Would ask unanimous consent to put my entire statement in the record.

Mr. BOUCHER. Without objection.

Mr. BARTON. Thank you, Chairman. I am just going to summarize because we want to hear from you folks on the FCC. First of all, if you have to have a federal broadband policy plan, you all have done about as good as can be done. But it is kind of like the old movie “The Good, The Bad, and The Ugly.” The good news is you say some things that I think need to be said. You try to reform the Universal Service Fund. You try to free up some spectrum, as Chairman Waxman just alluded to.

The bad, the worst idea I have heard in years is reclassification. I just—I don’t know about anybody else on this committee, but I

don't want to regulate broadband like we regulated telephone services in the 1930s. I just don't want to do it, and I don't think the country wants to do it.

As far as the ugly part of it, just generically, you know, Mr. Waxman talked about the interstate highway system as an infrastructure program, and he is right about that. If the federal government hadn't decided to do the interstate highway system, we wouldn't have had that type of a system. But 95 percent of America has broadband. The federal government hasn't had to spend a dime. This isn't a have/have not program. This is a find-something-for-the-FCC-to-do-that-makes-sense-in-the-21st-Century program.

So some of your components are things that I think we can work together on, but overall, you know, as everybody knows, if it is not broke, don't fix it. And you all are trying to fix something that in most cases isn't broke.

So with that, Mr. Chairman, I would yield back. Again I want to commend the Commission for working really hard, but you have produced a work product that we can use as a roadmap. But we don't need to reinvent the wheel here.

[The prepared statement of Mr. Barton follows:]

**Statement of the Honorable Rep. Joe Barton
Ranking Member, House Energy & Commerce Committee
Subcommittee on Communications, Technology, & the Internet
“The National Broadband Plan”
March 4, 2010**

Thank you, Mr. Chairman, and thank you for scheduling this hearing on the FCC’s National Broadband Plan.

I want to start by congratulating the Chairman, the Commissioners, their staff, and the Staff of the National Broadband Team. The National Broadband Plan was quite an undertaking and I applaud all those who worked so hard to cover so much ground.

However, it looks like all this impressive work, and the \$20 million spent to fund it, might have been unnecessary. Our old plan has worked. The almost 400-page document starts by telling us that more than 95 percent of the country already has access to broadband without the government having to spend a dime on the build-out.

Let me note that our Democratic friends have just decided to spend \$938 billion so government could intervene in the health care system in order to increase coverage about 10 percentage points. That is said to be the greatest political victory since Medicare and Social Security. I think it may be remembered differently.

It's my opinion that we might have accomplished a great deal more for a lot less by removing barriers to a free market, incentivizing innovation and empowering consumers, just like we've managed to do in the telecom sector, and in a bipartisan way, at that.

Even in a recessionary economy and without government wisdom to guide them, the industry has invested tens of billions of dollars to expand and improve its networks. Broadband providers are laying cable and fiber, putting in place new connections, and building out wireless and satellite-based broadband networks. From 2003 to 2009, these types of direct investments created some 434,000 jobs; and over

the next five years, the same process could produce upwards of 500,000 new jobs. Getting in the way of this with government rules and well-meaning, but misguided policies would be a mistake of huge proportions.

So, my message for the Commission and for my colleagues on the Committee and in the Congress is simple, and it's the same message that former Chairmen Kennard and Powell conveyed: Don't mess it up.

With all that said, there are some promising proposals in the plan. The goal of freeing up 500 megahertz of spectrum for wireless and mobile broadband is laudable. And the proposals to reform the Universal Service Fund to focus on the truly unserved households is promising as well. The areas that don't currently have broadband access are those that are uneconomic to serve, mainly sparsely

populated rural places, and any government money used should help Americans who live in these areas.

As the Republicans on this Committee have been saying for more than a year, no one should get “seconds” before everyone gets “firsts.” Given what this plan says about funding broadband, I wish the Commission could have voted in our Committee for the amendment we offered during the stimulus markup focusing on unserved households. The Republicans would have prevailed and the potential waste and overbuild problems with the NTIA and RUS broadband programs might have been avoided.

Finally, I want to say a few words about the issue of reclassification that has the industry and the interest groups buzzing. Using monopoly-era law and regulations to regulate the most vibrant and competitive sector of our economy is beyond misguided. It flies in the face of the facts and it is quite simply a recipe for failure. I hope

the Commission doesn't give in to special interest groups, and deviate from what, by the plan's own admission, has been remarkably successful, just because they may lose the authority argument in court.

If people are curious about what reclassification would do to the industry, ask any investment analyst. To a person, they will tell you to take your money and run if the Commission reclassifies broadband. Furthermore, solving a problem that doesn't exist by using reclassification to impose network neutrality, force access to facilities, mandate wholesale obligations, and regulate rates is the surest way to deter the investment we need to reach the new broadband plan's goals.

Again, I congratulate the Commission on its hard work, and I thank all the Commissioners for being here today.

Thank you, Mr. Chairman, and I yield back.

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Mr. BOUCHER. Thank you very much, Mr. Barton. The Chairman Emeritus of the Energy and Commerce Committee, the gentleman from Michigan, Mr. Dingell, is recognized for five minutes.

OPENING STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. DINGELL. Mr. Chairman, I thank you, and I commend you for holding today's hearing. I want to also commend Federal Communications Commission Chairman Dan Husky and his team. They have completed a roadmap to ensure broadband reaches every corner of the United States.

There are two elements that should be the core of this effort. First, it should focus on promoting broadband adoption. Second, it should establish and address a support mechanism for broadband's expansion into high cost and underserved areas of the country. I am pleased that the National Broadband Plan includes chapters on these issues.

Nonetheless, I have great concerns about several of the plan's recommendations about spectrum reallocation and competition-based issues. At best these matters are insular to the Congress's intent to expand National Broadband Access. At worst, they would reinstitute the old policy fights, long since satisfactorily settled.

In November of last year, I wrote to the Commission to express my misgivings about reallocating spectrum from broadcasters to mobile communications providers. Over-the-air broadcasters surrendered nearly a third of their spectrum to facilitate the recent transition from analog to digital signal transmission. Further loss of spectrum can have a very serious adverse effect on the public by limiting consumer choice. With respect to broadband television, this potential outcome would also reflect a marked weakening of the long-cherished principles of diversity and localism.

My father and I have defended these since the Commission's establishment in 1934. Before considering whether if or how to reallocate frequencies used for television, it behooves the Commission to work with NTIA to complete a comprehensive spectrum inventory such as the one mandated by H.R. 3125, "The Radio Spectrum Inventory Act." I consider this a necessary predicate for the Congress's consideration of the national broadband proposal to grant the Commission the authority to conduct spectrum reallocation incentive options.

I have also serious apprehensions about the plan's chapter on competition issues. This chapter is an unpleasant reminder of old arguments from the '90s. At that time, the Commission required that local companies should make their networks available to all manner of carriers at below-market prices. This so-called unbundling resulted in a glorious mess.

My colleague, Mr. Billy Tauzin, and I moved legislation through the House to eliminate unbundling requirements with respect to carriers' investment in broadband facilities. The Senate, as it is unfortunately oft wont to do, did not pass this eminently sensible legislation. But the Commission ultimately adopted the bill's essence in its triannual review of 2003. The result has been enormous in-

vestments by carriers in broadband, both in my home state of Michigan and across much of the Nation.

Chapter four of the National Broadband Plan signals communication and the Commission's intention to revisit the unbundling statute. This, I think, is to reopen an old fight, and it gives me great concern because it can very well serve as a disincentive to necessary investments in broadband facilities.

In conclusion, Mr. Chairman, I would like to remind the witnesses today that the Congress is the sole progenitor of the Commission's authorities. To quote Sam Everett, "If the Commission remembers it works for us, everything will turn out fine." In keeping with the sentiment and concerns I have just articulated, I respectfully suggest that the Commission stay focused on the Congress's simple goal of ensuring that broadband is accessible and affordable to all Americans, rather than to seek to rehash old and unproductive policy debates and to start counterproductive fights which are quite unnecessary.

Mr. Chairman, I thank you for your courtesy. I ask unanimous consent to submit letters to the Commission to finish out the questions that we will need to ask today. I yield back the balance of my time.

Mr. BOUCHER. Thank you very much, Mr. Dingell. The record of this hearing will remain open for members to submit additional questions in writing to members of the FCC. The gentleman from Illinois, Mr. Shimkus, is recognized for two minutes.

Mr. SHIMKUS. Mr. Chairman, I think Mr. Upton here is prior to my time.

Mr. BOUCHER. All right, I am sorry. Mr. Upton, you are recognized for two minutes.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Thank you, Mr. Chairman, and welcome, Commissioner, it is good to see you. The trend in telecommunications sector is towards development of advanced technologies and increase competition. Deregulation has successfully promoted investment, innovation, and more competition, benefitting consumers to no end.

95 percent of Americans now have broadband in more than one choice of carrier. That statistic along with more than \$100 billion recently invested in the infrastructure speaks for itself. So, as Mr. Barton said, if it ain't broken, don't fix it. So as it works, let us not break it. It is clear to me that as the level of competition in the market increases, the amount of government regulation should decrease.

And I would hope that we all could agree that the markets, in fact, have done a better job of protecting consumers than the regulators do. And in a competitive market, we should permit market forces to work and not interpose government regs between providers and consumers. All that does is impede the competition that we all want to see. I applaud your goal of providing 100 million homes with access to 100-megabytes-per-second broadband by 2020. And I believe that we can do that without regulation.

The level of deployment will only come, however, with the continued robust investment by the private sector. And I would agree

with Chairman Dingell that the FCC, for example, the FCC requirement to carriers to unbundle their fiber, that goal will not be met by this legislative body. Don't change the rules after investments have been made. Don't put up roadblocks to new investment.

Finally, I have some concerns about spectrum repacking proposals that could cause harm to consumers and broadcasters as a result of the DTV transition. Broadcasters returned over 100 megahertz of spectrum to the government and at the same time increased their services. Yield back my time.

Mr. BOUCHER. Thank you, Mr. Upton. The gentleman from Massachusetts, Mr. Markey, is recognized for two minutes.

OPENING STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS

Mr. MARKEY. Thank you, Mr. Chairman, very much, and congratulations to the Federal Communications Commission, you, Mr. Chairman, and all the Commissioners. When I put the language in the stimulus package mandating that the Federal Communications Commission had to return this as a report back to the American people on the future of broadband just 13 months ago, I can tell you right now that you met the highest expectations which I had when I inserted that language into the law.

And the table of contents is just an indication of how thoroughly you have examined this subject. Health care, education, and energy and the environment, economic opportunity, government performance, civic engagement, public safety. This is as thorough a compendium of the issues that we have to work on in order to make sure that America once again regains its position as number one in the world in broadband as could ever be asked to be put together. We have dropped from second to fifteenth in the world behind Luxembourg, behind Canada, behind Finland over the last eight years. What we saw was incumbent companies going to court, going to the FCC chipping away at the proinvestments, precompetitive rules that we had put on the books. And as that happened, we saw slowly but surely the United States slip step by step into a position where the rest of the world looks at us over their shoulder.

And this gives us the opportunity with this plan to once again regain that leadership. Google, EBay, Amazon, Hulu, we branded this made in the USA in the 1990s, but we have been slowly but surely slipping behind. So this is an incredible plan. And if it is fully implemented, both investment and consumer protection will be unleashed in a way which will guarantee that the American people will be, in fact, the country that the rest of the world looks to with envy.

And we thank you for that, and we want to work with you to ensure that it is fully implemented so that we can regain that competitive edge that gave us that incredible position that we enjoyed and now has slipped from our grasp.

We thank you, Mr. Chairman, for holding this hearing, and we thank the Commissioner for being here.

Mr. BOUCHER. Thank you very much, Mr. Markey. The gentleman from Illinois, Mr. Shimkus, is recognized for two minutes.

OPENING STATEMENT OF HON. JOHN SHIMKUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. SHIMKUS. Thank you, Mr. Chairman. I am glad I waited and followed my friend from Massachusetts because as far as I know, this is a product of the chairman. It is not a product of the Commission. There was no vote on this plan, and I think we are going to hear that through the questions today, not that the chairman didn't put a lot of time and effort into this and his staff.

I want to debunk this sixteenth or twenty-fifth place. You have to be joking me. Lichtenstein, Monaco, Cutter, Malta, Bahrain, Luxembourg, Hong Kong, South Korea, Iceland, Singapore, St. Kitz, Nimitz, Macau, everyone in the top 20, we could fit the 25 in the continental United States. So we got to get off this aspect of comparing apples to oranges. It is like saying the city of New York has it, and so we are fine.

We have 95 percent of our people have broadband. Five percent do not. Do you know where they are at? They are in my district. You know what? The stimulus has not gone to them, and the RUS fund is not going to them. And that is what torques people off. 95 percent of us have it. It is the private sector that has rolled it out, and now we want to take over one-sixth of the economy, another one-sixth of the economy to moving this whole information age from Title One to Title Two. The dirty little secret back here, it has already been exposed. We are not going to get a surprise from the chairman this time in the hearing because it is here. Some commented or suggested a second approach in which the FCC would implement certain plan recommendations under its Title Two authority.

So let us have this hearing. Let us have this debate. The system is working. Where it is not working is in rural America which we spend billions of dollars, and the money is not going there. And we have the rollout. We got the stimulus rollout. We are overbuilding places that have broadband right now with our tax dollars. And it is not going to where it is needed. I yield back.

Mr. BOUCHER. Thank you very much, Mr. Shimkus. The gentlelady from California, Ms. Eshoo, is recognized for 2 minutes.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman, for moving so quickly to schedule this hearing and welcome to the entire Federal Communications Commission. I have read the plan. I want to congratulate you. I think it is a bold one, and I think it is what our country needs.

On this issue of where the United States is ranked in the world, according to the International Telecommunications Union, they have measured the United States, and they say that we have slipped from eleventh to seventeenth between 2002 and 2007. We know that our standing in the world is not a source of pride to us. Fewer than 27 out of every 100 Americans have broadband service compared with much better numbers in other countries.

But today, we are going to hear the plan. We are going to ask questions about it. I am very pleased that many of the priorities

that I have kind of pounded away on over the years are contained in the plan that really reflects my own legislative agenda. I hope we will move expeditiously on the broadband conduit bill, which I call the digging bill, which will ensure that federally funded transportation projects are required, laying the broadband infrastructure so we don't have to dig up what we've already built in order to lay down what we know we need.

I also look forward to the subcommittee's fast-tracking consideration of the next generation 911 bill that my colleague, Jim Shimkus, and I know in his fight about where we are, where we are not, he would have mentioned this. We introduced the bill two weeks ago. I am ready to vote on a thorough and complete reconstruction of the Universal Service Fund and its programs so that we essentially can leapfrog into the 21st Century. America has always led the world in countless ways, and that is what I find so exciting about the plan because it is a roadmap, a plan, on how we can get there.

We also need to decide the future of telecommunications services and their individual classification so that we can ensure that consumers are really properly protected and that competitiveness is encouraged. No matter who I meet with, they are also for competition unless it cuts in some way to the competition that they have a total hold on. We need an aggressive agenda, as I said, because the United States really lacks badly.

So I look forward to hearing from each one of the Commissioners. This is going to be a lively debate, but at the end of it, I think what we all—our common goal must be is that there is competition that every person in the country is reached by 2020 with high speeds, not with this lagging speed that somehow people have a source of pride about. I don't. I don't think it is good enough for our country, and I look forward to working with everyone to accomplish this for our country.

So thank you for a job well done. It is broad. It is visionary, and it is bold. I think it is exactly what we need to be talking about. Thank you.

Mr. BOUCHER. Thank you very much, Ms. Eshoo. The gentlelady from California, Ms. Bono Mack, is recognized for two minutes.

OPENING STATEMENT OF HON. MARY BONO MACK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. BONO MACK. Good morning, Chairman Boucher, Ranking Member Stearns and Commissioners. I too would like to thank the FCC for its hard work on the National Broadband Plan. It is clear that a great deal of effort and thought went into this endeavor.

As I review the text, I see some real opportunities for the committee and the Commission to work together to increase investment and opportunity. In the general sense, I believe that the plan's approach to spectrum use and universal service are quite promising. Further, I believe most of us would agree that the goals of the plan are admirable. After all, who among us doesn't want to facilitate capital investment and increase their constituents' access to broadband?

However, like the broadband plan, members of Congress also have goals. As we all stare at high unemployment rates in our districts, my goal is to support policies that create jobs for my constituents. Therefore, I have to question portions of the plan that seem to imply the need for a heavier government hand. I personally remain unconvinced that a sector of our economy, which is continuing to attract capital investment and reach more American households is in need of more government interference.

As a matter of principle, I believe that broadband and the hi-techs are best served if the Commission and this committee enact policies which incentivize capital investment and promote greater economic freedom. Additionally, I strongly believe we need to take great steps to protect the digital content that is driving consumers to broadband. The creators and owners of content should have their property protected by law, and we should reward entities who work to ensure its protection, not punish them. When I read sections of the plan which call for relaxing such protections, I become very concerned.

Finally, I would like to caution the FCC on pursuing any agenda without solid legal authority. One certain way to stifle investment and stall economic growth is to make decisions that create uncertainty in a marketplace and encourage litigation.

Again I would like to thank the Commission. I look forward to the question-and-answer portion of today's discussion. I yield back the balance of my time.

Mr. BOUCHER. Thank you very much, Ms. Bono Mack. The gentleman from Michigan, Mr. Stupak, is recognized for 2 minutes.

OPENING STATEMENT OF HON. BART STUPAK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. STUPAK. Thank you, Mr. Chairman, and thanks for convening the hearing and welcome to the Commission. The National Broadband Plan hits a number of important issues such as public safety, interoperability, transitioning the universal service phone towards broadband, and freeing up additional spectrum for commercial use.

I want to focus on the plan's recommendations for the construction of a national interoperable public safety broadband network. The plan's recommendation identifies an issue I have been highlighting for years: the need for a funding mechanism for the construction of an interoperable public safety network. The plan calls on Congress to establish the grant program within a year to assist on the construction of the network and create a funding mechanism.

If the FCC is intent on moving forward with auctioning the D block spectrum for commercial use, we should use 100 percent of those funds as a down payment on building this network. The FCC has recognized the need for public funding, provided an analysis of the capital expenditure costs of the network and projected ongoing maintenance costs. Now Congress must act. Congress must act to establish a long-term funding mechanism that pays for the maintenance costs of the network and ensure that covers all Americans.

Now, Mr. Chairman, again thanks for holding this hearing. I look forward to discussing with the Commission how we can move for-

ward on the public safety provisions as well as other provisions in the national broadband, and if we have time, a question or two—hopefully we will be allowed to ask a few questions on the FCC collaboration act that we have introduced to bring a little sunshine so we can do our job quickly, more efficiently, more effectively and protect the public interest. Thank you.

Mr. BOUCHER. Thank you, Mr. Stupak. The gentlelady from Tennessee, Ms. Blackburn, is recognized for two minutes.

OPENING STATEMENT OF HON. MARSHA BLACKBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mrs. BLACKBURN. Thank you, Mr. Chairman. I appreciate the hearing, and I want to welcome the Commission. We are so pleased that you are here. Needless to say, we have all been following what you have done with the broadband plan, and we are anxious to have a discussion with you.

A couple of quick points. Among my biggest concerns with the broadband plan is how these recommendations will affect private investment innovation and jobs creation. And because of this, I really am anxious to drill down a little bit deeper with all of you. You all know my district in Tennessee and know our creative community there and their continued expression of concerns with the availability of broadband.

And in this vein, Chairman Genachowski, I agree with Chairman Barton on this. I was hoping for stronger and more definitive language closing the door on reclassifying broadband under Title Two, and instead I have really found the language to be ambiguous. And I am hopeful that we are going to see some changes there or could see some changes there again. Again investment is a concern that I have. And as we all know, a reclassification to Title Two is nothing more than a stepping stone for implementing net neutrality, which I believe would be detrimental to a thriving telecommunications industry.

And before I yield back, I also want to flag for each of you a concern over what I think is a kind of a pretty toothless effort in the plan to curb copyright infringement. And I applaud your acknowledging the illegal distribution of copyrighted content being a problem. But I am anxious to get your thoughts on how we can put a little bit more heft behind that and continue to protect the innovations of those that are bringing next-generation technologies and uses about and also by creative community. And I yield back.

Mr. BOUCHER. Thank you very much, Ms. Blackburn. The gentleman from Pennsylvania, Mr. Doyle, is recognized for two minutes.

Mr. DOYLE. Thank you, Mr. Chairman. I will be brief. I was always taught that if you fail to plan, then you plan to fail. And looking over the broadband plan, I have to say congratulations. You all have passed. There is a lot of policy goals outlined in the plan. It sets the FCC on a bold plan of action, and it gives us, in Congress, a few things to do also.

I am not going to run down a laundry list, but I think that the plan to promote competition is much needed and well received.

Competitors need access to wires and spectrum in order to deliver more affordable and more innovative services.

Additionally the plan for Universal Service Fund reform is well thought out. I hope that the Commission also takes this up as soon as possible, even without a new bill out of Congress. Chairman Genachowski, you have a lot to be proud of in this plan, and I want to congratulate you and your team for their hard work. And I yield back.

Mr. BOUCHER. Thank you very much, Mr. Doyle. The gentleman from Alabama, Mr. Griffith, is recognized for two minutes.

Mr. GRIFFITH. Thank you, Mr. Chairman, and I will ask unanimous consent to submit my opening statement for the record.

Mr. BOUCHER. Without objection.

Mr. GRIFFITH. Just a few comments. I never thought I would ever see the FCC Commission. 15 year ago, I founded FM frequency and put it up for public notice, and seven years later, we got it on the air. So you can see that I am not pro-regulation. But I do believe that the report is done with a good heart and with the American people in mind.

I recognize that the competition that exists in the marketplace today has accomplished a great deal, and I hope that as we go through these hearing—and I am sure the debate will be spirited—I hope we have in mind that there is not a whole lot we can do to improve what has been done or in the spirit of what has been accomplished by private industry and investment. It has been significant.

So I appreciate you being here and look forward to the discussion. Thank you, Mr. Chairman. I yield back.

Mr. BOUCHER. Thank you, Mr. Griffith. The gentlelady from California, Ms. Matsui, is recognized for two minutes.

OPENING STATEMENT OF HON. DORIS O. MATSUI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. MATSUI. Thank you very much, Mr. Chairman, and thank you for calling today's hearing. I also would like to thank Chairman Genachowski and the other Commissioners for being with us today and for their work on the National Broadband Plan. I would also like to commend the FCC broadband team for their hard work and thoughtfulness in crafting a bold and visionary plan.

Though no plan of this magnitude is perfect, this plan demonstrates American leadership and will serve as a blueprint for the world to follow. I am particularly pleased that the plan aims to close this Nation's digital divide by recognizing the fact that millions of Americans, particularly in such economic times, simply cannot afford the high cost of broadband.

Last September, I introduce the Broadband Affordability Act that would expand the USF Lifeline Assistance Program for universal broadband adoption to help ensure all Americans living in urban, suburban, and rural areas have access to affordable broadband services. I applaud the FCC for including my proposal as essential recommendations to increase broadband adoption rates among lower income household in the National Broadband Plan. In doing so, we will take a major step toward closing the digital divide, and

I look forward to working with my colleagues and the FCC to make this a reality.

The plan also recognizes the importance of allocating more spectrum into the marketplace and ways to improve our Nation's education, infrastructure, health care, public safety systems, as well as our anchor institutions in promoting competition in our economy. The plan recognizes the critical role that broadband plays in moving our Nation toward a more sustainable path of greater energy independence and efficiency by including a series of recommendations to modernize our Nation's smart grid.

I plan to introduce legislation in the coming weeks that would complement many of the FCC recommendations on smart grid, so this Nation can promote a smarter electric grid that empowers consumers to make choices that can save us energy and can save them money. I am looking forward to working with my colleagues and the Commission on overseeing and implementing many of the important initiatives recommended in the National Broadband Plan.

I thank you, Mr. Chairman, for holding this important hearing, and I yield back the balance of my time.

Mr. BOUCHER. Thank you, Ms. Matsui. The gentleman from Nebraska, Mr. Terry, is recognized.

OPENING STATEMENT OF HON. LEE TERRY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. TERRY. Thank you, Mr. Chairman. I appreciate you holding this hearing. Mr. Chairman, thank you for being here and Commissioners, appreciate your input on the broadband plan. I hope that it lays a good overview. Generally I think it brought it from just a nebulous maybe 50,000 down to the 10,000-foot level, not really getting into the super-granular activities or details, which I felt was good in the sense that it may signal that we actually have a role in Congress.

And that is the theme I want to state here today is while I think you have done a good job of incorporating especially USF, I think Congress needs to take your plan, use that as the recommendations, but we need to do our job in Congress. Frankly I am uncomfortable with just saying you take the lead on all of this stuff. We are not going to deal with it. I think the opposite. The role is for us to do it, and I am going to take your plan as recommendations.

On the Republican side, we have heard a lot about private sector involvement here, and I want to make sure that when I read the plan, I read that, yes, there were some regulatory type of policies outlined that we will have hopefully great debate within this committee on. But let us not short the private sector here. \$60 billion per year by the private sector, and ruling out high speed broadband in this Nation should not be glossed over.

We did \$8 to \$9 billion in the stimulus package over two years, so government spending and subsidy of broadband rollout is a small percentage. And if we start thinking that government is going to be the answer in rolling this out, we aren't going to get this plan adopted. So with that, I will yield back.

Mr. BOUCHER. Thank you very much, Mr. Terry. The gentleman from California, Mr. McNerney, is recognized for two minutes.

Mr. MCNERNEY. Well, I want to thank you, Mr. Chairman, for leading this important and timely hearing, and I want to commend the Commission for your hard work on this. This is a pretty comprehensive plan. You worked hard. The plan clearly includes many important issues, but I am only going to be able to focus on a couple of them.

A large part of my district has been severely hit by the economic downturn, and promoting job creation is my highest priority. It is significant that many of the companies in the telecommunication industry are still expanding even in the economic downturn, so there is something here that we want to capitalize on.

I am very excited by the job growth creation potential that implementing this plan can produce, and vigorous investments by private sector coupled by sensible policy will clearly benefit our entire Nation.

And finally I would like to ask the Commissioners to discuss briefly issues pertaining to spectrum allocation and special access. And with that, I yield back the balance of my time.

Mr. BOUCHER. Thank you very much, Mr. McNerney. The gentleman from Michigan, Mr. Rogers, is recognized for two minutes.

OPENING STATEMENT OF HON. MIKE ROGERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. ROGERS. Thank you, Mr. Chairman. I hope we get to some resolve here of where we are going, and I think Title Two reclassification is dangerous at best. Just the fact that this plan exists has put a shiver of cold in the investment community about where we go in broadband development.

We often want to talk about what has made America great. It wasn't the United States Congress. It wasn't the executive branch. It was private entrepreneurs putting capital at risk and making things happen, and the reason we have—and my friends on the other side of the aisle say 27 percent or whatever figure they use. It is because the private market is going to pursue a plan that allows a return on the investment so they can go to the next phase of that investment.

And any time that we seek to stand in the way of that, we are going to get a horrible outcome. And just the notion that we are even talking about going to net neutrality, more regulation. I mean if you look at why it took so long for wireless to get to where it is and phones to get where it is, it is because they base the original rules, regulations, and laws on the Common Carrier Act for railroads in 1897. And we applied it to phones. This is exactly that same kind of iron horse regulatory ideas on an industry that is changing so fast we can't keep up with it. Satellites are going to get ready to go to 4G pretty soon. What we ought to do is get out of their way and let competitive reign the day.

The reason those other countries did it the way they did is because they don't have economies like the United States. They don't have the kind of investment and investors that the United States does. There is a marketplace here that is attracting money. My fear is if we continue down this path, we will stop that investment, and I think we will do far more harm than good.

Doesn't mean there is not a role for government. I think we can work on those things, but the very principle and idea that you have thrown this into—this uncertainty in the marketplace I think is a little bit dangerous to what I think is competitive development of broadband, and I would yield back my time.

Mr. BOUCHER. Thank you very much, Mr. Rogers. The gentleman from Connecticut, Mr. Murphy, is recognized for two minutes.

Mr. MURPHY. Thank you, Mr. Chairman. I will associate myself with a portion of Mr. Rogers' remarks except to say that I think what has made this country great are free markets, but structured free markets. And I appreciate the hard work the Commission has put into this plan. It can certainly be improved, but it provides, I think, the type of structure that we need to make sure that the type of robust capital investment that we know is going to build out our broadband system is done in the fairest means possible.

I would just like to associate myself with remarks made with respect to the issue of online piracy, and I understand that in the open Internet notice of proposed rulemaking, the Chairman has stated very clearly that the Internet and this new broadband platform should not be a shield for violations of the law and copyright infringement. But I think you are hearing from both sides of the aisle that there is a little bit of dissatisfaction on the amount of focus in this report on that issue.

This country is losing billions of dollars every year to Internet piracy, and the trend is going in only one direction. As much as we can ask content providers to do, ultimately, I think, the solution largely lies in the hands of those distribution networks that are going to take advantage of what is now a partially federally funded broadband network.

And so I think you are hearing from a number of people that would love to hear some comments from the Commission on how we think we either revise the plan or add to the plan with respect to piracy in order to guard copyright moving forward. But all in all, I would agree with many of my colleagues to say that this is a product of, I think, great labor and, I think, great importance for the rollout of broadband in this country, and I yield back.

Mr. BOUCHER. Thank you very much, Mr. Murphy. The gentleman from Missouri, Mr. Blunt, is recognized for two minutes.

Mr. BLUNT. Thank you, Mr. Chairman. I have remarks for the record. In addition to that, I would just like to say that the comments that I made and others made in our hearing on this last year about unserved versus underserved areas continue to trouble me. As we go into the finding of what unserved areas are, it does seem to me that in rural areas particularly, you run the great risk of making that service untenable because you create a competitor in a marketplace that can barely handle one provider. I am concerned by that.

I am concerned by what net neutrality is in this plan that might lead to needless regulation, unbundling mandates. All of those things discourage the build-outs in the areas that we need them. I do think that the Universal Service Reform and the spectrum planks, the new plan probably keep us away from that regulation if we focus on them instead of the other things.

But, Mr. Chairman and Mr. Stearns, thank you for holding this hearing. I hope that we do become vigorous and active partners with the Commission as you now look at the work product you put before us, and that we don't make the kind of mistakes that slow down the great expansion that we have had in broadband over the last few years. And I yield back, Mr. Chairman.

Mr. BOUCHER. Thank you very much, Mr. Blunt. The gentleman from North Carolina, Mr. Butterfield, is recognized for two minutes.

OPENING STATEMENT OF HON. G.K. BUTTERFIELD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. BUTTERFIELD. Thank you, Mr. Chairman. I too want to thank you for convening this hearing and thank the five Commissioners for coming forward today to have this conversation with all of us. I too have a copy of the plan. I must concede that I have not read every word of it, but I certainly plan to. It is a very comprehensive plan, and I want to thank you for your work.

From what I can understand, the plan states that 95 percent of households in America do indeed have access to broadband while 5 percent, 1 out of 20, do not. Well, my district in eastern North Carolina, the rural district that I represent is home to many of those households who are without very basic access to broadband. With commerce, education, and communication being just a few of the everyday tasks that are moving online, those who cannot access broadband become further disenfranchised and unprepared for achieving a successful and productive life.

It is particularly important that efforts be focused on connecting the unconnected first so that students, teacher, job seekers, and others like those in my district have the opportunity to play on equal footing. The less densely populated economically depressed areas like much of my district are no less in need of access to quality broadband and are certainly no less deserving. I hope we can build on the plan's goals and recommendations.

The National Broadband Plan enumerates six long-term goals with hopes of achieving them by 2020. The goals are indeed very ambitious but certainly achievable so long as government moves quickly and responsibly to update its communications policy framework while partnering and empowering private industry to robustly invest in network expansion and improvements.

I would like to note the extraordinary private investments made to building the networks we use every day. As Congress and the FCC move forward, it is important we take that investment into account when drafting policy around the goals of the plan.

For example, between '06 and '08, AT&T, a very responsible corporation, invested more than \$1.2 billion in my state of North Carolina in an effort to enhance and improve our networks. Increased regulations and mandates on the companies that built these networks with their private dollars may not be the best way to achieve the goals of the plan.

So it is critical, in closing, that policymakers and regulators work in concert—that is the key word—work in concert with private in-

dustry when drafting those policies. Thank you for your indulgence, Mr. Chairman. I yield back.

Mr. BOUCHER. Thank you very much, Mr. Butterfield. The gentlelady from Colorado, Ms. DeGette, is recognized for two minutes.

Ms. DEGETTE. Thank you very much, Mr. Chairman. I will put my full statement in the record. I just want to mention a couple of things. I agree with my colleagues that this National Broadband Plan is a comprehensive, and it is a forward-looking document, and I strongly share the goals. I want to raise just a couple of issues.

The first one is cities like Denver, which is my district, are often the first to get access to the first communications technologies. But access alone is not enough. What we have to remember as we go forward is that broadband also has to be affordable for low-income Americans, many of whom live in urban areas like my area and who have seen a real divide, even though broadband is accessible in urban areas.

Second issue I want to mention is the conflicts with existing uses that we are going to have to resolve. The broadband plan recommends allocating new spectrum to satisfy consumer demand for wireless data networks. And this could provide important benefits, but it also raises questions about how, if a significant transfer of spectrum to broadband is needed, we can accomplish the objective in the fairest way to existing spectrum uses. And so this is one of the questions that I hope that we can explore today.

I want to just mention two other aspects of this plan that I am very pleased to see. The first one is the emphasis on health IT which is going to be very important as we move forward with our new health care plan in this country, and which we have seen in my district with Denver Health how much health IT can help with patient outcomes and efficiency.

Secondly, I am very pleased to see some mention of expanding in national smart energy grid. I think a smart grid is going to be very important as we get independent from foreign oil and develop alternative energy.

With that, Mr. Chairman, I will yield back.

Mr. BOUCHER. Thank you very much, Ms. DeGette. The gentlelady from Florida, Ms. Castor, is recognized for two minutes.

Ms. CASTOR. Thank you, Chairman Boucher, for calling this hearing, and thank you, Chairman Genachowski and the entire FCC for your work on the National Broadband Plan. You have given us a lot to consider, and there are many competing interests here, but I think our overarching goal must be to ensure that all Americans have access to broadband and the many benefits that the technology has to offer. And whether we live in big cities and urban areas or small rural towns, whether we are rich or poor, black or white, broadband hold so much promise.

And it appears that the National Broadband Plan is a commitment to finally getting everyone on board and ensuring that we are a Nation that is united by the most important technology since the invention of the telephone. So we must continue to modernize and innovate.

I would like to direct your attention to a couple of the proposals that are particularly important to the hard-working families in my

state. First, the Universal Service Fund. Florida historically has paid a lot into it and hasn't gotten much back. So I would like to hear how the broadband plan will correct this past discrepancy. Do you have a commitment to the use of spectrum for low-cost wireless service in communities where affordability remains a high barrier to broadband use? I know there are a lot of students and teachers and older folks who will need our help accessing this vital technology.

The E-rate program should be robustly funded in order to ensure that schools and libraries have access to affordable broadband including wireless connectivity. Reform of the universal service fee must address these issues going forward.

Second, a public safety network is indispensable to the functioning of our communities in an emergency, and Florida hurricane season is just around the corner. That means our first responders will be on high alert should a big storm knock out power and wreak havoc on our coastal communities. There is a lot of debate as to whether a dedicated block of spectrum would serve our first responders better than a shared network, and I would like to hear more on this proposal.

Overall, I am supportive of the recommendations in the plan. I think it strikes a good balance between the incentives for innovation and incorporates practical mechanism to bring the digital divide. Congratulations.

Mr. BOUCHER. Thank you very much, Ms. Castor. The gentle lady from the Virgin Islands, Ms. Christensen, is recognized for two minutes.

Mrs. CHRISTENSEN. Thank you, Chairman Boucher, and thank you for holding this hearing so that we can go home better informed about the National Broadband Plan that was unveiled by the FCC this week. Although the number of people connected to broadband in this country has gone from 8 million in 2000 to almost 200 million last year, far too many families are still not connected, and our world rankings are far too low.

So while this plan is a solid blueprint, I do look forward to implementations closing the gap and propelling us into the world leadership that we used to have before. It cannot be that because they are not connected, children can't do their homework, individuals can't access jobs, small businesses cannot buy or sell competitively, health care cannot reach everyone who needs it, and our public safety agencies cannot communicate well enough to protect us in an emergency. So this plan needs to ensure all of this while preserving and stimulating competitiveness in keeping costs affordable is quite a challenge you and all of us have ahead of us.

We will monitor with great interest the reforming of the Universal Service Fund and the E-rate which we have had problems with in the Virgin Islands as well as a freeing up and an auctioning of the spectrum.

I have several concerns. One being, of course, that the territories be fully included. The rest of them I hope to get to in questions. And again I want to commend you, Chairman Genachowski, and the other Commissioners for the transparent, open, and comprehensive process, and welcome all of you back to the subcommittee.

Mr. BOUCHER. Thank you, Ms. Christensen. The gentleman from New York, Mr. Weiner, is recognized for two minutes.

OPENING STATEMENT OF HON. ANTHONY D. WEINER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. WEINER. Thank you very much, Mr. Chairman. I want to welcome members of the Commission here and express the gratitude of our committee for the work that went into this report. I want to associate myself with the remarks of Mr. Markey, and I do want to just make a brief mention of my good friend Mr. Shimkus and his remarks. He is able to work up a level of indignancy by 10:00 most of us can't muster in a whole day, but it is important to note that having a conversation about broadband in our economy without looking at what we are doing and not doing and how we are slipping in relation to other states and other nations is just folly.

You know we have learned with our history with the Internet and technology, it is a great job producer for us. It is a way we keep our competitive advantage. It would be akin to opening up a shoe store in a neighborhood and saying I'm not going to look at any other shoe stores in the neighborhood or in the neighborhood counties to find out what they are doing right or wrong. We have to think that way, and too often we—and it is a constitutional problem probably—we think for a year to the next budget, to the next fiscal year, to the next appropriation bill. This document that was produced by the FCC takes that and turns it on its head and said we have to look for the next generation, for the next 30 years, for the next 50 years. Admittedly, there are going to be some elements of this plan that are going to maybe create problems for one sector. Maybe they are going to encourage other sectors, but that is exactly the type of thinking that we should want to do.

We have to remember as we look at this committee that we are looking for opportunities in this document to produce thousands and thousands and thousands of jobs. But we are not going to know exactly what they are going to look like. That is the way technology always operates. We are at our best in this body and in this subcommittee when we are laying the groundwork for innovation.

The FCC has done it, and I want to thank you very much for setting us on this path. We are going to change a lot of words in this document. We are going to make some amendments to it, and we are going to find our own way as a legislature often does, but as a blueprint, you have really scored. And I want to express the gratitude of our country for your doing so.

Mr. BOUCHER. Thank you very much, Mr. Weiner. The gentleman from Ohio, Mr. Space, is recognized for two minutes.

OPENING STATEMENT OF HON. ZACHARY T. SPACE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. SPACE. Thanks, Mr. Chairman, for holding this hearing. I would like to thank Chairman Genachowski and the Commissions along with your staff for a lot of hard work. I know a lot of people have worked very hard around here lately, but I don't know that

anyone has matched that you and your teams have put in. So thank you.

There are a lot of exciting and, I think, forward thinking aspects to the National Broadband Plan that you have prepared. And I would like to highlight two areas of interest that I believe will benefit the constituents that I represent back in Ohio.

First I am delighted to see that the plan proposed to transform the existing high costs of the Universal Service Fund Into the Connect America fund that will support broadband networks. As stated in the testimony before us this morning, 95 percent of Americans have access to broadband. While that is obviously very impressive, we still have a lot of work to do to cover that five percent, many of whom within rural districts and have no options when it comes to broadband.

Many of those people are my constituents in southern Ohio, and transitioning the high-cost fund to explicitly support broadband deployment to rural areas would be a tremendous help to the residents of Appalachian Ohio.

Second, I am encouraged to see the plan's recommendations on expanding the FCC's Rural Health Care Pilot Program. In 2007, the southern Ohio healthcare network was successful in obtaining a pilot program grant to build a fiber optic network across about 12 counties to connect health care facilities. This has paved the way for further broadband expansion in the region, and at present we are attempting to leverage this previous investment to deploy broadband, actually middle mile fiber, to 34 counties in southern Ohio that again in many places have no options.

Success breeds success, and we must strengthen the Rural Health Care Pilot Program by making it permanent as the plan suggests and by permitting for-profit entities serving vulnerable populations to be eligible. I stand ready to assist on this front. And in closing, I reiterate my support for the goals addressed in the plan, and I very much look forward to working with the Commission and my colleagues here in Congress and industry partners to realize our Nation's broadband potential. Thank you and I yield back.

Mr. BOUCHER. Thank you, Mr. Space. The gentleman from Illinois, Mr. Rush, is recognized for two minutes.

OPENING STATEMENT OF HON. BOBBY L. RUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. RUSH. Thank you, Mr. Chairman, and, Mr. Chairman, I thank you for conducting this hearing, and also the Chairman of the FCC, Chairman Genachowski, and the other Commissioners. And I want to join my colleagues in congratulating you on a job well done.

As members of Congress, we have seen far more than our fair share of plans before, and they have promised us the sun, the moon, the stars, the celestial bodies seen and unseen, known and unknown. But very few have been heralded so highly as this plan and its promises to enhance America's ability to improve the life choices of the people and to maintain her status as a global leader.

While that may sound a bit skeptical about this plan, I am really not. Much of it sounds good on paper and certainly makes for good

and polished sound bites. I understand the power of new communication, technologies, and the importance of innovation at least in people and communities' commercial efficiency and productivity. Same as in our precious energy resources as well as ability to safeguard public safety.

The promise of widespread public access is important for our Nation. The unique opportunity we are presented with at this moment in history is unprecedented, and I want to ensure that Congress and the FCC serve the best interests of the American people.

Mr. Chairman, if we don't execute this plan comprehensively and thoughtfully, we will miss out on a huge opportunity while also setting back the short-term and long-term technology needs of the American people.

I am therefore interested in hearing this Commission's discussion especially on how the adoption of the broadband plan can help to drive our economy out of its current doldrums by stimulating new jobs as well as opportunities for small business and innovative entrepreneurs. The plan as it currently reads does not provide any recommendations however on how small minority businesses and similarly the American economy, and I think the plan should. I think this is a stunning omission, and, Mr. Chairman, with that said, I yield back the balance of my time.

Mr. BOUCHER. Thank you very much, Mr. Rush. The gentleman from Vermont, Mr. Welch, is recognized for two minutes.

Mr. WELCH. Thank you very much, Mr. Chairman. Two points and one observation. First the work that you are doing is absolutely critical to the future economic growth of this country, and what you have presented is a solid plan that embraces competition, and acknowledgement if we are going to have competition, we have to have access to the wires and the spectrum. And we have to have universal service so it is going to reach the most remote parts of our tremendous country.

Second, you have done this on a bipartisan basis, and I got to tell you that is pretty unique around here. And I want to thank you for that. And this is my observation. You have taken a very difficult topic, presented a solid plan, and done it on a bipartisan basis. And it is so effective, you may embarrass us into trying to do the same. Thank you. I yield back.

Mr. BOUCHER. Thank you, Mr. Welch. The gentleman from Washington State, Mr. Inslee, is recognized for two minutes.

Mr. INSLEE. Thank you. I just want to note the work you are doing is helpful to improve our health reform efforts, which are new and still building. I just want to point one instance where our broadband policy can help the city of Republic, Washington, eastern Washington. We essentially have to turn off all the computers in Republic, Washington if you want to send an x-ray from Republic to have it read by a diagnostician in Seattle. That is unacceptable. This is part of the health reform effort as well.

I just want to make three quick points. First, I appreciate the plan's effort to complete our white spaces program which would free up spectrum, could allow the geniuses who are coming to create these new technologies. It is very exciting to get that done.

Second, I am pleased that you support essentially the direction, the moving in our spectrum allocation provision. We passed the bill

in this committee to get that done, and you have joined us in that effort. We hope that will actually be a while before we even get the next version of the report out.

Third, I am pleased that you got the public safety block. We have some ideas how to move forward. This is very frustrating to all of us to not to have an interoperable system at this late, late, late date with our law enforcement officers not having—and firefighters not having systems. Got to get that job done. I think we are on the right track. Thank you.

Mr. BOUCHER. Mr. Inslee, thank you very much, and thanks to all members for being expeditious this morning. Well, you have heard from us. Now we get to hear from you, and we would like to welcome the members of the Federal Communications Commission. The Chairman, Julius Genachowski, Commissioner Michael Copps, Commissioner Robert McDowell, Commissioner Mignon Clyburn, and Commissioner Meredith Baker. Without objection, your prepared written statements will be made a part of the record. We would welcome your oral summaries and ask that you keep those to approximately five minutes so that we will have ample time to question you.

Chairman Genachowski, we welcome you, and we will be happy to hear your statement.

STATEMENTS OF JULIUS GENACHOWSKI, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; MICHAEL J. COPPS, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; ROBERT M. McDOWELL, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; MIGNON L. CLYBURN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; AND MEREDITH ATWELL BAKER, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF JULIUS GENACHOWSKI

Mr. GENACHOWSKI. Thank you, Chairman Boucher, Ranking Member Stearns, members of the committee. Thank you all for the chance to testify in the National Broadband Plan. The plan addresses the opportunities and challenges of broadband high-speed Internet in a way that reflects a strong conviction that as our Nation rebuilds its economy, broadband can and must serve as a foundation for long-term economic growth.

Mr. BOUCHER. Chairman Genachowski, if I could get you to pull that microphone just a little bit closer, we can hear you better.

Mr. GENACHOWSKI. How is that?

Mr. BOUCHER. That is much better. Thank you.

Mr. GENACHOWSKI. A foundation broadband for long-term economic growth, ongoing investment and enduring job creation. Multiple studies tell us the same thing. Even modest increases in broadband adoption can yield hundreds of thousands of new jobs. A broad array of people throughout the ecosystem, investors, entrepreneurs, business leaders, labor leaders, consumer advocates, and others agree that if the U.S. has world-leading broadband networks, we will see a powerful new wave of innovation in business and job creation here at home.

The title of one recent op-ed written by the CEO of a major American technology company said it well. Fix the bridges but don't forget broadband. Now we have real work to do to seize the opportunities of broadband. The status quo is not good enough. Notwithstanding the many positive and even exciting developments in the U.S. around wired and wireless broadband, our country is not where it should be or needs to be to maintain our global competitiveness in our rapidly changing world.

First, the U.S. is lagging globally as several studies show, as low as seventeenth in one broadband study, and 40th out of 40 among countries surveyed in the rate of change of innovative capacity. That tells us that other countries are improving faster than the U.S.

Second, certain communities within the U.S. are lagging. Rural Americans, low-income Americans, African Americans, Hispanic Americans, seniors, tribal communities, Americans with disabilities, for these groups, adoption rates are much lower than the 65 percent national average, which is itself much lower than other countries and much lower than what we would tolerate for vital infrastructure like electricity or telephones.

Altogether, 93 million Americans are not connected to broadband at home, including 13 million children, and 14 million Americans do not have access to broadband where they live even if they want it. That is too many.

Third, the costs of digital inclusion grow higher every day. Several years ago, not having broadband could have been thought by some to be simply an inconvenience. Now broadband access and digital literacy are essential to participation in our economy and our democracy. As I believe Congress anticipated when it directed the FCC to prepare a National Broadband Plan, the plan the FCC has submitted is a plan for action and a call to action that these times require.

The terrific FCC staff and broadband team have produced a team that is as strong as it is nonideological and nonpartisan. It was the outcome of an extraordinary process that has been unprecedented in so many respects, unprecedented in its openness and transparency, in the breadth and depth of public participation and its professionalism, and in its focus on data and analytical rigor.

The plan sets ambitious goals for the country, including access for every American to robust and affordable broadband services and the skills to subscribe, broadband speed of at least one gigabyte to at least one library, school, or other public anchor institution in every community, affordable hundred megabytes per second to 100 million households, world leading mobile innovation with the fastest and most extensive wireless networks of any nation, access for every first responder to a nationwide interoperable broadband public safety network.

In addition to these and other goals, the plan lays out a robust, sensible, and efficient roadmap for achieving them. Among other things, it proposes a once-in-a-generation transformation of the Universal Service Fund from yesterday's technology to tomorrow's. It proposes recovering and unleashing licensed to unlicensed spectrum so that we can head off the looming spectrum crisis and lead the world in mobile. It proposes ways to cut red tape, lower the

cost to private investment, and accelerate deployment of wired and wireless networks. It proposes initiatives to foster vibrant competition and empower consumers. It proposes a roadmap to tackle vital inclusion challenges so that everyone everywhere can enjoy the benefits of broadband, and it proposes ways in which broadband can be deployed to help solve many of our Nation's challenges including education, health care, energy and public safety.

I am heartened that a broad array of companies as well as non-profits, consumer and public interest groups have voiced strong support for the plan. If I may read what John Chambers, CEO of Cisco, wrote in Business Week, "the vital communication systems that make our economy work and serve as a platform for business innovation and social interaction are second class." Sadly, many of us have accepted that. It is time to overcome our broadband complacency. The National Broadband Plan sent to Congress by the FCC is critical to our economic and national security. Without a plan, we simply cannot compete.

I believe the plan will deliver extremely significant economic and fiscal benefits over time as broadband is harnessed for job creation and new investment. I believe the plan is fiscally prudent, respecting the primacy of private investment and identifying opportunities for billions of dollars in spectrum auctions.

As we move forward, I look forward to working with members of the committee on the broadband plan and on all ideas to unleash the power of broadband, the technology with the greatest potential since the advent of electricity to advance our economic and social well-being to the benefit of all Americans. Thank you, Mr. Chairman.

[The prepared statement of Mr. Genachowski follows:]

**Written Statement of
Julius Genachowski
Chairman
Federal Communications Commission**

**“Oversight of the Federal Communications Commission:
The National Broadband Plan”
Hearing before the
Subcommittee on Communications, Technology, and the Internet
United States Senate
March 25, 2010**

Chairman Boucher, Ranking Member Stearns, Members of the Committee, thank you for the opportunity to testify today on the National Broadband Plan.

The Plan, as you know, stems from a Congressional directive that the FCC prepare a “national broadband plan” that “shall seek to ensure that all people of the United States have access to broadband capability,” include a strategy for affordability and adoption of broadband, and also recommend ways that broadband can be harnesses to tackle important “national purposes.”

The Plan addresses each aspect of these Congressional requirements in a way that reflects a strong conviction that, as our nation rebuilds its economy, broadband can and must serve as a foundation for long-term economic growth, ongoing investment, and enduring job creation.

Broadband is the indispensable infrastructure of the digital age – the 21st Century equivalent of what canals, railroads, highways, the telephone, and electricity were for previous generations.

Multiple studies tell us the same thing – even modest increases in broadband adoption can yield hundreds of thousands of new jobs.

Broadband increases the velocity of information, and the velocity of commerce.

A broad array of people throughout the ecosystem – investors, entrepreneurs, business leaders, labor leaders, consumer advocates and others – agree that if the United States has world-leading broadband networks, we will see a powerful new wave of innovation, and business and job creation here at home.

The title of one recent op-ed written by the CEO of a major American technology company said it well: “Fix the bridges, but don’t forget broadband.”

We have work to do to seize the opportunities of broadband. The status quo is not good enough. The record compiled during the FCC’s broadband proceeding shows that, notwithstanding the many exciting and positive developments in the U.S. around wired and wireless broadband, our country is not where it should be – or needs to be – to maintain our global competitiveness in this rapidly changing world.

First, studies place the U.S. as low as 16th when it comes to important attributes of broadband adoption and speeds. Our record shows roughly 65% adoption in the U.S. compared to significantly higher adoption percentages for some countries in Asia and Western Europe.

One study ranks the U.S. 6th out of 40 industrial countries in innovative competitiveness – and 40th out of the 40 in “the rate of change in innovative capacity.” The first of those rankings is enough of a concern. That last-place statistic is the canary in the coal mine.

It shows that we will not succeed by standing still, or even moving at our current pace.

Second, certain communities *within* the U.S. are lagging – rural Americans, low-income Americans, minorities, seniors, Tribal communities, and Americans with disabilities. For these groups, adoption rates are much lower than 65%.

Altogether, 93 million Americans are not connected to broadband at home, including 13 million children. And 14 million Americans do not have access to broadband where they live, even if they want it.

Finally, the work of the FCC staff on the broadband plan showed that the costs of digital exclusion grow higher every day. Several years ago, not having broadband could have been thought by some to simply be an inconvenience. Now, broadband access and digital literacy are essential to participation in our economy and our democracy.

- For example, more and more companies are posting job openings *exclusively* online. If someone is unemployed and does not have access to broadband, opportunities are passing them by.
- Children are increasingly given homework and research assignments that require online access. Studies show that combining in-person instruction with online learning can significantly improve educational results. Children are at a disadvantage if they can't connect to broadband at home, or are in schools with inadequate broadband connections.

As I believe Congress anticipated when it directed the FCC to prepare a National Broadband Plan, the plan that the FCC has submitted is a plan for action, and a call to action, that these times demand.

The staff has produced a plan that is as strong as it is non-ideological and non-partisan. It was the outcome of an extraordinary process that has been unprecedented in many respects: unprecedented in its openness and transparency; in the breadth and depth of public participation; in its professionalism; and in its focus on data and its analytical rigor.

The Plan sets ambitious goals for the country, including:

- Access for every American to robust and affordable broadband service and to the skills to subscribe.
- Broadband speed of at least 1 gigabit to at least one library, school, or other public anchor institution in every community in the country.

- Affordable 100 megabits per second to 100 million households.
- World leading mobile innovation, with the fastest and most extensive wireless networks of any nation.
- Access for every first-responder to a nationwide, interoperable broadband public safety network.

In addition to these and other goals, the Plan lays out a robust, sensible and efficient roadmap for achieving them:

- It proposes a once-in-a-generation transformation of the Universal Service Fund from yesterday's technology to tomorrow's.
- It proposes recovering and unleashing licensed and unlicensed spectrum so that we can lead the world in mobile.
- It proposes ways to cut red tape, lower the cost of private investment, and accelerate deployment of wired and wireless networks.
- It proposes initiatives to foster vibrant and competitive free markets and empower consumers.
- It proposes a roadmap to tackle vital inclusion challenges, so that everyone, everywhere can enjoy the benefits of broadband.
- And it proposes ways in which broadband can be deployed to help solve many of our nation's major challenges: including education, health care, energy, and public safety.

All of these solutions – coupled with the Plan's recommendations on eGovernment – can not only lead to improvements and cost savings in each of area, they can increase demand for broadband, creating a virtuous cycle that will promote broadband build out and adoption, and help spur our economy.

On public safety, America's first responders are on the front lines every day protecting our families and communities. The National Broadband Plan lays out a multi-part gameplan designed to finally deliver on the recommendation of the 9/11 Commission that we have interoperable communications for our first responders.

I am pleased that several bi-partisan members of the 9/11 Commission – including Chair and Vice Chair Thomas Kean and Lee Hamilton – have praised the Plan's public safety provisions as “a clear roadmap for finally reaching th[e] goal” of interoperability.

I am similarly heartened that a broad array of companies – including companies that often disagree on key communications policies – as well as non-profits, consumer and public interest groups have voiced strong support for the Plan and for moving expeditiously toward implementation.

If I may pull out one quote, John Chambers, CEO of Cisco, wrote in *Business Week*: “The vital communications systems that make our economy work and serve as a platform for business innovation and social interactions are second-class. Sadly, many of us have accepted that. It’s time to overcome our broadband complacency. The national broadband plan sent to Congress by the Federal Communications Commission is critical to our economic and national security. Without a plan, we simply cannot compete.”

I believe the Plan will deliver extremely significant economic and fiscal benefits over time, as broadband is harnessed for job creation and new investment.

And cognizant of the challenging economic times we now confront, the Plan is fiscally prudent. The Plan recognizes the overwhelming primacy of private investment in achieving our national broadband goals. And it identifies opportunities for new spectrum auctions that could generate billions in revenue, exceeding any funding or investments that the Plan suggests for Congressional consideration.

As we move forward, working with this Committee and all stakeholders, the same principles that guided the creation of this plan will guide its implementation, including:

- Processes that are open, participatory, fact-based, and analytically rigorous.
- A recognition of the transformative power of high-speed Internet.
- The essential role of private investment in extending broadband networks across our Nation.
- The profound importance of vibrant competition to bring consumers the best services at the best prices, and to spur world-leading innovation and ongoing investment.
- The necessity of tackling vital inclusion challenges and promoting universal digital literacy, so that everyone, everywhere can enjoy the benefits of a broadband internet that is open, safe, and trusted.
- And a recognition that government has a crucial, but restrained, role to play, focusing with laser-like precision on efficient and effective solutions.

As the Executive Director of the agency’s broadband effort, Blair Levin, said: “This plan is in *beta* and always will be.” Like the Internet itself, the plan should change in light of new developments. Implementation requires a long-term commitment to measuring progress and adjusting to improve performance. But evaluation is no excuse for paralysis.

The important point is to act on the challenges and opportunities of broadband. Other countries are doing so; they are developing infrastructure to attract technology innovators. A recent *New York Times* article reported that, for the first time, the Chief Technology Officer of a major American tech company, has moved to China. Reporting from China, the reporter wrote:

“Companies – and their engineers – are being drawn here more and more as China develops a high-tech economy that increasingly competes directly with the United States.”

In the 21st century digital economy, to stand still is to fall behind. I look forward to working with Members of the Committee on our broadband plan and on all ideas to unleash the power of broadband, a technology with the greatest potential since the advent of electricity to advance our economic and social well-being, to the benefit of all Americans.

Thank you.

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Mr. BOUCHER. Thank you, Chairman Genachowski. Commissioner Copps.

STATEMENT OF MICHAEL COPPS

Mr. COPPS. Good morning and thank you, Chairman Boucher, Ranking Member Stearns, members of the subcommittee for having us up here today to discuss the National Broadband Plan. This is something, as many of you know, that has been near and dear to me for the almost nine years that I have been at the Commission.

I had long lamented our Nation's lack of a broadband strategy in a competitive world where other nations were leaving in the digital dust. Now that has changed. We have a roadmap. We have set our compass on due north. We know where we want to go, and we are setting off down that road. At last we begin to walk the broadband walk.

We head down this road not because broadband is some technophile's dream or some cool new tool, but because of the dawning realization that high value broadband is the great enabler of our time. This technology infrastructure intersects with just about every great challenge confronting our country today. Jobs, business growth, education, energy, the environment, international competitiveness, health care, overcoming disabilities, opening doors of equal opportunity, news and information, and our democratic dialogue, there is no solution to any of these challenges that does not have a broadband component to it. Now we understand.

So it was music to my ears when Congress called for the development of National Broadband Plan. Under the visionary leadership of Chairman Genachowski and with the hard work of an impressive FCC team, and in the most open and transparent process I have witnessed at the Commission, we now have a plan with clear objectives and a considered strategy aimed at ensuring that everyone in this country has equal opportunity in this new digital age, no matter who they are, where they live, or the particular circumstances of their individual lives.

Foremost among our charges is digital inclusion. Every one of our citizens must have access to this enabling technology in order to participate fully in 21st century life. You won't get a job without it. You won't be safe without it. You can't be well educated without it. You cannot be an engaged citizen without it. So surely America cannot afford to have any digital divides between haves and havenots, between those living in big cities and those in rural areas or tribal lands, between the able-bodied and people with disabilities.

Broadband must leave no American behind, including the original Americans, Native Americans. I encourage the broadband team to make sure this plan works for Indian country, and I am pleased with the recommendations that have been delivered. I also wanted to ensure that the plan was aimed at providing full accessibility to persons with disabilities. These are folks who ask nothing more than an equal shot at being fully productive citizens, and broadband can make that so much more achievable if we get it to them. My written testimony elaborates on these two points.

Let me also very quickly say how pleased I am that the plan addresses the need for better research and development efforts in our

society and, of course, pleased about the public safety plan, which we will talk about.

I want to spend my last couple minutes on the perhaps less tangible but no less important dimensions of broadband. As our information infrastructure begins to migrate online, we becoming increasingly dependent upon broadband for news and information, for our civic engagement, for our democratic dialogue. America's future town square will be paved with broadband bricks. We need to make sure it is available to all and open to all.

With high-speed Internet, those who are connected can have the world at their fingertips. For the unconnected, it is beyond their reach. An increase of technology does not by itself, however, guarantee a more informed citizenry. Neither does just hooking everybody up to broadband. A well-connected nation does not equate to a well-informed nation without significant effort. Put another way, a nation connected but not informed or civically engaged is about as useful to democracy as a plugged-in lamp with no light bulb.

I believe that our country's democratic dialogue will suffer if the same harms that have been inflicted on traditional media are allowed to undercut the potential of new media in the digital age.

Time happily spares you my extended remarks on the subject, but we all know journalism is in trouble. Journalism is at crossroads, and we better do something about how the American people are going to receive the news and information we need in a world where the town square is going broadband and where a critically important public interest has somehow to be safeguarded. Any viable solutions will have to address both traditional media and online media. And I am pleased that the National Broadband Plan recognizes the need to come to terms with the news and information implications of the digital transition.

I look forward to working on this with the members of this subcommittee. Each of the Commissioners would have, I am certain, some variations on the plan that has been presented. In matters involving the reclamation of spectrum, for example, I will be especially vigilant that nothing we do decreases the already scarce diversity we have in programming or in media ownership. Every local voice that disappears runs against the grain of the public interest.

Regarding competition in our telecommunications industries, it will take great vigilance to ensure that consumers in our present consolidated environment can have more access to competitive providers. This may require some very tough decisions, but I believe the plan provides ample opportunity for us to tackle and resolve such problems as we proceed.

My final comment is on an issue I try to highlight every time I come before you. It is the need to facilitate the work of the Commissioners by modifying the closed meeting rule that prohibits more than two of us ever talking together and sharing our experiences about the great issues before the Commission. My experience has shown me that this has had pernicious and unintended consequences, stifling collaborative discussions among colleagues, delaying timely decision-making by the agency, and short-changing the public interest.

I note the Representatives Stupak, Eshoo, and Doyle have introduced legislation to correct this. I believe the legislation they have introduced would constitute a major a reform of the Commission procedures as any that I can contemplate. Thank you for the opportunity to testify today, and I look forward to your comments, your guidance, and your questions.

[The prepared statement of Mr. Copps follows:]

**TESTIMONY OF FCC COMMISSIONER MICHAEL J. COPPS
U.S. HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET
“THE NATIONAL BROADBAND PLAN”**

MARCH 25, 2010

Good morning Chairman Boucher, Ranking Member Stearns, and Members of the Subcommittee. When I put today’s hearing on my calendar, I realized that it was one year ago this week that I sat before you as Acting Chair of the FCC testifying on the Commission’s efforts to prepare the American people for the digital television transition. That was no small undertaking. I am once again privileged to come before you today, along with Chairman Genachowski and my colleagues, to discuss another great task being undertaken by the FCC—to ensure that every American has high-speed, opportunity-creating, affordable broadband.

Since my confirmation as a newly-minted Commissioner in 2001, I have been calling for a national broadband strategy to ensure this nation’s going-forward global competitiveness. It is my belief that high-value broadband is the Great Enabler of our time. This technology infrastructure intersects with just about every great challenge confronting our nation today—jobs, business growth, education, energy, climate change and the environment, international competitiveness, health care, overcoming disabilities, opening doors of equal opportunity, news and information, our democratic dialogue. There is no solution for any of these challenges that does not have some broadband component to it. So, after seeing this country drop in broadband penetration rankings among OECD economies, it was music to my ears when Congress called for the development of a National Broadband Plan. Under the visionary leadership of Chairman Genachowski, and with the hard work of an impressive team of FCC staff, we now have a Plan with clear objectives and a considered strategy aimed at ensuring that everyone in this country has equal opportunity in this new Digital Age, no matter who they are, where they live, or the

particular circumstances of their individual lives.

The process to develop this Plan has been the most comprehensive, open and transparent that I have ever seen at the Commission. The broadband team searched out a myriad of traditional and non-traditional stakeholders that needed to be heard, making a special effort to be inclusive of those without a corporate lobbyist or lawyer working for them in Washington. After all, I strongly believe that a broadband policy *for* the American people should be a broadband policy *of* and *by* the American people.

The goal of a broadband plan, in my opinion, should be to ensure a robust broadband ecosystem that serves the American people. And, I believe that this Plan can achieve this—with recommendations to reform the Universal Service Fund, identify additional licensed and unlicensed spectrum for wireless broadband, encourage ICT research and development, to name just a few.

I am pleased that the Plan has concrete recommendations for ensuring that the public safety community has access to the broadband tools it needs to protect American lives and property. The Commission finally has a plan based on a level of data and analysis far better than anything that has been available before. We've been saying this for some time—we simply have to get this done—and I think the Plan puts us in the direction of creating a much-needed, nationally-connected, interoperable broadband network for first responders to ensure the safety of all. The Plan addresses many of my priorities for broadband; I can't possibly delve into each of them here and do them any semblance of justice. I do want to highlight a few.

Foremost among them is digital inclusion. Every one of our citizens must have access to this enabling technology in order to participate fully in 21st century life. Access denied is opportunity denied. America cannot afford to have digital divides between haves and have-nots,

between those living in big cities and those living in rural areas or tribal lands, between the able-bodied and persons with disabilities. There is a huge and potentially debilitating irony here: this liberating and dynamic technology that can make so many things better could end, if we don't do the job thoroughly and do it right, by creating even wider divides in this country going forward than we have had in the past.

So broadband must leave no American behind—not African Americans, not Hispanic Americans, not Asian Americans, not disabled Americans, not poor Americans, not rural Americans, not inner-city Americans. And all Americans includes the original Americans—Native Americans. I have seen first-hand the unacceptable state of communications in much of Indian Country. Even the plain old telephone service that so many of us take for granted is at shockingly low levels of penetration there—below 70 per cent of Native American households. And we have no reliable data on the status of Internet subscribership on tribal lands, because no one has collected it. That's why I encouraged the broadband team to develop a Plan that works for Indian Country, and I am pleased with the recommendations they delivered. Implementation will give Native American communities the visibility they deserve at the FCC and will build upon the trust relationship that Bill Kennard did so much to promote while he was Chairman of the FCC.

Another important focus of the Plan is ensuring accessibility for persons with disabilities. In my time at the Commission, I have had the inspiring experience of working with numerous disabilities communities, beginning with my very first speech as a Commissioner, which was to a deaf and hard-of-hearing audience. I've come to see and appreciate the talents these folks have and to begin understanding the challenges they must constantly overcome—every day, all day. These are individuals with so much talent and dedication, and all they ask is

an equal shot at being productive members of society. We just cannot countenance their exclusion. At a broadband hearing that I chaired at Gallaudet University, we saw how new broadband technology can change lives and create opportunities for people who want to be, who need to be, fully participating, mainstream citizens. There is no question that we have made some progress in recent years, but we have much more to do. Implementation of the recommendations in the Plan will help ensure that communications services, equipment and content are accessible to persons with disabilities.

Inclusion of all Americans is all the more important given the critical role broadband will play in informing our civic dialogue and stimulating citizen engagement in our democracy. I realize that you already know this—your constituents probably get a lot of their information, and misinformation, about Congress and their representative's doings via the Internet. But, we are late in understanding the broad civic implications of broadband as we begin to migrate so much of our national conversation to the Internet. America's future town square will be paved with broadband bricks—and it must be accessible to all and reflect the diverse voices of our diverse country. Sustaining democracy by effectively informing all of our communities in the Digital Age goes to the core of what we are trying to achieve as we implement the Plan. With high-speed Internet, those who are connected have the world at their fingertips. For the unconnected, that world is beyond reach. Already we see a blossoming participatory and experimental culture on the Net. We see evolving new platforms that astound us, from smart phones to tablets to the advent of at-home 3-D viewing and we can communicate with someone on the other side of the world as easily as with our next-door neighbor.

An increase of technology does not by itself guarantee a more informed citizenry. A 2009 study indicates that, as a country, we now consume in excess of 1.3 trillion hours of media

per year. Yet the production and distribution of essential news and information content has never been more in doubt. The same hyper-speculation and consolidation that wreaked havoc on so much of our economy began even earlier with the media sector. That, coupled with the dismantlement of public interest oversight of our broadcast stations, has decimated newsrooms, brought pink slips to many thousands of journalists, put investigative journalism on the endangered species list and replaced real news with glitzy infotainment. A new Pew Research Center report shows a 50 percent decline in network news reporting and editing capacity since the 1980s and a 30 percent drop for newspapers since 2000. I believe that our country's democratic dialogue will suffer if these same harms that have been inflicted upon traditional media are allowed to undercut the potential of new media in the Digital Age.

We face a two-pronged challenge. First, ensuring that the Internet of the future can support the information infrastructure that democracy requires; and, second—for the years immediately ahead—stemming the decline of traditional media journalism that still supplies the overwhelming bulk of our news and information. So I'm pleased that the National Broadband Plan recognizes the need to come to terms with the news and information implications of the digital transition, and I am also pleased that the Commission has launched a separate, but really inherently related, examination focusing on "The Future of Media and Information Needs of Communities in a Digital Age." A Commission without steady focus on this would ignore one of the core implications of broadband infrastructure.

And, one last note about inclusion. To fully realize the goal of broadband for all, broadband must not only be ubiquitously deployed, accessible and affordable—we must know how to use it. I commend the Plan's clear commitment to digital literacy so that people have the training and education to use the Internet and the discernment to understand how, if wrongly

used, the Net can inflict personal and social harms.

Each of us would have, I am sure, some variations on the Plan that has been presented. In matters involving the reclamation of spectrum, for example, I am always conscious of the fact that the airwaves belong to the American people and that licensees may *use* that spectrum, but they do not *own* it. Talk about directly compensating licensees for spectrum runs into that reality. Also regarding broadcasting, I will be urging great caution because of the possibly detrimental effects of reallocating spectrum from those stations currently using it to serve diverse audiences. Every local voice that disappears runs against the grain of localism, diversity and competition.

Regarding issues of competition, we will have to be vigilant that the Plan's strategies actually work. Lack of competition could require us at some point to take actions going beyond what has generally been discussed. While competition is at the core of our enabling statute, I do not view competition today as a hallmark of our present telecommunications environment. In competition, as in other areas, should we find that we lack the tools necessary to conduct effective public interest oversight of the evolving broadband ecosystem, we may have to invoke other available authorities already invested in the Commission—or, should we lack some authority that we need, we may have to come back here and request it. We are dealing with a broadband information ecosystem where many parts come together to form a complex, synergistic and interdependent whole. If we lack the oversight tools to treat it systemically, we invite harms that could do the ecosystem grave injustice.

The Plan produced by the broadband team should not be viewed as a static document, but rather as one that will likely require adjustment and flexibility as we proceed. This, in my opinion, is a strength rather than a weakness. Taken as a whole, the Plan points the compass and

sets us on the right path. But like every great infrastructure endeavor this country has undertaken—be it roads, canals, bridges, railroads, highways, electric power, even basic telecommunications—to get the job done we will need a combination of private sector leadership and visionary government policy. In other words, we have a lot of work to do.

I look forward to working cooperatively with my colleagues to begin the hard work of safeguarding America's global competitiveness by ensuring that every American has high-speed, opportunity-creating, affordable broadband. In mentioning the workings of the agency, I would be remiss if I did not express my appreciation for the efforts of Representatives Bart Stupak, Anna Eshoo and Mike Doyle to reform the work of the agency by proposing to eliminate the statutory prohibition on more than two Commissioners talking together outside a public meeting. My experience has shown me that this bar has had seriously pernicious and unintended consequences—stifling collaborative discussions among colleagues, delaying timely decision-making by the agency, discouraging collegiality and short-changing the public interest. The legislation they have proposed would, in my mind, constitute as major a reform of Commission procedures as any I can contemplate.

Thank you for the opportunity to testify today and I look forward to your comments, guidance and questions.

Mr. BOUCHER. Thank you very much, Commissioner Copps. Commissioner McDowell.

STATEMENT OF ROBERT McDOWELL

Mr. McDOWELL. Thank you, Mr. Chairman and Ranking Member Stearns and all members of the committee. It really truly is a privilege to be before you today. The broadband plan offered up last week by the Office of Broadband Initiative does represent a tremendous amount of hard work and thoughtfulness. However, it was not put to a Commission vote and contains no rules, and that is because the plan represents the beginning of a process and not the end of one.

While we may disagree at times on the best paths to follow during our upcoming journey, we can all agree on at least the primary destination, a country that offers faster broadband access to more Americans at affordable prices.

Before going further, however, all policymakers involved should pledge to do no harm. Precisely because the FCC classified broadband services as less regulated information services, we have seen a deployment and adoption of broadband technologies flourish. As the plan itself asserts, the number of Americans who have broadband at home has grown from 8 million in the year 2000 to nearly 200 million last year. In fact, today out of 114 million households, only 7 million lack access to broadband. Some form of broadband is available to roughly 95 percent of Americans while over two-thirds have actually subscribed.

One especially bright gem in America's economy is the phenomenal growth in wireless broadband adoption. Mobile broadband was virtually unheard of in the year 2000. By the end of last year, however, an estimated 100 million Americans subscribe to wireless broadband technologies. We lead the world in 3G buildout and adoption.

Furthermore, America is home to more wireless companies than any other country. More than half of all Americans have a choice of five wireless providers. 94 percent have a choice of four. Not only has investment and innovation been dynamic in the telecom core of the Internet environment, but economic activity at the edge of networks has been nothing short of explosive as well.

For instance, last year Americans again lead the world by downloading over 1.1 billion applications onto their mobile devices. Not only does the United States have one-third of the world's market share of mobile apps, but the American mobile app market has grown over 500 percent since the year 2007.

In fact, some researchers estimate that annual domestic mobile app downloads will reach nearly 7 billion by the year 2014.

The Internet is an environment that is growing and evolving faster than any individual company or government can measure. The Net operates in an open and free marketplace where innovation and investment are thriving. In fact, some estimate that private sector investment in broadband infrastructure exceeded \$60 billion last year alone.

Any policies the government adopts should nurture and strengthen these trends and not undermine them. For instance, cable modem services alone are available to 92 percent of American

households. Merely by upgrading cable networks with the DOXIS 3.0 system, which is expected to happen over the next few years anyway, over 104 million American homes will have access to speeds of up to 100 megs. Unless the government provides disincentives to investments, the broadband plan's goal of reaching 100 million households with 100 meg services should be attained well before the year 2020 if we allow current trends to continue.

In that spirit, I question calls for further regulating one of the brightest spots of the American economy. Chapter 17 of the Plan opens the door to classifying broadband services as old-fashioned, monopoly-era, circuit-switched, voice telephone services under Title Two of the Communications Act of 1934.

Broadband has flourished because of the absence of such regulations, and let me clear up a persistent myth. Broadband has never been regulated under Title Two. Not only would such a classification likely fail on appeal, I also don't see how foisting regulations first devised in the 19th century would help a competitive 21st century marketplace continue to thrive.

The plan does contain ideas that are worth exploring further however. For instance, bringing more spectrum to market should continue to be a priority for the Commission, as it has been for the past several years. We should place a special emphasis on frequencies that are lying fallow or are underused, particularly spectrum held by the government when auction spectrum should remain unencumbered by regulation.

At the same time, however, the Commission should encourage more efficient use of the airwaves in addition to rapid buildout. The need to use spectrum efficiently is inevitable, so we should work to stay ahead of the spectral efficiency curve.

Additionally, the plan calls for comprehensive reform of the universal service subsidy rules. This system is broken, plain and simple. Our first priority, however, should be to contain costs. The contribution factor, a tax of sorts, which is directly paid by consumers, has ballooned from 5.53 percent in 1998 to over 15 percent today. This trend hurts American consumers and is unsustainable. In its current condition, the Universal Service Fund cannot support additional obligations.

I have outlined many other ideas in my written statement. In the meantime, I look forward to working with Congress and my Commission colleagues to adopt policies that allow investment, innovation, job growth, competition, and adoption in the broadband market to continue. Thank you, Mr. Chairman. I look forward to your questions.

[The prepared statement of Mr. McDowell follows:]

**STATEMENT
of
COMMISSIONER ROBERT M. McDOWELL
FEDERAL COMMUNICATIONS COMMISSION**

**Before the
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY
AND THE INTERNET
UNITED STATES HOUSE OF REPRESENTATIVES**

March 25, 2010

Mr. Chairman, Ranking Member Stearns and Members of the Subcommittee, it is a privilege to appear before you today.

The Broadband Plan (Plan) offered up by the FCC's Office of Broadband Initiative represents a tremendous amount of hard work and thoughtfulness. It is important for everyone to understand, however, that the Plan does not carry with it the force and effect of law. In other words, the Plan itself contains no rules. Not having a Commission vote gave the Broadband Plan team the flexibility to make their recommendations to Congress and the Commission freely. Rulemakings, opportunities for public comment, subsequent debates and votes on proposed rules spawned by the Plan, not to mention possible legislation, still lie over the horizon. In short, we are at the beginning of a long process, not the end of one.

Before the government intervenes further into this marketplace, however, we should recognize how far America has come. As the Plan itself asserts, "The number of Americans who have broadband at home has grown from eight million in 2000 to nearly 200 million last year." In fact, today, out of 114 million households, only seven million lack access to broadband. Some form of broadband is available to roughly 95 percent of Americans, while over two-thirds have subscribed to these services. Seven years ago, only 180,000 homes had access to fiber-based broadband. By the middle of last year, that figure spiked to over 17 million households.

Additionally, America has experienced phenomenal growth in wireless broadband adoption. Mobile broadband was virtually unheard of in 2002. By the end of last year, however, an estimated 100 million Americans subscribed to wireless broadband technologies. America is home to more wireless companies than any country in the

world. More than half of all Americans have a choice of five wireless providers. Ninety-four percent have a choice of four. Similarly, we lead the world in 3G build-out and adoption.

Not only has investment and innovation been dynamic in the telecom “core” of the Internet environment, but economic activity at the “edge” of networks has been nothing short of explosive as well. For instance, last year Americans led the world by downloading over 1.1 billion applications onto their mobile devices. Not only does the United States have one-third of the world’s market share of “mobile apps,” but the American mobile app market has grown over 500 percent since 2007. Hundreds of thousands of mobile applications are pouring into the market, with countless more on the way from thousands of developers for years to come. By 2014, annual domestic mobile app downloads are estimated to reach nearly seven billion.

As a direct result of adopting policies that ensured the ‘Net would be regulated only with a light touch, the Internet environment is growing and evolving faster than any individual, company or government can measure. The ‘Net operates in an open and free marketplace where innovation and investment are thriving. In fact, some estimate that private sector investment in broadband infrastructure exceeded \$60 billion last year alone.

As Congress and the Commission consider the ideas from the Office of Broadband Initiative, we should make sure that we first and foremost do no harm. For instance, cable modem services alone are available to 92 percent of American households. Merely by upgrading cable networks with the DOCSIS 3.0 system, which is expected to happen over the next few years anyway, over 104 million American homes

will have access to speeds of up to 100 mbps. In other words, unless the government provides *disincentives* to investment, the Plan's goal of reaching 100 million households with 100 mbps services should be attained well before 2020 if we allow current trends to continue in an unfettered manner. To that end, I look forward to working with Congress and my colleagues to adopt policies that allow investment, innovation, job growth, competition and adoption in the broadband market to continue to flourish.

As we go forward, I agree that some aspects of the Plan deserve further investigation. For example:

- Although Chapter 5 of the Plan places great emphasis on long-term spectrum needs, I am hopeful that we will also encourage and consider ideas that call for more efficient use of spectrum. These include more robust deployment of enhanced antenna systems; improved development, testing and roll-out of creative technologies, where appropriate, such as cognitive radios; and enhanced consideration of, and more targeted consumer education on, the use of femto cells. Each of these technological options, already available in the marketplace, augment capacity and coverage, which are especially important for data and multimedia transmissions.
- As I have said for quite some time, we should accelerate our efforts to create a more specific framework for allowing unlicensed use of the television "white spaces." And I am pleased that Recommendation 5.12 of the Plan agrees. I am also interested in using some portion of this spectrum to provide wireless backhaul in rural areas. Our work on white spaces started under FCC Chairman Michael Powell, but the Commission has been too slow to deliver our promise to all American consumers.
- Similarly, we should explore our existing authority under Section 336 of the Communications Act to provide television broadcasters an incentive to lease their spectrum. Focusing on this statutorily permissible and *voluntary* mechanism for leasing parts of the airwaves may be an easier path to accelerating deployment of advanced wireless services, as opposed to the more coercive means discussed in Chapter 5 of the Plan.
- Furthermore, we should bring spectrum that is lying fallow to auction as quickly as possible. I agree with Recommendation 5.5 of the Plan, which proposes that government should strive to lead in relinquishing spectrum it does not use efficiently or, sometimes, at all. Congressional input, as well as improved interagency coordination, is vital in this pursuit.

- With respect to the Universal Service Fund and intercarrier compensation mechanism, which are discussed in Chapter 8 of the Plan, reform is embarrassingly overdue. As a Commission, we came very close to codifying consensus on reforms in late 2008. Unfortunately, needless procedural roadblocks thrown in our way prevented us from consummating any agreements. I hope we can rekindle the same constructive and positive bipartisan spirit, which existed at that time, in any future proceedings.
- For several years, I have said that any USF reform must accomplish five basic objectives. The Commission must:
 - (1) contain the growth of the Fund;
 - (2) in a limited and fiscally sound manner, explore the possibility of broadening the base of contributors;
 - (3) reduce the contribution burden (By the way, the contribution factor has grown from 5.53 percent during the first quarter of 1998 to currently a level of 15.3 percent, which is an historic high. This confiscatory money grab not only burdens America's consumers the most, it is evidence that the Fund's viability is in question.);
 - (4) ensure competitive neutrality; and
 - (5) eliminate waste, fraud and other abuses of the system.

Such comprehensive reform – which would include all of these objectives – should be accomplished *before* embarking on any effort to alter the distribution system.

As I continue to review and analyze the Plan, I may find additional proposals I can support. At the same time, I would be remiss if I did not point out some ideas that give me concern.

- First, Chapter 17 of the Plan opens the door to classifying broadband services as old-fashioned monopoly era, circuit-switched, voice telephone services under Title II of the Communications Act of 1934. Broadband deployment and adoption have flourished in the absence of such regulations. Not only do I doubt that such a reclassification would survive appeal, I don't see how foisting a regulatory framework first devised in the 19th Century would help a competitive 21st Century marketplace continue to thrive.
- Second, Recommendation 4.7 of the Plan implies that the Commission should mandate the unbundling of fiber and other network elements that have been deployed since the agency deregulated some of these components. As a result of that deregulation, fiber deployment has spiked in recent years. Rather than reversing course by re-opening settled conflicts, the Commission instead should ensure that any future actions will not discourage capital investment. By

unearthing regulations from yesteryear to foist on cutting-edge innovations, we would be inviting years of unnecessary litigation and all of the regulatory uncertainty that comes with it. Such an environment would inhibit investment.

- Third, Chapter 4 of the Plan refers to the elephant in the room, a proceeding that has shadowed the Plan since last fall: the open Internet or “net neutrality” proceeding. Although the Plan does not take a position on that proceeding, I take this opportunity to reiterate my serious concerns regarding the Commission embarking on such a regulatory journey.
- I also question Recommendation 15.6, which asks Congress to fund a new “public media” communications venture that, unlike current funding for public broadcasting, would cover new online digital platforms and expand the eligible pool of applicants beyond FCC license holders. I cannot in good conscience endorse new federal spending for this or many other ideas contained in the Plan when our government is spending record amounts by taking on monumental levels of debt – all while America’s families and businesses are cutting their budgets in an attempt to restore fiscal responsibility.
- In the same spirit, I am concerned that Chapter 4 of the Plan may have given new life to ideas that could result in the imposition of new taxes on the Internet. Federal preemption of Internet taxation could be beneficial, but only if it results in more freedom.
- After the Commission’s workshop on capital investment in the broadband sector last October, I was hopeful that the Plan would contain a chapter discussing and making recommendations on the ideas several commenters submitted in the record regarding tax incentives to spur more broadband deployment and adoption. Helping to elevate that discussion could lead to new ideas that could further our goal of greater broadband ubiquity. The Plan’s recommendation (7.2) to make the Research and Experimentation tax credit “long term,” however, is a step in the right direction.
- Furthermore, I question recommendations 11.4, 15.7 and 15.9, which call on Congress to amend the “fair use” provision of the Copyright Act for various purposes. These recommendations were edited late in the process; however, it still is not clear how broadly the Plan’s proposal actually sweeps. Copyright issues in the digital era are highly complex. More importantly, policies that support strong enforcement of property rights, including intellectual property rights, will encourage the creation of more compelling content that could help spur broadband adoption. I look forward to learning more about the request for statutory change.
- Finally, when it comes to the Plan’s discussions regarding set-top boxes in Chapter 4 of the Plan, I caution the Commission to tread gingerly. Technological mandates by the government almost never result in robust innovation. In fact,

history shows that such mandates are more often than not counterproductive. It is my hope that if the Commission is to act at all in this area, it start with a notice of inquiry to explore whether any further action is required.

The time has come to debate the Plan's recommendations in a positive, constructive and civil manner, and I am pleased to be a part of this dialogue. While we may disagree at times on the best paths to follow during our upcoming journey, we can agree on at least the primary destination: a country that offers faster broadband access to more Americans at affordable prices.

In conclusion, America's communications sector is at a critical juncture. America's technological future could be even more brilliant if we, as policymakers, have the courage to make the right choices. I look forward to continuing to work with Congress, Chairman Genachowski and my Commission colleagues on these important policies to grow the economy, create new jobs and make America stronger and more competitive.

Mr. Chairman, Ranking Member Stearns and Members of the Subcommittee, thank you again for the opportunity to appear before you today. This concludes my statement, and I look forward to answering your questions.

Mr. BOUCHER. Thank you very much, Commissioner McDowell. Commissioner Clyburn.

STATEMENT OF MIGNON CLYBURN

Ms. CLYBURN. Thank you, Mr. Chairman, Ranking Member Stearns and members of the subcommittee.

Mr. BOUCHER. Yes, your microphone please.

Ms. CLYBURN. That might help. Thank you.

Mr. BOUCHER. Thank you.

Ms. CLYBURN. Thank you, Mr. Chairman, Ranking Member Stearns, and members of the subcommittee. It is an honor and a privilege to appear before you today to discuss the National Broadband Plan. Over the past nine months, the FCC undertook the mammoth task of developing a blueprint for this Nation that aims to bolster our standing as a world leader in technology, business, and inclusion. Under Chairman Genachowski's leadership, this process was conducted in an unprecedented open and transparent manner in order to ensure that we maximized opportunity for public input.

There are three issues in particular that I wanted to touch on today. In my view, each of these warrants our upmost and immediate attention. One, fostering the development of a nationwide interoperable public safety network. Two, ensuring an environment conducive to universal broadband adoption. And three, cultivating vibrant competition in the broadband marketplace.

Developing a nationwide interoperable public safety network is no easy task. This fact, however, is no excuse for where we stand today. It is inconceivable that it will be almost nine years since the tragic events of September 11, 2001. We still have not meaningfully addressed this critical need. The National Broadband Plan attempts to meet this challenge. It offers concrete steps for a nationwide public safety wireless broadband network that will provide needed functionality and interoperability for the public safety community.

The recommendations for the Emergency Response Interoperability Center and Congressional funding for the network in particular address two of the most fundamental building blocks necessary to make this network a reality.

Moreover, the plan sets forth a rigorous program to make sure we get the details right, and the Commission has already put these ideas in motion by hosting a technical panel to review the finer points of the proposed network.

Another indispensable part of the plan concerns broadband adoption. Approximately one-third of Americans have not adopted broadband at home. While some view this percentage as a success, there are reasons to be concerned. High-speed Internet is the gateway to opportunity and is fast becoming a requirement for meaningful citizenship. If you want to apply for a job, get more information on health-related issues, take classes that are unavailable in your town, unlock economic opportunities, be able to obtain government services, you must have direct high-speed access to the Internet. If we steamroll ahead without our fellow Americans joining us online, we will merely be reinforcing an underclass that will weigh heavily on our progress as a Nation.

The plan also offers a critical recommendation with respect to the high cost of broadband. Specifically the plan recommends wholesale reform of the Universal Service Fund to both make it more efficient and enable it to directly support broadband service. This process requires assessing and adjusting nearly every aspect of the current USF support methods as well as the intercarrier compensation system.

The third element central to a successful broadband strategy is competition. Competition is the lifeblood of investment, innovation, and affordable prices. Without it, industry has little reason to upgrade its facilities and improve its services.

A cable industry executive noticed as such, informing investors that there is simply no need for the company to roll out the faster Internet speeds available today in areas where it does not have competition from another high-speed provider. Thus, only in areas where Americans are lucky enough to have more than one provider with truly high-speed capability will providers like this one have any economic incentive to offer better service. The same holds true for prices. There is little question that where there is limited or no competition, consumers pay higher prices for broadband.

Indeed, just recently we saw a new spike in prices levied by providers on the lowest tiers of service. When such across-the-board increases occur, our role as stewards of the public interest requires us to examine the market carefully and take appropriate action where necessary.

In closing, I would like to express my gratitude to my colleagues and my enthusiasm for working with them to address the challenges ahead. I also want to recognize the important work of the committee. I look forward to engaging constructively with you in the weeks and months ahead.

The American people rely on us to work cooperatively to ensure that we implement a National Broadband Plan that is good for consumers and that helps drive our economy. Thank you again for the opportunity to appear before you today, and I look forward to answering any questions you may have.

[The prepared statement of Ms. Clyburn follows:]

**TESTIMONY OF COMMISSIONER MIGNON L. CLYBURN
FEDERAL COMMUNICATIONS COMMISSION**

**BEFORE THE SUBCOMMITTEE ON
COMMUNICATIONS, TECHNOLOGY, AND THE INTERNET
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES**

March 25, 2010

Thank you Mr. Chairman, Ranking Member Stearns, and members of the Subcommittee. It is an honor and a privilege to appear before you today alongside my esteemed colleagues to discuss the National Broadband Plan. Over the last nine months, the FCC undertook the mammoth task of developing a broadband blueprint for the Nation that aims to bolster our standing as a world leader in technology, business, and inclusion. Under Chairman Genachowski's leadership, this process was conducted in an unprecedented open and transparent manner in order to ensure that we maximized opportunities for public input.

The Plan tackles nearly every aspect of our Nation's broadband challenge, taking a pragmatic approach to a number of problems previously deemed intractable. For example, the cost and timetable for obtaining access to poles, ducts, conduit, and rights-of-way have slowed deployment and investment in networks for years. The Plan takes this obstacle head on with common sense recommendations for expediting the process and lowering unnecessary costs, as well as by supporting current Congressional proposals to increase efficiency and cost savings through "Dig Once" legislation.

There are three issues in particular that I wanted to touch on during my brief time here with you today. In my view, each of these warrants our utmost and immediate

attention: (1) fostering the development of a nationwide, interoperable public safety network; (2) ensuring an environment conducive to universal broadband adoption; and (3) cultivating vibrant competition in the broadband marketplace.

Developing a nationwide, interoperable public safety network is no easy task. This fact, however, is no excuse for where we stand today. It is inconceivable that, in the almost nine years since the tragic events of September 11, 2001, we still have not meaningfully addressed this critical need.

The National Broadband Plan attempts to meet this challenge. It offers concrete steps for a nationwide public safety wireless broadband network – a network that will provide needed functionality and interoperability for the public safety community. The recommendations for the Emergency Response Interoperability Center and Congressional funding for the network in particular, address two of the most fundamental building blocks necessary to make this network a reality. For the first time, the Commission is recommending a Plan that involves input from all stakeholders and has a strong chance of success. The Plan itself recognizes a rigorous program for the agency to make sure we get the details right, and the Commission has already put these ideas in motion by hosting a technical panel last week to review some of the finer points of the proposed network.

Another indispensable part of the Plan concerns the issue of broadband adoption. Approximately one-third of Americans have not adopted broadband at home. While some view this percentage as a success, there are reasons to be concerned. High-speed Internet is the gateway to opportunity and is fast-becoming a requirement for meaningful citizenship. If you want to apply for a job, get more information on health-related issues, take classes that are unavailable in your town, unlock economic opportunities, or, before

long, be able to obtain government services, you will have to have direct, high-speed access to the Internet. If we steamroll ahead without our fellow Americans joining us online, we will merely be reinforcing an underclass that will weigh heavily on our progress as a nation.

In addition to the innovative programs suggested in the Plan to combat adoption barriers such as digital literacy and relevance, the Plan offers a critical recommendation with respect to the high cost of broadband. Specifically, the Plan recommends wholesale reform to the Universal Service Fund (USF) to both make it more efficient and enable it to directly support broadband service. This process requires assessing and adjusting nearly every aspect of the current USF support methods, as well as the intercarrier compensation system. We must consider all the costs incurred to provide broadband as well as the revenues derived from broadband networks and adjust our support mechanisms accordingly. Moreover, support should be targeted to those areas – on a technology-neutral basis – where broadband deployment and service would not be economical.

The third element central to a successful broadband strategy is competition. Competition is the lifeblood of investment, innovation, and affordable prices. Without it, industry has little reason to upgrade its facilities and improve its services. A cable industry executive recently noted as much, informing investors that there is simply no need for the company to roll out the faster Internet speeds available today in areas where it does not have competition from another high-speed provider. Thus, only in those areas where Americans are lucky enough to have more than one provider with truly high-speed capability will providers like this one have any economic incentive to offer better service.

And the same goes for prices. There is little question that where there is limited or no competition, consumers pay higher prices for broadband. Indeed, just recently we saw a new spike in prices levied by providers on the lowest tiers of service. When these across-the-board increases occur, our role as stewards of the public interest requires us to examine the market carefully and take appropriate action where necessary.

In closing, I would like to express my gratitude to my colleagues and my enthusiasm for working with them to address the challenges ahead. I also want to recognize the important work of the Committee, and look forward to engaging constructively with you on the most important telecommunications issues of the day. The American people rely on us to work cooperatively to ensure that we implement a National Broadband Plan that is good for consumers and that helps drive our economy.

Thank you for the opportunity to appear before you today, and I look forward to answering any questions you may have.

Mr. BOUCHER. Thank you very much, Commissioner Clyburn. Commissioner Baker.

STATEMENT OF MEREDITH ATWELL BAKER

Ms. BAKER. Thank you very much, Mr. Chairman, Ranking Member Stearns, and members of the subcommittee. Good morning or almost afternoon now. It is really a privilege to appear before you today. I look forward to working with you as we consider the many important issues that have been raised in the National Broadband Plan.

I would like to share just a few remarks with you here this morning, hitting many of the topics that my companions have, as you have also, as I understand my full statement will be entered into the record.

Broadband in America is a success story. Under a light-touch, targeted, regulatory regime in both the Clinton and the Bush Administrations, we have gone from a narrow band dialup world to a multi-platform broadband world by crafting a regulatory framework that promotes facilities-based competition, not prescriptive government requirements.

Private industry from every communication platform has responded to this consistent framework with substantial network investment and deployment to the great benefit of consumers. This has resulted in broadband availability to 95 percent of Americans and healthy competition from rival providers. Indeed, there are only 7 million households where market forces have yet to yield a wired broadband provider.

Yet there is more work to be done, and I am pleased to be here talking about the National Broadband Plan. Turning to the National Broadband Plan itself, there are places where I would have made different recommendations and suggestions, but I am grateful to the Commission's broadband team for its hard work and find that significant parts of the plan deserve careful consideration. I would like to say a few words about three key priorities from the plan today.

First, as I have said since I arrived at the FCC, one area of prompt government action is spectrum policy. One of the plan's most important recommendations is the call for more comprehensive, long-term approach to spectrum management. The continued success of state-of-the-art mobile broadband depends on our ability to align our spectrum policies with the changing needs of consumers and industry.

Other nations, like Germany and Japan, are already planning significant additional blocks of spectrum to be auctioned for mobile broadband. The U.S. must act similarly to lay the foundation for the next generation of mobile innovation, machine-to-machine communications, mobile health, and a meaningful alternative to fixed broadband.

I hope our policies in this area will be guided by three overarching objectives: facilitating efficient use of spectrum, identifying and reallocating additional spectrum, and encouraging investment and innovation in wireless networks and technologies.

The second policy area is Comprehensive Universal Service Fund and intercarrier compensation reform targeted to broadband invest-

ment in unserved areas. We need to update our funding mechanisms to reflect a broadband world, and we must do so in a manner that ensures accountability and efficiency. We need to do this in a manner that does not expand the size of the \$9 billion fund. Consumers pay for this. The universal service contribution factor for next quarter will be the largest ever, 15.3 percent. This is real money. A \$6 tax on a \$40 phone bill.

Third, nationwide public safety interoperability must be a top priority. I believe the plan's recommendations are an appropriate place for us to start, focusing on the sufficiency of first responder funding and available spectrum resources. The need for interoperability was highlighted in the 9/11 report and devastatingly illustrated in the aftermath of Hurricanes Katrina and Rita. We must move forward expeditiously to provide the communications tools our Nation's first responders deserve.

As we consider all of the plan's recommendations, our broadband policy should be focused on these efforts directly tied to promoting adoption, deployment, and facilities-based competition. We should build upon the strong regulatory foundation that we have before us, harnessing private investment, encouraging entrepreneurs and inventors to provide better broadband to more Americans.

I am concerned that some of the proposals referenced in the plan have the Commission chart a more radical path, changing our market-based regulatory framework midcourse in a manner that could diminish our much-needed emphasis on adoption and chill the private investment we need for our broadband infrastructure.

We must, in particular, resist efforts to adopt rules in the network neutrality proceeding that would dictate how networks are managed and operated. I have attended two technical workshops and reviewed the record on net neutrality, and I have yet to see any evidence of a systematic problem that needs to be addressed today.

We also should reject calls to regulate the Internet under monopoly-era Title Two rules and rebuff unbundling proposals that selectively forget our long and checkered history with government-manufactured competition.

Lastly I am hopeful we avoid one-size-fits-all approaches to broadband. This is particular true with respect to affordability, relevancy, and literacy adoption hurdles facing a third of Americans today. Each one of them has its own importance. Thank you again for the opportunity to be here today, and I look forward to your questions.

[The prepared statement of Ms. Baker follows:]

**TESTIMONY OF FCC COMMISSIONER MEREDITH A. BAKER
U.S. HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET
“THE NATIONAL BROADBAND PLAN”**

MARCH 25, 2010

Mr. Chairman, Ranking Member Stearns and Members of the Subcommittee, it is a privilege to appear before you today. I look forward to working with you as you consider the many important issues that have been raised in the National Broadband Plan.

The National Broadband Plan is an impressive body of work. There are places where I would have made different recommendations and suggestions, but I am grateful to the Commission’s Broadband Team for its hard work and find that significant parts of the Plan deserve careful consideration. These include the promotion of a strategic spectrum plan, long-overdue universal service reform, and the deployment of a national interoperable broadband network for public safety. I would like to say a few words about these key priorities today.

At the outset, however, I would like to share my belief that broadband in America is a success story. Under a light-touch targeted regulatory regime in both the Clinton and Bush Administrations, we have gone from a narrowband dial-up world to a multi-platform broadband world by crafting a regulatory framework that promotes facilities-based competition in lieu of prescriptive government requirements. Private industry from every communication platform has responded to this consistent framework with substantial network investment and deployment to the great benefit of consumers. This has resulted in broadband availability to 95 percent of Americans, the vast majority of whom have choice amongst competing providers.

There is absolutely more to be done to reach the remaining seven million unserved households that the Broadband Plan has identified. However, as we strive to get more broadband—with faster speeds—deployed to more Americans in more places, we must acknowledge what the current regulatory environment has accomplished.

As I have said since I arrived here at the FCC, one area for prompt government action is spectrum policy. Consequently, I am pleased that one of the Broadband Plan’s most important priorities is the call for prompt action on spectrum. The continued success of state-of-the-art mobile broadband depends on our ability to align our spectrum policies with the changing needs of consumers and industry. Other nations, like Germany and Japan, are already planning to allocate significant additional blocks of spectrum to mobile broadband. The U.S. must act similarly to lay the foundation for the next generation of mobile innovation,

machine-to-machine communications, mobile health and a meaningful alternative to fixed broadband.

The Plan identifies the need for a more comprehensive, long-term approach to spectrum management. The United States needs a spectrum plan that expands upon proven flexible, market-oriented approaches to facilitate spectrum access, wireless innovation and competition. I hope our policies in this area will be guided by three overarching objectives: facilitating efficient use of spectrum, identifying and re-allocating additional spectrum, and encouraging investment and innovation in wireless networks and technologies.

As we proceed, we must take care to ensure that we treat all licensees equitably. We should provide both existing and new license holders with as much latitude as possible to design and deploy state-of-the-art, efficient networks and develop service offerings to appeal to U.S. consumers. I would strongly oppose any efforts to dictate business plans or service offerings through regulatory mandate or inflexible allocations or service rules.

I also support the Plan's emphasis on comprehensive Universal Service Fund and intercarrier compensation reform, targeted to broadband investment while not expanding the size of the fund. It is necessary to evolve our support mechanisms into an era in which all Americans have the opportunity to benefit from broadband. We must transition in a considered way to an explicit support mechanism that will ensure accountability, efficiency, and adequate funding in areas where market forces are not sufficient to drive broadband services to America's consumers. But we must also be mindful that the nearly \$9 billion Fund is not without limits. Consumers pay for this. The universal service contribution factor for next quarter will be the largest ever—15.3 percent. This is real money from real people. Our efforts to modernize the Universal Service Fund should not become an excuse to further grow the overall size of the Fund. It is our obligation to ensure that money is spent wisely to achieve the goals set out by Congress—but without distorting the market or breaking the bank. The Plan gives us helpful recommendations to begin this process.

I also believe the Broadband Plan's focus on public safety is long overdue. I think nationwide public safety interoperability should be a top priority for this Commission and believe the Plan is an appropriate place for us to start, focusing on the sufficiency of first responder funding and available spectrum resources. The need for interoperability was highlighted in the 9-11 Report and devastatingly illustrated in the aftermath of Hurricanes Katrina and Rita. We need to move forward expeditiously to provide the communications tools our nation's first responders deserve.

As we consider the Plan's recommendations in detail, our broadband policy should be focused on those efforts directly tied to promoting adoption, deployment, and facilities-based competition. We should build upon the strong

regulatory foundation that we have before us, harnessing private investment, encouraging entrepreneurs and inventors to drive better broadband to more people, whoever they are and wherever they live.

I am concerned about passages throughout the Plan, notably in Chapter 4, that suggest an interest in re-opening settled regulatory battles and changing our market-based regulatory framework mid-course in a manner that could diminish our emphasis on adoption and chill the private investment we so desperately need in our broadband infrastructure. We must, in particular, resist efforts to adopt rules in the Network Neutrality proceeding that would dictate how networks are managed and operated. We should also reject calls to revert to monopoly-era Title II regulation for broadband services that ignore the track record of success under Title I, and rebuff fiber unbundling and copper retirement proposals that seem to selectively forget our long and checkered history with government-manufactured competition.

We must also be careful to avoid prescribing government-imposed answers to questions best left to the market as consumers and companies. As we shift towards a broadband-enabled and digital world, government should not be in the business of mandating technologies or picking technology winners. We must avoid one-size-fits-all approaches to broadband. This is particularly true with respect to the affordability, relevancy, and literacy adoption hurdles facing a third of Americans today.

In closing I would be remiss not to note that much of the Plan is dedicated to ensuring broadband connectivity to serve a number of statutorily enumerated national purposes from education and health care, to energy policy. In each of these critical areas, broadband can be a great enabling technology and I am hopeful that the Plan's thoughtful efforts will prove valuable to those agencies and stakeholders seeking to work with the FCC to harness the power of broadband for the betterment of our nation and consumers.

Thank you again for the opportunity to be here today. I look forward to your questions.

Mr. BOUCHER. Thank you very much, Commissioner Baker, and thanks to each of the Commissioners and the Chairman for your thoughtful comments to us today. We appreciate you sharing some of the rationale you have had in developing this comprehensive and very well-constructed plan.

Commissioner Genachowski, I was very pleased to note the ambitious deadlines that you have set forth in the plan for at long last achieving the competitive availability of set-top boxes. I think that if consumers could shop for set-top boxes in the store and choose boxes that have varied functionality, a variety of different functions available from different manufacturers, all of which are compatible with every cable system and every satellite system for delivering multi-channel video, we would see tremendous innovation in the market for the origination of these devices.

And I think we would soon see devices on store shelves that would have functionality well beyond the typical set-top box you buy from the cable company or the satellite company today. So I commend you for setting forth these ambitious deadlines. This is not a new issue, and in fact, it is 15 years old. In the '96 Communications Act, we directed the Commission to move forward with the rule making in order to assure the competitive availability of these set-top boxes.

And still today consumers can't go to the store and shop for a variety of different set-top boxes. So I am glad to see the recommendation. I would ask you if you agree with me that rather than putting forth a mere notice of inquiry and continuing for a much longer period of time the discussion about this, it is now time to move to a notice of proposed rule making. I think it is. I hope you would agree, and I would ask for your response.

Mr. GENACHOWSKI. Well, first of all, thank you for raising that topic. It is an important one.

Mr. BOUCHER. And if you could pull the mike a bit closer, we could hear you better.

Mr. GENACHOWSKI. All right, I think you mentioned Congress did require competition in this area. We have seen much less competition and innovation than we could have. The reason that it is in the broadband plan is that the team realized during its work that while computers are only in about 76 percent of homes, TVs are in almost 100 percent of homes. And so if we can unleash this particular market, that can help accelerate our broadband goals.

With respect to the exact process, I would be happy to work with you. I think that it is the intention to move as expeditiously as possible. We haven't made a final decision on the process to use, but I would be happy to—

Mr. BOUCHER. Well, thank you very much. I would encourage you to give very serious favorable consideration to going right to a rule-making. We have been discussing this for 15 years. This time enough.

Secondly you appear to be recommending a role for local governments, municipalities across the country in helping to deploy broadband. I share that aspiration. In fact, in past Congresses, I have introduced legislation that would free local governments to offer broadband particularly where there are gaps and for whatever

reason the commercial providers have not offered an array of competitive services for broadband.

Does the mention of this in your broadband plan imply support for legislation that would remove the roadblocks that various states have erected to their municipalities offering broadband? And would you recommend that we adopt legislation effectively preempting those roadblocks and freeing communities nationwide in order to deploy broadband services?

Mr. GENACHOWSKI. Well, Mr. Chairman, if I could not comment on specific legislation, although we would be happy to be a resource to you on that. The goal of unleashing local governments to experiment and innovate around broadband access seems to me a highly desirable goal, and I would be pleased to work with you on the best path to encourage the kind of local experimentation that could be very—

Mr. BOUCHER. Thank you, Mr. Chairman. Very diplomatic answers you are providing this morning. Let me use the balance of my time to talk a bit about D block. I think you are on the right track in recommending that the D block of the 700 megahertz spectrum, the only part of the 700 megahertz still in government hands be auctioned, and auctioned essentially without the kinds of onerous conditions that attached to the D block auction several years ago that caused that auction to fail.

So I heartily endorse your idea of auctioning without those kinds of conditions. I have two questions. First of all, would you need legislation in order to devote the proceeds to that auction in some significant part or perhaps totally to the buildout of equipment for fire, police, and rescue nationwide?

Mr. GENACHOWSKI. I believe we would.

Mr. BOUCHER. I agree, and we will certainly work. I am working now with Chairman Waxman to structure a bill that would provide that clear authority. The second question I have relates to your proposal that the winners in the D block auction and also the holders of all 700-megahertz spectrum, that would include the cellular companies that prevailed in previous 700-megahertz auctions, provide roaming access to first responders at reasonable rates and also give priority access to first responders at times when the public safety spectrum is either fully occupied or for other reasons unavailable.

Now, that recommendation on its face may give pause to some who would consider taking part in an auction because it needs better definition. So I suppose my direct question to you is how does that requirement, were it to be a part of your auction rules, relate to the existing priority, a wireless priority system, that is in place today for federal personnel? Would it be a simple extension of that which might prove to be not so onerous, or would it be something beyond that that might prove to be more onerous?

Mr. GENACHOWSKI. Mr. Chairman, the goal is to adopt a set of rules that would not be onerous and that would allow us finally to move forward and deliver on the 9/11 Commission recommendations. It will be the subject of the rule making. We will have plenty of opportunity for input, but I am very pleased that four members on a bipartisan basis of the 9/11 Commission have looked at our plan and said this is a very sensible way to go.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman. We appreciate your being here and sharing these thoughts with us. The gentleman from Florida, Mr. Stearns.

Mr. STEARNS. Mr. Chairman, thank you very much, and I ask unanimous consent to insert into the record the response that Chairman Genachowski sent to me about creation of this plan.

Mr. BOUCHER. Without objection.

Mr. STEARNS. I noticed, Mr. Chairman, that you indicated you spent about \$20 million to develop this plan. I think that works out about \$50,000 a page or more, and it took you about a year, I think, to develop this plan. So in effect, \$50,000 a day. I think when we developed the 1996 Telecommunication Bill, we didn't have a plan in there, and then later on, there was some talk about it. And your former Chairman Kinard said that in 1999, let me read his speech, that "the fertile fields of innovation across the communications sectors and around the country are blooming because from the get-go we have taken a deregulatory, competitive approach to our communications structure, especially the Internet." So I think with those statements and this obviously predecessor of yours, do you agree with his statements?

Mr. GENACHOWSKI. I agree. Yes, I do.

Mr. STEARNS. And they remain valid today?

Mr. GENACHOWSKI. Yes, I would say making sure that we have policies that unleash investment, that encourage innovation—

Mr. STEARNS. Policies of the government, you mean?

Mr. GENACHOWSKI. Well, you know, as you know in this area, whether it is spectrum, whether it is Universal Service Fund, there are policies that the government needs to be involved in and is involved with. The question for us is what kind of climate, what kind of policies could we make sure we have that promote investment, that promote innovation, that protect and empower consumers, that promote competition. That is how I look at it.

Mr. STEARNS. OK, Mr. McDowell, Mr. Welch has indicated this is a bipartisan plan, and I think you pointed out no one voted on it. It is true that you and Ms. Baker didn't vote on this bill. Is that correct?

Mr. MCDOWELL. That is correct.

Mr. STEARNS. And during the process this year that it was developed in, they spent \$20 million. Were you ever consulted during the year, you and your staff? Were you called up and let in to participate in the development of this plan?

Mr. MCDOWELL. Absolutely.

Mr. STEARNS. OK, and you were, Ms. Baker, too?

Ms. BAKER. Yes.

Mr. STEARNS. When did you get a chance to see the final plan?

Mr. MCDOWELL. We saw the final text, the final drafts starting about 21 days before the March 18 meeting, so late February.

Mr. STEARNS. Late February?

Mr. MCDOWELL. Did you think it might be helpful that you had seen it earlier? I mean how do you feel about your participation?

You know I think there is actually a benefit to the fact that there was not a vote, in that I think it allowed the broadband plan team to have the liberty to put in there what they saw fit to put in there.

So I think there was actually a net positive. Obviously there are things I agree with and things I disagree with, as I think all of us can probably say that. So I think it was a net positive we did not have the vote and allowed them. Certainly I originally a year ago, long before Chairman Genachowski was even nominated, had said that a plan like this should be put out for public comment, but the Commissioner only had a year to do it. So I understand there were time constraints as well.

Mr. STEARNS. OK, Chairman Genachowski, the broadband plan recommends appropriating an additional \$9 billion to convert the already \$8 billion-a-year Universal Service Fund for broadband. Now if we have \$7.2 billion in the stimulus package for broadband was appropriately spent, why do we need an additional \$9 billion?

Mr. GENACHOWSKI. Mr. Stearns, if I could—sir, that is not exactly what the plan says. First on Universal Service Fund, the plan outlines a road map for the FCC to cut and cap existing spend for telephone service and transition that funding to broadband without increasing the growth of the fund. So that over a 10-year period, the transition from the old USF to the new USF can happen without any additional funding.

The plan goes on to say that if Congress thought it desirable to accelerate that transition, to have that transition happen faster than 10 years, it would cost several billion dollars over a few years to do that. And that is something that, as part of the development of the plan, it was thought should be presented for consideration.

Mr. STEARNS. Commissioner McDowell, Assistant Secretary of State Verdeer said that net neutrality could be employed as a pretext or as an excuse for undertaking public policies that we would disagree with pretty fundamentally. Just days earlier, the president of Venezuela called for regulation of the Internet while demanding authorities crack down on a news Web site that was critical of him. “The Internet can’t be something free when anything can be done and said. No, every country has to impose its rules and regulation” is what he said.

How do we hold other countries to higher standards if we ourselves are beginning to get involved with regulation? Or perhaps you might just comment on some of the comments that the assistant secretary of state said as well as what the president of Venezuela said.

Mr. MCDOWELL. Well, I will let Ambassador Verdeer speak for himself, but I have for quite some time now expressed similar concerns that as governments encroach more into the area of network management of the Internet that we really start to lose the moral high ground. What appears to be reasonable to us may not appear reasonable to other countries and vice versa.

Actually as Commissioner Baker said, since the Clinton/Gore Administration, it has been the policy of the U.S. government that network management issues and the governance of the Internet should be left to nongovernmental bodies such as the Internet Engineering Task Force and others. And this has worked quite well. What has really made the Internet so robust and growth there so explosive is in effect it is somewhat lawless, that it is positively chaotic in a positive and constructive way. And I think we do need to be very cautious before we venture into this area further.

Mr. STEARNS. Thank you, Mr. Chairman.

Mr. BOUCHER. Thank you, Mr. Stearns. The chairman of the Energy and Commerce Committee, the gentleman from California, Mr. Waxman, is recognized for five minutes.

Mr. WAXMAN. Thank you, Mr. Chairman. Before I begin my questions, I would like to correct an assertion made by Commissioner McDowell that broadband has never been regulated under Title Two. DSL broadband was a Title Two service until August 2005 when the Commission moved it to Title One.

I would like to ask a question about the plan's recommendations regarding the creation of a nationwide interoperable broadband network for public safety. I know that all parties agree that the problem of interoperability needs to be resolved, but it seems like there is a strong disagreement regarding what we should do with the D block. Chairman Genachowski, in your February 25, 2010 remarks, introducing the public safety recommendations, in the plan you emphasized that you directed FCC staff to begin anew, not take anything for granted, be data-driven and creative, and come up with the best policy recommendations to achieve success. Do the recommendations in the plan reflect that direction?

Mr. GENACHOWSKI. Yes, they do. Admiral Jamie Barnett, an extraordinary public servant, has led up our efforts to do this. That was the charge to him, and he has been committed with his team on developing a framework for finally delivering on the 9/11 Commission recommendation.

Mr. WAXMAN. Was the staff free to recommend reallocation of the D block if that was the best plan for public safety?

Mr. GENACHOWSKI. Yes.

Mr. WAXMAN. And do you agree with the conclusion that 10 megahertz of dedicated broadband spectrum in combination with access to additional commercial spectrum is enough to ensure public safety interoperability at this time? And what about the future?

Mr. GENACHOWSKI. Yes, I agree with the very deeply thought through plan that was put together by the public safety team. In the future, there may be additional needs for spectrum. We need to recover more spectrum for a variety of purposes, that in the future we may need more spectrum for public safety, and it should be part of our strategic planning process over time.

Mr. WAXMAN. Is it correct to say that the FCC's engineers and technical experts fully analyzed where the 10 megahertz of spectrum dedicated to broadband would yield adequate spectrum capacity? And did they do their due diligence on this question?

Mr. GENACHOWSKI. Yes, I believe they did.

Mr. WAXMAN. I would like to ask Commissioner Copps, McDowell, Baker, and Clyburn, is the approach outlined in the plan the best way to achieve interoperability in your view? Do each of you support the recommendation that the D block be auctioned for primarily commercial purposes?

Mr. COPPS. I support this plan. When I was acting chairman, one of the things that I did was direct our staff to go back to a basic put all the options on the table for the incoming chairman so we could really start and look at all options.

As Commissioner Clyburn pointed out, we are eight years beyond 9/11 now. We have to get moving. This is a far more solidly ground-

ed plan, a far more thought out plan. I am not saying it is the only plan, and I am not saying all the questions are answered right this second. But I think this is the one to proceed on if it meets the approval of the Congress because Congress has a role here too.

But I am happy we have, under the Chairman's leadership, moved the ball this far down the field. I think we have a unified plan here, and we shouldn't—

Mr. WAXMAN. Well, let me ask your colleagues because—and maybe they can give me a yes or no answer because the time is running out. Do you support the recommendation D block be auctioned for primarily commercial purposes?

Mr. MCDOWELL. Thank you, Mr. Chairman. Very quickly, the transition component of that broadband has been regulators. Broadband services have never been regulated under Title Two. I will be happy if, Chairman, you will allow me to file something supplemental for the committee outlining the history of that. In any case, the D block, I think, primarily should serve as commercial services and should be auctioned off accordingly.

Keep in mind that Congress in 1997 well before 2001, September 11, set aside 24 megahertz of the 700 megahertz block. That is sitting there. That is wonderful spectrum. It should be used for something other than narrow band voice. Public safety has at its disposal about 97 megahertz total of spectrum of various kinds. Not all apples, some apples and oranges but so—

Mr. WAXMAN. So you agree with the—

Mr. MCDOWELL. It should be auctioned off commercially.

Mr. WAXMAN. OK, Commissioner Clyburn.

Ms. CLYBURN. I believe that the auction model is comprehensive and pragmatic, yes.

Mr. WAXMAN. Commissioner Baker.

Ms. BAKER. On balance, I agree with the plan.

Mr. WAXMAN. OK, the plan recommends that Congress come up with very significant amounts of money to fund the construction and maintenance of the proposed network. Chairman Genachowski, does the \$6.5 billion estimated for construction of the network account for state matching funds? And if the federal government were to contribute to the construction of this network, would it be reasonable to require states to pay a share of the cost associated with the construction?

Mr. GENACHOWSKI. Well, Mr. Chairman, if I could, we would be happy to supply you the underlying work behind the \$6 billion. I am not sure of the answer to your question. I will say one thing if I could. To move forward on this now while commercial forging networks are being built out is the least expensive way to make sure that we build a public safety network. If we wait, the price will only go up.

Mr. WAXMAN. Thank you very much. I look forward to moving on a bipartisan basis to meet the needs of the public safety community. I look forward to working with the FCC toward that goal. Mr. Chairman, I would like to put in the record a press comment by the FCC dated August 5, 2005 regarding the Title One/Title Two issue.

Mr. BOUCHER. Without objection.

Mr. WAXMAN. Thank you.

Mr. BOUCHER. The gentleman from Michigan, Mr. Upton, is recognized for five minutes.

Mr. UPTON. Thank you, and again welcome, Commissioners. A number of us have a good number of questions. Chairman Genachowski, welcome again. First question for me is as it relates to the broadcast spectrum. As you know, we are working on legislation here. I think one of the things that we want to make sure is that you all do not force the broadcasters to give away or auction some of that spectrum. Are we on the same page on that?

Mr. GENACHOWSKI. I think so. The need here is urgent for the country. Mobile broadband is as important a platform for job creation, innovation for decades to come. We have the opportunity to lead the world, but not if we don't have enough spectrum. What our team has done is develop a win/win/win plan for mobile broadband, for broadcasters, for the public that I would be happy to discuss with you further but that I think should work for everyone. And it is based on voluntary actions by broadcasters and an incentive auction that we hope Congress will authorize.

Mr. UPTON. I like those words. Mr. McDowell, we all, as we look to increase speeds, as I look at chapter four in this book, it seems to me that if there were a fiber unbundling requirement that it would hurt us dramatically as we try to deploy fiber networks in areas that do not have the broadband access today. I think you are in agreement on that. It would be wonderful if you might want to comment.

Mr. MCDOWELL. In the next couple of years, if we were to do that today, in the next couple of years, I think we would receive a tremendous amount of litigation. There are two decisions by the U.S. Court of Appeals for the D.C. Circuit, USTA 1 and USTA 2, that speak directly to these issues. And it is really at this point settled law as Commissioner Baker was saying. And I think we would be exposing ourselves to a tremendous level of litigation and ultimate loss if we tried to impose unbundling regulations on fiber that had been laid subsequent to those court cases especially.

Mr. UPTON. And, Chairman Genachowski, I noted that Brer Levin, the executive director of your broadband initiative, dismissed unbundling in a December 21, '09 interview as "not very productive." The reason that he explained is the Commission is not that terribly—this is again in quotes—"not that terribly interested in moving towards things which will freeze capital investment and have long, complicated court battles," along the lines of what Mr. McDowell indicated. More importantly he observed these suggestions "fail to look at what is really going on in the market." What are your thoughts as it relates to your executive director? Does he have good ground?

Mr. GENACHOWSKI. The goals of promoting investment innovation in the sector are our highest goals. Promoting competition is one of if not the best strategy to get there. Unbundling is a word that creates more confusion, clarifies less. What the plan actually focuses on are some issues that we heard from business in the market, whether it is special access, whether it is providing choice for small businesses. We have heard many complaints from small businesses that they lack choice, that their prices are too high.

And so the plan suggests several discrete areas where the record showed real competition issues, especially for small businesses, that it tees up an inquiry by the Commission. And I think it is important to look at those.

Mr. UPTON. But you understand the fear that we would have if you pursued such a course?

Mr. GENACHOWSKI. Of course I do. Again the goals of the Commission very clearly are to adopt policies that promote investment, promote innovation, promote competition, and protect and empower consumers. That is what I have instructed the staff to look at every day.

Mr. UPTON. Now, as we look at this entire document, tell me what your next step is. What is the timeframe that you are going to try to embark on?

Mr. GENACHOWSKI. Well, the staff has been working on an implementation schedule, and so in the period ahead, we will be announcing a schedule for implementing the plan. I think that there are, as I said during my opening remarks, I am not satisfied with the status quo. I think this is an extraordinary platform for job creation and investment. There are some very real problems that have been acknowledged on a bipartisan basis that we need to solve.

So I am going to push to move forward as quickly as we can because I think it is critical for U.S. world leadership in this area.

Mr. UPTON. Thank you. Yield back.

Mr. BOUCHER. Thank you, Mr. Upton. The gentleman from Massachusetts, Mr. Markey, is recognized for five minutes.

Mr. MARKEY. Thank you, Mr. Chairman, very much. The first broadband plan was the 1996 Telecom Act. And the 1996 Telecom Act, of course, actually resulted in broadband being regulated under Title Two. And from 1996 all the way until August of 2005, broadband was under Title Two, just for the record.

And during that period of time, we got a lot of policies that were implemented. Consumer protection, universal service, protecting consumer privacy, interconnection and competition provisions, access for individuals with disabilities, consumer billing protections. And what was also possible under Title Two?

Well, under Title Two, the FCC could forbear if it wanted to, and it availed itself of that power right up until August of 2005 wherever it thought it was necessary. So I don't think we should pretend that going back to Title Two would mean that the earth would stop spinning on its axis and the end of time would be upon us. We can achieve a sensible policy, a balance in Title Two, just as others assert that we can achieve it in Title One.

Now, I know that the FCC is fighting in court to defend the current Title One policy framework. Hopefully the court will uphold that, but if it doesn't, cool heads will prevail. And we will work with the FCC to ensure that all of the goals that are in this broadband plan, universal service, investment, competition, privacy, disability, access, will all be implemented. So the agenda for connecting America doesn't change if the FCC uses Title One or Title Two.

I know that there are some people out there saying they shouldn't have the authority under Title One or Title Two. Kind of turn it into an agency that is just kind of enforcing the law without

any ability to be rule makers, but I just completely disagree with that. History says that that is completely wrong, and the Telecom Act of '96 was a broadband plan. And this is the next iteration of it. This is broadband plan number two going forward for the 21st century. Do you agree with that interpretation, Chairman Genachowski, of the law?

Mr. GENACHOWSKI. Congressman Markey, you—

Mr. MARKEY. Can you turn on your microphone please?

Mr. GENACHOWSKI. Sorry. You lived it, and so it couldn't possibly be wrong. During those years from 1998 to 2008, I was in the private sector. I was a business operator, and I was in investment. And I am very sensitive to the effects that poor policies can have on investment.

I am confident that this FCC will tackle all of these issues in a way that has great respect for the private investment that we need to get to world leadership on broadband. And as you mentioned, the FCC has been operating under Title One. A company made a decision to challenge that in court. The FCC is defending it, but I believe we have the authority and that we will have the authority.

Mr. MARKEY. OK, and I agree with that 100 percent. Otherwise the whole history of the Telecom Act of 1996 makes no sense because all of those regulations were implemented under Title Two. So it really doesn't make any difference except that there are some companies out there that enjoyed the forbearance that was engaged by the FCC during a particular period of time would just like to extend it in perpetuity, and I do not think that would be a good policy for our country. Competitiveness, Darwinian, paranoia-inducing competition is what America should be all about, not forbearing from competition but inducing it into every single aspect of this communications marketplace.

That is how we got Hulu and YouTube and Google and EBay and Amazon. Not one home in America had broadband in February of 1996 when the Telecom Act was signed. Not one home had broadband. Ten years later, we come back, and there is a completely different dialogue in our country.

One final question. That is on the E-rate that Congresswoman Matsui and Capps and I have both introduced, have all introduced E-rate 2.0 Act to change the way in which we look at the E-rate to ensure that there is more access. How do you feel about that, Mr. Chairman?

Mr. GENACHOWSKI. I think it is essential. I thank you, of course, and the committee for its work on E-rate over the years. One of the things that I see when I talk to teachers around the country is how frustrated they are by the fact that some of their kids have broadband access, some don't. And how frustrated that they are that their facilities, while we have connected classrooms, aren't good enough to give them what they want. So tackling that is a recommendation of the plan. It owes a lot to your leadership with respect to E-rate.

Mr. MARKEY. We thank you, Mr. Chairman. We thank all of the Commissioners for their excellent work on this plan. It is going to actually play a historic role in ensuring that America regains its position as number one. Thank you.

Mr. BOUCHER. Thank you, Mr. Markey. The gentlelady from California, Ms. Bono Mack, is recognized for five minutes.

Ms. BONO MACK. Thank you, Mr. Chairman. First questions are the Commissioners Genachowski and McDowell. I am very concerned about the plan's recommendations to changes in the copyright law expanding the definition of fair use. Can you please explain why this is necessary?

Mr. GENACHOWSKI. Sure, the first point to make is that it is very important that we make sure that the Internet is not only open but a safe place to do business, including by owners of copyrights. And so I have been very clear and the plan is very clear that we need to make sure that companies can enforce their rights and that we don't have rampant piracy on the Internet.

Over the course of a broadband proceeding, we heard from teachers and some in the education community that pointed to some narrow issues where they said our ability to do what we would like to do in teaching is inhibited, and there may be some ways to fix that that don't challenge the fundamental point that protecting intellectual property is essential.

Ms. BONO MACK. Mr. McDowell.

Mr. MCDOWELL. We want to encourage owners of copyrighted works to put them online. So they need to feel comfortable in doing so. That means they have to enjoy the strongest possible intellectual property rights protection. We have to allow them to work constructively and cooperatively with carriers to police and act against stolen intellectual property.

So first of all, I should start off by saying we are not the expert agency on intellectual property or copyrights. But I am sounding a note of caution when it comes to any recommendations that could be seen as wanting to weaken intellectual property rights. I think what will actually help the proliferation of new content and applications online will be if we have strong intellectual property rights enforcement.

Ms. BONO MACK. But there is almost no discussion in this whole document about legal content protection. Is it not a priority at all for the FCC? Just to either one of you.

Mr. GENACHOWSKI. I believe there is some discussion. We would be happy to follow up with you on that. IP is not a central issue in the broadband plan, so there is an endorsement of the importance of copyright protections, and then there is an identification of an issue that was raised with us in the record with respect to education and the suggestion for further work on that.

Mr. MCDOWELL. I think if you look at Sections 11.4, 15.7, and 15.9, there you will see some discussion there. But some of the concerns that when I read it were that we could be suggesting a weakening of intellectual property rights protection.

Ms. BONO MACK. Thank you. Just to echo my concern, in the document, the example you cite in fair use is actually, you said, teachers seeking to use Beatles' lyrics to promote literacy is the example that you cite. Now, in education, the best way we can improve literacy is to cite the Beatles? And this is the example you have used for this argument. Do you care to comment on that? Because you just spoke to this very comment about it being the example that was given to you was the Beatles' lyrics.

Mr. GENACHOWSKI. I think what I would be happy to do is make sure that we share with your office the comments that we received from educators on their concerns in this area. And I am confident that the report emphasizes the importance of intellectual property and puts ideas on the table.

As you know, it is not self-executing, but certainly we would be happy to be a resource to you. And I would be happy to supply the information that we received in the course of process on the issues that that section addresses.

Ms. BONO MACK. I would appreciate that very much. Does anybody else care to comment?

Ms. BAKER. I would like to make a comment. I have not visited with the teachers or the educational community, so I can't speak to that. But I have visited with consumers and media companies. And video is driving broadband at option. And for media companies to put their expensive content on the web, they need to have assurance that it is going to be protected.

And so I think it is very important that we consider this as we move forward with broadband, and that it is very important that we are protecting our intellectual property.

Ms. BONO MACK. Thanks very much, Mr. Chairman. I yield back.

Mr. BOUCHER. Thank you, Ms. Bono Mack. The gentlelady from California, Ms. Eshoo, is recognized for five minutes.

Ms. ESHOO. Thank you to each one of you. I hung on every word of your testimony and welcomed it. So thank you again for the extraordinary work.

We know that or I am convinced that you all, through your testimony and otherwise, that you recognize the need for speed, but I continue to have some concerns, especially when it comes to spurring competition with new and innovative uses of the spectrum. There are so many entrenched interests that seem to be able to stop new ideas from taking root through delaying tactics that keep the spectrum concentrated in the hands of the larger carriers. I think this concern has been raised by other members of the committee as well.

If we are going to see that 100 megabytes reach 100 million homes, the FCC has to begin and complete rule makings faster so we can see immediate action. And I don't know what you all have to say about that. I think that perhaps it is more in the hands of the chairman. I might be wrong about that.

I am disappointed that the advanced wireless spectrum, the AWS3, was not recommended for immediate deployment. You are not surprised by my comment, Mr. Chairman, on that. It was a proceeding that was teed up years ago, and I don't really think that businesses can either afford to or should be allowed to have to hang around and lose money for years.

It is my understanding that the DOD's spectrum band that the National Broadband Plan, that you are considering pairing that spectrum with the currently jammed, I think it is jam-packed with vital systems, including the drones. I put on my Intelligence Committee hat. The drones were air strikes in Afghanistan and Pakistan and border security here at home. And that these systems in the band cost over \$100 billion and can't be relocated until 2030.

I don't know if you want to comment on this. I don't really see the DOD giving up spectrum. So have you contacted the DOD? Has the DOD contacted you? That is my first question. And if you don't find paired spectrum by the October deadline that you outlined in the report, are you actually going to auction the spectrum and put it in use as soon as possible?

I am going to continue on with my questions and then you can answer them. On the next generation 911, as I said, Mr. Shimkus and I are cochairs of the E-911 caucus. We have offered legislation, and if you have had a chance to take a look at it, what your take is on that.

There are so many things to ask about. Of course, we are going to submit more questions that you can answer in writing. Public television and their broadcast spectrum issues, the public television stations are very different from commercial television stations as you obviously appreciate. As the Commission looks ahead the rule makings announced in the plan to reclaim the 120 megahertz of spectrum from these broadcasters.

Can you give us any assurances that public television stations would be protected from involuntary reallocations of that spectrum? I think it is important that they are protected. I think they represent one of the treasures of our Nation. So those are my opening questions, and I am going to submit to you, to the Commission to respond to in writing.

So whoever would like to answer, I welcome it.

Mr. GENACHOWSKI. I would be happy to do so. On the first issue, our staff at the FCC and their colleagues at NCIA and other agencies have been talking about spectrum and with respect to the spectrum you mentioned, they have identified a potential opportunity that could be very good for the country in terms of pairing.

I completely agree with you that it is a bad practice to extend proceedings, petitions indefinitely at the FCC, and one of the things that the plan did was put a deadline on exploration of this pairing alternative. And I believe the plan goes on to say that if the pairing is not possible, then the Commission should proceed, adopt rules, and auction that spectrum.

With respect to E-911, I think we owe you and Congressman Shimkus thanks for the ideas because I believe that E-911 is discussed in the broadband plan certainly as part of looking to the future on public safety in the 21st century, and broadband tackling 911 and the way that people are actually using communication devices is essential.

And on public TV, the answer to your question is yes, and I think for public TV too, there is an opportunity here for a win/win. And that is something that I hope we can work on with everyone together in the proceedings that will watch.

Ms. ESHOO. Thank you very much, and I am very excited. It is as if the cobwebs are being cleared and we have a vision for our future. And I really look forward to working with the Commission and the full subcommittee on this. Thank you.

Mr. BOUCHER. Thank you very much, Ms. Eshoo. Gentleday from Tennessee, Ms. Blackburn, is recognized for five minutes.

Mrs. BLACKBURN. Thank you, Mr. Chairman. And I want to thank you all again for being here. I have to tell you. The lack of

attention to intellectual property and the way you are punting the question is a little bit troubling to me. I think that you have to look at the fact that broadband—you are talking about wanting broadband, a robust broadband deployment and expansion. And to not have some of the intellectual property protections—and I know that you are not the central agency that handles that, but I do think that it is worthy of a revisit from you.

The expansion of fair use is of concern to me. One of my writers terms it fairly useful way to steal my money. And that is his version of fair use. So I think that I would encourage you all to have a revisit on that.

I have about seven questions. I am not going to get through all of them. So, Commissioner McDowell, you had mentioned something I want to go back to. The notion of net neutrality, having net neutrality and those net neutrality rules could complicate the efforts to enforce the laws on illegal content, illegal downloading online. I would like for you to just expand a little bit about that relationship between net neutrality rules and enforcement against illegal content.

Mr. MCDOWELL. Sure. First of all, the proposed rules do call for a carveout for enforcement of such things as illegal content, not just intellectual property theft but child pornography or things involving national security, et cetera.

But I think my concern with adopting those rules in general is the amount of uncertainty that it will inject. We have talked about today extensively Title One versus Title Two. I will be filing a letter with the committee regarding my position on that, but that is being litigated before the courts. And these things do take years.

In the meantime, would new rules actually give network operators pause in terms of acting on a number of fronts including the enforcement of intellectual property where it might not be so clear, especially if we are talking about relaxing or undermining fair—expanding fair use, undermining of the existing protections? So I think it creates some certainty.

You know after the '96 Act, we have the legislation and then regulation and then litigation cycle that went on for better part of a decade. I would think that after we try to promulgate some rules, we would have at least half a decade of such uncertainty, and that is probably not good for intellectual property rights holders.

Mrs. BLACKBURN. OK, Mr. Chairman, let us go back to Commissioner Baker's comment where, you know, talking about the media companies and the push to get that content on their because of the way people are doing research. So if you want to ensure both a robust broadband deployment and a protection of the intellectual property and that content from those copyright industries that are going to be essential and are going to contribute to that growth, then how are you going to go about that?

I think we have to realize that our core copyright industries contributed nearly a quarter of the real growth we had in our economy last year. And you are talking about, you know, ease of access here. So how are you going to marry those two? We are all interested in it. We have a lot of innovators who have invested a lot of money in new platforms. So how do you make that guarantee?

Mr. GENACHOWSKI. Well, one is I couldn't be more firm in my conviction that it is essential to be able to protect intellectual property on the Internet. I have been clear about this since the first day I was sworn in as Chairman. I understand that one, it will be video under Commissioner Baker and other content that will be an important part of driving broadband everywhere, and one of the main ways that a strong broadband policy will create job creation and innovation in the country.

So I think in general I am in complete agreement with you on this. I think we have to be sensitive as a Commission to suggestions that we have from teachers or others saying can you look at narrow issues to see what makes sense. We wouldn't do anything in this area without a robust, open, participatory proceeding that heard views from everyone involved. And I think that is our job. But I should stop there, but I don't—

Mrs. BLACKBURN. Well, we are out of time, so that will be fine. And thank you again so much to all of you for your preparation and being here. And, Mr. Chairman, I will submit the balance of my questions, and we are appreciative for your efforts today. Thank you.

Mr. BOUCHER. Thank you very much, Ms. Blackburn. The gentleman from Michigan, Mr. Stupak, is recognized for five minutes.

Mr. STUPAK. Thank you, Mr. Chairman. Chairman Genachowski, Mr. Waxman spent a little bit of time on public safety. I have a couple questions I would like to follow up on. The National Broadband Plan proposes roaming and priority access to public safety organizations for all license holders in the 700-megahertz realm. What type of obligations would be placed on commercial providers to ensure that public safety is given more than just priority access but also a robust and resilient access at times of emergency?

Mr. GENACHOWSKI. Well, the details of that are exactly the kind of thing that would be worked out of the rule making that we will hold. But that is the—what you describe is the goal. To put in place a mechanism where public safety can have prioritized access to spectrum that it needs. The team that has worked so hard on this and has consulted with everyone involved believes that there is a path that can work for public safety and deliver on the 9/11 Commission recommendations and that is also reasonable for wireless industry, and it takes advantage of this unique moment in time. If we do this as the commercial networks are being built out, we can get it done, do it efficiently, and deliver on the 9/11 Commission recommendations.

Mr. STUPAK. Well, in order for it to work though, you are going to have to have a ready and willing commercial partner to work with for law enforcement. And are you confident we are going to have it in all parts of America, especially our rural areas? If they don't, how would public safety proceed to have this plan?

Mr. GENACHOWSKI. I asked this question of our team because I wanted to make sure that the plan that was being proposed met these goals. They are confident that this mechanism will work for public safety and that commercial providers will provide the access that is described in the plan.

Mr. STUPAK. Even in areas that are not developed now?

Mr. GENACHOWSKI. I believe that is the case. It is certainly something we would be happy to follow up with you. Sorry, the areas that are not developed now, the idea is that as we push forward on forging mobile broadband network everywhere, it would be developed and that actually it would accelerate buildout of 4G networks in rural areas because we can do the commercial networks and the public safety networks together.

I fear that if we don't do that, in some areas, we won't get any 4G networks, and some areas we might get commercial and no public safety at all because, as Commissioner McDowell mentioned, there is public safety spectrum that is there. It is not being built, and the goal here is to get it built.

Mr. STUPAK. You mentioned 4G, but then you add in the mobility fund, you provide for support for 3G wireless network. So I guess that seems like—how are you going to get the 4G then to help our law enforcement in those areas when the minimum is going to be a 3G in that Connect America Fund, I think it is, in your proposal. And plus you are only going to support one carrier with subsidies in a given geographic area, right, underneath this Connect America Fund?

So how will you determine which broadband provider in a given area would receive support if they are only supposed to be 3G, but yet you are talking about public safety needs 4G? How do we bridge that?

Mr. GENACHOWSKI. Well, the 3G networks would be the foundation for the 4G networks, so I do think this is part of the solution to make it happen. With respect to the other issues, I think you are raising issues that, of course, we'll take up in the course of developing the rule making. In the meantime, we would be happy to follow up with you on more information that went into the development of this plan.

Mr. STUPAK. Well, let me ask you one more since we are going to look to the future development. In the intercarrier compensation scheme that is going to be sort of Universal Service Fund phased out, what, over 10 years? Is that what it is?

Mr. GENACHOWSKI. Yes.

Mr. STUPAK. OK, and how does the FCC plan to ensure that the necessary support for rural telecommunications remain in places considering how essential the implicit support is to many of these rural companies?

Mr. GENACHOWSKI. Well, we believe that the plan proposed a transformation over 10 years.

Mr. STUPAK. OK.

Mr. GENACHOWSKI. We will have that result. As I said to one of your earlier questions, the team has also suggested an alternative to accelerate the transition. There is a possibility of identifying additional funding. That is a choice that we would be happy to work with the committee on. But the goal of the plan would be to deliver exactly what you are seeking for rural America.

Mr. STUPAK. I appreciate the goals and the thought and analysis that went into this. It is just that whenever we do, whether it is the Telecommunications Act of '96 or anything, it is always rural areas, we will get to you. We are still waiting, and law enforcement, it is even greater. You say you need 4G. We can't even get

the basic cable up in some of those areas or DSL. So I am a little concerned about that.

Commissioner Copps, I have four seconds left. The bill we entered as the FCC Corroboration Act, give me just a quick comment on why we need it and hopefully we can convince the chairman, even though he has indicated we might get a hearing on it here soon, why we need this.

Mr. COPPS. Well, I want to commend you again on introducing the legislation to make this possible. I just think it would be a great step forward from the standpoint of dispatching the business of the Commission. You know we were all standing around in the room out front waiting for the hearing to start here, and it was an opportunity we could have talked about some stuff on broadband and maybe resolved a problem or two. I don't know. But we all had to get lockjaw at that point because we would be delving into the world of substance.

So I think from the standpoint of doing business, you have five people here who come from five very different backgrounds with hopefully different talents to contribute to the cause, different perspectives. You can really benefit from those folks sitting around and talking about these issues. It serves the public interest. You do it with counsel present. You build in protections, but the system we have right now disservices the public interest and retards the ability of the Commission to discharge its obligations in a timely and public-interest-friendly fashion. And if there was one reform that I could make at the FCC, the one you proposed would be it.

Mr. STUPAK. Thank you very much.

Ms. Clyburn wants to comment on it.

Ms. CLYBURN. Mr. Chairman, if you would allow. One example to augment that. I had the opportunity to chair the joint board for USF where all of the joint boards. Thank you very much, Mr. Chairman. And one of the things—and my colleagues are members. I distinctly remember on our inaugural call, which we had a lot of new voices because it was virtual. A lot of voices on the line and Commissioner Copps was in the middle of a very significant point, and it was 17 minutes after the hour when Commissioner Baker—and she was quite on time—came into the room. And Commissioner Copps had to get offline. So what happens is we lost that exchange, and just lost that train of thought. And it is a very cumbersome process. So I thank you for recognizing that even on that level where notes would be taken that this country and the joint board would be better served in having a process that is more relaxed.

Mr. BOUCHER. Thank you very much—

Mr. STUPAK. Thank you, Mr. Chairman.

Mr. BOUCHER [continuing]. Ms. Clyburn and Mr. Stupak. And let me assure you there will be a hearing on your measure in the not-too-distant future. The gentleman from Alabama, Mr. Griffith, is recognized for five minutes.

Mr. GRIFFITH. Thank you, Mr. Chairman. I appreciate the opportunity. When you mention staff, is it your staff that is going to make the recommendation so that we remain competitive and enhance the creativity of our Internet?

Mr. GENACHOWSKI. I think it is the FCC staff.

Mr. GRIFFITH. Well, it is the FCC staff. Is there a group that is specifically in tune with what has happened in the marketplace in the last 10 years and has a relationship with that marketplace?

Mr. GENACHOWSKI. That is a great question. That is the job of the staff of the agency to be proactive, to stay on top of market developments and to make sure that we have the skill sets necessary to do our job.

Mr. GRIFFITH. Right, and so those individuals have had experience in the marketplace and understand the reality of the capitalistic system and the development and the risk capital and that sort of thing? Is that a fair—

Mr. GENACHOWSKI. I come from 10 years in the private sector and taking this job, and I have focused on bringing in to the staff a broad collection of people with backgrounds in operating businesses and investment firms as well as people who have other relevant experiences. I think that is how we do our job best, to put a room together of people with different backgrounds and disciplines and have them focused on doing the right thing for the country. But certainly making sure that people have a very real understanding of technology, the marketplace, what drives business decisions is essential to me.

Mr. GRIFFITH. Would it be five or six staff members that will be assigned to the development of the language and how it might affect private investment?

Mr. GENACHOWSKI. I think the implementation of the plan will be worked on by many more staff members than that.

Mr. GRIFFITH. Well, where I am going is I would love for you to identify those for me, and I would love to sit and see their resumes and also talk with them if that would be fair because it is of great interest to me, having been in the communication field once before.

And in the interest of the health care bill that we just went through, I have read that bill, and there is no provision in the health care bill for broadband envy. So we have to—that is a joke. We hope that you guys can solve that problem for us here. And thank you very much for being here. We appreciate it.

Mr. BOUCHER. Thank you, Mr. Griffith. The gentlelady from California, Ms. Matsui, is recognized for five minutes.

Ms. MATSUI. Thank you very much, Mr. Chairman. You know in many districts even like mine in Sacramento, there are far too many households who cannot afford broadband services. In a recent survey conducted by the FCC found that 93 million Americans do not subscribe to in-home broadband services in large part because of affordability barriers.

The fact is the high cost of broadband leaves far too many lower income families in urban and rural areas at a severe disadvantage in our economy. Last September, I introduced a broadband affordability act to expand the USF Lifeline Assistance Program for universal broadband adoption. This bill will ensure that all Americans, whether they live in urban, suburban, or rural areas all have access to affordable broadband services.

Chairman Genachowski, I applaud you actually and the Commissioners for including this proposal as a central element of your plan. How important is it, in your view, is it for our economy and for the matter of our country to fully close the digital divide?

Mr. GENACHOWSKI. I think it is essential, and I appreciate your leadership on this, and it is included in the plan. Ten years ago if you were looking for a job, you would get a newspaper. You would look at the classified, and that is how you would look for a job. Today job posting have moved online. Most jobs require online applications. If you don't have Internet access, you are disadvantaged in looking for a job. More and more jobs require basic digital skills and digital literacy, and so it is very important that we move forward on this.

It is one of our biggest gaps too globally where other countries are ahead of us on adoption rates. So it is a very important challenge. There is no silver bullet, and the plan recommends a number of different strategies to tackle adoption issues.

Ms. MATSUI. Now, if this program, my linkup program for universal broadband service were implemented, in your view, how much do you estimate it would increase the broadband adoption rates in urban and rural areas?

Mr. GENACHOWSKI. Well, we have set a goal in the plan of moving from 65 percent to 90 percent adoption over the next 10 years, which would be a third as fast, two-thirds as fast as the adoption rate for telephone. With respect to lifeline linkup, we want to move forward as quickly as we can with smart pilot projects so we can identify what works, what really moves the needle on adoption, and then focus our energies on those.

Ms. MATSUI. And that would be both in urban and rural areas?

Mr. GENACHOWSKI. Yes.

Ms. MATSUI. OK, that's great.

Mr. GENACHOWSKI. Yes.

Ms. MATSUI. I had in my opening remarks broadband is going to play a major role in the sustainable path to clean energy economy, improving energy efficiency standards, and lessening our dependence on foreign oil.

As I mentioned before, I will soon be introducing legislation that will complement many of the recommendations made in your plan to modernize our Nation's smart grid. In doing so, it will make our smart grid more reliable and efficient and assure resilience to natural disasters and empower consumers to make more energy efficient and economic decisions about their energy usage.

Chairman Genachowski, how important do you believe that broadband is to modernize our Nation's smart grid?

Mr. GENACHOWSKI. I think it is essential. I think Congress was wise in instructing us to prepare a broadband plan, to ask us to look at the relationship between broadband and energy, health care, education. There is a section in the plan, as you know, but it is going to be critical to integrate broadband with our smart grid both critical and efficient and ultimately would result in very significant savings and benefits for the country.

Ms. MATSUI. Well, can you expand on the point made in the plan about the importance of ensuring that consumers have greater access to information about their electricity usage, and why is it so important? What are the barriers in order to provide them that access?

Mr. GENACHOWSKI. There is terrific innovation going on in this base with products that help consumers visualize their energy use

and a lot of evidence that that translates directly into energy savings. Many of those technologies rely on broadband connectivity and often wireless connectivity to fully see and fully visualize. So homes that don't have access to broadband or haven't adopted broadband are not able to get the benefits of those kinds of technologies. And so in a number of different areas here, the nature of broadband is a general purpose technology that can fuel so much innovation, investment, and benefit producing activity applies very much to energy. And this is a good example.

Ms. MATSUI. Well, in Sacramento, the utility district receive \$129 million grant for smart grid, and in talking, we felt it was really important to look at that and look at broadband and how the connection of this is so important when you think about the community and what we need to do and to see the relationships.

That is really very important too because for some reason I think when you think about things like smart meters and being able to find out what's being used in your house, people seem to understand that this is somehow connected to broadband. So I think it is important, and I am very grateful that you have a new plan. Thank you.

Mr. GENACHOWSKI. Thank you.

Mr. BOUCHER. Thank you very much, Ms. Matsui. The gentleman from Michigan, Mr. Rogers, is recognized for five minutes.

Mr. ROGERS. Thank you very much, Mr. Chairman. Thanks again, Commissioners. Mr. Genachowski, I am very impressed with and I like a lot what you are saying. But when I went back and took a look at your statement on September 17 at the hearing, nowhere in this statement does it talk about net neutrality, not once. Great statement. Get tears in your eyes reading this thing. I want to stand up and salute the flag.

And then four days later, you introduce a rule, a pretty sweeping rule on net neutrality. Today I heard you tell this panel that I am for a light touch on regulation. That is what has generated all of this competition, and yet your FCC was doing oral arguments arguing where you have the ability to regulate the Internet. And maybe you can help me understand how we get from that position to net neutrality and your position of today that you are telling me now, which I like to hear, light touch on regulation. You can argue the case that you have the ability to do that even though it appears to me by reading the case that the three-judge panel was pretty tough on your position. Could you help me understand that, sir?

Mr. GENACHOWSKI. Sure, I think, you know, I have been very public for quite a long time on my very strong view that clear, high-level rules to preserve a free and open Internet are pro-investment rules, pro-competition, pro-innovation that we have an obligation to make sure that the open architecture of the Internet that has served the country so well continues going forward. So I see real consistency between my priorities of innovations and investment and preserving a free and open Internet.

Mr. ROGERS. The very things that you reference actually in your speech to the Brookings Institute where you talked about, you know, Chevrolet and hot dogs and apple pie. Great stuff, but you—there are some of the things that you reference, Netscape, started in Ann Arbor, Michigan. We are very proud of that. The Facebook,

those other innovations didn't happen because of this social justice notion we are going to have this exchange of information. We are going to be in the back yard and have Kum By Ya and play drums. And somebody was going to make some money, right?

Mr. GENACHOWSKI. Absolutely.

Mr. ROGERS. And so what you are saying is I believe in the light touch. I believe in a free and open Internet. That is why we are going to regulate the Internet. There is no such thing as being a little bit pregnant. When you start getting into regulation of the Internet, you are going to make determinations. You have to make determinations.

And you are arguing the fact that you absolutely have the ability to do it. I agree with the three-judge panel. I don't think you do. I would love to know—obviously we are going to disagree. You think it is consistent that you can do that. I don't think you are. You need to help me understand where does it say, in what section of the law, in what you are arguing that gives the FCC the ability to regulate the Internet.

Mr. GENACHOWSKI. Well, we are not in favor—I am not in favor of regulating the Internet.

Mr. ROGERS. But you are in favor of net neutrality which is regulating the Internet.

Mr. GENACHOWSKI. I completely disagree with that, sir. It is about—in fact, some companies have come to us to suggest that we regulate the Internet, and we have resisted it. The FCC has, for many decades, had rules that apply to the onramps for the Internet to promote competition to make sure that those are free and open and fair. And I do think that we should continue that in the Internet world so that the next Facebooks, the next eBay, the next Netscapes have the ability to innovate, to invent, and as you say, I completely agree, get a return on their investment by having a fair chance to reach a market.

Mr. ROGERS. And I agree with you, but when the federal government, FCC, gets into the business of setting up what those rules are that don't exist today, you have regulated the Internet. I don't know how you cross that barrier and think that there's no harm, no foul. There clearly is, and I will tell you what will happen. There is a member who—a complete free market. I believe in the market. I think it works.

Now we are going to create these big programs to give broadband to people because maybe you have all gotten in and regulated the Internet where there isn't a clear market solution, but there might be in your terms, at least Mr. Copps' view, I think, a social justice issue for having that broadband at the house.

Now you have completely dismantled the very model that got us to 200 million folks having access to broadband, and how you don't intertwine that is beyond me. And I guess my concern is exactly that. You say here light touch. Four days later, you unleash a pretty aggressive, first-time-ever I would argue regulation of the Internet.

Today you said light touch. What is next? I mean obviously this is something you are wedded to and you are clearly committed to this. And I think Mr. McDowell pointed out this section. I apologize. I don't—it was section 17? Is that right, sir? Did I get that

right? I mean so you have clearly laid out the platform to do this. And is it your position that you are going to continue to pursue at least in court that you have the right to regulate the Internet?

Mr. GENACHOWSKI. If I may, sir, when I started at the FCC, the prior administration had adopted first a set of principles regarding the free and open Internet, then enforced those principles against a company. It was the prior administration that did it. That is why we are now in court. It took those principles and attached them as conditions to a merger, so I inherited a landscape around this area where there were open Internet rules in effect, but they were confusing to people, diminishing predictability and certainty.

I think it is important to adopt clear, high-level rules of the road that encourage innovation, competition, and that make clear what is not permitted. And almost anyone involved in this will tell you there are some things you shouldn't be able to do. Make clear what is permitted, and then have a fair process for disputes to be resolved.

And I would be happy to work with you on that. I think there is a way to do this completely consistent with investment growth.

Mr. BOUCHER. Thank you very much, Mr. Rogers. Your time has expired.

Mr. ROGERS. Thank you, Mr. Chairman.

Mr. BOUCHER. The gentleman from California, Mr. McNerney, is recognized for five minutes.

Mr. MCNERNEY. Thank you, Mr. Chairman. You know I have really enjoyed this hearing so far. Mr. Chairman, I have a question concerning access. Do you believe that pursuing a purely engineering approach to meeting data flow challenges would make net neutrality an obsolete issue?

Mr. GENACHOWSKI. I would be—one of the suggestions that I made in the rule making that we propose was to increase transparency, to increase the information about the engineering network management rules that will be available to entrepreneurs and CTOs. I think it would have the positive effect of minimizing disputes, minimizing the government role. And so if that is what you are referring to, it is something that I would like to pursue.

Mr. MCNERNEY. Well, what I am getting at is that a purely engineering approach would basically expand the capability of the existing spectrum, and that may be enough to override whatever net neutrality issues are. Commissioner McDowell, do you have—your head is shaking there.

Mr. MCDOWELL. I think you are on the right track absolutely. I think what can actually obviate the need for—first of all, there is no need. The Internet is not broken in this regard, but what we really—the ultimate antidote to potential anticompetitive behavior is more competition, especially in the last mile. The most robust area for that competition recently has been wireless.

The Commission has worked hard for years since the chairmanship of Michael Powell, for instance, on getting unlicensed use of the white spaces out to market. This is something that in November of '08 with great fanfare we announced a groundbreaking order of 5-0 bipartisan unanimous vote. It was absolutely a wonderful moment, but we have bogged down in our progress there.

Something like the use of unlicensed use of the white spaces could actually absolutely obviate the need for any rules. I dispute that there is a need right now. The record doesn't have any evidence that there is. But you are absolutely right. So also with new technologies, cognitive radio, software defining radio, new smart antenna technologies. All these can allow us from a wireless perspective to have more competition the last mile wirelessly so you get multiple providers and consumers have a wonderful robust marketplace to choose from.

Mr. MCNERNEY. Thank you. I have another question for you, Commissioner McDowell. Do you feel that the plan will succeed in meeting the six goals that are identified? Do you think the plan as written and published?

Mr. MCDOWELL. It remains to be seen. First of all, it is obviously a very ambitious plan. It is very lengthy. There are several hundred recommendations, some of which are for the FCC to do, some of which are for other agencies to do, some of which are for Congress to do. So all those moving parts, I think it is going to be very difficult to say all of them are going to realize the hope of their recommendations. But we can always be optimistic.

Mr. MCNERNEY. One more question for you if you don't mind. While I certainly appreciate the risk of additional regulation, and, as I mentioned in my opening statement, creating jobs is very important to me, considering the situation in my district and in the country. And I wish to work with the Commission on that issue as we move forward.

Do you think there is any risk of abuse without further regulation, without additional regulation? Is that something you see as a potential problem?

Mr. MCDOWELL. Well, I think in the context, for instance, of our net neutrality proceeding, the Department of Justice, the anti-trust division found comments in early January, which is very rare for the anti-trust division to do that. It examined the marketplace and not only said was it not broken, in other words, there was not concentration and abuse of market power, there was actually downright optimistic that there is a competitive marketplace for broadband and that more competition is coming, especially because of wireless.

The Federal Trade Commission also examined this in 2007. Issued a 5-0 bipartisan unanimous report that said that we need to be very careful. This is a competitive marketplace, and while new rules might have the best of intentions, they could create regulatory uncertainty. So I think there is great risk there.

Mr. MCNERNEY. Any other Commissioners care to take a stab at that?

Ms. CLYBURN. As it relates to competition, sir, I am concerned about the future. In chapter four of the plan, it talks about what 2012 looks like, and it talks about cable rolling out its DOXIS 3.0 product which will provide incredible—the goal, incredible potential high speed. What it also points out is that in the market that we are speaking, that competition may only exist in up to 15 percent of the market.

So if we talk about, you know, prices and service quality and the like, I am a bit concerned because I don't see robust competition

in that particular segment in terms of high speed deployment being available in the next couple of years.

Mr. MCNERNEY. OK, thank you.

Ms. BAKER. I appreciate and understand the concern. My concern is that we proactively produce regulations when we are talking about a marketplace in the future. I think that right now the market is competitive, and any significant change in the regulatory environment will cause investment to dwindle, and that will cause jobs to dwindle. And I think we need to be very careful when we tread in this area.

Mr. MCNERNEY. OK, thank you. My time is up.

Mr. BOUCHER. Thank you very much, Mr. McNerney. The gentleman from Missouri, Mr. Blunt, is recognized for five minutes.

Mr. BLUNT. Thank you, Chairman, for the time. Let me ask—see what questions I can ask and which questions we will submit later. The first question would be in 2007, the FCC determined that a wireless service is not required to provide another wireless carrier with roaming services if the second carrier holds a wireless license of spectrum usage in the same geographic location.

Is there anything in this plan that changes that? And, Mr. Copps, you were there in '07. If you want to answer that.

Mr. COPPS. I think what we are trying to do is trying to revisit that a little bit on the premise that roaming is essential, I think, to competitive environment and looking at the end-market exception that was put in place at that time when several of the carriers were telling us this is, you know, inhibit the small one, inhibiting their ability to be able to connect and do business as they would like.

So I think the Commission was well advised, and the chairman can speak better to this, what is looking at, trying to take another look at that and see what, if any, changes need to be made at this point.

Mr. BLUNT. So, Chairman, your sense is there would be some potential there, that this will reverse some of that 2007 structure?

Mr. GENACHOWSKI. I wouldn't say that mostly because that process, that proceeding hasn't happened yet. If I remember correctly, the plan does identify roaming as an issue whose resolution could affect the speed of deployment and acceleration and competition in the mobile broadband market and suggested it is something that the Commission needs to look at.

Mr. BLUNT. Now the previous view was if you had a license to serve the area already, you were required to provide your own service. Mr. McDowell, do you have a view on that?

Mr. MCDOWELL. I think as a policy matter what we need to encourage is buildout of your home region. So I think what you are referring to is there was a concern in '07—I was there too—that we wanted to make sure roaming wasn't just a substitute for resale.

If you had a license and weren't building out in your own region, we wanted to provide a disincentive for that and an incentive for you to build out your own network so that you can become self-sufficient, so that the spectrum could be used more efficiently and consumers could be better served. So I think that has got to be a fundamental policy objective for us is to encourage buildout in home region and therefore everywhere.

Mr. BLUNT. OK, thank you. Let us go to broadcast TV for a minute. This committee in this Congress passed a bill out where the FCC would create an inventory of all the spectrum out there, how it is currently being used. That has never been voted on by either the House or the Senate, and I think this report calls for the need to find another 500 megahertz of spectrum.

Do you think it would be helpful to analyze how the spectrum is currently being used? And would you encourage use to move forward and ask the FCC to find out how the spectrum is currently being used before you just go out and try to find 500 megahertz of spectrum? Anybody can answer.

Mr. GENACHOWSKI. Sure, I would be happy to tackle that. The spectrum inventory bill is very important, and it reflects the recognition of the importance of spectrum in mobile to our economic landscape. Much is known already. The demands on our mobile network, the constraints that we are heading into are very clear based on the record.

And of course the FCC has information about where licensees are. The wireless industry in the course of our proceeding on broadband came and suggested that we need 800 megahertz of spectrum to satisfy forthcoming mobile needs. The staff at the FCC did work and felt the 500 megahertz was a reasonable goal. There has been record development with respect to broadcast spectrum and record development with respect to the win/win idea that is in the plan.

Of course, there is a lot more work to do, and we look forward to working with the committee to find a sensible way to unleash spectrum for economic activity to make sure the broadcasters are treated fairly, that viewers are served, and that there is a possibility to generate billions of dollars of revenue through auctions that we do—

Mr. BLUNT. OK, well I thought that this committee was right when we encouraged that you be funded, allowed, directed to make that review, and I hope we do that. But if we don't do that, what is the impact of over-the-air broadcasting on any spectrum reallocation? I know we have some areas all over the state that aren't served by the same over-the-air broadcast they were before the digital conversion.

How much worse does that get as we begin to reallocate spectrum, and, you know, we have lots of areas in America that are still either you pay for the satellite or you have over-the-air broadcasting or you don't have television.

Mr. GENACHOWSKI. The goal of the proceeding would be to respect the needs of viewers, especially those who still get their TV signal over the air. The congestion issues that we are concerned about are chiefly large market issues, and we can make substantial progress for the country if, in a small number of large markets, a small number of broadcasters share spectrum. We can free up very significant amounts of spectrum for our mobile broadband economy, generating auction revenues.

So I am confident that there is a win/win here. I think the issues will be much less in rural areas because the congestion issues on the mobile broadband side are less intense.

Mr. BLUNT. Well, it could be though a lot of the unserved people that were served before the other conversion are the people closest to the station, closest to the tower, if you are on that higher number on the band. But I have some other questions on the unserved and underserved and other things, and we will submit those for your answers in writing. Again thank all of you for being here today. Mr. Chairman, thank you for your time.

Mr. BOUCHER. Thank you very much, Mr. Blunt. The gentlelady from the Virgin Islands, Ms. Christensen, is recognized for five minutes.

Mrs. CHRISTENSEN. Thank you, Mr. Chairman, and again welcome. My first question is hopefully just for the record, Mr. Chairman. States means states and territories wherever we see that in the plan?

Mr. GENACHOWSKI. Yes.

Mrs. CHRISTENSEN. Good, OK. Thank you. Before coming to Energy and Commerce, I was on Homeland Security. So the issue of interoperability was and remains a big challenge and one I am very concerned about.

I have heard some concerns that the 10 megahertz of broadband might be inadequate for public safety needs either now or in the future. Listening to your prior comments, it seems that you were pretty satisfied that you were meeting the needs of public safety in this regard. So do you have concerns that there is not enough, or do you plan to expand the spectrum later on?

Mr. GENACHOWSKI. As I mentioned to Chairman Waxman, my charge to the team at the FCC, which is led by a wonderful 30-year admiral, was to take a fresh look at public safety mobile communications needs and recommend an overall plan that would most quickly and effectively deliver on the 9/11 Commission recommendations.

As Commissioner McDowell mentioned, there is 24 megahertz that has already been allocated. It is not being used because there is no strategy to build the network. And so this program, which includes several elements, is a plan to get the network built, to act consistent with the authority we have now to auction the 10 megahertz, referring to the D block.

I do have tremendous faith in our team and in the commitment to delivering on the 9/11 Commission recommendations.

Mrs. CHRISTENSEN. Thank you. Everyone feel the same way? OK. Commissioner Clyburn, when you came before us in the initial hearing with the Commission, you talked a lot about the concern about preserving diversity and local programming as well as closing the gaps for women and minorities. Do you feel that the plan provides enough capacity potential to meet those concerns?

Ms. CLYBURN. It provides some promise, but I remain concerned on some fronts. The concern for me is when we talk about, and I am not—I am for a voluntary spectrum reallocation. But what the potential of that is that some of these entities who may be financially strapped may be the first to sell their space, which would possibly further dilute the gains in the quest for diversity with the voices.

But the frontier, when I look at the overall plan, I am hopeful because it provides a whole host of opportunities that some are

named and some are not, you know, low-power television, entertainment in other types of sourcing or programming over the Internet. There are growing enterprises and arches who exclusively want to stay in that space because of the flexibility and the potential for keeping more of their dollars.

So while I am concerned on the other front, I am hopeful that this space will be one that literally the sky is the limit in terms of potential for diverse voices.

Mrs. CHRISTENSEN. And so would it be the role of the FCC to do the outreach to make sure that these smaller entities know what is available, or is it our role or CPC's role or—

Ms. CLYBURN. I think it is very much a global effort. When I go out and speak, I say just that, the more positive aspect. A young lady came up to me and said, you know, I am in my senior year of college. You know what do I do? You know I want to get into broadcasting, and I am a proponent of in the meantime. In the meantime, you have a vehicle, a relatively affordable vehicle through the Internet to promote yourself, to produce yourself, and so I look at this as both of an opportunity and a bridge to whatever comes next.

Mrs. CHRISTENSEN. Thank you. Let me just ask this question. I know that preserving and stimulating competition is a major part of the plan, but are there any new mandates imposed on industry—and anybody can answer this—in the broadband plan? And if so, what industries might have mandates that might require additional investment?

Mr. GENACHOWSKI. Well, the plan itself is not self-executing. There are a number of ideas in the plan to promote competition. I spoke earlier about the complaints that we have heard at the Commission from small businesses who want to move on to broadband but are dissatisfied with the choice that they have and their prices. And we hear from other competitors who have raised issues. And the plan identifies a number of issues that require further work.

Mrs. CHRISTENSEN. Thank you. My time is up, Mr. Chairman. I yield back whatever is left.

Mr. BOUCHER. Thank you very much, Ms. Christensen. The gentleman from Nebraska, Mr. Terry, is recognized for five minutes.

Mr. TERRY. Thank you, Mr. Chairman. It has been asked before, but I haven't asked it, as the old saying goes. But I am going to ask it in a little bit different way regarding the over-the-air TV spectrum. The plan suggests the option of being able to give back or sell back—I am not sure—that part of the spectrum. The second half of that is does—if there are not enough station holders willing to give back some of their spectrum, we have heard that you won't just force it. But does the FCC even have authority to force them to give back or the authority to take back some of that spectrum?

Mr. GENACHOWSKI. With respect to authority, the authority that we don't have is to structure what we call the incentive auction where with respect to any band, we have the ability to ensure that any spectrum that is used that way, that some of the auction proceeds benefit the license holders.

On the first question, again I would emphasize that both that there is a real issue ahead of us for the country and our ability to

lead the world in mobile. We have all the ingredients lining up with the incredible innovation that we are seeing, with the fact that we are moving quickly to 4G to lead the world. And we would be happy to share with you the data that shows the gap that we are going to face between capacity—

Mr. TERRY. I am well aware. I am just wondering if you have that authority or whether Congress would have to give you that authority to grab back that spectrum if they don't voluntarily offer it to you.

Mr. GENACHOWSKI. My understanding is that the authority that we lack is the incentive auction.

Mr. TERRY. So you think if it just we are going to take that back, you have the authority to do that without congressional—

Mr. GENACHOWSKI. I think in general with respect to licenses—

Mr. TERRY. OK.

Mr. GENACHOWSKI [continuing]. They are licensees of spectrum.

Mr. TERRY. OK, which is also a follow-up question about giving it back, whether you could buy it back. They are leasing it. I don't know if they would have the power to resell that anyway without the FCC allowing that or Congress.

Just overall, I like the plan in part, and, of course, we are always going to disagree with some of the details out here. But one of them, I view this plan as mostly an infrastructure, but a lot of the opening statements was on tape rate. And I think that is an interesting discussion of access versus acceptance. And so I want to talk about what part of the plan do you think is important on the tape rate, which then dovetails into the buzzword affordable. And I think that is a term of art not necessarily science. And so are there mandates in here on pricing, or how would you make this "affordable" so more people take it once we get the infrastructure and access out there? And I will open that up to any of them. Chairman, you have a good job of burdening and shouldering most of the answers and questions.

Mr. COPPS. I will get us going quickly.

Mr. TERRY. We can go to Michael. He needs to be involved more.

Mr. COPPS. Well, I think, number one, inferring that there is a competitive environment out there that helps drive down consumer costs is one way you get this stuff out and make it affordable. I think digital literacy is important so people understand the importance of this to their individual lives and to the future of the Nation.

Going back for just a second to that previous question you asked about, you know, licenses all expire. So, you know, we are not necessarily talking about going in and grabbing. I have always been a believer in kind of use-it-or-lose-it, and if you are in the broadcast spectrum, that involves serving the public interest. So my advice to the broadcast industry, while we are cogitating all of this and doing inventories and all of that is to make sure that that spectrum is being used.

Mr. TERRY. Mr. Copps, I hate to be rude to you, but I only have 23 seconds left, and I want to follow up on the affordability and how we are going to do that. And I thought the E-rate was the an-

swer to that question. So in this discussion of affordability and take within urban cores and rural areas, has E-rate not been successful?

Mr. COPPS. E-rate has been a stunningly successful program, I do believe, and I think it is—you are talking about digital literacy and all of that. And certainly E-rate is connected to that, but just from the standpoint of connecting kids to the 21st century, it has been an outstanding success.

Mr. BOUCHER. Thank you very much, Mr. Terry. The gentleman from Illinois, Mr. Rush, is recognized for five minutes.

Mr. RUSH. I want to thank you, Mr. Chairman. This has been an excellent hearing. Chairman Genachowski and the other Commissioners, you may be aware of the joint efforts by this subcommittee and the subcommittee that I chair to draft a federal privacy legislation. In recent days, much has been made about the plan's proposal to commission future spectrum options for broadband service around advertising business models.

If the FCC imposes conditions on spectrum and the 700 megahertz auctions require free broadband access for people who can't afford it, then one probable way to finance the purchase price would be through advertising-based services. The plan offers this as a proposed recommendation. However if I am veteran to auction and I know when to follow rules of the road with respect to protecting consumer privacy, then I might not be inclined to participate or to bid as much as might otherwise. This especially puts the cart before the horse and could open the doors to another set of unsuccessful auctions. With the passage of privacy legislation, what impact do you think that this passage will have on your auction designs for the 700 megahertz?

Mr. GENACHOWSKI. The privacy issue is a very important one is a very important one, and it is discussed in the plan. It is one of the big looming topics that the plan does say needs to be addressed to give consumers and businesses the confidence they need to participate in a broadband future.

It is not—I think we are glad that there is work proceeding on legislation, and I think, if I understand your point, it is that clarity around the rules of the road on privacy would have real benefits to the business community and individuals as the broadband future rolls out. And I would agree with that.

Mr. RUSH. And on to another matter. As you know, one of my observations is that the broadband plan places too much emphasis on the demand and the adoption side without giving corresponding weight to factors that will stimulate entry by small businesses, including by minority-owned and entrepreneurs. Small businesses are a critical part of the equation, and they can help to offset the huge number of layoffs that we witness from large carriers.

And I wanted to ask you, Chairman Genachowski and Mr. Copps. Mr. Copps, I know minority ownership has been a real area of concern for you over the years, and how do you plan on directing this stunningly silent omission in the National Broadband Plan?

Mr. GENACHOWSKI. If I may, sir, there is complete agreement on the importance of small businesses and the challenges and opportunities around broadband. We held three workshops looking at the small business issues, and there is a discussion in the plan. I would be happy to follow up with you and make sure, but with respect

to training, information, digital literacy for small businesses, there are recommendations in the plan with respect to small business administration and joint activities, extension programs, to make sure that small businesses get the information that they need. There are several recommendations on that.

And then with respect to the affordability issue that we heard from small businesses, there are recommendations with respect to moving forward on competition issues to get more competition to help reduce the price. So I hope the plan is not confusing on that, but I—there is complete agreement on the importance of small businesses in all ways that you said. And I hope that we can follow up and make sure that we are being as clear as we should be.

Mr. COPPS. For my part, I commend the emphasis of the plan on small business. Ever since I was assistant secretary of commerce in previous administration, Clinton Administration, I have dealt a lot with small and medium-sized enterprise. They are the locomotive of the economy. They are the job creators. So getting broadband out there that can facilitate their business is an important priority.

Also is making sure the small business is a participant in the building out of this infrastructure and gets its share of activity as we build out.

Mr. RUSH. Yes, I only have—I guess my time is expired.

Mr. BOUCHER. Thank you very much, Mr. Rush. The gentleman from Vermont, Mr. Welch, is recognized for five minutes.

Mr. WELCH. Thank you very much. I had some of the same concerns that Mr. Blunt had, and I think that you all have addressed those questions. But obviously on the issue of this spectrum, we can't afford to ignore the incredible opportunity that it has to connect folks in rural and low-income communities. And I think all of us represent some part of our district, most of us anyway, that are rural and low income. And that is certainly the case in Vermont.

You have heard this, and you understand it, but it is important for me to say it so that folks back in Vermont appreciate that we are on the job here about the absolute necessity of treating this in many ways like electricity. So that that opportunity to create jobs comes to the rural communities, and I appreciate your concern on that.

I wanted to ask you about this. The Commission obviously recognizes and understands the problems in the wholesale market, particularly with high speed special access connections. In Vermont, we have established, with the help of the governor and the legislature, Republican and Democrat, the Vermont Telecommunications Authority. And it has identified the high cost of wireless back haul as one of the most significant potential barriers to our success in Vermont in getting wireless service deployed in rural Vermont.

So on the one hand, we are committed to the goal. On the other hand, we have a practical impediment that really does require leadership and guidance from you. And I just want to kind of go down the line a little bit about your views on that. Why don't we start at this end with Ms. Atwell Baker, who thank you for coming into my office and saying hello.

Ms. BAKER. Absolutely. It was a great visit. I am glad that we had the time. Special access is an important input into services in-

cluding wireless and the back haul is certainly important. It is something we are taking a look at. We gathered the data. We are in the process of doing that now to look at what parts need to be regulated, what parts need to be unregulated. So hopefully we will be able to do this expeditiously.

Mr. WELCH. OK, thank you. Ms. Clyburn.

Ms. CLYBURN. Yes, sir. As it relates to back haul, I recognize the importance of that, and recognize that it will increase competitive options and make the cost of deployment lower. So I am looking forward to engaging more fully with that and to get rid of the some of the bottlenecks that cause.

Mr. WELCH. Let me just elaborate on this, Mr. McDowell, when you do it. You know in Vermont we have been trying to encourage some local generation of power, and then local generators have to use the wires and poles that were there beforehand in a regulated utility. And it is a practical challenge trying to figure out what is fair compensation on an asset that has been fully depreciated. And to some extent, these back haul charges remind me of that whole battle that we went through.

And there is the property right obviously, the owner on the one hand. On the other, there is the acknowledged and urgent necessity of not reinventing the wheel in providing access to an infrastructure so that all of the economy can prosper.

And do you have any thoughts on how to thread that needle?

Mr. MCDOWELL. Very perceptive question actually. So when we talk about lofty and laudable goals in broadband, sometimes it does come down to the nitty-gritty of things like pole attachments and access to rights-of-way—

Mr. WELCH. Well that is what it is about.

Mr. MCDOWELL [continuing]. And special access absolutely. So the plan does tee up those issues. I don't want to steal the chairman's thunder, but when or what we might be doing going forward on pole attachments. I will let him speak to that and things of that nature with special access. For about three years now, I have been calling for a cell fight by cell fight, building by building mapping with special access. The last time the Commission looked at the regulations was 1998.

I want to commend the chairman for issuing a public notice to get into the next stage where we can actually make a very informed decision as to what to do next.

Mr. WELCH. OK, great. Mr. Copps, thank you.

Mr. COPPS. Special access, I think it is time to do this. I am pleased that the broadband plan tees this up. We can't take forever on this. This has been a problem for a long time. The facts that we have leads me to believe that maybe some people are paying a lot more for this kind of access than they should be. If that is true, I don't think we should take forever to resolve that. I think we need to get to the essential core of data we need and then go ahead and act.

Mr. WELCH. OK, thank you. Mr. Genachowski.

Mr. GENACHOWSKI. I agree with each of my colleagues. I think it is an example of the kind of issue, sort of a blood-and-guts issue where government can play a positive role in promoting investment, promoting competition, and it has to roll up its sleeves with

the data, tackle the rules. And so I think it is an opportunity in this issue and others for a very healthy discussion and debate that is focused on the barriers in the marketplace.

Mr. WELCH. OK, thank you. I see my time has expired, Mr. Chairman. Thank you, and I thank the Commission.

Mr. BOUCHER. Thank you very much, Mr. Welch. Chairman Dingell is on his way, and we expect him to arrive momentarily for his round of questions. Right on time. Thank you, Chairman Dingell. You are recognized for five minutes.

Mr. DINGELL. There will probably be a lot of yes-or-no questions, and I hope that our panel will be kind to me over this matter. Mr. Chairman Genachowski, Webster's Dictionary defines the word voluntary as being "done, made, brought about, undertaken et cetera by one's own accord or by free choice." Is that the definition that would be applied to the word voluntary or voluntarily in the recommendations of the Commission's broadband plan?

Mr. GENACHOWSKI. Yes.

Mr. DINGELL. Now, so I assume that would apply then to the questions where they are talking about voluntary channel sharing and motivating existing licenses to voluntarily clear the spectrum. Am I right?

Mr. GENACHOWSKI. Yes.

Mr. DINGELL. Mr. Chairman, the National Broadband Plan states if the FCC does not receive authorization to conduct incentive auctions or if the incentive auctions do not yield a significant amount of spectrum, the FCC should pursue other mechanisms. That is a quote. Now, are these other mechanisms going to be voluntary? Yes or no?

Mr. GENACHOWSKI. I think that language speaks for itself.

Mr. DINGELL. I am sorry?

Mr. GENACHOWSKI. I think that language speaks for itself. The other mechanisms would be determined in the future.

Mr. DINGELL. All right, if these are not voluntary, how would they then be accomplished?

Mr. GENACHOWSKI. Sir, that would be speculation. I am focused on a near term win-win that works for broadcasters and that is done on a voluntary basis.

Mr. DINGELL. Well, you understand there is a concern here because everybody wants to know what these is going to constitute. Now, would we assume then that these other mechanisms will be 100 percent voluntary or involuntary or what?

Mr. GENACHOWSKI. I would be speculating to talk about what would happen if we face a spectrum crisis in the country and—

Mr. DINGELL. I hope you and the Commission understand that this is a point of no small importance. Now, to all of this witnesses, and this again is a yes-or-no question. And, ladies and gentlemen, I apologize if this is discourteous. Does the Commission possess the authority, whether under the Communications Act of 1934, the Telecommunications Act of 196 or otherwise, with which to require broadband networks to unbundle access? Starting with you, Mr. Chairman, please. Yes or no.

Mr. GENACHOWSKI. Well, that is a good—I would like to be advised by counsel on that. We have been focused on broadband policies and—

Mr. DINGELL. I will ask then that you submit that for the record.

Mr. GENACHOWSKI. I will, sir.

Mr. DINGELL. Mr. Copps?

Mr. COPPS. I would say yes.

Mr. DINGELL. Well—

Mr. MCDOWELL. I would say no.

Mr. DINGELL. Commissioner?

Ms. CLYBURN. I would say I would submit that later.

Mr. DINGELL. And the last of our Commissioners?

Ms. BAKER. No.

Mr. DINGELL. Now, does the Commission believe unbundling network access will have a chilling effect on further investments to expand broadband infrastructure? Again with apologies, yes or no.

Mr. GENACHOWSKI. I don't know that it lends itself to a yes or no because unbundling means so many different things to different people.

Mr. DINGELL. Commissioner Copps?

Mr. COPPS. I think I would give the same answer, and a shorter answer would be not necessarily.

Mr. DINGELL. Commissioner?

Mr. MCDOWELL. If history is our guide, yes.

Mr. DINGELL. Commissioner?

Ms. CLYBURN. I echo Ms. Copps' answer.

Mr. DINGELL. Commissioner?

Ms. BAKER. Chilling, yes.

Mr. DINGELL. Again to all witnesses, does the Commission eventually intend to require unbundled access to broadband networks? Yes or no?

Mr. GENACHOWSKI. Again I think the plan speaks for itself, and the plan does not speak about unbundled network elements.

Mr. DINGELL. Commissioner Copps?

Mr. COPPS. I can't predict what the Commission intends to do.

Mr. MCDOWELL. I can't predict what the Commissioner will do either.

Ms. CLYBURN. I am not sure at this time. Thank you.

Ms. BAKER. I hope not.

Mr. DINGELL. Now, my time is running out here. Mr. Chairman, the National Broadband Plan mentions wireless communication services as a source of new spectrum. On February 16, 2010, I sent a letter to the Commission highlighting my concern that the opening of the spectrum for mobile broadband services may result in interference with satellite radio signals. Can you unequivocally assure me that this will not be the case? Yes or no?

Mr. GENACHOWSKI. If the staff in the agency says there is not interference, then there won't be interference.

Mr. DINGELL. I didn't hear the answer, sir.

Mr. GENACHOWSKI. Sorry. If the engineers at the FCC say there won't be interference, then I believe there won't be interference.

Mr. DINGELL. Mr. Chairman, will the Commission provide advanced notice of the WCS rules, publish them, and allow for comment prior to their implementation? Yes or no?

Mr. GENACHOWSKI. I believe I don't see any reason why not. That is what we always do.

Mr. DINGELL. Ladies and gentlemen, thank you. My time is up. You have been very kind, Mr. Chairman. I reiterate my request for sending a letter asking further questions of the Commission and ask that it be inserted in the record.

Mr. BOUCHER. Thank you very much, Chairman Dingell. And the record of this hearing will remain open until such time as a letter has been sent to you containing questions that various members of the committee may decide to ask beyond the context of today's hearing and until we have received your response to that letter. So when you receive it, please be as prompt as you can.

We thank you for your attendance here today and for sharing your views with us extensively. We have been here now for about three and a half hours, and we have certainly been enlightened by the information you have provided, and hopefully you have been somewhat enlightened by the views we have expressed as well.

The gentleman from Florida, Mr. Stearns, is recognized for unanimous consent request.

Mr. STEARNS. Thank you for your forbearance, Mr. Chairman. I ask unanimous consent to enter into the record just for the history a letter from 2007 from this committee, a bipartisan letter, to the FCC about the D block. Chairman Genachowski, just let me commend the staff for their public safety proposal. The 16 of us from both sides of the aisle sent a letter to your predecessor recommending a very similar approach. And I am optimistic that Congress will consider legislation authorizing first responders to use auction revenues to build a public safety network. And if possible, your public safety and wireless staff could provide input to help us draft that, that would be appreciated. Thank you, Mr. Chairman.

Mr. BOUCHER. Thank you very much, Mr. Stearns, for that rather lengthy unanimous consent request. Without objection. Well, thanks to the Commission. This hearing is adjourned.

[Whereupon, at 1:40 p.m., the Subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

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 EDWARD J. MARKEY, MASSACHUSETTS
 NICK RACONIC, VIRGINIA
 EDOLPHUS TOWNES, NEW YORK
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 GREGG A. ROTHSCHELD, CHIEF COUNSEL

ONE HUNDRED TENTH CONGRESS

U.S. House of Representatives
 Committee on Energy and Commerce
 Washington, DC 20515-6115

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The Honorable Kevin J. Martin
 Chairman
 Federal Communications Commission
 445 12th Street, S.W.
 Washington, D.C. 20554

Re: Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010 PS Docket No. 06-229, WT Docket No. 96-86 (*Ninth Notice of Proposed Rulemaking*)

Dear Chairman Martin:

We commend you for your consideration of the above-referenced rulemaking. We request that this letter be placed in the public comment file with respect to that proceeding. We believe that it is worth considering whether public-private partnerships can help First Responders use more efficiently the 24 MHz of spectrum that was cleared by the Digital Television Transition and Public Safety Act of 2005 and made available specifically for that purpose. Proposals like those of Frontline to jury-rig the 700 MHz auction, however, would force public safety officials to negotiate with one winner, of one auction, with one pre-determined business plan and no track record of success. In the end, it would harm both the broader auction and our public safety goals. We urge you to reject Frontline-type schemes and stick with your proposal in the Ninth Notice of Proposed Rulemaking to allow First Responders to negotiate with all comers outside the confines of an auction.

Public safety officials have expressed concern that Frontline does not adequately represent their interests, as evidenced in the recent filings of the National Public Safety Telecommunications Council, the Association of Public Safety Communications Officials, and others. State and local government representatives oppose the Frontline proposal for similar reasons in filings by the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the U.S. Conference of Mayors, and the National League of Cities. The public safety and

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government officials note that little time has been available to scrutinize the 11th-hour proposal, which is short on specifics, leaving doubt whether the business plan and proposed network will really work. They also worry that the coverage, reliability, security, and quality of service will not meet public safety standards; that the network will not be available for years; and that First Responders will lack control.

Public safety officials are so skeptical, in fact, that they insist any spectrum set-aside for entities such as Frontline be granted on the condition that the licensee meet a series of public safety requirements or return the spectrum. The statement of requirements, however, will not be drafted until some time in the future. The odds of crafting precisely the right auction conditions, that create precisely the right model, and that result in precisely the right winner, who will then agree to public safety's requirements are minimal at best. We are likely to be left either with no bidder, or a winner who will neither meet the needs of public safety nor relinquish the license without a fight. Meanwhile, we would have wasted time, spoiled the auction, taken valuable spectrum out of circulation, and slowed progress toward our public safety goals. The history of spectrum policy has been marred by unfortunate incidents in which litigation delayed the allocation and use of spectrum.

Alarming, a number of Frontline's proposals do not even have anything to do with public safety. Suggestions to impose wholesale and so-called open access requirements, for example, are blatant poison pills to discourage competing bids and lower the price of the spectrum. An outright prohibition on participation by incumbents is similarly self-serving. Whether considered as part of the Frontline proposal or as stand-alone requirements, these restrictions are inappropriate. Business models should be left to the market, not hard-wired into auctions. Moreover, Congress overwhelmingly rejected network neutrality mandates last year in a bipartisan vote of 269 to 152 on the House floor. The Commission has also just launched proceedings which we believe will demonstrate that network neutrality and device unbundling mandates are not only unnecessary, but harmful. The National Public Safety Telecommunications Council and the Association of Public Safety Communications Officials have also expressed concerns that requiring open access would jeopardize the public safety network.

To avoid starting down a path that will be difficult, if not impossible, from which to recover, we suggest that the Commission follow the approach it outlined in the Ninth Notice of Proposed Rulemaking. There, the Commission proposed assigning half of the 24 MHz of spectrum to a public safety licensee that would have discretion to enter into public-private partnerships. This would allow more time to consider additional proposals, increase the likelihood that the network actually meets the needs of public safety, and give First Responders more control, not to mention more competitive alternatives than one license holder. Further, it does so without jeopardizing the 24 MHz of public safety spectrum, the 60 MHz of commercial spectrum, or the auction proceeds that will fund the \$1 billion interoperable public safety grant program and the \$1.5 billion converter-box program for digital television. The prospect of subscribers from tens of thousands of public safety agencies and the pooling of spectrum will give multiple parties incentives to negotiate with First Responders. Proposals could come from winners of this

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auction as well as holders of other licenses, all of whom may be willing to provide public safety access to additional spectrum and their existing infrastructure in return for access to public safety's spectrum.

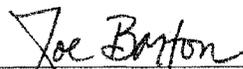
This approach will also leave more spectrum available to create a greater diversity of geographic license sizes and spectrum blocks. The Commission would then have an easier time creating options for a wide variety of providers: national, regional, and local; large, medium, and small; incumbent and new entrant; rural and urban.

It is imperative that the Commission abide by the statutory timetable for the auction. Achieving the right balance between the commercial and public safety interests, however, will take fundamentally more flexibility, coordination, and cooperation than can possibly be achieved through a hastily fabricated proposal reverse-engineered into an auction. Separating this matter from the auction would also allow us to take a more cautious and deliberative approach, not just the 28 days that could be allotted to the pleading cycle without jeopardizing the January 28, 2008, statutory deadline for start of the auction. Moreover, both the First Responders and the commercial entities may see need for adjustments. Such adjustments are manageable when relationships are based on contracts and service agreements, which can have shorter durations, modification provisions, and termination clauses. Spectrum licenses, by contrast, cannot be easily modified or terminated. De-linking the debate from the auction would also free bidders to make their auction plans, rather than continue to hold them hostage as delays over this controversy continue to threaten the time that will remain between release of the rules and the auction.

If Frontline and others believe in their business plans and are genuine in their desire to help public safety, there should be no need to stack the deck. They can still participate in the auction, enter into an agreement with First Responders, and voluntarily operate their networks under a wholesale and open access model. If they cannot raise enough money to win spectrum at a fairly structured auction, this is an indication that their proposal will not adequately serve either public safety or consumers. Honest, market-based auctions work when free of onerous service conditions. They have fostered a vibrant and competitive wireless industry, and produced tens of billions of dollars in Federal revenue. But the rules are critical. If done right, they create a fair playing field. If rigged, they sway the auction toward particular parties and particular business models. Let us not mistake this proposal for what it is: yet another attempt to get valuable spectrum on the cheap.

Sincerely,

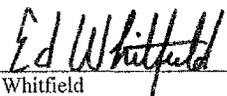
cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell

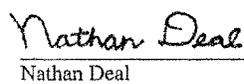

Joe Barton, Ranking Member,
Committee on Energy & Commerce

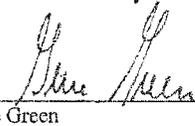

Fred Upton, Ranking Member,
Subcommittee on Telecommunications &
the Internet

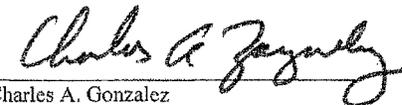

J. Dennis Hastert


Cliff Stearns

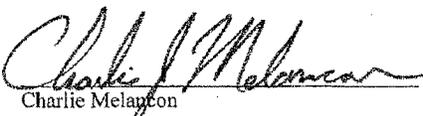

Ed Whitfield

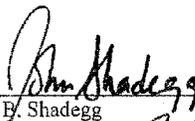

Nathan Deal

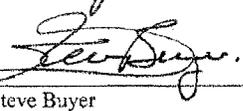

Gene Green

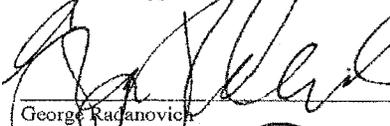

Charles A. Gonzalez

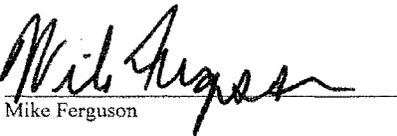

G.K. Butterfield

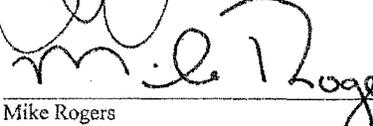

Charlie Melancon


John E. Shadegg


Steve Buyer


George Radanovich


Mike Ferguson


Mike Rogers


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Federal Communications Commission
445 12th Street, S.W.
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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action.
See MCI v. FCC, 315 F.2d 385 (D.C. Cir. 1974).

FOR IMMEDIATE RELEASE:
August 5, 2005

NEWS MEDIA CONTACT:
Mark Wigfield, 202-418-0253
Email: mark.wigfield@fcc.gov

FCC Eliminates Mandated Sharing Requirement on Incumbents' Wireline Broadband Internet Access Services

Decision Places Telephone and Cable Companies on Equal Footing

Washington, D.C. – The Federal Communications Commission today adopted policies that will bring more and better broadband services to consumers by eliminating facilities sharing requirements on facilities-based wireline broadband Internet access service providers.

The changes will enable wireline broadband Internet access providers to respond quickly to consumer demand with efficient, innovative services and spur more vigorous head-to-head competition with broadband services provided over other platforms. The Commission's action responds to market and technological changes marked by growth in the use of the Internet for communications and the availability of Internet service from multiple broadband pipelines, including cable, wireless, satellite, and power line networks.

The Report and Order adopted by the Commission puts wireline broadband Internet access service, commonly delivered by digital subscriber line (DSL) technology, on an equal regulatory footing with cable modem service, currently the market leader. This approach is consistent with a recent U.S. Supreme Court decision upholding the Commission's light regulatory treatment of cable modem service. Consistent regulatory treatment of competing broadband platforms will enable potential investors in broadband network platforms to make market-based, rather than regulation-driven, investment and deployment decisions.

Specifically, the Commission determined that wireline broadband Internet access services are defined as information services functionally integrated with a telecommunications component. In the past, the Commission required facilities-based providers to offer that wireline broadband transmission component separately from their Internet service as a stand-alone service on a common-carrier basis, and thus classified that component as a telecommunications service. Today, the Commission eliminated this transmission component sharing requirement, created over the past three decades under very different technological and market conditions, finding it caused vendors to delay development and deployment of innovations to consumers.

To ensure a smooth transition, the Order requires that facilities-based wireline broadband Internet access service providers continue to provide existing wireline broadband Internet access transmission offerings, on a grandfathered basis, to unaffiliated ISPs for one year. The Order

also requires facilities-based providers to contribute to existing universal service mechanisms based on their current levels of reported revenues for the DSL transmission for a 270-day period after the effective date of the Order or until the Commission adopts new contribution rules, whichever occurs earlier. If the Commission is unable to complete new contribution rules within the 270-day period, the Commission will take whatever action is necessary to preserve existing funding levels, including extending the 270-day period or expanding the contribution base.

The Order also allows wireline providers the flexibility to offer the transmission component of the wireline broadband Internet access service to affiliated or unaffiliated ISPs on a common-carrier basis, a non-common carrier basis, or some combination of both. Some rural incumbent local exchange carriers, or LECs, have indicated their members may choose to offer broadband Internet access transmission on a common carrier basis.

In a Notice of Proposed Rulemaking, the Commission seeks comment on whether it should develop a framework for consumer protection in the broadband age – a framework that ensures that consumer protection needs are met by *all* providers of broadband Internet access service, regardless of the underlying technology.

Action by the Commission, August 5, 2005, by Report and Order and Notice of Proposed Rulemaking, (FCC 05-150). Chairman Martin, Commissioner Abernathy, and Commissioners Copps and Adelstein concurring. Separate statements issued by Chairman Martin, Commissioners Abernathy, Copps and Adelstein.

Wireline Competition Bureau Staff Contacts: Terri Natoli and William Kehoe, (202) 418-1580

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OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

March 23, 2010

The Honorable Cliff Stearns
Ranking Member
Subcommittee on Communications, Technology,
and the Internet
Committee on Energy and Commerce
U.S. House of Representatives
2370 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Stearns:

Enclosed please find my responses to the questions in your letter of March 12, 2010.
Please let me know if I can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Genachowski".
Julius Genachowski

Enclosure

Chairman Genachowski's response to Congressman Stearns's Questions

1. *Why, specifically, was it necessary to delay release of the plan to March 17 from the statutorily required deadline of February 17?*

The Commission requested a one-month extension in the interest of advancing a National Broadband Plan that reflected the extraordinary importance of the task and that was responsive to the unprecedented record developed during the comment and workshop period. The Commission's process for the Plan was unparalleled. It was the most open and participatory process in the agency's history and included over 50 public workshops and field hearings, 30 Public Notices, and significant hours devoted at eight separate Commission meetings to provide the public with updates on the Plan's development.

2. *What was done between February 17 and March 17?*

The additional time enabled the staff to thoroughly compile and review the extraordinary record developed during this effort – over 74 thousand pages of comments from 700 parties -- to obtain additional input from key stakeholders, and to more fully brief Commissioners on aspects of the Plan as it came together.

3. *How much money have you spent in preparing the plan? Please provide a total figure as well as a breakdown, including figures for categories such as the total amount paid to existing employees for time spent on the plan, the total amount paid to new employees for time spent on the plan, amount spent on studies and reports, amount spent on travel, amount spent on workshops, and amount spent on printing and production.*

The Chart below provides the information you requested.

FCC's Broadband Plan Expenditures for FY 2009 & FY 2010¹

Compensation and Benefits	In Millions of Dollars (Estimates)
Existing FCC Employees (over 300 employees, part time)	2.38
New Employees (78 Temporary employees, full and part time)	4.00
Other Expenditures	
IT Infrastructure and Support ²	5.37
Software and Cost Modeling	3.92
Data & 3 rd Party Research ³	4.01
Outreach (including workshops and travel)	0.34
Printing and Production ⁴	0.60
Total	20.62
Portion of Total Funded through FCC Appropriations	7.34
Portion of Total Funded through ARRA funding	13.28

¹ Expenditures as of March 15, 2010, which includes FCC appropriations and ARRA funds

² Includes infrastructure upgrades to host new datasets, and web-based tools and information services.

³ Includes purchase of over 20 third-party datasets

⁴ The printing is being performed in-house, above represents pre-production cost estimate

4. How many staff people were hired specifically to work on the plan? From where were they typically hired? What is the employment classification of these staffers? How many of them had a background in communications law as opposed to a general consulting background? Were they hired through the same process other FCC employees who do not work on the plan are typically hired?

The limited term hires the agency brought in to develop the Plan reflected Congress's broad charge to the FCC under the American Recovery and Reinvestment Act, including the requirement to assess and develop strategies for use of broadband to address the important national purposes Congress requested, such as "advancing consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth." These limited term hires are highly qualified and dedicated professionals skilled in a broad array of communications disciplines (legal and non-legal), or leaders in fields like education, medicine, and energy who understand the stakes involved in creating a comprehensive broadband infrastructure. In all, the FCC hired 78 limited term staff. Some of these staff were employed for the entire duration of the National Broadband Plan; others were employed for only part of that time. These employees typically were hired from private sector organizations, including consulting firms, law firms, investment firms and operating businesses, as well as non-profit and other organizations. These employees serve on non-permanent appointments in various job classifications such as: Economist, Program Manager, Program Analyst, Telecommunications Analyst, Attorney and Consultant. Nine of the hires had a specific background in communications law; many more had experience in non-legal aspects of the communications sector. The Commission was granted Direct Hire Authority (DHA) from the Office of Personnel Management in response to the congressionally mandated requirements for a National Broadband Plan. Direct Hire Authority is a competitive process that allows for a streamlined approach to hiring. In addition to using DHA, the Commission used appointing authorities that are outside the competitive hiring process such as the Recovery Act appointing authority, temporary consultant and student appointment authorities, as well as details of staff from other federal agencies to quickly ramp up its broadband efforts.

5. The Administration has emphasized its policies to limit the hiring of, or communication with, private sector employees in connection with government generally and the American Recovery and Reinvestment Act in particular. While I am not convinced that such interaction between the public and private sectors is problematic, I am concerned if a double standard is being applied. How is it consistent with the Administrations' overall position on the interaction between the private and public sectors the FCC used private sector consultants, on a limited-term basis, many of whom may return to the private sector?

The unprecedented scope of the requirements set out in the Recovery Act to create this Plan within one year challenged the FCC to assemble a team and access expertise in the latest technology that is not readily available in the government. The Commission gained crucial

insight from the broad array of skilled professionals and stakeholders hired to assist us in creation of the Plan. These professionals included engineers, economists, entrepreneurs, scholars, analysts, lawyers, as well as leaders from non-profits, medicine, education, energy, and government. All came together as public servants to tackle vitally important issues focused on what's right for our country.

6. How did the FCC review potential conflicts of interest among employees hired from the private sector? Does the FCC plan to make available in publicly reviewable form any potential conflicts so that the American people can be assured that the plan was put together in an objective manner?

As soon as prospective senior members of the Broadband task force were identified, they were contacted by an ethics official in the FCC's Office of General Counsel (OGC) and were personally vetted, in advance of being hired, to ensure that they had no disqualifying conflicts or appearance concerns and that they were aware of the ethics restrictions that would govern their activities as Federal employees. Those who were determined by OGC to have potential conflicts or appearance concerns that could not be resolved were not hired.

All individuals who were selected for hire as members of the Broadband team were contacted by the FCC's Human Resources Office and provided a form on which they were required to indicate whether they had financial holdings or interests of any kind. Those who indicated that they had such holdings or interests were referred to OGC, and their holdings or interests were reviewed for potential conflicts with their Federal service. In addition, the two individuals who were hired as members of the Senior Executive Service, and the one who was hired as a Schedule C employee, were required to file Public Financial Disclosure Reports (SF-278). All other employees who were hired at or above the GS-13 level were required to complete Confidential Financial Disclosure Reports (OGE Form-450). Both forms list the investments held by the filing employee, their spouse and their dependent children. Any employee who reported any personal investments in companies subject to significant regulation by the FCC was required to divest such investments.

Although the FCC is not permitted to make available in a publicly reviewable form the contents of any employee's Confidential Financial Disclosure Report, the contents of the Public Financial Disclosure Reports filed by three senior members of the Broadband team are available upon request by members of the public.

7. How soon will an electronic, searchable copy of the plan be available to help facilitate review of the plan by congressional staff and the public?

A searchable pdf file was available on the FCC's website as soon as the Commission released the Plan on March 16th. There will be a Spanish version of the plan produced in April and a Braille version soon after.

8. Please answer yes or no to each of the following questions: If the D.C. Circuit rules that the FCC lacks jurisdiction under Title I to impose network neutrality regulations, will you, as

Chairman, propose that the FCC classify broadband services under Title II? Might you make such a proposal even if the D.C. Circuit does not so rule and, if so, why?

9. What is your personal opinion on whether broadband services should be classified under Title II?

As you know, the Commission is currently litigating the case to which you refer, *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. argued Jan. 8, 2010), before the D.C. Circuit. The FCC is vigorously asserting the position, presented in the Commission's brief in that case, that Congress has delegated the agency the authority to address certain broadband issues under Title I and other provisions of the Communications Act. When the D.C. Circuit issues its decision in the *Comcast* case, we will review and assess the significance of that decision for matters before the Commission.

On the broader question of the appropriate treatment of broadband under the Communications Act, I believe broadband is essential to our country's economic health and global competitiveness; to improving the lives of the American people; and to meeting critical national challenges like education and public safety. I believe the FCC must pursue policies that promote investment, innovation, competition and consumer interests associated with broadband networks and services. I am committed to ensuring an approach to broadband that will continue to allow the agency to meet the goals Congress has set for it.



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

July 1, 2010

The Honorable of Henry A. Waxman
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Waxman:

Attached please find my responses to the additional post-hearing questions from my appearance before the Committee on March 25, 2010. Please let me know if I can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Genachowski".

Julius Genachowski

**Responses of Chairman Julius Genachowski to Questions for the Record
Oversight Hearing of the Federal Communications Commission:
The National Broadband Plan (March 25, 2010)**

**QUESTIONS FOR THE RECORD
THE HONORABLE ANNA G. ESHOO**

1. AWS-3 Spectrum Deployment

The Commission and its staff have demonstrated a sense of urgency in drafting this Report. I'm convinced, based on the testimony presented here, that the Commission recognizes the need for speed. But I continue to have some concerns, especially when it comes to spurring competition with new and innovative uses of the spectrum. Too many entrenched interests seem to be able to stop new ideas from taking root through delaying tactics that keep spectrum concentrated in the hands of larger carriers.

The Commission has to work together in an expeditious fashion to deploy already available spectrum. If we're going to see that 100 megabits reach 100 million homes the FCC has to begin to complete rulemakings faster so that we see immediate action. I am disappointed that the Advanced Wireless Spectrum (3) was not recommended for immediate deployment -- that's a proceeding that was teed up years ago. Businesses can't be expected to participate in a hackneyed process that leaves them wondering and losing money for years.

Also, I have heard that the Department of Defense's (DOD) 1755-1780 MHz spectrum band that the National Broadband Plan is considering pairing with AWS-3 is currently jam packed with vital systems including drones for air strikes in Afghanistan and Pakistan and border security here at home, and that the systems in that band cost over \$100 billion and cannot be relocated until 2030. Could you comment on this matter?

RESPONSE: The National Broadband Plan ("Plan") recommends that NTIA, in consultation with the FCC, conduct an analysis, to be completed by October 1, 2010, of the possibility of reallocating a portion of the 1755-1850 MHz band to pair with the AWS-3 band. This effort is already under way with our colleagues at NTIA. As suggested by the plan, NTIA and FCC staff involved in these consultations are considering various possibilities for reallocating spectrum to meet the needs of the wireless market's explosive growth. This includes, but is not limited to, the 1755-1780 MHz band.

Almost ten years have passed since spectrum managers last examined the possibility of reallocating additional spectrum from the 1.7 GHz band, so a fresh look is appropriate. Obviously the wireless marketplace and mobile technologies have undergone significant changes in the last decade. For example, in 2000-2001, DoD assumed that all non-Federal operations would involve IMT-2000 or 3G technology, which may no longer be the case. Carriers are now contemplating deployment of 4G technologies, including LTE and WiMAX. Also, during the last review, the process for reimbursing Federal users was unclear. Now, the Commercial Spectrum Enhancement Act passed in 2004 provides certainty to Federal users--and I understand that Congress may also consider additional improvements to that process.

In summary, the Plan recommends that over the next months we analyze the possibility of obtaining additional spectrum to pair with AWS-3. I completely agree with you that it is important for the Commission to resolve proceedings as expeditiously as possible, and I note that the Plan sets a deadline of October 1, 2010 to complete the analysis of this pairing alternative. The Plan recommends that if there is a strong possibility of reallocating federal spectrum to pair with the AWS-3 band, the FCC, in consultation with NTIA, should immediately commence reallocation proceedings for the combined band. The Plan goes on to recommend that if pairing is not a strong possibility, the Commission should proceed promptly to adopt rules in 2010 and auction the AWS-3 spectrum on a stand-alone basis in 2011.

2. Since there is no evidence or data in the National Broadband Plan supporting this possible pairing, did anyone at the Commission contact DOD officials to get the real picture on reallocating DOD's spectrum during the preparation of the National Broadband Plan?

If so, please make available to me and my colleagues the data from the DoD or the Administration suggesting the possibility of reallocating federal spectrum to pair with the AWS-3 band.

RESPONSE: It has been almost 10 years since NTIA and the FCC have formally evaluated the possibility of non-Federal use of spectrum within the 1755-1850 MHz frequency band. NTIA has agreed to take a fresh look at this possibility, commenting that "the Administration supports exploring both commercial and government spectrum available for reallocation." FCC staff members have been participating in an interagency process with NTIA and other Federal agencies regarding potential non-Federal use of spectrum in a number of bands, including the 1755-1850 MHz frequency range.

3. I want to know what you will do individually to move us forward. If you don't find paired spectrum by the October deadline outlined in the report, will you actually auction the spectrum and put it in use as soon as possible?

RESPONSE: Yes. One of the things that the Plan did was set a deadline for analysis of this pairing alternative. The Plan also recommends that if the pairing is not possible, the Commission should immediately proceed to adopt rules, and auction the AWS-3 spectrum. Recently, the FCC released an Action Agenda that indicates that the Commission will, by October 1, 2010, conclude a process with NTIA to determine whether a portion of the 1.7 GHz band currently used for federal government purposes can be paired with 20 MHz of spectrum in the AWS-3 band. The Plan Action Agenda also indicates that if, at the end of the inquiry, there is not a strong possibility of reallocating federal spectrum, the Commission plans to adopt final rules in the fourth quarter of calendar year 2010 to auction the AWS-3 spectrum on a stand-alone basis in the second quarter of calendar year 2011.

4. With this in mind, I did not see any immediate, specific recommended actions in the Plan that would have the FCC create new broadband competition through the use of spectrum. What

specific actions will you be taking in the short term, say in the next 3 months, that will provide spectrum so we can help create new entrants to the broadband market?

RESPONSE: The Plan laid out several recommended actions to create broadband competition through the use of spectrum. Specifically, the Plan recommends that the FCC make 500 megahertz newly available for broadband use within the next 10 years, of which 300 megahertz between 225 MHz and 3.7 GHz should be made newly available for mobile use within five years. In addition, the Plan suggests that the Commission should free up new, contiguous spectrum for unlicensed use, which could provide additional opportunities for competitive entry and ongoing innovation in mobile services and technologies. The Commission's Bureaus and Offices have already begun executing the strategy laid out in the Plan. The Broadband Action Agenda, announced on April 8, 2010, explains the purpose and timing of more than 60 rulemakings and other notice-and-comment proceedings the Plan recommends for FCC action. See <http://www.broadband.gov/plan/broadband-action-agenda.html>. For example, by the end of this quarter, the Commission plans to address an Order to enable robust mobile broadband use of 20 MHz of spectrum in the 2.3 GHz Wireless Communications Service (WCS) band.

5. Next Generation 911

I was pleased to see a specific reference to funding for Next Generation 911. As you know, I joined with my colleague, John Shimkus, the Co-Chair of the E911 Caucus, to offer bipartisan, bicameral legislation to renew grants for 9-1-1 call center technology, and to move that technology into the next developmental phase. Have you had the opportunity to review the legislation and could you give me your opinion about the need for H.R. 4829?

RESPONSE: I have reviewed H.R. 4829, as well as the companion Senate bill, S. 3115. The legislation is consistent with our recommendations in the National Broadband Plan (NBP) and would advance the vision for the rapid and efficient deployment of and migration to Next Generation 911. Consistent with our recommendations in the NBP, the legislation reauthorizes the 911 grant program that was created in 2004 by the ENHANCE 911 Act, and reauthorizes the 911 Implementation Coordination Office (ICO) as well. In particular, there is a significant need for those provisions that would authorize grants for Enhanced 911 and Next Generation 911 implementation, condition receipt of grants on use of 911 funds only for their intended purposes, and address 911 caller location issues with respect to operators of multi-line telephone systems (MLTS). I also appreciate that the legislation includes training in 911 services, because I recognize that training is of national importance. The need for these provisions can be measured in the lives that Enhanced 911 and Next Generation 911 services will save, the injuries they will prevent, and the property they will protect. I look forward to working with you and your colleagues in implementing all of the NG 911-related recommendations contained in the NBP and ensuring that NG 911 is available throughout the nation.

6. Special Access

I was glad to see that the Plan includes several references to making sure that special access rates are just and reasonable. As we all know, these circuits provide critical connections for wireless services – including backhaul for wireless providers to small businesses using

ATM's, to the largest retail chains placing orders with their vendors. I have LONG advocated that the Commission look into the pricing and competition of special access services and I'm glad to see that it is a priority. Are you confident that you have the legal authority to move ahead?

RESPONSE: Yes. Special access service is a common carrier telecommunications service subject to statutory requirements under Title II of the Communications Act. See *Special Access Rates for Price Cap Carriers NPRM*, 20 FCC Rcd 1994 (2005) (describing the history of the Commission's rate regulation of interstate access services, including special access service). For example, section 201 of the Act requires common carriers to provide their services at just and reasonable rates. See 47 U.S.C. § 201(b). Section 202(b) prohibits carriers from engaging in unjust or unreasonable discrimination in their charges or practices. See 47 U.S.C. § 202(a). Moreover, the Commission has the authority to prescribe just and reasonable special access rates. See 47 U.S.C. § 205. These provisions provide the Commission with ample legal authority to ensure just and reasonable rates in the provision of special access services.

On November 5, 2009, the Commission issued a public notice seeking comment on an appropriate analytical framework to resolve issues raised in the pending *Special Access Notice of Proposed Rulemaking*. This proceeding seeks to determine whether the Commission's rules are working to ensure that rates, terms, and conditions for special access services, which serve business locations and cell towers, are just and reasonable, as required by law. The Commission's staff is presently analyzing the extensive comments it has received in response to that public notice. Further, the National Broadband Plan makes certain recommendations regarding special access services to promote broadband deployment, competition, and investment. In this regard, the Plan recommends that the Commission comprehensively review its regulations and develop an effective policy framework for taking expedited action to ensure the widespread availability of inputs for broadband services, including the inputs provided by special access services.

As part of its recently announced broadband action agenda for implementing the National Broadband Plan's recommendations, the Commission will hold a staff workshop late in the second quarter or early third quarter to discuss the analytical framework it should use to assess the effectiveness of the existing special access rules. In late third quarter or early fourth quarter, the Commission plans to propose such a framework and identify associated data collection requirements, if necessary – critical steps toward ensuring that rates, terms, and conditions for special access services are just and reasonable, as required by law.

7. Affordability

The National Broadband Plan doesn't provide specifics on how to achieve bringing more broadband connectivity to low income and rural homes in this country, other than through use of the Universal Service Fund. Will the FCC work more closely with HUD to expand this needed technology?

RESPONSE: The plan includes a number of recommendations aimed at increasing connectivity to low income and rural homes. Some, such as expanding low income

Universal Service support to broadband, will be lead by the FCC. When implementing recommendations within its jurisdiction, the FCC, where appropriate, will seek input from HUD and other federal agencies who serve large groups of non-adopters such as the Department of Agriculture or the Department of Education.

The plan also addresses affordability as part of other, broader recommendations to increase adoption and the FCC may not have a role in implementing some of those recommendations. For example, the National Broadband Plan recommended that NTIA explore public-private partnerships (PPPs) to stimulate broadband adoption in non-adopting communities, and noted that HUD residents are an especially vulnerable group. NTIA recently awarded a \$28.5 million sustainable adoption grant, which will be supplemented by \$23 million matching funds by a consortium of private companies, to collaborate with 159 affordable housing units across the country, subsidize connections for 27,000 housing units. The FCC is also aware of a round two BTOP application that proposes to work more closely with HUD to institute similar, multi-pronged adoption programs targeting as many as 250,000 low income households. The FCC will not have a formal operational role in any particular PPPs that may develop as part of BTOP, but the FCC will continue to explore innovative approaches to coordinate with other government actors like HUD, NTIA and the Department of Agriculture while also leveraging efforts by other stakeholders from the private and non-profit sectors.

8. I'm concerned that low income homes will get hooked up, but the residents will be unable to maintain monthly payments. Once low income and rural households do acquire broadband technology, what can be done to assure that the monthly service charge is kept to a minimum so that the service may be maintained?

RESPONSE: The National Broadband Plan recommends that universal service low-income programs (Lifeline and Link Up) be expanded to include broadband service. Currently, Lifeline discounts offset eligible low-income consumers' recurring, monthly telephone charges, while Link Up discounts reduce eligible low-income consumers' one-time telephone connection/installation charges. If both Lifeline and Link Up discounts are expanded to apply to service packages that include broadband, as the Plan recommends, eligible low-income consumers would be eligible for discounts on both recurring monthly charges and installation charges for broadband service. Specifically, the Plan recommends that: (1) the FCC and states should require eligible telecommunications carriers (ETCs) to permit Lifeline customers to apply Lifeline discounts to any service or package that includes basic voice telephone service; (2) the FCC should integrate the expanded Lifeline and Link Up programs with other state and local e-government efforts; and (3) the FCC should facilitate pilot programs that will produce actionable information to implement the most efficient and effective long-term broadband support mechanism.

9. Competition Questions

The National Broadband Plan observes that there is not a coherent and effective framework governing the Commission's wholesale competition regulations, including wireless roaming policies. Indeed, the FCC's current wireless roaming rule expressly permits the nation's largest wireless carriers to discriminate or exclude large geographic areas altogether in providing wholesale roaming services to their competitors. As the Plan notes, such conduct

undermines longstanding competition policy objectives by limiting the ability of smaller carriers to gain access to the necessary inputs to compete. How do you intend to address this important wholesale competition issue in the context of wireless roaming services?

RESPONSE: In April, the Commission modified the 2007 roaming rule and eliminated the home roaming exclusion.¹ Under the revised roaming rule, upon a reasonable request, CMRS carriers are obligated to provide voice, text messaging, and push-to-talk roaming to any technologically compatible, facilities-based CMRS carrier on reasonable and not unreasonably discriminatory terms and conditions. This new framework for roaming will encourage carriers of all sizes to reach reasonable roaming agreements for any area, while also encouraging these carriers to continue investing in the coverage and capacity of their networks. Elimination of the home market roaming exclusion will increase consumers' access to seamless nationwide mobile services, wherever and whenever they choose, and will promote investment, innovation, and competition in mobile wireless services.

10. The National Broadband Plan acknowledges the importance of data roaming to entry and competition for mobile broadband services. But the FCC's present voice roaming rule contains an "in-market" exclusion that expressly permits carriers to deny roaming service to their competitors' customers in large portions of their licensed territories. This exclusion, if replicated in the data roaming context, would appear to severely undercut the Commission's stated goal in the Plan of achieving "wide, seamless and competitive coverage." How does the Commission intend to address this problem?

RESPONSE: As discussed above in response to question #9, with respect to voice and related services, the Commission eliminated the home roaming exclusion. With respect to data roaming and consistent with the National Broadband Plan, the FCC sought additional comment on whether to extend automatic roaming obligations to mobile data services. The Commission committed to resolve the data roaming issue in an expedited manner. As I have said before, there are few areas in communications that present greater promise for our country than mobile – in terms of driving our economy and delivering broad opportunity for all Americans – and our goal must be for America to lead the world in mobile. To promote this goal, we must ensure that American consumers have access to competitive broadband data communications services whenever they want and wherever they are, while also ensuring that the United States has the fastest and most extensive mobile networks in the world.

11. Public Television – Broadcast Spectrum Issue

As you know, public television stations are very different from commercial television stations with respect to their funding, their programming, their mission and the efficient manner in which they use spectrum to serve the public interest. Public television stations also have been confronting extraordinary fiscal challenges during the past 18 months. As the Commission looks ahead to rulemakings announced in the National Broadband Plan to

¹ See *Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, WT Docket No. 05-265, FCC 10-59 (rel. Apr. 21, 2010).

reclaim 120 MHz of spectrum from broadcasters, can you give us assurances that public television stations will be protected from involuntary reallocations of spectrum?

RESPONSE: Yes, the rules for broadcast spectrum reallocation that I will support will provide for a voluntary program for public television stations, as well as commercial stations. Our initial estimates of how much spectrum per market we'll need to repurpose do not distinguish between commercial and non-commercial television spectrum.

We do distinguish, however, between how to allocate the proceeds resulting from any contributions of commercial and non-commercial station spectrum. In Recommendation 15.6 of the National Broadband Plan, we suggest that Congress consider allowing 100% of the proceeds from the sale of spectrum contributed by non-commercial television stations to endow a trust fund for the production, distribution and archiving of digital public media. We also recommended that these proceeds should be distributed so that a significant portion goes to public media in the communities from which the spectrum was contributed.

Our expectation is that this voluntary program will achieve all our goals.

12. Would you elaborate on the sequencing of the rulemakings for reclaiming the broadcast spectrum and the creation of incentive auctions in the National Broadband Plan? As you know, only the Congress can authorize the creation of incentive spectrum auctions in which the contributors of spectrum could receive some of the proceeds. I am particularly interested in the proposal for the creation of a digital media trust fund to be created from the proceeds of incentive auctions of spectrum contributed by public television stations. If Congress does not authorize such incentive auctions, will these other rulemakings go forward in any event?

RESPONSE: In Recommendation 15.6 of the National Broadband Plan, we suggest that Congress consider allowing 100% of the proceeds from the sale of spectrum contributed by non-commercial television stations to endow a trust fund for the production, distribution and archiving of digital public media. We would look to Congress to determine an appropriate trustee and uses of trust income and disbursements, but envision that trust fund proceeds would be supplemental to current Congressional appropriations for public broadcasting.

I have asked my staff to focus our next television spectrum rulemaking on rule changes necessary to allow stations to share a 6-megahertz channel. We believe channel-sharing introduces a new and meaningful option of which broadcasters could avail themselves independent of Congress granting us incentive auction authority.

**QUESTIONS FOR THE RECORD
THE HONORABLE CLIFF STEARNS**

1. Does the broadband plan lay out any cost-benefit analyses? How many dollars should we spend for each additional broadband subscriber we create and each additional megabit-per-second we provide? \$1,000? \$10,000? \$100,000? Will you commit to providing these sort of cost-benefit analysis before adopting any item in the plan?

RESPONSE: The Commission created the National Broadband Plan in response to direction from Congress, in the ARRA, to “seek to ensure that all people of the United States have access to broadband capability...” The Plan presents analyses of where broadband infrastructure is available, where there are availability gaps, and the cost to fill those gaps. The methodology and model underlying these analyses are explained in detail in a staff technical paper titled “The Broadband Availability Gap” released by the FCC’s broadband team on April 21, 2010. This paper describes in detail the methodology and model employed to estimate areas of the U.S where broadband service is not likely to be available in the next several years, and estimates the cost of bringing broadband to these unserved areas.

Costs of bringing broadband to a particular unserved home will vary greatly depending on geography and technology, making it difficult to provide a single figure per home or Mbps.

We recognize that the solution to filling broadband availability gaps will not be the same for all homes and that part of that solution involves finding the most cost-effective means to make broadband available. The Commission is committed to continuing with its open, transparent, data driven processes as it works to implement recommendations contained in the National Broadband Plan. This process will include rigorous analysis of data in the records developed to consider Plan recommendations, prior to adoption of any recommendations.

2. The broadband plan proposes expanding the E-rate program, but the GAO found in 1998, 1999, 2005, and 2009 that the FCC has not developed adequate performance goals and measures for the E-rate program, despite GAO’s repeated requests. If we cannot tell how effective and efficient past E-rate spending has been, how can we be assured expansion will be done properly or is even a good idea in the first place? Will you commit to submitting E-rate performance measures and goals to GAO and to us for approval before anyone considers expanding the program?

RESPONSE: During its 11-year existence, the E-rate program has helped thousands of schools and libraries improve their technological capabilities. When the Commission first adopted a structure for the E-rate program, the Commission identified goals for the program and established priorities accordingly. As the Commission noted in its *Universal Service First Report and Order*, the E-rate program was intended to ensure that eligible schools and libraries have affordable access to modern telecommunications and information services that would enable them to provide educational services to all parts of the nation. While the Commission did not set a target for achievement at that time, the program has been

successful in getting schools and libraries connected to the Internet. The National Center for Education Statistics found nearly 100 percent of public schools in the United States had Internet access, and 97 percent of these schools used broadband connections to access the Internet. The National Broadband Plan seeks to further ensure that the E-rate program helps students and communities across the nation continue to have access to essential broadband connections.

Given the pace at which society and technology move today, it is important to conduct periodic reviews of the Commission's goals to examine whether those goals remain valid or if adjustments are necessary. The Commission has taken the initial actions necessary to conduct this evaluation as part of its ongoing comprehensive review proceeding. Additionally, the Commission recently requested comment on establishing new goals, both short-term and long-term, for the E-rate program. This proceeding is still pending. Once the Commission has considered the comments and developed new goals, it will revise its policies as necessary to achieve them.

3. The broadband plan recommends providing more spectrum for unlicensed use. A 2008 paper by the FCC's Office of Strategic Planning and Policy Analysis indicates that the most efficient way to allocate spectrum for unlicensed use would be to do so by auction. If the sum of the bids of those seeking unlicensed use exceeds the bid of the highest bidder seeking licensed use, the spectrum would go to the unlicensed use. This would not only ensure the spectrum is allocated efficiently, it could raise substantial revenue. Will you commit to seeking comment on the use of auctions in any proceeding regarding potential distribution of additional unlicensed spectrum?

RESPONSE: The use of market-based techniques in the context of unlicensed spectrum is certainly an idea I would support exploring.

4. Some questions were raised at the hearing that spectrum that might otherwise be paired with the AWS-III spectrum for commercial mobile broadband use may be needed for use with military drones. But didn't a Department of Defense report released to the public in 2009 indicate that most current and future high-capacity spectrum used domestically and abroad for drone flights over about 150 km is on frequencies far from the spectrum that could be paired with the AWS-III spectrum? Won't they mainly use the X-Band from 8 to 12 MHz, the Ku-Band from 11.5 to 14.5 GHz, and the Ka Band from 26.5 to 40 GHz for mission critical operations? Aren't there also line-of-sight and other issues for most non-satellite spectrum under 3 GHz that limits its use for most drone missions? And if, other than for testing, the drones are mainly used overseas, will there really be much of an interference issue with commercial use here?

RESPONSE: The 2009 report you reference, which I believe is titled, "United States Air Force Unmanned Aircraft Systems Flight Plan 2009-2047," appears to support your suggestion that certain Department of Defense drone systems currently use, or will likely use in the future, X Band and Ka Band frequencies. These frequencies are far removed from spectrum currently being considered in the interagency process for pairing with the AWS-3 spectrum, minimizing any interference concerns.

The 2009 report may not address all relevant Department of Defense systems comprehensively; our colleagues at NTIA would be in a better position to do so. It is possible, however, that even if spectrum identified through the interagency process for potential pairing with AWS-3 spectrum were used for data links from drones to a satellite system, or for similarly sensitive DoD operations, there may be mitigation techniques that can be employed to reduce the potential for interference between the systems.

**QUESTIONS FOR THE RECORD
THE HONORABLE FRED UPTON**

1. I appreciated your comment at the hearing that the FCC would make sure that any changes in the Wireless Communications System rules do not result in interference to satellite radio consumers. My understanding, however, is that the FCC engineering staff is proposing rules that will allow for at least some interference with satellite radio. What specific actions will the Commission take to ensure that level of interference is not unacceptable to consumers?

RESPONSE: The rules the FCC engineering staff is recommending are designed to prevent harmful interference to the satellite radio service and quickly remedy interference if it should occur. The proposed rules would permit the wireless communications service (WCS) to offer mobile voice, video and data services. Sirius-XM believes that WCS mobile devices transmitting continuous video from a vehicle will cause harmful interference to satellite radio reception in nearby vehicles. While much of the debate has focused on whether usage cases such as video conferencing from vehicles or video uploads of movies are likely, lost in this discussion is the fact that the engineering staff does not believe harmful interference will occur for these cases, however frequent or infrequent they may be.

The WCS Coalition conducted a demonstration in Ashton, Virginia last summer using an actual device transmitting multiple types of signals from inside a vehicle, including video, while other vehicles equipped with Sirius-XM radios drove or parked next to one another. The demonstration was open to the public and was also witnessed by about a dozen FCC engineering staff. No harmful interference occurred. The technical parameters in use at that demonstration and the results of that demonstration, along with all of the other information submitted by parties, informed the proposed rules publicized by the FCC's engineering staff in a recent Public Notice. Our decision on this matter will be further guided by the information and arguments submitted in response to those very specific proposed rules.

**QUESTIONS FOR THE RECORD
THE HONORABLE JON SHADEGG**

1. The National Broadband plan mentions special access circuits and analyzing competition in the middle mile – do you anticipate going forward with a request for data soon so we can address this issue?

RESPONSE: On November 5, 2009, the Commission issued a public notice seeking comment on an appropriate analytical framework to resolve issues raised in the pending *Special Access Notice of Proposed Rulemaking*. This proceeding seeks to determine whether the Commission's rules are working to ensure that rates, terms, and conditions for special access services, which serve business locations and cell towers, are just and reasonable, as required by law. The Commission's staff is presently analyzing the extensive comments it has received in response to that public notice. Further, the National Broadband Plan makes certain recommendations regarding special access services to promote broadband deployment, competition, and investment. In this regard, the Plan recommends that the Commission comprehensively review its regulations and develop an effective policy framework for taking expedited action to ensure the widespread availability of inputs for broadband services, including the inputs provided by special access services. As part of its recently announced broadband action agenda for implementing the National Broadband Plan's recommendations, the Commission will hold a staff workshop late in the second quarter or early third quarter to discuss the analytical framework it should use to assess the effectiveness of the existing special access rules. In late third quarter or early fourth quarter, the Commission plans to propose such a framework and identify associated data collection requirements, if necessary – critical steps toward ensuring that rates, terms, and conditions for special access services are just and reasonable, as required by law.

QUESTIONS FOR THE RECORD
THE HONORABLE STEVE BUYER

1. Broadband providers have invested hundreds of billions of dollars in recent years to build and improve their infrastructure and creating jobs at a time when the job market has been in trouble. The broadband industry is projecting to invest additional billion of dollars in the coming year – again providing an engine of economic growth. As one of the few industries of strength and investment, past decisions at the FCC to not saddle the Internet with heavy regulation clearly demonstrate that a less regulatory environment is working. Why are you proposing that the FCC now pivot away from these policies and impose 19th-century common carrier monopoly regulation on a 21st century competitive industry, disrupting the virtuous cycle that currently exists? If it's not broken, why fix it?

RESPONSE: Promoting continued investment and job creation, both in the core broadband networks and through Internet-based services and applications that ride on such networks, is a key priority for the FCC and a key focus of the National Broadband Plan. The private sector is the key to investment and job creation, but government policy can help facilitate those outcomes, including through recommendations of the National Broadband Plan to spur broadband deployment and adoption, such as USF reform. Telecommunications policy must take account of current market and technological realities.

After the National Broadband Plan was released, the United States Court of Appeals for the District of Columbia Circuit released its decision in *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). The *Comcast* decision casts serious doubt on whether the legal framework the Commission chose for broadband Internet services nearly a decade ago is adequate to achieve these core broadband policies, which prior Commissions thought they had legal authority to implement. To address this challenge, the Commission adopted a Notice of Inquiry at its June 17 Open Meeting to initiate a public discussion on how the Commission should proceed in light of *Comcast*. The Notice seeks comment on all options, and invites any ideas for how the Commission should proceed, including: maintaining the current "information service" classification of services such as cable modem and DSL Internet access; classifying broadband Internet connectivity service as a "telecommunications service" to which all the requirements of Title II of the Communications Act would apply; and the "third way" – similar to the highly successful approach that has been used for cell phone services since 1993 – under which the Commission would identify the Internet connectivity service that is offered as part of wired broadband Internet service as a telecommunications service and forbear from applying all provisions of Title II other than the small number that are needed to implement fundamental universal service, competition and market entry, and consumer protection policies. I am enclosing a copy of the Notice for your information. I look forward to working with Commission staff to review the comments the Notice will generate.

I welcome the process that Chairmen Rockefeller, Waxman, Kerry, and Boucher have announced to develop proposals updating the Communications Act. A limited update of the Communications Act could lock in an effective broadband framework to promote investment and innovation, foster competition, and empower consumers. I have committed all available

Commission resources to assisting Congress in its consideration of how to improve and clarify our communications laws. Meanwhile, in view of the court decision, and as the Congressional Chairs have requested, the Commission has an obligation to move forward with the public proceeding initiated by our Notice, which is complementary to Congress's own efforts.

2. Recommendation 4.7 implies that the FCC should mandate the unbundling of fiber. Why? It is my understanding from previous testimony by the FCC that this issue was settled. Such a recommendation makes no sense because fiber deployment has gone up dramatically in recent years since the FCC confirmed that it was not subject to unbundling in the Triennial Review Order of 2003, which deregulated some of those components. Can you explain the legal basis on which the FCC could undertake to reverse itself on this matter? What findings/analysis would be required? What decisions would need to be reversed?

RESPONSE: Recommendation 4.7 refers to several petitions before the Commission, including one regarding access to local fiber facilities, and recommends "act[ing] on these proceedings within the context of rigorous analytic frameworks" that "appropriately balance the benefits of competitive entry with incentives for carriers to invest in their networks."

The Commission derives its legal authority to regulate aspects of wireline networks and services from several statutory provisions, including sections 201, 202, 251, and 271 of the Communications Act. The Commission has from time to time reviewed its implementation of these sections and may choose to modify its rules, if warranted, after a review of the legal, factual, and rational basis for the rules, and after conducting an open and transparent proceeding in which all parties have a fair opportunity to respond. The Commission has not proposed any changes, therefore I cannot speculate as to which prior rulings, if any, might be affected.

3. Do you think that there would be the same level of fiber deployment today if the FCC had not decided in 2003 to end the mandatory unbundling of such facilities?

RESPONSE: It is difficult for me to speculate as to exactly what would have happened if different regulatory decisions had been made years ago. Nevertheless, we expressly recognized in the Plan that the Commission's wholesale competition rules should "appropriately balance the benefits of competitive entry with incentives for carriers to invest in their networks."

4. If the FCC is going to revisit its decision not to require unbundling of packet and fiber facilities, a decision that I think would severely damage broadband investment, do you believe that packet/fiber unbundling should apply only to ILECs, or to cable operators as well? I'm not arguing for more regulation – but I am trying to get a sense for whether you will commit not to disadvantage one technology, business model, or competitor in future rulemakings.

RESPONSE: The Commission plans to engage in a comprehensive review of its wholesale competition regulations to "establish coherent sets of conditions under which such rules

should be applied.” The Commission will, in the course of its review, evaluate the legal and policy constraints affecting to whom and how such rules would apply.

5. For years I have been an advocate of encouraging and providing incentives for companies to take risks by developing and investing their own infrastructure. The NBP appears to take a step back on many fronts, including special access. Evidence shows that plenty of competition exists and prices have decreased – showing the market is working. Rolling back pricing flexibility – thereby lowering rates through further regulation – would only encourage less competition and less innovation. Why does this FCC leadership insist on providing less competition to the marketplace?

RESPONSE: The recently released National Broadband Plan recognizes the importance of competition in achieving the goals for broadband deployment and maximizing its benefits and applications for all Americans. The Plan makes certain recommendations regarding special access services to promote broadband deployment, competition, and investment. In this regard, the Plan recommends that the Commission comprehensively review its regulations and develop an effective policy framework for taking expedited action to ensure the widespread availability of inputs for broadband services, including the inputs provided by special access services. As the Plan notes, the Commission has already taken steps with regard to special access services. On November 5, 2009, the Commission issued a public notice seeking comment on an appropriate analytical framework to resolve issues raised in the pending *Special Access Notice of Proposed Rulemaking*. This proceeding seeks to determine whether the Commission’s rules are working to ensure that rates, terms, and conditions for special access services, which serve business locations and cell towers, are just and reasonable, as required by law. The Commission’s staff is presently analyzing the extensive comments it has received in response to that public notice. Further, as part of its recently announced broadband action agenda for implementing the National Broadband Plan’s recommendations, the Commission will hold a staff workshop late in the second quarter or early third quarter to discuss the analytical framework it should use to assess the effectiveness of the existing special access rules. In late third quarter or early fourth quarter, the Commission plans to propose such a framework and identify associated data collection requirements, if necessary – critical steps toward ensuring that rates, terms, and conditions for special access services are just and reasonable, as required by law.

6. The telecommunications industry has been a significant leader in America’s economic engine in both times of economic strength and times of challenge. Why does the NBP open the door to reclassifying broadband back to the old monopoly era phone service which will stifle investment and growth of the industry and innovation?

RESPONSE: Section 17.3 of the National Broadband Plan (at page 337) discusses the legal framework for the FCC’s implementation of the Plan. Section 17.3 notes that commenters in the National Broadband Plan proceeding suggested two alternative approaches for FCC implementation of the Plan, assuming that Congress does not amend the Communications Act. First, commenters suggested that the Commission could rely on its ancillary authority under Title I of the Act to promulgate most of the rules relating to broadband that the Plan recommends. The Plan acknowledges that while some commenters believe Title I ancillary

authority, coupled with specific grants of authority in other provisions in the Act, provides the Commission with ample authority to implement the Plan, others expressed doubts about the adequacy of Title I authority to support FCC efforts to advance broadband goals.

Second, commenters in the Plan proceeding suggested that the Commission could classify broadband services as telecommunications services and implement certain plan recommendations under its Title II authority. These commenters believe that such an approach would provide a sounder legal basis for implementing recommendations in the Plan, such as establishing direct support for rural broadband. Commenters also noted that classifying a broadband service as a telecommunications service would not require the Commission to apply all provisions in Title II to the service. Rather, the Commission could exercise its forbearance authority under section 10 of the Act to narrowly tailor its use of Title II to advance policies including those described in the Plan. The Plan acknowledges that other commenters oppose applying Title II to broadband services, contending that Title II is an ill-fitting legal framework for broadband services. Section 17.3 concludes with the following statement: "The FCC will consider these and related questions as it moves forward to implement the plan."

As I mentioned in response to question number 1, after the National Broadband Plan was released, the D.C. Circuit released its decision in *Comcast*, which casts serious doubt on whether the legal framework the Commission chose for broadband Internet services nearly a decade ago is adequate to achieve core broadband policies, which prior Commissions thought they had legal authority to implement. To the extent *Comcast* casts doubt on the Commission's ability to address recommendations in the National Broadband Plan, the record generated in response to the Notice of Inquiry adopted on June 17 will help the Commission determine how to proceed.

7. Many people, including Commissioner Clyburn, have raised concerns that the FCC's plan to reallocate broadcast spectrum to wireless broadband could have a disproportionately negative impact on minority and female-owned stations. Drafters of the broadband plan admit that "the reallocation mechanisms could impact the number and diversity of 'voices' in a community or market" and recommend simply that the FCC "study" this potential impact. Do you think that the purported benefits of more expansive wireless broadband outweigh the benefits of a diversified local media?

RESPONSE: Our proposal around channel-sharing by broadcasters that want to participate in the auction and still broadcast their primary stream is intended to *maximize* the number of "voices" in a community while simultaneously repurposing spectrum. We are just now beginning to study the potential impacts on women and minority-owned stations, as we seek to balance (1) making the revenue sharing opportunity equally available to *anyone* who volunteers to participate with (2) maintaining programming that serves local and minority community interests, and will share those results with you.

8. The National Broadband Plan recommends that Congress grant the FCC and NTIA authority to impose spectrum fees on spectrum not licensed for flexible use. The Plan quotes the Government Accountability Office, which says that “these fees mimic the functions of the market.” In your view, do spectrum fees “mimic the market,” or is this a manipulation of the market by the government and a way to force certain licensees off the band? Please explain your views.

RESPONSE: The National Broadband Plan calls on Congress to grant the FCC and NTIA authority to impose spectrum fees, but only on spectrum that is not licensed for exclusive flexible use. This is a recommendation that has bipartisan support and has been suggested in the past by Presidents of both parties. In my view, spectrum fees can serve some of the same effects that a well-functioning market produces by compelling spectrum users to recognize the value to society of the spectrum that they use.

9. How do the FCC’s reallocation mechanisms affect low-power TV stations and translators? In many western TV markets, as many as 30 percent of over-the-air viewers rely on TV translators or boosters for their service. Would a broadcast “repack” negatively impact these viewers? Why or why not?

RESPONSE: We plan to conduct an open and transparent process to determine how best to provide access to the current TV broadcast spectrum for wireless broadband services. I announced that we plan to conduct an Engineering Forum in the near future and we are planning to initiate a Notice of Proposed Rule Making in the third quarter of this year. It is premature to speculate how the Commission might ultimately go about making the spectrum available. I recognize the importance of low-power TV stations and translators to communities throughout the nation. I assure you that any potential impact on low-power TV stations and translators will be fully considered in this process.

10. Verizon CEO Ivan Seidenberg recently said that he “does not buy into the idea” that broadcast spectrum should be reallocated for wireless broadband and that “technology will tend to solve” any possible spectrum shortage. This seems to contradict the National Broadband Plan findings that a spectrum shortage is inevitable. Is it possible, in your view, that advances in wireless technology can keep pace with demand and that more spectrum may not be the primary answer?

RESPONSE: I believe that the biggest threat to the future of mobile services in America is the looming spectrum crisis. On our current trajectory, the demand for spectrum for mobile Internet access will outstrip the supply. During our open broadband process, over one hundred companies – technology, telecom, electronics and others, representing many billions of dollars of ongoing investment and millions of American jobs – submitted a formal filing stating, “Our nation’s ability to lead the world in innovation and technology is threatened by the lack of sufficient spectrum for wireless broadband applications and services.” The National Broadband Plan lays out a well-balanced plan designed to be a win-win-win for broadcasters, mobile Internet providers, and the American people.

11. It is important to ensure our first responders have an uninterrupted safety network. First responders currently work with broadcasters who utilize their spectrum to deliver emergency messages and information to their local communities. The NBP outlines the taking of spectrum from some entities, like broadcasters, when there has not yet been a complete inventory of spectrum allocation, as posed in H.R. 3125, the Radio Spectrum Inventory Act. Why is the NBP getting ahead of the game by allocating spectrum when we don't have a clear understanding of what exactly there is to allocate?

RESPONSE: A spectrum inventory is a very useful activity that will enable better spectrum policies across all of the spectrum bands. We have already undertaken an extensive review of commercial uses of the spectrum, and as a result have identified some allocations that can be opened to new uses. In light of our mandate to manage spectrum efficiently, we should take action in areas that we already know have great potential to bear fruit. The process of freeing up additional spectrum will take several years. If we wait to start that process until a spectrum inventory is complete, we will push back the date when we can alleviate the spectrum crunch. Laying this technical and regulatory groundwork now will pay off whenever an inventory is implemented in the future.

**QUESTIONS FOR THE RECORD
THE HONORABLE MIKE ROGERS**

1. A group of cable and satellite companies recently weighed in with Congress and the FCC complaining about the so-called retransmission consent process. Congress established retransmission consent as a free market negotiation between distributors and broadcasters.

These distributors are asking for the government to meddle in these negotiations with broadcasters.

It is concerning for me to hear appeals for the Federal government to intervene and affect potential progress at the negotiation table. Government intervention can make it much more difficult for private parties to determine the fair-market value of the property in question.

- a. Do you share my concern about the unintended consequences of the government even considering intervention in the marketplace?
- b. Do you believe you that the Communications Act grants the Commission the authority to intervene in these private negotiations?

RESPONSE: I agree that the market is the preferred means to establish retransmission consent arrangements between broadcasters and MVPs, and in the vast majority of negotiations, the parties are able to reach an agreement without a service disruption. However, I do have concerns about processes that cause needless disruption to viewers when commercial entities fail to reach a deal. As you may know, the Commission recently solicited public comment to a Petition for Rulemaking filed by a group of 14 entities, including small, medium, and large cable companies, as well as satellite operators and public interest organizations, that asked the Commission to amend our retransmission consent rules. We will evaluate the record developed, including providing careful consideration of the consequences of government intervention in the marketplace.

While the Communications Act contemplates that the terms of retransmission consent should be resolved by agreement between private companies, the Act does provide for a formal role by the Commission in resolution of a retransmission consent dispute upon the filing of a complaint by either party. Even when the parties do not bring a formal complaint to the Commission, if Commission staff becomes aware that negotiations are reaching a standstill, staff may reach out to the parties to request status updates and encourage retransmission consent extensions so that subscribers are not subject to a loss of programming.

2. As we all know, broadband is central to our economic recovery and we are grateful to have the benefit of a plan to guide us. While the Plan recognizes the strides we have made in deploying broadband to Americans, it also discusses areas that the Commission believes is impeding that deployment. In particular, the broadband plan discusses the special access market.

- a. Would you please discuss your vision on the way forward with the special access market?
- b. When discussing the wire line competition recommendations in Chapter 4 of the National Broadband plan, did you have in mind any specific type of customer?
- c. Does Chapter 4 of the National Broadband plan impose any restrictions or limitations as to the class of customer for which these services would be made available?

RESPONSE: On November 5, 2009, the Commission issued a public notice seeking comment on an appropriate analytical framework to resolve issues raised in the pending *Special Access Notice of Proposed Rulemaking*. This proceeding seeks to determine whether the Commission's rules are working to ensure that rates, terms, and conditions for special access services, which serve business locations and cell towers, are just and reasonable, as required by law. The Commission's staff is presently analyzing the extensive comments it has received in response to that public notice. Further, the National Broadband Plan makes certain recommendations regarding special access services to promote broadband deployment, competition, and investment. In this regard, the Plan recommends that the Commission comprehensively review its regulations and develop an effective policy framework for taking expedited action to ensure the widespread availability of inputs for broadband services, including the inputs provided by special access services. As part of its recently announced broadband action agenda for implementing the National Broadband Plan's recommendations, the Commission will hold a staff workshop late in the second quarter or early third quarter to discuss the analytical framework it should use to assess the effectiveness of the existing special access rules. In late third quarter or early fourth quarter, the Commission plans to propose such a framework and identify associated data collection requirements, if necessary – critical steps toward ensuring that rates, terms, and conditions for special access services are just and reasonable, as required by law.

Chapter 4 of the National Broadband Plan references all kinds of customers, including those in the residential, small business, enterprise, wholesale, and mobile markets. The National Broadband Plan does not impose any restrictions or limitations as to the class of customer.

**QUESTIONS FOR THE RECORD
THE HONORABLE MARSHA BLACKBURN**

1. I note in your testimony that this is a plan that is in beta form and that it should change in light of new developments. As you may know, the core copyright industries contributed close to one-quarter of the real growth achieved by the U.S. economy as a whole in 2006-07. How do we ensure both robust broadband deployment and the protection of the intellectual property of those copyright industries which contribute greatly to our growth of our economy?

RESPONSE: The National Broadband Plan recognizes (at page 58) that “[t]he Internet must be a safe, trusted platform for the lawful distribution of content.” The Plan acknowledges (at page 17) that digital piracy is an ongoing problem, but notes that technologies designed to prevent piracy, such as content fingerprinting, show promise. The Plan also highlights industry-led initiatives to develop guidelines for dealing with piracy. I am optimistic that continuing advances in technology, development of industry guidelines, and enforcement of copyright laws can curb piracy without stifling innovation or overburdening lawful uses of copyrighted works.

2. The National Broadband Plan notes that, “piracy is still present in the broadband ecosystem.” But the Plan also recommends that Congress take legislative action to “encourage copyright holders to grant educational digital rights of use, without prejudicing their other rights.” As you know, this is a very complicated area of intellectual property law that clearly falls outside the jurisdiction of the FCC. Are there other recommendations in the FCC Plan that could impact U.S. Copyright Policy? Also, can you give me your assurances that the FCC will not make any recommendations for modification to U.S. copyright law without the involvement of the two expert agencies that have primary jurisdiction over copyright issues, namely the PTO and Copyright Office?

RESPONSE: The National Broadband Plan includes three recommendations that address copyright issues. Recommendation 11.4 suggests that Congress should consider taking legislative action to encourage copyright holders to grant educational digital rights of use, without prejudicing their other rights. Recommendation 15.7 suggests that Congress should consider amending the Copyright Act to provide for copyright exemptions to public broadcasting organizations for online broadcast and distribution of public media. Recommendation 15.9 suggests that Congress should consider amending the Copyright Act to enable public and broadcast media to more easily contribute their archival content to a digital national archive and grant reasonable noncommercial downstream usage rights for this content to the American people. I assure you that I will consult with PTO and the Copyright Office before recommending modifications to copyright laws.

3. Did the FCC analyze the impact of broadband expansion on copyright piracy in other countries, like South Korea, and other than noting that “piracy is still present in the broadband ecosystem,” does the Plan have any recommendations for making sure that broadband expansion does not increase the amount of piracy of US copyrighted works?

RESPONSE: The FCC team that prepared the National Broadband Plan did not analyze the impact of broadband expansion on copyright piracy in other countries. The Plan recognizes that illegal distribution of copyright-protected content over the Internet is an ongoing problem, but does not specifically recommend methods for limiting piracy of copyrighted works.



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

April 21, 2010

The Honorable John D. Dingell
U.S. House of Representatives
2328 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Dingell:

Attached please find my responses to the post-hearing questions from my appearance before the Subcommittee on Communications, Technology, and the Internet on March 24, 2010. Please let me know if I can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Julius Genachowski", written over a horizontal line.

Julius Genachowski

Enclosure

RESPONSES TO CONGRESSMAN DINGELL

1. **On page 92, the National Broadband Plan states, “If the FCC does not receive authorization to conduct incentive auctions, or if the incentive auctions do not yield a significant amount of spectrum, the FCC should pursue other mechanisms.” Will these “other mechanisms” be completely voluntary, as the plan makes patently clear will be the case for spectrum incentive auctions? Please explain your response.**

RESPONSE:

For the Plan to work, it will not be necessary for most, or even very many licensees to participate in a voluntary incentive auction. If a relatively small number of broadcasters in a relatively small number of markets share spectrum, the Commission’s staff believes we can free up a very significant amount of bandwidth. I believe, and the staff at the FCC believes, that an incentive auction will work. We do not believe that it will come to the point where it will be necessary to examine other mechanisms already permitted by law to achieve our goals.

2. **Does the Commission possess the authority, whether under the Communications Act of 1934, the Telecommunications Act of 1996, or otherwise, with which to require broadband network owners to unbundled access to their networks? Please explain your response, including relevant citations of statute if you believe the Commission does indeed possess the authority required to unbundle access to broadband networks.**

RESPONSE:

As an initial matter, I would note that the term “unbundling” can mean different things to different people. Under the Communications Act, “unbundled access” describes the duty of incumbent local exchange carriers (ILECs) to provide requesting telecommunications carriers nondiscriminatory access to network elements. This obligation of ILECs is established in 47 U.S.C. § 251(c)(3). Bell Operating Companies have a further duty to unbundle under 47 U.S.C. § 271(c)(2)(B). The Commission, however, is able to forbear from applying network-unbundling requirements if it finds that certain conditions are satisfied. The United States Court of Appeals for the District of Columbia Circuit has explained the forbearance process as follows:

As contemplated by § 706 [of the Telecommunications Act of 1996, now codified at 47 U.S.C. § 1302], the FCC has utilized forbearance from certain Title II regulations as one tool in its broadband strategy. Forbearance decisions are governed by the Communications Act’s § 10, codified as amended at 47 U.S.C. § 160, which provides that any telecommunications carrier may file a petition with the FCC requesting that the Commission forbear from applying any Communications Act provisions or FCC rules to specific services. Under § 10, the FCC must grant forbearance if enforcement is unnecessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; enforcement is unnecessary to protect consumers; and forbearance is consistent with the public interest, in that it “will promote competitive market conditions” and “enhance competition among providers of telecommunications services.”

AD HOC Telecom. Users Committee v. FCC, 572 F.3d 903, 907 (D.C. Cir. 2009).

- 3. Do you believe unbundling access to broadband networks will have a chilling effect on further private investments in broadband infrastructure? Please explain your response.**

RESPONSE:

Fostering investment and innovation in broadband is a fundamental goal; and competition is a key strategy to achieve that goal in the National Broadband Plan. The Plan also recommends various initiatives to lowering the cost of deployment of broadband infrastructure. Another recommendation of the Plan involves small businesses. The Plan recommends that the FCC should review its wholesale competition regulations to develop a coherent and effective framework and act based on that framework to ensure widespread availability of inputs for broadband services provided to small businesses, mobile providers and enterprise customers. An effective analytical framework for the FCC's wholesale access competition policies will enable efficient collection of any necessary data, evaluation of current rules and determination of what actions are necessary to achieve the goals for robust competition in business and consumer markets. I assure you that I have not prejudged these issues.

The National Broadband Plan, also recommends that the FCC review recent petitions for Commission action on competition issues within the context of rigorous analytic frameworks that appropriately balance the benefits of competitive entry – such as better broadband speeds, increased service quality, more innovative services and lower prices – with incentives for carriers to make network investments. As with our other matters, we will proceed through an open and transparent process, basing any decisions on facts and data in the record, and carefully weighing the likely impacts of our decisions on our core goals of promoting innovation, investment, competition and protecting and empowering consumers.

- 4. Does the Commission eventually intend to require unbundled access to broadband networks? Please explain your response.**

RESPONSE:

See question #3 response.

- 5. Chapter Five of the National Broadband Plan mentions Wireless Communications Services (WCS) band as a source of new spectrum. On February 16, 2010, I sent a letter to the Commission highlighting my concern that opening this spectrum for mobile broadband services may result in interference with satellite radio signals, which reflects a 1997 declaration by Commission engineers that this would likely be the case. Please indicate unequivocally (“yes” or “no”) whether there will be interference with satellite radio signals if WCS spectrum is opened for use by mobile broadband devices. Further, please describe what specific actions the Commission will take to ensure there**

is no interference, including the safeguards the Commission will require to stop any interference that may arise.

RESPONSE:

No. With the adoption of appropriate technical standards, the risk of interference to Satellite Digital Audio Radio Service (SDARS) from Wireless Communications Service (WCS) mobile operations is negligible.

The standards that were adopted in 1997 were extremely conservative, to the point that they effectively precluded the use of 30 megahertz of spectrum that could otherwise be used to provide mobile broadband services to the American public. Such inefficient use of our spectrum resources imposes enormous costs on our economy and consumers.

Today's wireless technology is considerably more advanced than what was available in 1997. Wireless networks today are designed to dynamically control the frequencies and power levels that are used by individual devices. Indeed, in July of last year, the WCS Coalition conducted a demonstration of its currently available WiMax technology in Ashburn, VA, with Sirius XM, Commission staff and other interested members of the public present. The WCS Coalition operated actual WiMax equipment under several use scenarios while in the vicinity of OEM and aftermarket SDARS receivers installed in vehicles. With the exception of one anomaly, the Commission staff present observed no instances where the SDARS receivers experienced interference.

The Commission has not yet adopted final rules. However, our engineers believe that we can and will adopt standards that are effective in preventing harmful interference. We also plan to adopt procedures that will help identify any potential interference before it occurs and promptly correct any interference that does occur. The FCC staff issued a public notice on April 2, 2010, inviting comment on the specific draft rules, including both the technical standards and interference resolution mechanisms. We anticipate that we will receive comments proposing further refinements to those proposals and we will make adjustments as may be appropriate before adopting the final rules so that we may more formally address our nation's spectrum challenges while guarding against interference with existing services such as SDARS.

6. Will the Commission provide advance notice of the WCS rules, publish them, and allow for public comment prior to their implementation?

RESPONSE:

On April 2, 2010, Commission staff issued a public notice inviting comment on specific draft rules for the Wireless Communications Service (WCS) and Satellite Digital Audio Radio Service (SDARS). A copy of the notice is attached. In addition, on March 2, 2010 Commission staff met jointly with the WCS Coalition and Sirius-XM and provided considerable details on the rules the staff contemplated recommending to the Commission. Both parties provided ex parte responses that resulted in some modifications as reflected in the rules attached to the Public Notice. This proceeding has been ongoing for many years and

there is a voluminous record that includes proposals and counterproposals from all of the interested parties. Our goal is to adopt rules in the very near future so that we may more formally address our nation's spectrum challenges while guarding against interference with existing services such as SDARS.

7. **As you may be aware, I am a long-time supporter of public broadcasting, or what the National Broadband Plan refers to as "public media." As such, I appreciate the plan's acknowledgement that public media play a vital and unique role in our democracy. On page 92, however, the plan calls for "a trust fund for digital public media that is endowed by the revenues from a voluntary auction of spectrum licensed to public television," which I believe is something that cannot be done without an act of Congress. I would imagine our country's public television stations would be cautious about this approach. If no public television station volunteers for this proposed auction, will the Commission reallocate spectrum anyway? Please explain your response.**

RESPONSE:

I believe our public broadcasting system plays a vital role in our national media landscape. Public TV stations bring diverse, high quality programming and important news and civic information to communities around the nation, and have high quality educational children's programming on for many hours. Strengthening this system for the future and ensuring its longterm health is a key goal I share.

The Plan's proposal for voluntary spectrum participation to the Mobile Future Auction does not distinguish between commercial and non-commercial broadcasters. Like commercial stations, public television stations can make a voluntary decision whether to participate or not. In major markets where multiple public TV stations co-exist, channel sharing may be a compelling option to help defray costs and continue to serve local communities without diminishing service. I share your goal of preserving and strengthening public media.

8. **The National Broadband Plan also notes that public media are at a crossroads with respect to content delivery. Though there is a plethora of digitally distributed content, our public media system is structured predominantly around broadcast-based communications. To implement the National Broadband Plan, will the Commission propose amendments to the Public Broadcasting Act? If so, please provide those amendments and detailed explanations of them, including why they are necessary.**

RESPONSE:

No specific amendments to the Public Broadcasting Act are included among the recommendations in the National Broadband Plan. The Plan does recommend that Congress consider increasing funding to public media for broadband-based distribution and content, including the creating of a trust fund for digital public media.

9. **What is the exact number of recommendations the National Broadband Plan makes to the Congress? Please provide a complete list of those recommendations. In addition, please provide a complete list of the items in the plan that require congressional action or additional authority from the Congress, including an explanation of such action and/or additional authority.**

RESPONSE:

There are 207 recommendations discussed in the National Broadband Plan, including the 4 recommendations in the BTOP Appendix to the Plan -- or 203 recommendations without the Appendix. Of those, 51 recommendations are recommendations relating to Congress.

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

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

NOTICE OF INQUIRY

Adopted: June 17, 2010

Released: June 17, 2010

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

Comment Date: July 15, 2010
Reply Comment Date: August 12, 2010

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

¹ In this Notice we use the term “broadband Internet service” to refer to the bundle of services that facilities-based providers sell to end users in the retail market. This bundle allows end users to connect to the Internet, and often includes other services such as e-mail and online storage. In prior orders we have referred to this bundle as “broadband Internet access service.” We use the term “wired,” as in “wired broadband Internet service,” to distinguish platforms such as digital subscriber line (DSL), fiber, cable modem, and broadband over power lines (continued...)

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

2. These developments lead us to seek comment on our legal framework for broadband Internet service. In addition to seeking original suggestions from commenters, we ask questions about three specific approaches. First addressing the wired service offered by telephone and cable companies and other providers, we seek comment on whether our “information service” classification of broadband Internet service remains adequate to support effective performance of the Commission’s responsibilities. We then ask for comment on the legal and practical consequences of classifying Internet connectivity service as a “telecommunications service” to which all the requirements of Title II of the Communications Act would apply. Finally, we identify and invite comment on a third way under which the Commission would: (i) reaffirm that Internet information services should remain generally unregulated; (ii) identify the Internet connectivity service that is offered as part of wired broadband Internet service (and only this connectivity service) as a telecommunications service; and (iii) forbear under section 10 of the Communications Act⁴ from applying all provisions of Title II other than the small number that are needed to implement the fundamental universal service, competition and small business opportunity, and consumer protection policies that have received broad support. We seek comment on the same issues as they relate to terrestrial wireless and satellite broadband Internet services, as well as on other factual and legal issues specific to these wireless services that bear on their appropriate

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(BPL), from platforms that rely on wireless connections to provide Internet connectivity and other services in the last mile. We refer to the service that may constitute a telecommunications service as “Internet connectivity service” or “broadband Internet connectivity service.” As discussed below, Internet connectivity service allows users to communicate with others who have Internet connections, send and receive content, and run applications online. For administrative simplicity we incorporate the same distinction between broadband and narrowband that the Commission applied in the classification orders we revisit here. That is, services with over 200 kbps capability in at least one direction will be considered “broadband” for the particular purposes of these Notices. *See, e.g., Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14860 n.15 (2005) (*Wireline Broadband Report and Order and Broadband Consumer Protection Notice*), *aff’d sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

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

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

⁴ 47 U.S.C. § 160.

classification. We further seek comment on discrete issues, including the states' proper role with respect to broadband Internet service.

I. INTRODUCTION

3. This Commission exists "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications."⁵ During more than 75 years of technological progress—from the time of tube radios and telephone switchboards to the modern era of converged digital services—the Commission has promoted innovation and investment in new communications services and protected and empowered the businesses and consumers who depend on them.

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

- i. The Commission generally does not regulate Internet content and applications;
- ii. Access to an Internet service provider via a dial-up connection is subject to the regulatory rules for telephone service; and
- iii. For the broadband Internet services that most consumers now use to reach the Internet, the Commission has refrained from regulation when possible, but has the authority to step in when necessary to protect consumers and fair competition.

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

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

7. The third element of the framework, restrained oversight of broadband Internet service, was expressed clearly on September 23, 2005, for example, when the Commission released two companion decisions. The first "establishe[d] a minimal regulatory environment for wireline broadband Internet access services."⁹ It reclassified telephone companies' broadband Internet service offerings as

⁵ 47 U.S.C. § 151.

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

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

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

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

indivisible “information services” subject only to potential regulation under Title I of the Communications Act and the doctrine of ancillary authority.¹⁰ In that decision, the Commission articulated its belief that “the predicates for ancillary jurisdiction are likely satisfied for any consumer protection, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers.”¹¹ The second decision that day adopted principles for an open Internet, again expressing confidence that the Commission had the “jurisdiction necessary to ensure that providers of telecommunications for Internet access . . . are operated in a neutral manner.”¹² Earlier this year, the Commission unanimously reaffirmed in a *Joint Statement on Broadband* that “[e]very American should have a meaningful opportunity to benefit from the broadband communications era,” and that “[w]orking to make sure that America has world-leading high-speed broadband networks—both wired and wireless—lies at the very core of the FCC’s mission in the 21st Century.”¹³ Together, these and other agency decisions show the Commission’s commitment to restrained oversight of broadband Internet service, and its equally strong resolve to ensure universal service and protect consumers and fair competition in this area when necessary.

8. Before the *Comcast* case, most stakeholders—including major communications service providers—shared the Commission’s view that the information service classification allowed the Commission to exercise jurisdiction over broadband Internet services when required.¹⁴ But the D.C. Circuit concluded that the Commission lacked authority to prohibit practices of a major cable modem Internet service provider that involved secret interruption of lawful Internet transmissions, which the Commission found were unjustified and discriminatory and denied users the ability to access the Internet

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

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

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

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

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

content and applications of their choice.¹⁵ Today, in the wake of the *Comcast* decision, the Commission faces serious questions about the legal framework that will best enable it to carry out, with respect to broadband Internet service, the purposes for which Congress established the agency. Meanwhile, Congress has highlighted the importance of broadband networks and Internet-based content and services for economic growth and development and has directed the Commission to develop policies to address concerns about the pace of deployment, adoption, and utilization of broadband Internet services in the United States.¹⁶

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

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

II. DISCUSSION

A. Background

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

1. The Commission's Classification Decisions

12. In 1966, the Commission initiated its *Computer Inquiries* "to ascertain whether the services and facilities offered by common carriers are compatible with the present and anticipated

¹⁵ See *Comcast*, 600 F.3d at 651-60.

¹⁶ See *infra* para. 25.

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

¹⁸ See *Comcast*, 600 F.3d at 646-47.

communications requirements of computer users.¹⁹ In *Computer I*, the Commission required “maximum separation” between large carriers that offered data transmission services subject to common carrier requirements and their affiliates that sold data processing services.²⁰ Refining this approach, in *Computer II* and *Computer III* the Commission required facilities-based providers of “enhanced services” to separate out and offer on a common carrier basis the “basic service” transmission component underlying their enhanced services.²¹

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

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

²⁰ *Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm. Servs.*, Docket No. 16979, Final Decision and Order, 28 F.C.C. 2d 267, 270, para. 12, 275, para. 24 (1971) (*Computer I Final Decision*), *aff’d sub nom. GTE Servs. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 F.C.C. 2d 293 (1972).

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

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

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

²⁴ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11536, para. 73 (1998) (*Stevens Report*). In a 1997 Report and Order, the Commission had previously concluded that “[w]hen a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider’s service offering. . . . [I]nformation services are not inherently telecommunications services.” *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 9180, para. 789 (1997) (subsequent history and citations omitted). The Commission followed that precedent, without further analysis, in a Report and Order concerning pole attachment rates, to conclude that a cable operator providing

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address whether entities that provided Internet connectivity over their own network facilities were offering a separate telecommunications component.²⁵ The courts, rather than the Commission, first answered that question.

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

15. In 2002, the Commission exercised its authority to interpret the Act and disagreed with the Ninth Circuit. Addressing the classification of cable modem service, the Commission observed that “[t]he Communications Act does not clearly indicate how cable modem service should be classified or regulated.”²⁸ Based on a factual record that had been compiled largely in 2000,²⁹ the Commission’s

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Internet service over a facility that also provides cable television service is not a telecommunications carrier. The Commission found it unnecessary at that time to make a decision regarding the best classification of such services. *Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-151, 13 FCC Rcd 6777, 6794-96, paras. 33-34 (1998) (subsequent history omitted). See also *Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 338 (2002) (noting that “the FCC . . . has reiterated that it has not yet categorized Internet service”).

²⁵ *Stevens Report*, 13 FCC Rcd at 11530, para. 60 (“[T]he matter is more complicated when it comes to offerings by facilities-based providers.”), 11535 n.140 (“We express no view in this Report on the applicability of this analysis to cable operators providing Internet access service.”), 11540, para. 81 (“In essential aspect, Internet access providers look like other enhanced—or information—service providers. Internet access providers, typically, own no telecommunications facilities.”); *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities: Internet Over Cable Declaratory Ruling: Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4824, para. 41 (2002) (*Cable Modem Declaratory Ruling*) (“The [Stevens Report] did not decide the statutory classification issue in those cases where an ISP provides an information service over its own transmission facilities.”), *aff’d sub nom. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*); *Appropriate Framework for Broadband Access to Internet Over Wireline Facilities: Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3027-28, paras. 14-16 (2002) (“[I]n the *Stevens Report*, [t]he Commission recognized . . . that its analysis focused on ISPs as entities procuring inputs from telecommunications service providers. Thus, classifying Internet access as an information service in this context left open significant questions regarding the treatment of Internet (and information) service providers that own their own transmission facilities and that engage in data transport over those facilities to provide an information service. In addition, the Commission did not explicitly address the regulatory classification of wireline broadband Internet access services.” (citation omitted)).

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

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

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

Cable Modem Declaratory Ruling described cable modem service as “typically includ[ing] many and sometimes all of the functions made available through dial-up Internet access service, including content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet, including access to the World Wide Web.”⁵⁰ The Commission noted that cable modem providers often consolidated these functions “so that subscribers usually do not need to contract separately with another Internet access provider to obtain discrete services or applications, such as an e-mail account or connectivity to the Internet, including access to the World Wide Web.”⁵¹

16. The Commission identified a portion of the cable modem service it called “Internet connectivity,” which it described as establishing a physical connection to the Internet and interconnecting with the Internet backbone, and sometimes including protocol conversion. Internet Protocol (IP) address number assignment, domain name resolution through a domain name system (DNS), network security, caching, network monitoring, capacity engineering and management, fault management, and troubleshooting.⁵² The *Ruling* also noted that “[n]etwork monitoring, capacity engineering and management, fault management, and troubleshooting are Internet access service functions that are generally performed at an ISP or cable operator’s Network Operations Center (NOC) or back office and serve to provide a steady and accurate flow of information between the cable system to which the subscriber is connected and the Internet.”⁵³ The Commission distinguished these functions from “Internet applications [also] provided through cable modem services,” including “e-mail, access to online newsgroups, and creating or obtaining and aggregating content,” “home pages,” and “the ability to create a personal web page.”⁵⁴

17. The Commission found that cable modem service was “an offering . . . which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications.”⁵⁵ The Commission further concluded that, “as it [was] currently offered,”⁵⁶ cable modem service as a whole met the statutory definition of “information service” because its components were best viewed as a “single, integrated service that enables the subscriber to utilize Internet access service,” with a telecommunications component that was “not . . . separable from the data processing capabilities of the service.”⁵⁷ The Commission thus concluded that cable modem service “does not include an offering of telecommunications service to subscribers.”⁵⁸

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

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

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

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

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

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

³⁵ *Id.* at 4822, para. 38.

³⁶ *Id.* at 4802, para. 7.

³⁷ *Id.* at 4823, paras. 38-39.

³⁸ *Id.* at 4832, para. 39.

18. When the United States Supreme Court considered the *Cable Modem Declaratory Ruling* in the *Brand X* case,³⁹ all parties agreed that cable modem service either *is* or *includes* an information service.⁴⁰ The Court therefore focused, in pertinent part, on whether the Commission permissibly interpreted the Communications Act in concluding that cable modem service providers offer only an information service, rather than a separate telecommunications service and information service.⁴¹ The Court's opinion reaffirms that courts must defer to the implementing agency's reasonable interpretation of an ambiguous statute. Justice Thomas, writing for the six-Justice majority, recited that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts."⁴² Furthermore, "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis."⁴³

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

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

21. After the Supreme Court affirmed the Commission's authority to classify cable modem service, the Commission eliminated the resulting regulatory asymmetry between cable companies and other broadband Internet service providers by issuing follow-on orders that extended the information service classification to broadband Internet services offered over DSL and other wireline facilities,⁴⁹ power lines,⁵⁰ and wireless facilities.⁵¹ The Commission nevertheless allowed these providers, at their

³⁹ See *Brand X*, 545 U.S. 967.

⁴⁰ See *id.* at 987.

⁴¹ See *id.* at 986-87.

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

⁴³ *Id.* at 981 (quoting *Chevron*).

⁴⁴ *Id.* at 991.

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

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

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

⁴⁸ *Id.* at 1008.

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

⁵⁰ *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over*
(continued...)

own discretion, to offer the broadband transmission component of their Internet service as a separate telecommunications service.⁵² Exercising that flexibility, providers—including more than 840 incumbent local telephone companies⁵³—currently offer broadband transmission as a telecommunications service expressly separate from their Internet information service.⁵⁴

2. The Commission's Established Policy Goals

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

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Power Line Internet Access Service as an Information Service, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13281-82, paras. 1-2 (2006) (*BPL-Enabled Broadband Order*).

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

⁵² *Wireline Broadband Report and Order*, 20 FCC Rcd at 14858, para. 5, 14900-03, paras. 89-95, 14909-10, para. 103; *BPL-Enabled Broadband Order*, 21 FCC Rcd at 13289, para. 15; *Wireless Broadband Order*, 22 FCC Rcd at 5913-14, para. 33. In the 2005 order, the Commission also eliminated the *Computer Inquiry* requirements for wireline broadband Internet service. *Wireline Broadband Report and Order*, 20 FCC Rcd at 14875-98, paras. 41-85.

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

⁵⁴ See Comments of Organization for the Promotion and Advancement of Small Telecommunications Companies, GN Docket No. 09-51, at 30-31 (June 8, 2009) (“[A]ll RoR[r]ate of return]-regulated carriers (which encompasses most rural ILECs) offer broadband transmission on a stand-alone Title II common carrier basis. This means that they are required to offer that transmission at specified, non-discriminatory rates, terms, and conditions, including to non-facilities based Internet service providers (ISPs).” (citation omitted)).

⁵⁵ 47 U.S.C. § 254(b)(2).

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

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

service as an information service, outside the scope of any specific regulatory duty in the Act, would help achieve Congress's aims.⁵⁸

23. At the same time, the Commission acted with the express understanding that its information service classifications would not impair the agency's ability to protect the public interest. For example, when the Commission permitted telephone companies to offer broadband Internet service as solely an information service, it emphasized that this new classification would not remove the agency's "ample" Title I authority to accomplish policy objectives related to consumer protection, network reliability, and national security.⁵⁹ The *Wireline Broadband Report and Order* thus was accompanied by a *Broadband Consumer Protection Notice*, in which the Commission sought comment on "a framework that ensures that consumer protection needs are met by *all* providers of broadband Internet access service, regardless of the underlying technology."⁶⁰ The Commission stressed that its ancillary jurisdiction was "ample to accomplish the consumer protection goals we identify."⁶¹ The Commission similarly referenced the *Broadband Consumer Protection Notice* when it extended the information service classification to broadband Internet services offered over power lines⁶² and wireless facilities.⁶³

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

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

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

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

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

⁶¹ *Id.* at 14930, para. 146.

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

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

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

⁶⁵ *Id.* at 14988, paras. 4-5.

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

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

3. Legal Developments

25. Recent legislative and judicial developments suggest a need to revisit the Commission’s approach to broadband Internet service. Since 2008, Congress has passed three significant pieces of legislation that reflect its strong interest in ubiquitous deployment of high speed broadband communications networks and bear on the Commission’s policy goals for broadband: the 2008 Farm Bill directing the Chairman to submit to Congress “a comprehensive rural broadband strategy,” including recommendations for the rapid buildout of broadband in rural areas and for how federal resources can “best . . . overcome obstacles that impede broadband deployment”;⁶⁸ the Broadband Data Improvement Act, to improve data collection and “promote the deployment of affordable broadband services to all parts of the Nation”;⁶⁹ and the Recovery Act, which, among other things, appropriated up to \$7.2 billion to evaluate, develop, and expand access to and use of broadband services,⁷⁰ and required the Commission to develop the National Broadband Plan to ensure that every American has “access to broadband capability and . . . establish benchmarks for meeting that goal.”⁷¹ In the Recovery Act, Congress further directed the Commission to produce a “detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public,” and a “plan for [the] use of broadband structure and services” to advance national goals such as public safety, consumer welfare, and education.⁷² These three pieces of legislation, passed within a span of nine months, make clear that the Commission must retain its focus on implementing broadband policies that encourage investment, innovation, and competition, and promote the interests of consumers.

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

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

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

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

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

⁷¹ 47 U.S.C. § 1305(k)(2).

⁷² *Id.* § 1305(k)(2)(B), (D).

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

lacks authority to prohibit a broadband Internet service provider from engaging in discriminatory practices that violate the four principles the Commission announced in 2005.⁷⁴

27. On April 6, 2010, the D.C. Circuit granted Comcast's petition for review and vacated the Commission's enforcement decision, holding that the Commission had "failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility.'" ⁷⁵ The Commission had argued that ending Comcast's secret practices was ancillary to the statutory objectives Congress established for the Commission in sections 1 and 230(b) of the Act. The court rejected that argument on the ground that those sections are merely statements of policy by Congress—as opposed to grants of regulatory authority—and thus were not sufficient to support Commission action against Comcast.⁷⁶ The court also rejected the Commission's position that various other statutory provisions supported ancillary authority. As to section 706 of the Telecommunications Act of 1996, the court noted that the agency had previously interpreted section 706 as not constituting a grant of authority and held that the Commission was bound by that interpretation for purposes of the case.⁷⁷ The court also rejected the agency's reliance on sections 201, 256, 257, and 623 of the Communications Act.⁷⁸

B. Approaches to Classification

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

29. The Commission has frequently expressed its commitment to protecting consumers and promoting innovation, investment, and competition in the broadband context.⁸⁰ We reaffirm that commitment here and ask commenters to address—in general terms, as well as in response to the specific questions posed below—which of the three alternative regulatory frameworks for broadband Internet service (or what other framework) will best position the Commission to advance these fundamental goals. We note that because the broadband Internet service classification questions posed in this part II.B involve an interpretation of the Communications Act, the notice and comment procedures we follow here

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

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

⁷⁶ *Id.* at 651-58.

⁷⁷ *Id.* at 658-60.

⁷⁸ *Id.* at 660-61.

⁷⁹ 47 U.S.C. § 160.

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

are not required under the Administrative Procedure Act.⁸¹ In order to provide the greatest possible opportunity for public comment, however, we are soliciting initial and reply comments via the traditional filing mechanisms, as well as input through our recently expanded online participation tools.⁸²

I. Continued Information Service Classification and Reliance on Ancillary Authority

30. In this part, we seek comment on maintaining the current classification of wired broadband Internet service as a unitary information service. Under this approach, we would rely primarily on our ancillary authority to implement the Commission's broadband policies. We seek comment on whether our ancillary authority continues to provide an adequate legal foundation. Throughout the last decade, the Commission has stated its consistent understanding that Title I provided the Commission adequate authority to support effective performance of its core responsibilities.⁸³ Commissioners, including the two former Chairmen who urged the information service approach,⁸⁴ as well as cable and telephone companies and other interested parties,⁸⁵ individually expressed this understanding. In *Brand X*, the Supreme Court appeared to confirm this widely held view, stating that "the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction."⁸⁶ The *Comcast* decision, however, causes us to reexamine our ability to rely on Title I as the legal basis for implementing broadband policies.

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

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

⁸² See *infra* para. 114.

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

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

⁸⁵ See *supra* note 14.

⁸⁶ *Brand X*, 545 U.S. at 996.

a. Universal Service

32. Can the Commission reform its universal service program to support broadband Internet service by asserting direct authority under section 254, combined with ancillary authority under Title I? AT&T, for example, observes that section 254 provides that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the nation,” and that the Commission’s universal service programs “shall” be based on this and other enumerated principles.⁸⁷ AT&T notes that the Commission’s information service classification for broadband Internet service creates “tension” with “the text of Section 254(c)(1), which states that ‘[u]niversal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section.’”⁸⁸ But, AT&T suggests, “[o]ther evidence in the statutory text makes clear that Congress did not intend to disable the Commission from using universal service to support information services.”⁸⁹ For example,

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

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

33. We seek comment on whether we may interpret section 254 to give the Commission authority to provide universal service support for broadband Internet service if that service is classified as a unitary information service. Could we provide support to information service providers consistent with section 254(e), which says that “only an eligible telecommunications carrier designated under section

⁸⁷ See Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-47, 09-137, WC Docket Nos. 05-337, 03-109, attachment at 2 (Jan. 29, 2010) (*AT&T USF White Paper*) (quoting and citing 47 U.S.C. § 254(b)(2) (emphasis added)); Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-137, WC Docket Nos. 05-337, 03-109 (April 12, 2010) (*AT&T USF Comcast Letter*).

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

⁸⁹ *Id.*

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

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

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

214(e) shall be eligible to receive specific Federal universal service support,”⁹³ and 214(e), which sets forth the framework for designating “telecommunications carrier[s] . . . eligible to receive universal service support.”⁹⁴

34. AT&T posits that even after the *Comcast* decision, the Commission could bolster its reliance on section 254 by also relying on several other provisions of the Act.⁹⁵ First, the “necessary and proper clause” in section 4(i) of the Act allows the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”⁹⁶ Second, the Act makes clear that the Commission’s “core statutory mission” is to “make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges.”⁹⁷ Third, the text of 254, as described above, suggests that Congress intended the Commission to support universal broadband Internet service.⁹⁸ Finally, the policy directive in section 706 of the 1996 Act instructs the Commission to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.⁹⁹ AT&T contends that section 706’s directive supports the view that section 254 provides authority for supporting broadband Internet services with monies from the Universal Service Fund.¹⁰⁰ We seek comment on AT&T’s analysis.

35. The National Cable and Telecommunications Association (NCTA) has put forward a similar legal theory rooted in section 254(h)(2) of the Communications Act.¹⁰¹ That section gives the Commission authority “to enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries.”¹⁰² NCTA contends that because “the use of broadband in the home has become a critical component of the American education system . . . it is entirely reasonable to read the statutory directive to support Internet access for classrooms to include support for residential broadband service to households where it is reasonably likely that such service would be used for educational purposes.”¹⁰³ Could the Commission interpret section 254(h)(2) to permit this type of support for broadband Internet service? Is

⁹³ 47 U.S.C. § 254(e).

⁹⁴ *Id.* § 214(e).

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

⁹⁶ 47 U.S.C. § 154(i).

⁹⁷ 47 U.S.C. § 151.

⁹⁸ *AT&T USF White Paper* at 6-7.

⁹⁹ 47 U.S.C. § 1302.

¹⁰⁰ *AT&T USF Comcast Letter* at 2.

¹⁰¹ See Letter from Kyle McSlarrow, President & CEO, National Cable & Telecommunications Association, to Julius Genachowski, Chairman, FCC, GN Docket Nos. 09-51, 09-191, WC Docket No. 07-52 (March 1, 2010) (*NCTA USF Letter*).

¹⁰² 47 U.S.C. § 254(h)(2).

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

this approach a permissible extension of the Commission's existing E-Rate program?¹⁰⁴ Would this approach enable the Commission to provide support for broadband Internet service only to households with school-aged children, or could the Commission provide support for adult education as well?

36. Another legal theory for promoting broadband deployment under the Commission's current classification of broadband Internet service rests directly on section 706 of the 1996 Act. Section 706(a) states that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."¹⁰⁵ Section 706(c) defines "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."¹⁰⁶ The D.C. Circuit rejected section 706(a) as a basis for the Commission's *Comcast* order because "[i]n an earlier, still-binding order . . . the Commission ruled that section 706 'does not constitute an independent grant of authority,'¹⁰⁷ and 'agencies 'may not . . . depart from a prior policy *sub silentio*.'¹⁰⁸ We seek comment on whether the Commission should revisit and change its conclusion that section 706(a) is not an independent grant of authority.¹⁰⁹ What findings would be necessary to reverse that interpretation? If the Commission were to find that section 706(a) is an independent grant of authority, would that subsection, read in conjunction with sections 4(i) and 254, provide a firm basis for the Commission to provide universal service support for broadband Internet services?

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

[t]he Commission shall . . . annually . . . initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate

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

¹⁰⁵ 47 U.S.C. § 1302(a).

¹⁰⁶ 47 U.S.C. § 1302(d).

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

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

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

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

deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.¹¹¹

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

38. For each of these legal theories, the Commission seeks comment on the administrative record that would be needed to successfully defend against a legal challenge to implementation of the theory. Would adopting these theories be consistent with the federal Anti-Deficiency Act and Miscellaneous Receipts Act?¹¹² What other issues should the Commission consider in evaluating these legal theories? Are there other legal frameworks that would allow us to promote universal service in the broadband context without revisiting our classification decisions?

b. Privacy

39. The Commission has long supported protecting the privacy of users of broadband Internet services. In 2005, the Commission emphasized in the *Wireline Broadband Report and Order* that "[c]onsumers' privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on [telephone] services."¹¹³ The Commission believed at the time that it had jurisdiction to enforce privacy requirements, and "note[d] that long before Congress enacted section 222 of the Act," which requires providers of telecommunications services to protect confidential information, "the Commission had recognized the need for privacy requirements associated with the provision of enhanced services."¹¹⁴ In 2007, the Commission extended the privacy protections of section 222 to interconnected VoIP services without resolving whether interconnected VoIP services are telecommunications services or information services.¹¹⁵ More recently, the National Broadband Plan recommended that the Commission work with the Federal Trade Commission (FTC) to protect

¹¹¹ 47 U.S.C. § 1302(b).

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

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

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

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

consumers' privacy in the broadband context.¹¹⁶ Indeed, we fully intend that our efforts with regard to privacy complement those of the FTC. We seek comment on the best approach for ensuring privacy for broadband Internet service users under the Commission's current information service classification, and any legal obstacles to protecting privacy that may exist if the Commission retains that classification.

c. Access for Individuals with Disabilities

40. Section 255 requires telecommunications service providers and equipment manufacturers to make their services and equipment accessible to individuals with disabilities, unless not readily achievable.¹¹⁷ Section 251(a)(2) requires telecommunications carriers "not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255."¹¹⁸ In the 2005 *Wireline Broadband Report and Order*, the Commission committed to exercise its authority "to ensure achievement of important policy goals of section 255" in the broadband context.¹¹⁹ In 2007, the Commission exercised its ancillary authority to extend section 255 to interconnected VoIP providers,¹²⁰ and in 1999 the Commission similarly relied on ancillary authority to extend disability-related requirements to voicemail and interactive menu services.¹²¹ More recently, a unanimous Commission stated its belief that disabilities should not stand in the way of Americans' "opportunity to benefit from the broadband communications era."¹²² The Commission has also

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

¹¹⁷ 47 U.S.C. § 255.

¹¹⁸ *Id.* § 251(a)(2).

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

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

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

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

announced its intent to consider how “[t]o better enable Americans with disabilities to experience the benefits of broadband.”¹²³ We seek comment on the best legal approaches to extending disability-related protections to broadband Internet service users under the Commission’s current information service classification. Could we exercise ancillary authority to ensure access for people with disabilities? Could the Commission rely on the mandate in section 706(a) to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to *all* Americans,”¹²⁴ or the similar directive in section 706(b)?¹²⁵

d. Public Safety and Homeland Security

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

e. Addressing Harmful Practices by Internet Service Providers

42. Although the D.C. Circuit rejected the legal theory the Commission relied on to address Comcast’s interference with its customers’ peer-to-peer transmissions, some have suggested that other theories of ancillary authority could support Commission action to protect against harmful practices of this sort. For example, one commentator has proposed that the Commission assert ancillary authority pursuant to sections 251(a) and 256 of the Act, which address interconnection by telecommunications

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

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

¹²⁵ See *id.* 1302(b).

¹²⁶ *Id.* § 151.

¹²⁷ See *infra* part II.D.

¹²⁸ See 47 U.S.C. § 1302(a).

carriers.¹²⁹ Although these provisions apply specifically to telecommunications carriers, the proposal asserts that they are not explicitly limited to the telecommunications services provided by such carriers.¹³⁰

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

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

45. Section 202(a) of the Communications Act makes it unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.¹³⁵

It has been suggested that “[i]f network operators are allowed the option of offering broadband Internet access services on a completely unregulated basis, that option could enable them to end run Section 202(a)” as carriers move toward providing services over broadband Internet networks, “and render that

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

¹³⁰ *Id.*

¹³¹ 47 U.S.C. § 251(a)(1).

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

¹³³ Werbach, *supra* note 129, at 591 (citation omitted). See 47 U.S.C. § 256. The 2005 *Wireline Broadband Report and Order* stated that section 256 “affords the Commission adequate authority to continue overseeing broadband interconnectivity and reliability issues, regardless of the legal classification of wireline broadband Internet access service.” *Wireline Broadband Report and Order*, 20 FCC Red at 14919, para. 120.

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

¹³⁵ 47 U.S.C. § 202(a).

provision a dead letter.”¹³⁶ We seek comment on the factual and legal assumptions underlying this argument, and whether this reasoning provides the Commission authority to address practices of broadband Internet service providers that endanger competition or consumer welfare.

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

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

48. We also invite comment on whether the portions of section 214(a) addressing discontinuance, reduction, and impairment of service provide a potential basis for an assertion of ancillary authority regarding harmful Internet service provider practices. That provision mandates that a common

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

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

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

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

carrier may not “impair service to a community” without prior Commission approval.¹⁴⁰ Impairment, in the section 214(a) context, refers to both “the adequacy” and “quality” of the service provided.¹⁴¹

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

50. Other harmful practices by broadband Internet service providers may involve a failure to disclose practices to consumers.¹⁴³ For instance, one problem identified by the Commission in the *Comcast* case was Comcast’s failure to identify to customers its practice of degrading peer-to-peer traffic.¹⁴⁴ If the Commission maintains its information services framework for broadband Internet services, will it have sufficient authority to address these concerns?

f. Other Approaches to Oversight

51. Finally, we ask for public input on whether there are other approaches to fulfilling our role for broadband Internet services that would provide meaningful oversight consistent with maintaining robust incentives for innovation and investment. For instance, in a number of proceedings commenters have suggested that the Commission should pursue policies based on standards set by third parties and enforced by the Commission. In the Open Internet proceeding, Verizon and Google suggest that the Commission could create technical advisory groups “comprised of a range of stakeholders with technical expertise” to develop best practices, resolve disputes, issue advisory opinions, and coordinate with standards-setting bodies.¹⁴⁵ Although Verizon and Google “may not necessarily agree on which federal

¹⁴⁰ 47 U.S.C. § 214(a).

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

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

¹⁴³ See Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, at 5 (Feb. 8, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf (“Fourth, consumers should receive meaningful information regarding their service plans. Simply put, such information is necessary to ensure that the market is working. Providers have every right to offer a variety of service tiers with varying bandwidth and feature options. Consumers need to know about these choices as well as whether and how their service plans protect them against spam, spyware and other potential invasions of privacy.”); *Wireline Broadband Report and Order*, 20 FCC Red at 14933, para. 153 (“We seek comment on whether we should exercise our Title I authority to impose requirements on broadband Internet access service providers that are similar to our truth-in-billing requirements or are otherwise geared toward reducing slamming, cramming, or other types of telecommunications-related fraud. For example, during 2005, the Commission’s Consumer and Governmental Affairs Bureau has received complaints about the billing practices of broadband Internet access services providers.”).

¹⁴⁴ *Comcast Order*, 23 FCC Red at 13028, para. 1 (“Comcast’s failure to disclose the company’s practice to its customers has compounded the harm.”), 13058-59, paras. 52-53.

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

agency does or should have authority over these matters,” they “do recognize as a policy matter that there should be some backstop role for federal authorities to prevent harm to competition and consumers if or when bad actors emerge anywhere in the Internet space, and . . . agree that involvement should occur only where necessary on a case-by-case base basis.”¹⁴⁶ Commenters in other proceedings have suggested similar approaches.¹⁴⁷ We ask commenters to address whether the Commission should pursue a regime in which one or more third parties play a major role in setting standards and best practices relative to maintaining our policy goals for broadband Internet service. Pursuant to what authority could the Commission create a third party advisory group? What authority could the Commission delegate to such a third party or third parties? Would it be appropriate for other federal governmental entities, such as the FTC, to have a role in such an approach? Would the Commission have sufficient ancillary authority under its information service framework to serve as a backstop if the third party is unable to resolve a dispute or implement a necessary policy?

2. Application of All Title II Provisions

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

a. Current Facts in the Broadband Marketplace

53. In the *Cable Modem Declaratory Ruling*, the Commission observed that “the cable modem service business is still nascent, and the shape of broadband deployment is not yet clear.”¹⁴⁸ and nearly a decade has passed since the Commission examined the facts surrounding broadband Internet service in the *Cable Modem Declaratory Ruling*. In this part we therefore ask whether or not the facts of today’s broadband marketplace support a conclusion that providers now offer Internet connectivity as a separate telecommunications service.¹⁴⁹ In addition to the specific questions we ask below, we seek comment on what facts are most relevant to this inquiry. The Commission has explained that because the Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the

¹⁴⁶ *Id.* at 6.

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

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

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

public[.]’ . . . whether a telecommunications service is being provided turns on what the entity is ‘offering . . . to the public,’ and customers’ understanding of that service.”¹⁵⁰ Similarly, in *Brand X*, the majority opinion noted that “[i]t is common usage to describe what a company ‘offers’ to a consumer as what the consumer perceives to be the integrated finished product.”¹⁵¹ The *Brand X* dissent asserted that “[t]he relevant question is whether the individual components in a package being offered still possess sufficient identity to be described as separate objects of the offer, or whether they have been so changed by their combination with the other components that it is no longer reasonable to describe them in that way.”¹⁵² The *Brand X* majority opinion and the dissent examined consumers’ understanding of the services, analogies to other services, and technical characteristics of the services being provided. What factors should the Commission consider in order to assess the proper classification of broadband Internet connectivity service?

54. *Status of Current Offerings.* Is wired broadband Internet service (or any telecommunications component thereof) held out “for a fee directly to the public, or to such classes of users as to be effectively available directly to the public,” for instance through a tariff such as the NECA DSL Access Service Tariff¹⁵³ or through facilities-based Internet service providers’ public websites?¹⁵⁴ If so, we seek specific examples of such offerings. If not, does the Commission have legal authority to compel the offering of a broadband Internet telecommunications service that is not currently offered? If legal authority exists, would it be appropriate for the Commission to exercise such authority? Are there First Amendment constraints on the Commission’s ability to compel the offering of such a service? Would such a compulsion raise any concerns under the Takings Clause of the Fifth Amendment?

55. *Services Offered Today.* When the Commission gathered the record for its classification orders,¹⁵⁵ broadband Internet service was offered with various services—such as e-mail, newsgroups, and the ability to create and maintain a web page—that we described as “Internet applications.”¹⁵⁶ The Commission understood that subscribers to broadband Internet services “usually d[id] not need to contract

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

¹⁵¹ *Brand X*, 545 U.S. at 970.

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

¹⁵³ See *supra* note 53.

¹⁵⁴ 47 U.S.C. § 153(46). A provider is engaged in common carriage if it “make[s] capacity available to the public indifferently”; it can be compelled to offer a common carriage service if “the public interest requires common carrier operation of the proposed facility.” *Cable & Wireless PLC*, Memorandum Opinion and Order, 12 FCC Rcd 8516, 8522, paras. 14-15 (1997); see also *U.S. Telecom Ass’n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002) (“[C]ommon carrier status turns on: (1) whether the carrier ‘holds himself out to serve indifferently all potential users’; and (2) whether the carrier allows ‘customers to transmit intelligence of their own design and choosing.’” (citation omitted)); *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); *Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (“*NARUC I*”); *Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (“*NARUC F*”). Whether a provider has made a common carriage offering “must be determined on a case-by-case basis.” *Bright House Networks, LLC, et al. v. Verizon California, Inc., et al.*, Memorandum Opinion and Order, 23 FCC Rcd 10704, 10717-19, paras. 37-40 (2008) (finding carriers offered common carriage service despite lacking a tariff, website posting, or any other advertisement, because providers self-certified themselves as common carriers, entered into publicly available interconnection agreements, and obtained state certificates of public convenience and necessity), *aff’d sub nom. Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 275-76 (D.C. Cir. 2009).

¹⁵⁵ See *supra* note 29.

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

separately” for “discrete services or applications” such as e-mail.¹⁵⁷ We seek comment on whether this remains the case. To what extent are these and other applications and services sold with wired broadband Internet service today? Are providers offering the same applications and services that they did when the Commission began building the record in 2000, or have their offerings changed? Are these applications and services always packaged with Internet connectivity, or can consumers choose not to purchase them? What test(s) should the Commission use to evaluate whether particular features are today integrated with the underlying Internet connectivity?

56. *Consumer Use and Perception.* Next, we seek comment on how consumers use and perceive broadband Internet service. Do customers today perceive that they are receiving one unitary service comprising Internet connectivity as well as features and functionalities, or Internet connectivity as the main service, with additional features and functionalities simultaneously offered and provided?¹⁵⁸ To what extent do consumers continue to rely on the features and applications that are provided as part of their broadband Internet service package, and to what extent have they increased their use of applications and services offered by third party providers? For instance, some users now rely on free e-mail services provided by companies such as Yahoo and Microsoft,¹⁵⁹ social networking sites including Facebook and MySpace,¹⁶⁰ public message boards like those found in the Google Groups service,¹⁶¹ web portals like Netvibes,¹⁶² web hosting services like Go Daddy,¹⁶³ and blog hosting services like TypePad.¹⁶⁴ How does the use of these third party services compare with the use of similar services offered by broadband Internet service providers? To what extent do consumers rely on their Internet service provider or other providers for security features and spam filtering? To what extent do consumers rely on their Internet service provider, as opposed to alternative providers, for content such as news and medical advice? To the extent broadband Internet service providers offer applications to consumers, do consumers view them

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

¹⁵⁸ We note that under Commission precedent, services composing a single bundle at the point of sale—for instance, local telephone service packaged with voice mail—can retain distinct identities as separate offerings for classification purposes. *See, e.g., Stevens Report*, 13 FCC Rcd at 11530, para. 60 (“It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail.” (citation omitted)); *Regulation of Prepaid Calling Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, 7291, para. 3, 7295 (2006) (finding that menus allowing users to access information did not convert the telecommunications service offered by prepaid calling cards into an information service), *vacated in part sub nom. Qwest Servs. Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007); *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T’s Interspan Frame Relay Service Is a Basic Service et al.*, DA 95-2190, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13721, paras. 29-32, 13722-23, paras. 40-46 (1995) (*Frame Relay Order*) (finding that AT&T’s InterSpan frame relay service could not avoid *Computer II* and *Computer III* unbundling and tariffing requirements by combining basic and enhanced services).

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

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

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

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

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

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

as an integrated part of the Internet connectivity offering? To what extent do consumers today use “the high-speed wire always in connection with the information-processing capabilities provided by Internet access”?¹⁶⁵

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

58. *Technical and Functional Characteristics.* In addition, to aid our understanding of what carriers offer to consumers, we seek to develop a current record on the technical and functional characteristics of broadband Internet service, and whether those characteristics have changed materially in the last decade. For example, DNS lookup is now offered to consumers on a standalone basis,¹⁶⁶ and web page caching is offered by third party content delivery networks.¹⁶⁷ Web browsers, for example, are often installed separately by users.¹⁶⁸ We ask commenters to describe the technical characteristics of broadband Internet service, including identifying those functions that are essential for web browsing and other basic consumer Internet activities. What are the necessary components of web browsing? How is caching provided to end users, and how have caching services changed over time? How do routing functions and DNS directory lookup enable users to access information online?

59. In classifying services, the Commission has taken into account the purpose of the feature or service at issue. For example, some features and services that meet the literal definition of “enhanced service,” but do not alter the fundamental character of the associated basic transmission service, are “adjunct-to-basic” and are treated as basic (*i.e.*, telecommunications) services even though they go beyond mere transmission.¹⁶⁹ Do any of the features and functionalities offered by broadband Internet service providers have relevant similarities to or differences from those that resemble an information service but are treated differently under Commission precedent? Similarly, which, if any, of the “Internet

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

¹⁶⁶ See, e.g., Google Inc., Google Public DNS, <http://code.google.com/speed/public-dns> (last visited June 16, 2010); OpenDNS, OpenDNS > Solutions > Household, <http://www.opendns.com/solutions/household> (last visited June 16, 2010) (“Join the millions who’ve already unbundled their DNS service from their ISP’s Internet connection.”).

¹⁶⁷ See, e.g., Akamai, Facts & Figures, http://www.akamai.com/html/about/facts_figures.html (last visited June 16, 2010) (“Akamai delivers daily Web traffic greater than a Tier-1 ISP, at times reaching more than 2 Terabits per second.”).

¹⁶⁸ To give one example, the Firefox browser is provided for free by Mozilla, which estimates that it has 100 million users in North America. Mozilla, Firefox web browser, <http://www.mozilla.com/en-US/firefox/firefox.html> (last visited June 16, 2010); Mozilla’s Q1 2010 Metrics Report at 3, available at https://wiki.mozilla.org/images/e/ed/Analyst_report_Q1_2010.pdf; see also Google, Inc., Google Chrome, <http://www.google.com/chrome> (last visited June 16, 2010).

¹⁶⁹ See generally *Computer II Final Decision*, 77 F.C.C. 2d at 421, para. 98; *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services. Regulation of Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826, 4831, para. 16 (2005) (*Calling Card Order and NPRM*), *aff’d sub nom. AT&T v. FCC*, 454 F.3d 329 (D.C. Cir. 2006).

connectivity” functions listed in the *Cable Modem Declaratory Ruling* fall within the management exceptions to the information services category, and why?¹⁷⁰

60. Some have suggested that the Commission should take account of the different network “layers” that compose the Internet.¹⁷¹ Are distinctions between the functional “layers” that compose the Internet relevant and useful for classifying broadband Internet service? For example, the Commission could distinguish between physical, logical, and content and application layers, and identify some of those layers as elements of a telecommunications service and others as elements of an information service. (As discussed above, the Commission historically has distinguished between Internet connectivity functions and Internet applications.¹⁷²) If the Commission adopted this approach, which of the services offered by wired broadband Internet service providers should be included in each category? Are the boundaries of each layer sufficiently clear that such an approach would be workable in practice? Would such an approach have implications for services other than broadband Internet service?

61. *Competition.* We also seek comment on the level of competition among broadband Internet service providers. The Commission adopted the unitary information service classification for broadband Internet services in part “to encourage facilities-based competition.”¹⁷³ The Commission envisioned competition among cable operators, telephone companies, satellite providers, terrestrial wireless providers, and broadband-over-powerline (BPL) providers.¹⁷⁴ Has the market for broadband Internet services developed as expected, and, if not, what is the significance for this proceeding of the market’s actual development?

62. Are there other relevant facts or circumstances that bear on the Commission’s application of the statutory definition of “telecommunications service” to wired broadband Internet service?

b. Defining the Telecommunications Service

63. If the Commission were to classify a service provided as part of the broadband Internet service bundle as a telecommunications service, it would be necessary to define what is being so classified. Here we ask commenters to propose approaches to defining the telecommunications service offered as part of wired broadband Internet service, assuming that the Commission finds a separate telecommunications service is being offered today, or must be offered.

¹⁷⁰ 47 U.S.C. § 153(20) (“The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, *but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.*” (emphasis added)).

¹⁷¹ See, e.g., Douglas Sicker & Joshua Mindel, *Refinements of a Layered Model for Telecommunications Policy*, 1 J. TELECOMM. & HIGH TECH L. 69, 86-88 (2002); Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 FED. COMM. L.J. 207 (2003); Scott Jordan, *A Layered Network Approach to Net Neutrality*, 1 INT’L J. COMM. 427, 443 (2007). But see John T. Nakahata, *Broadband Regulation at the Demise of the 1934 Act*, 12 COMMLAW CONCEPTS 169, 173 (2004) (“[T]he difficulty with immediately implementing a layered approach—whatever its merit—is that the Communications Act itself is not layered. Instead, as has been discussed, it is comprised of service and technology-based silos.”).

¹⁷² *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4809-11, paras. 17-18, 4822, para. 38.

¹⁷³ *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4840, para. 73; see also *Wireline Broadband Report and Order*, 20 FCC Rcd at 14902, para. 91.

¹⁷⁴ See *Wireline Broadband Report and Order*, 20 FCC Rcd at 14856, para. 3 & n.7, 14880-81, para. 50.

64. We have previously defined “Internet connectivity” to include the functions that “enable [broadband Internet service subscribers] to transmit data communications to and from the rest of the Internet.”¹⁷⁵ Identifying a telecommunications service at a similarly high level—for instance, as the service that provides Internet connectivity—may be appropriate for this proceeding if a telecommunications service is classified. Is this approach or some other mechanism appropriate to give the Internet service provider latitude to define its own telecommunications service? For instance, would it be desirable for the Commission to identify only bare minimum characteristics of an Internet connectivity service? Or is it necessary for the Commission to define the functionality, elements, or endpoints of Internet connectivity service? What are the pros and cons of these and other approaches? Would use of the term “Internet connectivity service” in this context be unduly confusing because the Commission has previously defined that term to include the function of “operating or interconnecting with Internet backbone facilities” in order to “enable cable modem service subscribers to transmit data communications to and from the rest of the Internet”?¹⁷⁶

65. Commenters should also identify the particular aspects of broadband Internet service that do and do not constitute “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”¹⁷⁷ Does the catalog of Internet connectivity functions provided in the *Cable Modem Declaratory Ruling* include all the functions an end user would need from its broadband Internet service provider in order to use the Internet?¹⁷⁸ Are there other connectivity functions the Commission should consider? Can the Commission draw guidance from other attempts to define the functionality of an Internet connectivity service, such as the definition in NECA’s DSL Access Service Tariff?¹⁷⁹

c. Consequences of Classifying Internet Connectivity as a Telecommunications Service

66. If we were to classify Internet connectivity service as a telecommunications service and take no further action, that service would be subject to all requirements of Title II that apply to telecommunications service or common carrier service. If the Commission chose, it could provide support for Internet connectivity services through the Universal Service Fund under section 254. Under

¹⁷⁵ *Id.* at 4809, para. 17.

¹⁷⁶ *See id.* (citations omitted); *see also infra* paras. 107-108.

¹⁷⁷ 47 U.S.C. § 153(43).

¹⁷⁸ *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4809-11, paras. 17-18 (“Internet connectivity functions enable cable modem service subscribers to transmit data communications to and from the rest of the Internet. At the most basic level, these functions include establishing a physical connection between the cable system and the Internet by operating or interconnecting with Internet backbone facilities. In addition, these functions may include protocol conversion, IP address number assignment, domain name resolution through a domain name system (DNS), network security, and caching. Network monitoring, capacity engineering and management, fault management, and troubleshooting are Internet access service functions that are generally performed at an ISP or cable operator’s Network Operations Center (NOC) or back office and serve to provide a steady and accurate flow of information between the cable system to which the subscriber is connected and the Internet. . . . Complementing the Internet access functions are Internet applications provided through cable modem service.” (citations omitted)).

¹⁷⁹ In its tariff, NECA offers a DSL data telecommunications service to end user and Internet service provider customers. The service “enables data traffic generated by a customer-provided modem to be transported to a DSL Access Service Connection Point using the Telephone Company’s local exchange service facilities.” NECA DSL Tariff, page 8-1, Section 8.1.1. The Access Service Connection Point is a point designated by the telephone company that “aggregates ADSL Access Service and/or wireline broadband Internet transmission service data traffic from and to suitably equipped Telephone Company Serving Wire Centers.” *Id.*

section 222, the Commission could ensure that consumers of Internet connectivity enjoy protections for their private information. Consumers with disabilities would see greater accessibility of broadband services and equipment under section 255. And the Commission could protect consumers and fair competition through application of sections 201, 202, and 208. Would application of all Title II requirements to the wired broadband Internet connectivity service be consistent with the approach to broadband Internet service described in part II.A.2. above? We seek comment on whether these benefits to classifying Internet connectivity as a telecommunications service would outweigh the costs of doing so, including the application of numerous regulatory provisions that the Commission, in its information service classification orders, determined should not apply.¹⁸⁰ Are there any elements of our framework that the Commission could not pursue if it adopted a Title II classification? Under Title II classification what role, if any, might be played by third party standard setting bodies?¹⁸¹

3. Telecommunications Service Classification and Forbearance

67. In addition to the traditional information service and telecommunications service approaches discussed above, we identify and seek comment on a third option for establishing a suitable legal foundation for broadband Internet and Internet connectivity services. This third way would involve classifying wired broadband Internet connectivity as a telecommunications service (as suggested above), but simultaneously forbearing from applying most requirements of Title II to that connectivity service, save for a small number of provisions.

68. Specifically, if the Commission decided, after appropriate analysis, to classify wired broadband Internet connectivity (and no other component of wired broadband Internet service) as a telecommunications service, it could simultaneously forbear from applying all but a handful of core statutory provisions—sections 201, 202, 208, and 254—to the service. Two other provisions that have attracted longstanding and broad support in the broadband context—sections 222 and 255—might also be implemented for the connectivity service, perhaps after the Commission provides guidance in subsequent proceedings as to how they will apply in this context. We seek comment on this third approach, and whether it would constitute a framework for broadband Internet service that is fundamentally consistent with what the Commission, Congress, consumer groups, and industry believed the Commission could pursue under Title I before the *Comcast* decision.

a. Forbearing To Maintain the Deregulatory Status Quo

69. In recognition of the need to tailor the Commission's policies to evolving markets and technologies, Congress gave the Commission in 1996 the authority and responsibility to forbear from applying provisions of the Communications Act when certain criteria are met,¹⁸² and specifically directed the Commission to use this new power to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."¹⁸³ In typical forbearance proceedings, a petitioner—usually a telecommunications service provider—files a petition seeking relief from a provision of the Act that applies to it. The Commission "shall" grant the requested relief if:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that

¹⁸⁰ See generally Remarks of Commissioner Robert M. McDowell, *The Best Broadband Plan for America: First, Do No Harm* (Free State Foundation Keynote), Jan. 29, 2010, at 9-15 (discussing the costs of applying Title II regulations to broadband services).

¹⁸¹ See *supra* part II.B.1.f.

¹⁸² See 47 U.S.C. § 160.

¹⁸³ *Id.* § 1302.

- telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
 - (3) forbearance from applying such provision or regulation is consistent with the public interest.¹⁸⁴

In ordinary forbearance proceedings, therefore, the Commission must make a predictive judgment whether, without enforcement of the provisions or regulations in question, charges and practices will be just and reasonable, consumers will be protected, and the public interest will be served.¹⁸⁵

70. The forbearance analysis here has a different posture. The Commission would not be responding to a carrier's request to change the legal and regulatory framework that currently applies. Rather, it would be assessing whether to forbear from provisions of the Act that, because of our information service classification, *do not apply* at the time of the analysis.¹⁸⁶ In this situation, could the Commission simply observe the current marketplace for broadband Internet services to determine whether enforcing the currently inapplicable requirements is or is not necessary to ensure that charges and practices are just and reasonable and not unjustly or unreasonably discriminatory, whether application of the requirements is or is not necessary for the protection of consumers, and whether applying the requirements is or is not in the public interest?¹⁸⁷

b. Identifying the Relevant Telecommunications Service and Telecommunications Carriers

71. In this part of the Notice we assume, solely for purposes of framing the forbearance option, that the Commission has decided to classify the Internet connectivity service underlying broadband Internet service as a telecommunications service. Section 10 provides that "the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services" if certain criteria are met.¹⁸⁸ The relevant "telecommunications service" would be Internet connectivity service as the Commission defines it. The "class of telecommunications carriers" at issue

¹⁸⁴ *Id.* § 160(a). "In making the determination under subsection (a)(3) [that forbearance is in the public interest,] the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." *Id.* § 160(b).

¹⁸⁵ *Id.* § 160(a); see, e.g., *Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, CC Docket No. 96-45, Order, 20 FCC Red 15095, 15099, para. 6 n.25 (2005), *modified in part*, 24 FCC Red 3375 (2009).

¹⁸⁶ Under section 10, the Commission may forbear on its own motion. See 47 U.S.C. § 160(a). If the statutory criteria are met, the Commission is compelled to forbear just as if it were responding to a carrier's petition. *Id.*

¹⁸⁷ 47 U.S.C. § 160(a). Section 10 allows the Commission to consider forbearance from requirements that do not currently apply or may not apply even in the absence of forbearance. See *AT&T Inc. v. FCC*, 452 F.3d 830, 837 (D.C. Cir. 2006) ("We hold . . . that the Commission may not refuse to consider a petition's merits solely because the petition seeks forbearance from uncertain or hypothetical regulatory obligations.").

¹⁸⁸ 47 U.S.C. § 160(a).

would comprise the providers of the Internet connectivity service identified as a telecommunications service.¹⁸⁹

72. In this proceeding, however, we do not intend to disrupt the status quo for incumbent local exchange carriers or other common carriers that choose to offer their Internet transmission services as telecommunications services.¹⁹⁰ Nor do we propose to alter the status quo with regard to the application of section 254(k) and related cost-allocation rules to these carriers.¹⁹¹ We therefore seek comment on excepting from forbearance any carrier that elects to be subject to the full range of Title II requirements, and on the mechanism that would be most suitable for a carrier to make such an election.

c. Defining the Geographic Scope for Analysis

73. Section 10 requires the Commission to forbear from unnecessary requirements “in any or some of [carriers’] geographic markets.”¹⁹² By its terms section 10 requires no “particular . . . level of geographic rigor,” and the Commission has flexibility to adopt an approach suited to the circumstances.¹⁹³ The Commission decisions classifying broadband Internet service did not rely on any particular, defined geographic area. Instead, where those decisions evaluated the state of the marketplace, they did so “in view of larger trends.”¹⁹⁴ The 2005 *Wireline Broadband Report and Order* granted forbearance on a nationwide basis.¹⁹⁵ The Commission has adopted a similar approach to evaluating the broadband marketplace in other forbearance decisions.¹⁹⁶ Given that backdrop, and the fact that the forbearance discussed here would be designed to maintain a deregulatory status quo for wired broadband Internet service that applies across the nation, the same approach may be warranted here, with the effect that forbearance would be granted or denied on a nationwide basis. We seek comment on this approach. If commenters suggest a more granular geographic market as is sometimes used in other forbearance proceedings, we ask them to address whether such an approach would be legally required.

d. Identifying the Provisions of Title II from Which the Commission Would Forbear

74. The forbearance option contemplates a determination not to apply all but the small number of provisions of Title II that provide a solid legal foundation for the Commission to implement its established broadband policies. In this part, we seek comment on declining to forbear from the three core provisions of Title II—sections 201, 202, and 208. We also seek comment on whether we should decline to forbear from section 254 in order to ensure that the Commission has clear authority to pursue universal service goals for broadband services. And we seek comment on whether we should decline to forbear from two other provisions—sections 222 and 255—that speak to two other broadband issues the

¹⁸⁹ See *id.* § 153(44).

¹⁹⁰ See *supra* notes 53, 179 (describing the offering in the NECA tariff, pursuant to which approximately 800 incumbent local exchange carriers offer DSL transmission).

¹⁹¹ See *Wireline Broadband Report and Order*, 20 FCC Rcd at 14927-29, paras. 139-44.

¹⁹² 47 U.S.C. § 160(a).

¹⁹³ *EarthLink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006); *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009) (quoting *EarthLink*).

¹⁹⁴ *Wireline Broadband Report and Order*, 20 FCC Rcd at 14880-81, para. 50.

¹⁹⁵ *Id.* at 14901-02, paras. 91-93.

¹⁹⁶ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), et al.*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48. Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) (*Section 271 Broadband Forbearance Order*), *aff’d sub nom. EarthLink v. FCC*, 462 F.3d 1.

Commission has believed it can address (customer privacy and access by persons with disabilities). We further seek comment on whether forbearing from any of the remaining provisions of Title II is beyond our forbearance authority or otherwise should be rejected.

75. *Exclusions from Forbearance: Sections 201, 202, and 208.* The Commission has never exercised its authority under section 10 to forbear from these three fundamental provisions of the Act, although it has been asked to do so on many occasions.¹⁹⁷ In addition to being consistent with our precedent, a determination not to forbear from these core provisions would comport with Congress's approach to commercial mobile radio services (CMRS), such as cell phone services. In 1993, CMRS services were still nascent, and Congress specified in a new section 332(c)(1)(A) of the Communications Act that although Title II applies to CMRS, the Commission may forbear from enforcing any provision of the title *other* than sections 201, 202, and 208.¹⁹⁸ After Congress gave the Commission broader forbearance authority in the Telecommunications Act of 1996, the Commission considered a petition to forbear from sections 201 and 202 as applied to certain CMRS services. The Commission rejected that forbearance request, finding that even in a competitive market those provisions are critical to protecting consumers.¹⁹⁹

76. Applying sections 201 and 202 could provide the Commission direct statutory authority to protect consumers and promote fair competition, yet allow the Commission to avoid burdensome regulation.²⁰⁰ For example, while CMRS providers are subject to sections 201 and 202, they do not file

¹⁹⁷ See, e.g., *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, WC Docket No. 06-125, 23 FCC Red 12260, 12292, para. 64 (2008) (*Qwest Enterprise Broadband Forbearance Order*); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(C) from Application of Computer Inquiry & Certain Title II Common-Carriage Requirements*, 22 FCC Red 19478, 19508, para. 59 (2007), *aff'd sub nom. AD HOC Telecom. Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, et al.*, Memorandum Opinion and Order, WC Docket No. 06-125, 22 FCC Red 18705 18737-38, para. 67 (2007) (*AT&T Enterprise Broadband Forbearance Order*), *aff'd sub nom. AD HOC Telecom. Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance of Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Red 16304, 16360, para. 128 (2007); *Petition of SBC Communications, Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, 20 FCC Red 9361, 9368, para. 17 (2005) (*SBC IP Platform Services Forbearance Order*), *pet. for review granted on other grounds sub nom. AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006); *Personal Communications Industry Association Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Red 16857, 16866, para. 18 (1998) (*PCIA Forbearance Order*).

¹⁹⁸ 47 U.S.C. § 332(c)(1)(A).

¹⁹⁹ See *PCIA Forbearance Order*, 13 FCC Red at 16865, para. 15 (“[S]ections 201 and 202 lie at the heart of consumer protection under the Act. Congress recognized the core nature of sections 201 and 202 when it excluded them from the scope of the Commission’s forbearance authority under section 332(c)(1)(A).”), 16868, para. 23 (“Assuming all relevant product and geographic markets become substantially competitive, moreover, carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner.”), 16870, para. 29 (“[W]e are not convinced that any harm caused by sections 201 and 202, to competition or otherwise, outweighs the public interest benefits of these provisions.”).

²⁰⁰ After the *Comcast* decision, a number of broadband service providers expressed their acceptance of the basic standards articulated in sections 201 and 202, and enforced under section 208. See, e.g., Reply Comments of Comcast Corp., GN Docket No. 09-191, WC Docket No. 07-52, at 26 (April 26, 2010) (“[T]he Commission should (continued....)”)

tariffs because the Commission forbore from section 203.²⁰¹ We seek comment on these issues as well as how to address in any forbearance analysis the existing agency rules that have been promulgated under sections 201 and 202.²⁰²

77. In addition, we seek comment on not forbearing from section 208 and the associated procedural rules. Would the enforcement regime that would apply if we enforce only section 208 be sufficient if we decide to forbear from the damages and jurisdictional provisions of sections 206 (carrier liability for damages), 207 (recovery of damages and forum election), and 209 (damages awards)? Would forbearance from these additional provisions render enforcement under section 208 procedurally or substantively deficient, or would section 208 (together with Title V of the Act)²⁰³ provide the Commission adequate authority to identify and address unlawful practices involving broadband Internet service?

78. *Exclusion from Forbearance: Section 254.* Section 254, the statutory foundation of our universal service programs, requires the Commission to promote universal service goals, including “[a]ccess to advanced telecommunications and information services . . . in all regions of the Nation.”²⁰⁴ In March 2010, a unanimous Commission endorsed reform of universal service programs to “encourage targeted investment in broadband infrastructure and emphasize the importance of broadband to the future of these programs.”²⁰⁵ Reforming universal service to encompass broadband is also a keystone of the National Broadband Plan.²⁰⁶ Our current universal service support programs, including our high-cost program and our low-income programs, address deployment and income-related adoption barriers for voice. The Plan recommends that the Commission provide high-cost and low-income support that

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embrace the strong guidance against an overbroad rule and, instead, develop a standard based on ‘unreasonable and anticompetitive discrimination.’”); Reply Comments of Sprint Nextel Corp., GN Docket No. 09-191, WC Docket No. 07-52, at 23 (April 26, 2010) (“The unreasonable discrimination standard contained in Section 202(a) of the Act contains the very flexibility the Commission needs to distinguish desirable from improper discrimination.”); Reply Comments of AT&T Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 33-34 (April 26, 2010) (“And no one has seriously suggested that Section 202 should itself be amended to remove the ‘unreasonable’ qualifier on the ground that the qualifier is too ‘murky’ or ‘complex.’ Seventy-five years of experience have shown that qualifier to be both administrable and indispensable to the sound administration of the nation’s telecommunications laws.” (emphasis in original)).

²⁰¹ See 47 C.F.R. § 20.15(c); *Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1480, para. 179 (1994) (subsequent history omitted) (*CMRS Title II Forbearance Order*); *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (affirming Commission’s decision that sections 201 and 202 did not prohibit CMRS provider from entering individually negotiated pricing arrangements).

²⁰² Compare, e.g., *CMRS Title II Forbearance Order*, 9 FCC Rcd at 1475-90, paras. 164-213 (forbearing from numerous provisions of Title II without identifying the accompanying rules) with *Petition of Qwest Communications Int’l Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5236, paras. 56-57 (2007) (identifying the specific rules, promulgated under sections 203 and 214, from which the Commission forbears).

²⁰³ See, e.g., 47 U.S.C. §§ 501, 502 (authority to issue fines); § 503(b) (authority to impose forfeitures); § 504 (procedures regarding forfeitures).

²⁰⁴ 47 U.S.C. § 254(b)(2).

²⁰⁵ *Joint Statement on Broadband at 2.*

²⁰⁶ See, e.g., NATIONAL BROADBAND PLAN at 144.

ensures that all households have the ability to subscribe to a high-quality broadband connection that provides both broadband and voice services.²⁰⁷

79. Two subsections of section 254 bear particularly on whether to forbear from this universal service provision. First, section 254(c) defines universal service as “an evolving level of *telecommunications service*.”²⁰⁸ By not forbearing from section 254(c), the Commission would retain clear authority to support the availability and adoption of broadband Internet connectivity service through reformed high-cost and low-income programs in the Universal Service Fund.²⁰⁹

80. Second, section 254(d) requires *all* providers of telecommunications service to contribute to the Universal Service Fund on an equitable and nondiscriminatory basis.²¹⁰ Should the Commission apply the mandatory contribution requirement to broadband Internet connectivity providers? If so, should we delay implementation of the contribution obligation, through temporary forbearance or other means, until the Commission adopts rules governing specifically how broadband Internet connectivity providers should calculate their contribution consistent with the requirement that all telecommunications carriers “contribute[] on an equitable and nondiscriminatory basis,” possibly as part of comprehensive Universal Service Fund reform?²¹¹

81. If commenters suggest that we should forbear from applying the support provisions of section 254 in the context of broadband Internet connectivity service, we ask them to provide alternative proposals to ensure universal availability of broadband Internet connectivity services, and to assess the legal sustainability of proposed alternatives. If commenters suggest that we forbear from (or delay) applying the mandatory contribution provisions of section 254, what would be the consequences for the Universal Service Fund?²¹²

82. *Possible Exclusion from Forbearance: Section 222.* Section 222 of the Communications Act requires providers of telecommunications services to protect their customers’ confidential information, as well as proprietary information of other telecommunications service providers and equipment manufacturers.²¹³ As discussed above, the Commission has supported applying this provision in the broadband context.²¹⁴ Section 222 would appear to provide the Commission clear authority to implement appropriate privacy requirements for broadband Internet connectivity. We question, however, whether it would be in the public interest to apply section 222 to broadband Internet connectivity service immediately. It might be more effective for the Commission to interpret the specific provisions of section 222, including the definition of “customer proprietary network information,” in the broadband context before requiring broadband Internet connectivity providers to comply. Proceeding otherwise could cause confusion and disparity among broadband Internet connectivity providers, and confusion for consumers.

²⁰⁷ See *id.* at 145, 172.

²⁰⁸ 47 U.S.C. § 254(c) (emphasis added).

²⁰⁹ But see *supra* paras. 32-38 (noting that major providers have suggested that the Commission has authority under section 254 and Title I to provide universal service support to broadband as an information service).

²¹⁰ 47 U.S.C. § 254(d).

²¹¹ See *id.*; NATIONAL BROADBAND PLAN at 140-51

²¹² The Commission has statutory authority to assess any provider of interstate telecommunications if that would serve the public interest. See 47 U.S.C. § 254(d). Nothing in this Notice should be understood to limit the Commission’s ability to exercise this authority during the pendency of this proceeding.

²¹³ *Id.* § 222.

²¹⁴ See *supra* para. 39.

Compliance with section 222 could also be more expensive if the provision took effect immediately, and we later adopted specific rules. On the other hand, most providers are already subject to privacy requirements, at least for other services they provide; their costs of immediate compliance with section 222 may not outweigh the benefit to consumers of quick assurance of their privacy while using broadband Internet connectivity services.²¹⁵ In addition, section 631 of the Communications Act requires cable operators to fulfill certain obligations with respect to consumer privacy for cable or “other service[s]” to which a consumer subscribes.²¹⁶ The term “other service” includes “any wire or radio communications service provided using any of the facilities of the cable operator that are used in the provision of cable service.”²¹⁷ How should the obligations of sections 222 and 631 be reconciled for cable operators offering broadband Internet service? More broadly, we seek comment on the application of section 222 to any wired broadband Internet connectivity service that may be classified as a telecommunications service, and on whether the public interest would be served by permitting section 222 to apply in the absence of new implementing rules.²¹⁸

83. One aspect of retaining the information service classification for broadband Internet service (other than for the Internet connectivity telecommunications service that may be offered separately with broadband Internet service) is that it minimizes interference with the FTC’s ability to enforce the Federal Trade Commission Act’s prohibition of unfair, deceptive, or anticompetitive practices by broadband Internet service providers. Section 5(a)(1) of the FTC Act declares to be unlawful all “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”²¹⁹ but section 5(a)(2) of the FTC Act restricts the FTC’s ability to enforce this

²¹⁵ Section 222 generally applies to “telecommunications carriers.” 47 U.S.C. § 222(a). Section 631 of the Communications Act generally applies to “cable operator[s]” in their provision of “cable service or other service,” and protects subscribers’ “personally identifiable information.” *Id.* § 551(a)(1).

²¹⁶ 47 U.S.C. § 551.

²¹⁷ *Id.* § 551(a)(2)(B). See *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations By Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6664-65, paras. 277-79 (2001) (requiring AOL Time Warner to certify that it is and remains in compliance with section 631 of the Act); *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4853-54, paras. 111-12 (“[Section 631] has been interpreted by a court to encompass Internet service provided via a cable system. . . . In light of our determination in the Declaratory Ruling that cable modem service is an information service, we believe that cable modem service would be included in the category of ‘other service’ for purposes of section 631.” (citing *Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(D)*, 157 F. Supp. 2d 286, 291 (S.D.N.Y. 2001) (“This specific definition [in 47 U.S.C. § 551] of ‘other service’ plainly includes internet service transmitted via a cable system.”)).

²¹⁸ The Commission has previously forbore temporarily from applying a statutory provision or regulation. In 1994, soon after Congress authorized the Commission to deregulate wireless services, the Commission forbore temporarily from requiring or permitting CMRS providers to file tariffs for interstate access service. See *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480, para. 179 (1994). In 1999, the Commission forbore temporarily from enforcing number portability requirements for wireless carriers. See *Cellular Telecommunications Industry Association’s Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations, et al.*, WT Docket No. 98-229, CC Docket No. 95-116, Memorandum Opinion and Order, 14 FCC Rcd 3092, 3103-04, para. 23, 3112-13, paras. 40-42 (1999). And in 2005, the Commission temporarily forbore from carrier eligibility requirements for universal service support, to provide victims of Hurricane Katrina access to wireless phone service. See *Federal-State Joint Board on Universal Service, et al.*, CC Docket Nos. 96-45, 02-6, WC Docket Nos. 02-60, 03-109, Order, 20 FCC Rcd 16883, 16893-94, paras. 19-20 (2005).

²¹⁹ 15 U.S.C. § 45(a)(1).

prohibition with respect to common carrier activities.²²⁰ We seek comment on how the Commission might use its authority under section 222 to ensure privacy for users of Internet connectivity without significantly compromising the FTC's ability to address privacy issues involving broadband Internet services and applications.

84. *Possible Exclusion from Forbearance: Section 255.* Section 255 requires telecommunications service providers to make their services accessible to individuals with disabilities, unless not reasonably achievable.²²¹ As discussed above, the Commission has repeatedly expressed its intent to apply this requirement in the broadband context.²²²

85. We seek comment on the appropriateness of implementing section 255 to ensure that Americans with disabilities have access to broadband Internet connectivity services. As with section 222, might it be appropriate to apply section 255 only after a separate notice-and-comment proceeding that allows detailed consideration of disabilities-access issues in the broadband context? We seek comment on implementation questions and other issues related to the application of section 255.

86. *Scope of Forbearance Generally.* We believe that the six sections we have just discussed—sections 201, 202, 208, 222, 254, and 255—could compose a sufficient set of tools for effecting the established policy approach and implementing the Commission's goals for 21st Century communications. Are there others that should be added to this list? Some provisions of Title II relate directly or indirectly to the effective application and enforcement of the six provisions we have identified. Section 214, for example, deals primarily with "Extension of Lines" yet contains section 214(e), which provides the framework for determining which carriers are eligible to participate in universal service support programs.²²³ Similarly, section 251(a)(2) directs telecommunications carriers "not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255,"²²⁴ and section 225 establishes the telecommunications relay services program.²²⁵ Is application of these or any other provisions of Title II required to allow effective implementation and enforcement of the six provisions identified above? If so, should the Commission exempt such provisions from forbearance for administrative reasons, if this third approach to classification is adopted?

87. Are there provisions of Title II from which we lack authority to forbear? Section 10(a) directs the Commission to forbear from applying regulations or provisions of the Communications Act to telecommunications carriers or services in those instances where the Commission determines that the particular provision is unnecessary to ensure that carrier "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;" enforcement of such regulation is "not necessary for the protection of consumers;" and forbearance is consistent with the public interest.²²⁶ We ask whether section 10 provides authority to forbear from provisions of the statute that do not directly impose obligations on carriers. For example, section 224 provides the framework for the Commission's regulation of pole attachments, including the rates therefor. Does section 10 provide the Commission authority to forbear from section 224 insofar as it imposes rate-related obligations on the

²²⁰ See *id.* § 45(a)(2).

²²¹ 47 U.S.C. § 255.

²²² See *supra* para. 40.

²²³ 47 U.S.C. § 214(e) (designation of "eligible telecommunications carriers").

²²⁴ *Id.* § 251(a)(2).

²²⁵ *Id.* § 225(c).

²²⁶ *Id.* § 160(a)(1)-(3).

Commission and utilities that own poles, rather than on telecommunications carriers or telecommunications services?²²⁷ Similarly, section 253 permits the Commission to preempt state regulations that prohibit the provision of telecommunications services.²²⁸ Does section 10 provide the Commission authority to forbear from section 253, which does not impose obligations on telecommunications carriers? If the Commission were to forbear from section 253, how would the Commission's general authority to preempt inconsistent state requirements be affected?

88. Congress created the Commission in part "for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communication."²²⁹ Would it be consistent with the Commission's mission with respect to promoting safety of life and property, and consumer protection generally, to forbear from the portions of section 214(a) that address discontinuance, reduction, or impairment of service? Would it be consistent with our mission to forbear from section 214(d), which allows the Commission to require a carrier "to provide itself with adequate facilities for the expeditious and efficient performance of its service";²³⁰ or section 218, which permits the Commission to "inquire into the management of the business of all carriers subject to this Act"?²³¹ Does section 10 provide authority to forbear from these provisions? Should the Commission exclude them from forbearance so it may proceed with, for example, cybersecurity or data gathering initiatives, or would authority under sections 201 and 202 (or other provisions) be sufficient?²³² How would forbearance from these provisions affect the Commission's ability to promote adequate service to underserved communities?

89. Also with regard to our national defense and homeland security mission, we note that section 229 directs the Commission to implement the provisions of the Communications Assistance for Law Enforcement Act (CALEA).²³³ CALEA is a separate statute that requires "telecommunications carriers" to meet certain assistance capability requirements in support of electronic surveillance.²³⁴ The Commission has previously found that CALEA's definition of "telecommunications carrier" is broader than the definition of "telecommunications carrier" in the Communications Act.²³⁵ All service providers

²²⁷ *Id.* § 160(a) ("[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service . . .").

²²⁸ *Id.* § 253(a), (d) (providing that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" and that the Commission shall preempt such a statute, regulation, or local requirement in certain circumstances).

²²⁹ *Id.* § 151.

²³⁰ *Id.* § 214(d).

²³¹ *Id.* § 218.

²³² In our recent *Survivability Notice of Inquiry* and *Certification Program Notice of Inquiry*, we sought comment on our authority to act to adopt certain broadband policies. See *Effects on Broadband Communications Networks of Damage to or Failure of Network Equipment or Severe Overload*, PS Docket 10-92, Notice of Inquiry, FCC 10-62, paras. 8-9 (April 21, 2010); *Cyber Security Certification Program*, PS Docket No. 10-93, Notice of Inquiry, FCC 10-63, paras. 10-11 (April 21, 2010). Today's Notice complements, but does not supplant, those two notices.

²³³ 47 U.S.C. § 229(a).

²³⁴ Section 101, *et seq.* of CALEA, 47 U.S.C. § 1001, *et seq.*

²³⁵ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*. First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 14993, para. 10 (2005) (*CALEA First Report and Order*), *pet. for review denied sub nom. Am. Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006) (upholding the Commission's interpretation of CALEA's definition of "telecommunications carrier").

that are “telecommunications carriers” under the Communications Act are also “telecommunications carriers” subject to CALEA.²³⁶ and some providers—including facilities-based broadband Internet access providers—are subject to CALEA even if they are not “telecommunications carriers” as defined in the Communications Act.²³⁷ Specifically, the Commission held in 2005 that “facilities-based providers of any type of broadband Internet access service, including but not limited to wireline, cable modem, satellite, wireless, fixed wireless, and broadband access via powerline are subject to CALEA.”²³⁸ Thus, it appears that regardless of whether we maintain the current statutory classification for broadband Internet service or classify Internet connectivity (or some other service) as a telecommunications service, CALEA will continue to apply to these providers. We seek comment on this analysis. In addition, as we do with regard to the sections described just above, we seek comment on whether section 10 would provide authority to forbear from section 229, and on whether forbearance from application of section 229 would be consistent with the purposes for which CALEA was enacted and the public interest.²³⁹ Finally, we emphasize that section 10 does not provide the Commission authority to forbear from provisions of CALEA or any other statute other than the Communications Act.²⁴⁰

90. Section 257(c) requires the Commission to make periodic reports to Congress concerning the elimination of previously identified barriers to market entry by entrepreneurs and other small businesses.²⁴¹ This obligation applies to “the provision and ownership of telecommunications and information services” and thus applies regardless of the legal classification of broadband Internet service and broadband Internet connectivity service. It thus would appear that none of the three alternative approaches suggested here would affect the Commission’s duty to make the mandated reports. Nor, given the importance of lowering barriers to market entry, do we contemplate any circumstance in which it would be sound policy to cease making the reports. We seek comment on these issues and on how best to ensure that the obligation of section 257(c) is preserved in this context.

91. We further seek comment on whether there are provisions of Title II that would require interpretation even after forbearance. For example, would forbearance from section 203 mean that carriers may not file tariffs even if they want to, or just that they are not required to do so?²⁴² Would the

²³⁶ *Id.* at 14992, para. 9 n.17; *see also Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7114, para. 17 (2000) (all entities previously classified as “common carriers” for purposes of the Communications Act are telecommunications carriers for purposes of CALEA, as are cable operators and electric and other utilities to the extent they offer telecommunications services for hire to the public); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676, 15695, para. 39 (2004) (noting that CALEA unambiguously applies to all “common carriers offering telecommunications services for sale to the public” as so classified under the Communications Act and that such common carriers are subject to CALEA regardless of the technology they deploy to offer their service, including packet technology).

²³⁷ *CALEA First Report and Order*, 20 FCC Rcd at 14991-15012, paras. 8-45.

²³⁸ *Id.* at 15001, para. 24. A broadband Internet service provider is subject to CALEA with regard to its “switching and transmission” functions, but not with regard to “storage functions of its e-mail service, its web-hosting and DNS lookup functions or any other ISP functionality of its Internet access service.” *Id.* at 15008, para. 38.

²³⁹ Section 103(a)(1)-(4) of CALEA, 47 U.S.C. § 1002(a)(1)-(4).

²⁴⁰ 47 U.S.C. § 160(a) (“[T]he Commission shall forbear from applying any regulation or any provision of this Act”) (emphasis added).

²⁴¹ *Id.* § 257(c).

²⁴² *Id.* § 203.

Commission's review of transactions involving providers of broadband Internet connectivity service be affected if the Commission forbore from applying section 214?²⁴³

92. We also seek comment on whether there are approaches superior or complementary to forbearance that the Commission should consider as means of easing regulatory burdens. For example, in the past the Commission has "streamlined" the statutory procedures that apply to non-dominant carriers,²⁴⁴ and has granted blanket authority to all carriers under section 214 to provide domestic interstate services and to construct, acquire, or operate any domestic transmission line.²⁴⁵ Is any similar approach appropriate here?

93. Finally, we seek comment on the role of third party standard setting bodies if the Commission were to adopt one of the deregulatory approaches described here.²⁴⁶

e. Application of the Statutory Forbearance Criteria

94. *Charges, Practices, Classifications, and Regulations.* In 2002, when the Commission decided to classify cable modem service as an information service, only 12 percent of American adults had broadband at home.²⁴⁷ Now nearly two-thirds of American adults use broadband at home.²⁴⁸ In just the last two years, home broadband use has grown more than 25 percent.²⁴⁹ The quality and availability of broadband services continue to improve, with cable and telephone companies investing about \$20 billion in wireline broadband capital expenditures in 2008 and about \$18 billion in 2009.²⁵⁰ As described in the National Broadband Plan, "[t]op advertised speeds available from broadband providers have increased in the past few years. Additionally, typical advertised download speeds to which consumers subscribe have grown approximately 20% annually for the last 10 years."²⁵¹

95. Still, a number of reported incidents suggest there is a role for the Commission. Comcast's secret disruption of its customers' peer-to-peer communications, which the Commission determined to be unjustified, is one example.²⁵² There have been recent reports involving: AT&T's

²⁴³ *Id.* § 214.

²⁴⁴ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*) (subsequent history omitted).

²⁴⁵ *See Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, CC Docket No. 97-11; AAD File No. 98-43, Report and Order and Second Memorandum Opinion and Order, 14 FCC Rcd 11364, 11372, para. 12 ("[W]ith blanket authority, unlike forbearance, we retain the ability to stop extremely abusive practices against consumers by withdrawing the blanket section 214 authorization that allows the abusive carrier to operate."); 47 C.F.R. § 63.01.

²⁴⁶ *See supra* part 11.B.1.f.

²⁴⁷ JOHN B. HERRIGAN & LEE RAINIE, *THE BROADBAND DIFFERENCE: HOW ONLINE BEHAVIOR CHANGES WITH HIGH-SPEED INTERNET CONNECTIONS*, PEW INTERNET & AMERICAN LIFE PROJECT 9 (2002).

²⁴⁸ John B. Herrigan, *Broadband Adoption and Use in America*, 3 (Fed. Comm'n's Comm'n Omnibus Broadband Initiative, Working Paper No.1, 2010).

²⁴⁹ NTIA, *Digital Nation*, *supra* note 8, at 4.

²⁵⁰ NATIONAL BROADBAND PLAN at 37-38 (citations omitted).

²⁵¹ *Id.* at 20, 38 (citations omitted).

²⁵² *See supra* para. 26.

alleged failure to deliver DSL service at the speeds promised;²⁵³ allegations that although RCN promised subscribers “fast and uncapped” broadband, it delayed or blocked peer-to-peer file transfers without users’ knowledge or consent;²⁵⁴ and Windstream’s redirection of subscribers who used the default search function in the Firefox web browser to a Windstream “landing page.”²⁵⁵ Furthermore, legislative developments described above suggest that Congress is not satisfied with the pace of broadband deployment, adoption, and utilization.²⁵⁶

96. We seek comment on whether, in light of the current charges, practices, classifications, and regulations of broadband Internet connectivity service providers, it would be consistent with section 10(a)(1) for the Commission to forbear from all provisions of Title II except the six identified provisions. If we found on the record developed in response to this Notice that the marketplace for broadband Internet connectivity services is operating sufficiently well with regard to competition and consumers’ interests, then retaining only the authority in sections 201, 202, and 208; reforming universal service under section 254; and continuing to enforce the privacy and access provisions of sections 222 and 255 could be sufficient to address current and foreseeable future concerns.

97. *Protection of Consumers and the Public Interest.* Section 10(b) directs the Commission, in making its public interest analysis, to “consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions.”²⁵⁷ As discussed above, the goals of any action to classify broadband Internet connectivity as a telecommunications service would include preserving the Commission’s ability to step in when necessary to protect consumers and fair competition, while generally refraining from regulation where possible. Further, the Commission has tools to promote competition for broadband Internet services that would be unaffected by the forbearance proposal discussed here.²⁵⁸ We seek comment on this element of the forbearance test.

f. Maintaining Forbearance Decisions

98. We seek comment on whether, if we forbore from applying those provisions of Title II that go beyond minimally intrusive Commission oversight, that decision would likely endure. Section 10 allows the Commission to revisit a decision to forbear.²⁵⁹ Normally, to depart from a prior decision, an agency may simply acknowledge that it is doing so and provide a rational explanation for the change, which may or may not need to be more detailed than the explanation for the original decision.²⁶⁰ The agency “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than

²⁵³ See Class Action Settlement Agreement and Release and Order Preliminarily Approving Settlement; Conditionally Certifying Settlement Class; Approving Notice; and Setting Date for Final Approval Hearing, *Schmidt v. AT&T*, No. CV 09 688788 (Cuyahoga Cnty., Oh. Ct. Common Pleas Ct.).

²⁵⁴ See Notice of Pendency and Settlement of Class Action at 1, *Sabrina Chin v. RCN Corp.*, No. 1:08-CV-7349 (S.D.N.Y. Apr. 19, 2010).

²⁵⁵ See DSLReports.com, Our Response to Direct Service Concerns, <http://www.dslreports.com/forum/r24074065-Our-Response-to-Redirect-Service-Concerns> (last visited May 24, 2010).

²⁵⁶ See *supra* para. 25.

²⁵⁷ 47 U.S.C. § 160(b).

²⁵⁸ See, e.g., NATIONAL BROADBAND PLAN, Chs. 4-5 (recommending that additional spectrum be made available); *id.* at pp. 47-49 (recommending that the Commission comprehensively review its wholesale competition policies); *id.* at Ch. 6 (recommending ways that existing infrastructure could be better utilized to facilitate deployment).

²⁵⁹ See *EarthLink v. FCC*, 462 F.3d at 12.

²⁶⁰ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

the reasons for the old one.”²⁶¹ Section 10, though, requires the Commission to forbear if the statutory criteria are met.²⁶² Thus, to reverse a forbearance decision, the Commission must find that at least one of the criteria is no longer met with regard to a particular statutory provision. That determination would be subject to judicial review, and the Supreme Court has stated that an agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate” in instances where, for example, “its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.”²⁶³ Reversal of forbearance also might be in arguable tension with section 706(a) of the 1996 Act, which directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, . . . regulatory forbearance.”²⁶⁴ We seek comment on the Commission’s authority to reverse a forbearance decision concerning broadband Internet connectivity service. We also seek comment on what provisions, if any, could appropriately be included in a forbearance order to establish a heightened standard for justifying future “unforbearance.”

99. If the Commission were to elect the option of classifying Internet connectivity as a telecommunications service but forbearing from most of Title II, then a reviewing court could in theory uphold the classification determination but vacate the accompanying forbearance in whole or in part. In that situation, the Commission could maintain the classification of broadband Internet connectivity service as telecommunications service and allow the relevant provisions of Title II, which the court restored, to apply. We seek comment on any lawful mechanisms that (assuming adoption of the third classification option) could be utilized to address this theoretical situation, even if that means the Commission would not, in the post-litigation situation just described, ultimately maintain the classification of Internet connectivity as a telecommunications service.

C. Effective Dates

100. If the Commission decided to alter its current approach to Internet connectivity service, affected providers might need time to adjust to any new requirements. To reflect this, the Commission could delay the effective date of a classification (or classification and forbearance) decision for 180 days after release, or another suitable period. Moreover, as discussed above, certain provisions of Title II, such as sections 222, 254(d), and 255, could be phased-in on an even longer timetable. We seek comment on the effective date the Commission should adopt for a classification decision under one of the approaches proposed here, or an alternative approach identified by the commenter.

D. Terrestrial Wireless and Satellite Services

101. The Commission currently classifies broadband Internet service solely as an information service regardless of whether it is provided over cable facilities, wireline facilities, wireless facilities, or power lines.²⁶⁵ At the same time, the Commission has in the past taken a deliberate approach to extending its classification framework. In particular, though the Commission had classified all cable modem and wireline Internet access services as information services by 2005, it was not until 2007 that it

²⁶¹ *Id.* (emphasis in original).

²⁶² 47 U.S.C. § 160(a).

²⁶³ *Fox Television Stations, Inc.*, 129 S. Ct. at 1811.

²⁶⁴ 47 U.S.C. § 1302(a).

²⁶⁵ See *supra* para. 21.

extended that classification to wireless broadband Internet services, even though the first 3G networks went into service in 2003.²⁶⁶

102. We seek comment on which of the three legal frameworks specifically discussed in this Notice, or what alternate framework, would best support the Commission's policy goals for wireless broadband. In addition, as the Commission recently noted in the *Open Internet NPRM*, "there are technological, structural, consumer usage, and historical differences between mobile wireless and wireline/cable networks."²⁶⁷ We seek comment on whether these differences are relevant to the Commission's statutory approach to terrestrial wireless and satellite-based broadband Internet services. Do consumers today view wireless broadband as a substitute for wired services?²⁶⁸ How are terrestrial wireless and satellite Internet services purchased, provided, and perceived?

103. Several provisions of Title III of the Communications Act provide the Commission authority to impose on spectrum licensees obligations that are in the public interest.²⁶⁹ For example, section 301 provides the Commission authority to regulate "radio communications" and "transmission of energy by radio."²⁷⁰ Under section 303, the Commission has the authority to establish operational obligations for licensees that further the goals and requirements of the Act if the obligations are in the "public convenience, interest, or necessity" and not inconsistent with other provisions of law.²⁷¹ Section 303 also authorizes the Commission, subject to what the "public interest, convenience, or necessity requires," to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class."²⁷² Section 307(a) likewise authorizes the issuance of licenses "if public convenience, interest, or necessity will be served thereby."²⁷³ Section 316 provides a similar test for new conditions on existing licenses, authorizing such modifications if "in the judgment of the Commission such action will promote the public interest, convenience, and necessity."²⁷⁴ On the other hand, Title III provides the Commission no express authority to extend universal service to wireless broadband Internet services. We seek comment on whether these or other technical, market, or legal considerations justify different classification of wireless and wired broadband Internet services. We also seek comment on

²⁶⁶ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 05-71, Tenth Report, 20 FCC Rcd 15908, 15952, para. 114 (2005).

²⁶⁷ *Open Internet NPRM*, 24 FCC Rcd at 13119, para. 159.

²⁶⁸ See generally NATIONAL BROADBAND PLAN at 40-41 (discussing terrestrial wireless).

²⁶⁹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, FCC 10-59, para. 66 (rel. Apr. 21, 2010).

²⁷⁰ See 47 U.S.C. § 301. See also *IP-Enabled Services NPRM*, 19 FCC Rcd at 4918.

²⁷¹ See 47 U.S.C. § 303 (stating that if the "public convenience, interest, or necessity requires" the Commission shall "(r) . . . prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter"); *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992) (Communications Act invests Commission with "enormous discretion" in promulgating licensee obligations that serve the public interest).

²⁷² 47 U.S.C. § 303(b).

²⁷³ *Id.* § 307(a).

²⁷⁴ See 47 U.S.C. § 316(a); see also *WBEN, Inc. v. United States*, 396 F.2d 601 (2d Cir. 1968); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 18455, 18459, para. 7 (citing 47 U.S.C. §§ 303(r), 309)).

whether our approach to classification of non-facilities-based Internet service providers should be different in the wireless context, or the same as in the wired context.

104. In addition, section 332 sets forth various provisions concerning the regulatory treatment of mobile wireless service. Sections 332(c)(1) and (c)(3), in particular, require that CMRS providers be regulated as common carriers under Title II of the Act.²⁷⁵ To what extent should section 332 of the Act affect our classification of wireless broadband Internet services? Section 332(c)(1) gives the Commission the authority to specify certain provisions of Title II as inapplicable to CMRS providers. If the Commission were to take the third way described above in the wireless broadband context, could it and should it apply section 332(c)(1) as well as section 10 in its forbearance analysis? We also seek comment on whether the Commission would have reason to apply sections 201 and 202 differently to wireless and wired broadband Internet services.

105. We also ask commenters to address whether, if the Commission were to alter its present approach to broadband Internet service, it would be preferable for the Commission to address wireless services at the same time that it addresses wired services, or whether there are reasons for the Commission to defer a decision on classification of non-wired broadband Internet services (and any associated forbearance if a wireless broadband telecommunications service is identified).

E. Non-Facilities-Based Internet Service Providers

106. In 1998, the Commission addressed non-facilities-based Internet service providers and concluded that they provided only information services.²⁷⁶ In *Brand X*, Justice Scalia stated in his dissent that non-facilities-based Internet service providers using telephone lines to provide DSL service stand in a different position in the eyes of the consumer than the provider of the physical connection.²⁷⁷ Some industry members have suggested, however, that providers of Internet connectivity could avoid compliance with consumer protection measures by relying on non-facilities-based affiliates to offer retail broadband Internet service.²⁷⁸ We seek comment on what policy goals we should have for non-facilities-based Internet service providers, and what legal foundation for non-facilities-based Internet service providers can best support effective implementation of those goals.

F. Internet Backbone Services, Content Delivery Networks, and Other Services

107. The focus of this proceeding is limited to the classification of broadband Internet service. We remain cognizant that, under the Act, all information services are provided "via telecommunications,"²⁷⁹ and therefore the use of telecommunications does not, on its own, warrant the identification of a separate telecommunications service component. For example, we do not intend to address in this proceeding the classification of information services such as e-mail hosting, web-based content and applications, voicemail, interactive menu services, video conferencing, cloud computing, or

²⁷⁵ See *Wireless Broadband Order*, 22 FCC Rcd at 5915-20, paras. 37-57 (finding that "mobile wireless broadband Internet access service" does not meet the definition of "commercial mobile service" within the meaning of section 332 of the Act as implemented by the Commission's CMRS rules because such broadband service is not an "interconnected service," as defined in the Act and the Commission's rules).

²⁷⁶ *Stevens Report*, 13 FCC Rcd at 11539-40, para. 81.

²⁷⁷ *Brand X*, 545 U.S. at 1009 n.3 (Scalia, J., dissenting).

²⁷⁸ See e.g., Bob Quinn, *Pickett's Charge Redux*, AT&T Public Policy Blog, May 11, 2010, <http://attpublicpolicy.com/government-policy/pickett's-charge-redux/>.

²⁷⁹ 47 U.S.C. § 153(20).

any other offering aside from broadband Internet service.²⁸⁰ Services that utilize telecommunications to afford access to particular stored content, such as content delivery networks, also are outside the scope of this proceeding.²⁸¹ Nor do we intend here to address or disturb our treatment of services that are not sold by facilities-based Internet service providers to end users in the retail market, including, for example, Internet backbone connectivity arrangements. In short, the Commission proposes not to change its treatment of services that fall outside a commonsense definition of broadband Internet service. We seek comment on whether any of the three legal approaches described in this Notice would affect these services directly or indirectly, and how we should factor that into our decision-making about the treatment of broadband Internet service.

108. In a separate proceeding, the Commission has asked for public comment on the treatment of other services (including Internet-Protocol-based voice and subscription video services) that may be provided over the same facilities used to provide broadband Internet service to consumers, but that have not been classified by the Commission.²⁸² The Commission has described these as “managed” or “specialized” services, and recognized “that these managed or specialized services may differ from broadband Internet services in ways that recommend a different policy approach, and it may be inappropriate to apply the rules proposed here to managed or specialized services.”²⁸³ We do not intend to address the classification or treatment of these services in this proceeding. We seek comment on whether any of the three legal approaches identified in this Notice would affect these services directly or indirectly, and how we should factor that into our decision-making about the treatment of Internet connectivity service.

G. State and Local Regulation of Broadband Internet and Internet Connectivity Services

109. We also ask commenters to address the implications for state and local regulation that would arise from the three proposals described above. Under each of the three approaches, what would be the limits on the states’ or localities’ authority to impose requirements on broadband Internet service and broadband Internet connectivity service?

110. We anticipate that if a state were to impose requirements on broadband Internet connectivity service or broadband Internet service that are contrary to a Commission decision not to apply similar requirements, we would have authority under the Communications Act and the Supremacy Clause of the United States Constitution (Article III, section 2) to preempt those state requirements.²⁸⁴ In addition, section 10(e) provides that “[a] State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying.”²⁸⁵ We seek

²⁸⁰ See generally *Section 255 Order*, 16 FCC Rcd at 6457, para. 97 (identifying voicemail and interactive menu offerings as information services), 6461, para. 107 (identifying “e-mail, electronic information services, and web pages” as information services); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Report and Order and Further Notice of Proposed Rulemaking, FCC 09-105, attach. D (Eligible Services List Schools and Libraries Support Mechanism for Funding Year 2010) (rel. Dec. 2, 2009) (“Internet access provides a connection to a vast quantity of information and services, such as electronic mail and the documents and features of the World Wide Web.”).

²⁸¹ Compare 47 U.S.C. § 153(20) (definition of “information service”) with 47 U.S.C. § 153(43) (definition of “telecommunications”).

²⁸² *Open Internet NPRM*, 24 FCC Rcd at 13116-17, paras. 148-53.

²⁸³ *Id.* at 13116, para. 149.

²⁸⁴ See *Vonage Preemption Order*, 19 FCC Rcd at 22417, para. 21.

²⁸⁵ 47 U.S.C. § 160(e).

comment on the application of these provisions in the context of broadband Internet service and broadband Internet connectivity service, the states' role in the broadband marketplace, and how our decision to apply or not apply section 253 could relate to this authority.²⁸⁶

H. Related Actions

111. We seek comment on whether there are actions we can and should take outside the proceeding this Notice initiates to implement the established policy approach to broadband Internet service. As one example, the Commission could decline to pursue the "open access" policies for cable modem service on which the Commission sought comment in 2002 when it decided to classify cable modem service as a single information service.²⁸⁷ We seek comment on terminating the docket initiated by the notice of proposed rulemaking that accompanied the *Cable Modem Declaratory Ruling*, and we invite additional proposals.

III. PROCEDURAL MATTERS

A. Paperwork Reduction Act

112. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 47 U.S.C. § 3506(c)(4).

B. Ex Parte Presentations

113. The inquiry this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.²⁸⁸ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required.²⁸⁹ Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.²⁹⁰

C. Comment Filing Procedures

114. Interested parties may file comments and reply comments regarding the Notice on or before the dates indicated on the first page of this document. Comments and reply comments may be filed: (1) using the Commission's Electronic Comment Filing System (ECFS), (2) using the Federal Government's eRulemaking Portal, or (3) by filing paper copies. In addition, *ex parte* comments may be filed at any time except during the Sunshine Period. *Ex parte* comments may be filed: (1) using the Commission's Electronic Comment Filing System (ECFS), (2) using the Federal Government's eRulemaking Portal, (3) by filing paper copies, or (4) by posting comments and ideas on the Broadband.gov blog at <http://blog.broadband.gov/?categoryId=494971> or on <http://broadband.ideascale.com/a/ideafactory.do?discussionID=11271>. **All filings related to this Notice should refer to GN Docket No. 10-127. Further, we strongly encourage parties to develop responses to this Notice that adhere to the organization and structure of this Notice.**

²⁸⁶ *See supra* para. 87.

²⁸⁷ *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4839-41, paras. 72-74, 4843-47, paras. 83-93.

²⁸⁸ 47 C.F.R. §§ 1.200 *et seq.*

²⁸⁹ *See* 47 C.F.R. § 1.1206(b)(2).

²⁹⁰ *Id.* § 1.1206(b).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Blog Filers: In addition to the usual methods for filing *ex parte* comments, the Commission is allowing *ex parte* comments in this proceeding to be filed by posting comments on <http://blog.broadband.gov/?categoryId=494971> and on <http://broadband.ideascale.com/a/ideafactory.do?discussionID=11271>. Accordingly, persons wishing to examine the record in this proceeding should examine the record on ECFS, <http://blog.broadband.gov/?categoryId=494971>, and <http://broadband.ideascale.com/a/ideafactory.do?discussionID=11271>. Although those posting comments on the blog may choose to provide identifying information or may comment anonymously, anonymous comments will not be part of the record in this proceeding and accordingly will not be relied on by the Commission in reaching its conclusions in this rulemaking. The Commission will not rely on anonymous postings in reaching conclusions in this matter because of the difficulty in verifying the accuracy of information in anonymous postings. Should posters provide identifying information, they should be aware that although such information will not be posted on the blog, it will be publicly available for inspection upon request.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.
- Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.
- Documents in GN Docket No. 10-127 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street S.W., Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

D. Accessible Formats

115. People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

IV. ORDERING CLAUSE

116. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i), 4(j), 10, 218, 303(b), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 160, 218, 303(b), 303(r), and 403, this Notice of Inquiry IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI**

Re: Framework for Broadband Internet Service, GN Docket No. 10-127

In March, we released our country's first National Broadband Plan, an unprecedented, bold roadmap for America's broadband future. The Commission affirmed unanimously that: "Working to make sure that America has world-leading high-speed broadband networks—both wired and wireless—lies at the very core of the FCC's mission in the 21st Century."

In this increasingly interconnected world, broadband is our most important platform for investment, economic growth, and job creation—and for addressing major national challenges such as education, health care, and public safety.

As the National Broadband Plan recognized, however, America lags behind where it should be on broadband; the rest of the world isn't standing still; and government has a limited but vital role to play in spurring ubiquitous, fast, competitive, and affordable broadband networks available to every American.

In April, the DC Circuit issued a decision in the *Comcast* case that, unfortunately, created uncertainty in an area that had been widely regarded as settled. As our General Counsel has described, while acknowledging the agency's basic authority under the Communications Act to address issues of broadband access policy, the court opinion casts doubt on the particular legal theory the Commission had chosen to rely on for several years to support its efforts in this area. As others have described to me, this unwelcome decision was a curveball.

Last month, I said the Commission would initiate a process to explore and ultimately find a solution and resolve the uncertainty created by the decision. In particular, I said the Commission would consider all appropriate legal theories that would continue the same light-touch approach to broadband access policy that the agency has pursued for the past decade.

Recently, the Chairmen of the key Senate and House Committees—Chairmen Rockefeller, Kerry, Waxman, and Boucher—launched a process to update the Communications Act.

Let me take this opportunity today to say clearly: I fully support this Congressional effort. A limited update of the Communications Act could lock in an effective broadband framework to promote investment and innovation, foster competition, and empower consumers. I commit all available FCC resources to assisting Congress in its consideration of how to improve and clarify our communications laws.

Meanwhile, in view of the court decision, and as the Congressional Chairs have requested, the FCC has an obligation to move forward with an open, constructive public-comment process to ask hard questions, to find a solution, and resolve the uncertainty that has been created. The Congressional and FCC processes are complementary.

It's important to note that the recent court decision did not opine on the initiatives and policies that we have laid out transparently in the National Broadband Plan and elsewhere.

Our pro-investment, pro-innovation, pro-competition, pro-consumer policies remain unchanged and they remain essential for broadband in America. The purpose of the proceeding we launch today is to make sure those policies rest on a solid legal foundation by exploring and addressing the technical, legal

questions the court decision raises.

For example, American businesses and consumers need safe and secure broadband networks, yet the court case raises questions about the right framework for the Commission to help protect against cyber-attacks.

American businesses and consumers need broadband networks that reach every community and every American—rural and urban, regardless of circumstances—yet the court case raises questions about the right framework for the Commission to help bring the benefits of broadband to the tens of millions of Americans and the many schools, libraries, and other anchor institutions that either do not have access to adequate broadband networks or can't afford the service.

American businesses and consumers need broadband networks that will serve as a powerful engine for investment and innovation, yet the court case raises questions about the right framework for the Commission to safeguard the freedom and openness of the Internet, which has fueled extraordinary investment and innovation, vast consumer benefits and choice, which has led to unprecedented opportunities to spread knowledge and facilitate new and diverse voices – and which has for several years been protected by a bipartisan FCC.

These and other issues affected by the court decision—like access by people with disabilities, like privacy—are real issues with real consequences for every American, and the nation's agency with oversight responsibility for communications has a duty to address them.

We do so today in an open and balanced way. The Notice of Inquiry we adopt puts out for comment, even-handedly, several possible solutions to the challenge created by the court case—including a Title I path, a full Title II path, and a middle-ground solution—the Third Way approach that I have previously described. The Notice also solicits new ideas.

The Third Way approach was developed out of a desire to restore the status quo light-touch framework that existed prior to the court case.

It was developed as a potential response to the court decision that would reject the extremes—a response that rejects both the extreme of applying extensive legacy phone regulation to broadband, and also rejects the extreme of eliminating FCC oversight of broadband.

It's not hard to understand why companies subject to an agency's oversight would prefer no oversight at all if they had the chance.

But a system of checks and balances in the communications sector has served our country well for many decades, fostering trillions of dollars of investment in wired and wireless communications networks, and in content, applications, and services—and creating countless jobs and consumer benefits.

And there is no question that we need to pursue a framework and policy initiatives that encourage and unlock massive private investment.

Internationally, the Third Way would enable continued leadership on communications policy and Internet freedom, while doing nothing would leave the U.S. virtually alone in the world in not having tools to protect broadband competition and consumers and preserve Internet freedom and openness.

I suggested the Third Way approach as a reasonable and narrowly tailored path for promoting the massive private investment we need in broadband, and achieving broadly supported policy goals. It is a

preferable alternative to the approach of applying full Title II to broadband, an approach that is unacceptable to me.

While the term “Third Way” may be new to this debate, the model on which it is based is familiar. The Third Way is modeled on the highly successful deregulatory approach that the FCC has used for almost 20 years for mobile voice services: application of a small number of Title II provisions, with broad and reliable forbearance from all other provisions.

The mobile voice experience has shown the wisdom of leaving pricing to competitive markets, as well as the ability of the Commission to forbear from regulation effectively and without backsliding. Industry has repeatedly hailed this framework as having spurred robust investment and innovation.

So it is not surprising that the Third Way has received support from a broad array of businesses and investors, representing many billions of dollars of investment and serving millions of consumers and small and large enterprises.

Supporters—who believe the Third Way is a path to boost robust investment and competition in the U.S.—include major American Internet and technology companies, competitive broadband access providers, rural mobile companies, consumer electronics manufacturers, entertainment companies, successful investors and entrepreneurs, as well as leading consumer groups.

Now, as we move forward, my focus is not on any particular legal mechanism; my desire is simply that we restore the status quo and have a workable light-touch framework for broadband access.

My core focus is on achieving vital national broadband goals to spur investment, innovation and our global competitiveness. In order to do that, we must solve the problem the *Comcast* case created.

I recognize that there are pros and cons to all of the potential solutions that have been raised, and that this isn't an easy issue, or one without complexity. I remain open minded, I welcome the possibility of new ideas.

I'm pleased that the announcement of an FCC process has already catalyzed action among stakeholders. I encourage these consensus-building actions and discussions to find an enforceable framework for broadband policy.

I'm pleased also that this process has produced healthy dialogue inside the Commission staff and among those of us on the bench. There are a number of different views as we begin tackling this issue. I believe firmly and deeply in the benefits of a free marketplace of ideas and its potential to produce the best answers to hard questions, as long as all keep open minds.

I ask only this of all participants in this discussion, inside and outside the Commission: Let's not pretend that the problems with the state of broadband in America don't exist; let's not pretend that the risk of excessive regulation is not real, or, at the other extreme, that the absence of basic protections for competition and consumers is acceptable.

Instead, let's put rhetoric and posturing aside, and work together to solve the problem created by the court case, so that we can rise together to the major 21st century challenges of achieving U.S. world leadership in broadband and innovation, fostering sustainable economic growth and job creation, and bringing the benefits of broadband to all Americans.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: Framework for Broadband Internet Service, GN Docket No. 10-127

Between a few big industry players who never liked the telecommunications law passed by Congress and previous Commissions only too ready to sacrifice the public interest to special interests, consumers find themselves in quite a box. We are on the cusp of perhaps the greatest communications revolution since the printing press, yet we enter this new Digital Age arguably shorn of the ability to offer consumers the most basic of protections—such as insuring their security, safeguarding their privacy, providing them with the benefits of competition and making sure that dynamic new technologies are available to them and are open to the maximum extent possible—without needless gatekeeper control at the on-ramps to the information highway.

For much of the past decade, the FCC took American consumers on a costly and damaging ride, moving broadband Internet connectivity outside the statutory Title II framework that applies to telecommunications carriers. This was a major flip-flop from the historic—and generally successful—approach of requiring non-discrimination in our communications networks. I didn't buy it—and now we know from its *Comcast* decision that the D.C. Circuit Court of Appeals didn't buy it either. In fact, by taking the country on the joyless ride it did, the Commission essentially issued a guilt-edged invitation to the court to rule as it did. Previous Commissions are much more the culprit here than any court. After all, they were relying on an approach that was fundamentally at odds with the purposes set out in the Telecommunications Act of 1996. Anyone who thinks Congress envisioned deploying the new communications technologies and services of the Digital Age without the safeguards that generations of consumers and consumer advocates fought for and won has missed the meaning of the law and the intent of our elected representatives. I cannot believe that Congress ever envisioned that its fundamental statutory requirements could be made obsolete by a new service offering.

Permitting this chaotic stand-off to persist can only leave consumers, innovators and even broadband companies themselves on an uncertain and perilous path. Today, in an effort to right the wrong-headed policies of recent years, we tackle one of the most difficult challenges ever to confront this Commission. I commend Chairman Genachowski for launching this proceeding and I encourage its speediest possible resolution. Some believe that, to achieve one or more of our goals, the Commission could try—on a case-by-case basis—to make better-articulated Title I arguments that may persuade some court somewhere. Maybe. But case-by-case inevitably becomes court case-by-court case. Down this path would be years and years of dead-end delays, years without the most elemental public interest safeguards for broadband, and years of agency paralysis. It would be death by a thousand cuts. Why rest our case on the weakest part of the law when relying on the directly applicable stronger part of the statute is quicker, easier and, most importantly, consumer-friendlier? More years fighting back a costly and seemingly endless stream of court challenges to every action the Commission takes can only consign the United States to the digital dust as other countries focus on actually building out consumer-friendly advanced telecommunications (*i.e.*, broadband).

How did we get here? It is a sad—and all too familiar—tale where the law was twisted to shamefully promote the interests of a powerful few ahead of the interests of consumers. It began in 2002 with a Notice of Proposed Rulemaking on the classification of broadband services delivered by wireline providers. Then, just one month later and over the strong dissents of Commissioner Adelstein and me, the Commission issued a Declaratory Ruling that moved cable modem services away from any real oversight by classifying them as unregulated “information” services, subject only to the vague ancillary authority of Title I. Not only did that ruling place cable modem services into regulatory never-never land, but it struck at the very heart of this agency's ability to do its job of protecting public safety, promoting

universal service, ensuring disabilities access, fostering competition and safeguarding consumers in a broadband world. In my 2002 dissent, I said that the Commission was taking “a gigantic leap down the road of removing core communications services from the statutory frameworks established by Congress, substituting our own judgment for that of Congress and playing a game of regulatory musical chairs by moving technologies and services from one statutory definition to another.” We moved the chairs—but it sure wasn’t musical. Throw into this bubbling cauldron of trouble one subsequent agency decision after another to grant big industry players forbearance from their legal requirements to promote competition and consumer choices and you begin to get the picture of how we spent the bulk of the past decade around here.

I, for one, am worried about relying only on the good will of a few powerful companies to achieve this country’s broadband hopes and dreams. We see what price can be paid when critical industries operate with unfettered control and without reasonable and meaningful oversight. Look no further than the banking industry’s role in precipitating the recent financial meltdown or turn on your TV and watch what is taking place right now in the Gulf of Mexico.

Throughout the course of the Commission’s deregulatory binge, we were given repeated assurances that there was no need to worry. Somehow we would find enough jurisdiction under Title I “ancillary authority” to do our job. In truth, and not to be too conspiratorial about it, I rather believe that those who devised this abdication of our oversight responsibilities did so fully aware of what they were doing and who they were really helping. And they pressed on. In 2005, the Commission extended its oversight abdication by reclassifying DSL. The die had been cast by then, Justice Scalia and me to the contrary notwithstanding, and the challenge Commissioner Adelstein and I faced was to rescue what we could from the accident scene. About all we could manage was some—albeit inadequate—commitment that the Commission would have the ability to move forward with certain basic statutory obligations related to homeland security, universal service, disabilities access and competition, if it was wont to do so. It wasn’t often wont to do so. More formatively, we were able to win Commission adoption for the historic *Statement of Policy* on Internet openness—something which I had long advocated. We couldn’t get all the way there in that *Statement*, but we laid down the markers which I hope the present Commission will extend in the months ahead.

In sum, the Commission had moved its authority and oversight of advanced telecommunications to a part of the statute where those services would have a steep hill to climb to win even the most basic consumer safeguards. But let’s be clear here. We still have the original authority the Commission moved away from. It reposes in the statute. It is there for us to use—by sun-up tomorrow, if we choose. It rests on history and precedent. And, soundly argued in court, it puts us on much firmer legal footing to survive the inevitable industry challenges that are coming anyway than does trying to stand our ground on the quicksand of Title I. We need to reclaim our authority.

One other thing is at risk here—something pretty huge. I haven’t yet mentioned the National Broadband Plan, the proud achievement of Chairman Genachowski’s Broadband Team here at the Commission. The Team worked for nearly a year to provide our country with something it lacked (and almost every other leading industrial country possessed)—a national strategy to encourage the deployment and adoption of high-value, high-speed broadband for every citizen in the land. The *Comcast* decision puts crucial parts of the National Broadband Plan in jeopardy and on hold—potentially squandering the nation’s historic opportunity to build this vital infrastructure of the Twenty-first century that will open so many doors for so many people.

We cannot let that happen. Too much is at stake. Our global competitiveness depends on this new telecommunications infrastructure. Broadband is not technology for technology’s sake—it is important because it really can be our “Great Enabler.” This is technology that intersects with every great

challenge confronting our nation—improving energy efficiency, halting climate degradation, improving healthcare for all our citizens, educating our young (and our old, too), helping individuals with disabilities to realize their full potential, creating new public safety tools for first responders and opening the doors of economic and social opportunity for all. Broadband connectivity is about even more than that. Increasingly our national conversation, our news and information, our knowledge of one another, will depend upon access to the Internet. Each of these challenges I have mentioned has a broadband component as part of its solution. None has a solution without this broadband component. Private enterprise must lead the way with investment and innovation in broadband, to be sure. But only when it is accompanied by visionary public policy and meaningful oversight can we ensure that broadband will get built out to places where business has no incentive to go. We can no longer afford digital divides between haves and have-nots, between those living in big cities and those living in rural areas or on tribal lands, between the able-bodied and persons with disabilities.

Since the *Comcast* decision, I have heard opponents of reclassification make a number of self-serving arguments that range from the often-frivolous to the sometimes-nonsensical. For starters, let me be clear. Despite all the spin to the contrary, we are not talking—even remotely—about regulating the Internet. We are talking about meaningful oversight of the infrastructure and services that allow Americans to get to the Internet. This isn't about government regulating the Internet—it's about making sure that consumers, rather than a handful of entrenched incumbents, have maximum control over their access to the Internet.

I have also heard the perplexing contention by some that the Commission cannot move back to Title II classification because there have been no "changed circumstances," which are supposedly needed to justify such a correction. No changed circumstances? Have the mind-bending changes we have seen throughout the country and around the world due to broadband access to the Internet been anything short of revolutionary? I don't think so. The market for broadband technologies and services, and the ways in which we as a people communicate, have undergone seismic changes over just the last decade. Remember that it was not so long ago that many Americans were just getting used to the Internet, and independent Internet service providers like AOL and CompuServe were the names of the game. Since then, it is a few huge access providers that have become the only real broadband game in town. Resellers and competitive local telephone companies have been driven from the field, for the most part. And competition—that wonderful goal of the 1996 Telecommunications Act—reposes more in our hopes and dreams than it does on the bottom line of the monthly phone and cable bills we all get to pay. How can anyone fail to find "changed circumstances" in these revolutionary transformations?

So beware of all the slick PR you hear, and remember that much of it is coming from lavishly-funded corporate interests whose latest idea of a "triple play" is this: (1) slash the FCC's broadband authority; (2) gut the National Broadband Plan; and (3) kill the open Internet.

Today we launch a proceeding to look at the options available to us. Should we continue down our failed Title I path? Should we rely on the full range of Title II requirements and safeguards? Or should we take a "third way" by applying a limited number of fundamental provisions of Title II to Internet access service? I have said before that plain and simple Title II reclassification through a prompt—and by that I meant immediate—declaratory ruling, accompanied by limited, targeted forbearance from certain provisions—would have been the quickest and cleanest way to remove all question marks. Clear rules of the road don't just help consumers—they provide clarity and certainty to business, too. My former boss, the legendary Senator Fritz Hollings, frequently reminded us that "business can't operate with a question mark." Commission policies over the past decade have been replete with question marks for business, for consumers, for all of us.

So let's develop the record through this Notice, as quickly as we can. Let's then analyze the

record, develop final recommendations and vote them out with the sense of urgency that the present situation compels. Let us put an end to a decade of detours and derailment, and ensure, for every American, a communications infrastructure that serves their purposes, protects their interests and vindicates the awesome promise of the Digital Age.

**DISSENTING STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: Framework for Broadband Internet Service, GN Docket No. 10-127

First, I can't emphasize enough that we all want an open Internet that maximizes consumers' freedom. It is important to remember that an open and freedom-enhancing Internet is what we have today as the result of a decades-old, bipartisan and international consensus that governments should not interfere with Internet network management issues. At the same time, authorities should discourage and punish anti-competitive conduct, and they have the legal means to do so today as they have had for decades.

Before I go further, however, I thank the Chairman for his graciousness and generosity throughout this debate. He has consistently extended his hand in a willingness to discuss the issues. I'd like to underscore that 90 percent of what we accomplish at the FCC is not only bipartisan but unanimous as well. Few governmental institutions can make such a claim. That also means, however, that we disagree on one in 10 proceedings. Disagreement and debate are healthy and necessary components of a functioning democracy. Today's Notice of Inquiry is one of those moments of strong, but respectful, disagreement.

Having said that, I also thank the Chairman, his legal team and the bureau staff for writing a NOI that contains several open-ended questions that provide ample opportunity for public comment.

Nonetheless, I disagree with the premise of this proceeding. Not only is the idea of classifying broadband Internet access as common carriage under Title II unnecessary, already it has caused harm in the marketplace.

As a threshold matter, classifying broadband as a Title II service is not necessary to implement the recommendations of the National Broadband Plan. The *Comcast* decision certainly does not affect our ability to reallocate spectrum, one of the central pillars of the Plan. Nor does the decision undermine our authority to reform our Universal Service program, the other major component of the Plan. In the unlikely event that a court decided against granting us *Chevron* deference in the pursuit of directly supporting broadband with Universal Service distributions, the FCC could tie future subsidies to broadband deployment. This idea was agreed to in principle by a bipartisan group of four Commissioners in late 2008, and I remain optimistic that we could successfully defend such an idea on appeal.

In fact, the *Comcast* decision was quite limited in its scope. The court merely held that Title I does not grant us authority to regulate Internet network management. It reasoned that the Commission could not do so because its ancillary authority over Internet service providers was not tethered to a specific Congressional mandate. In short, if the Commission would like to regulate that activity, it must wait for Congress to change the law. We are not Congress.

As a young attorney 20 years ago, I cut my legal teeth on Title II. Over the decades, an overwhelming consensus emerged among tech companies and policy makers from both parties to insulate new technologies from the application of early 20th Century common carrier regulations. The fundamental Title II rules from the Communications Act of 1934, which the majority seeks to apply to today's broadband sector, are the same regulations adopted in the late 19th Century for the railroad monopolies. In essence, the Commission is seeking to impose 19th Century-style regulations designed for monopolies on competitive, dynamic, and complex 21st Century Internet technologies.

The ideas put forth for comment in today's NOI are not new. In fact, they were discussed and

discarded in an overwhelmingly bipartisan way in the 1990s. Let's look back at a 1998 Commission report under the leadership of Bill Kennard, Chairman during President Clinton's second term:

Turning specifically to the matter of Internet access, we note that classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it.²⁹¹

Just two years later, then-Chairman Kennard said:

It just doesn't make sense to apply hundred-year-old regulations meant for copper wires and giant switching stations to the IP networks of today. . . . We now know that decisions once made by governments can be made better and faster by consumers, and we know that markets can move faster than laws.²⁹²

And here's what the Clinton White House had to say about placing legacy regulations on the Internet:

We should not assume . . . that the regulatory frameworks established over the past sixty years for telecommunications, radio and television fit the Internet.²⁹³

The regulatory regime suggested by the majority today is likely to create asymmetries in the market place. For example, investment and innovation at the "edge" of the Internet, specifically devices and applications, are largely unfettered by regulation. This is as it should be. But the proposed new regime will place the heavy thumb of government on the scale of a free market to the point where innovation and investment in the "core" of the 'Net are subjected to the whims of "Mother-May-I" regulators. Although I have a tremendous amount of respect for my colleagues, no one can predict who will occupy these chairs in the future, or how they will act. Or, as Senator Olympia Snowe warned the Commission in a letter earlier this month:

I am concerned about the long-term implications such classification could have on innovation occurring in all segments of the Internet supply chain and the uncertainty that would prevail, since nothing precludes future Commissioners from retracting the very rules you plan to implement.²⁹⁴

Moreover, the agency's dramatic attempt to regulate broadband Internet access services comes at a time when consumers are demanding more convergence between the core and the edge. While

²⁹¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11501, ¶ 82 (1998).

²⁹² Remarks of the Honorable William E. Kennard, Chairman, FCC, *Voice Over Net Conference: Internet Telephony: America Is Waiting* (Sept. 12, 2000).

²⁹³ The White House, *A Framework for Global Electronic Commerce* (July 1, 1997).

²⁹⁴ Letter from the Honorable Olympia Snowe, United States Senator, to the Honorable Julius Genachowski, Chairman, FCC (June 1, 2010).

consumers and their suppliers in a competitive marketplace have been erasing lines of distinction separating tech business models, the Commission is proposing to up-end market trends and draw artificial legal lines to create new regulatory silos.

Investors and international observers are expressing serious concerns about what the FCC is poised to do. In the past two weeks I have traveled to New York and Europe. I have met with a diverse assortment of investors, market analysts, regulators, business people and academics. At every turn, I was met with confusion and questions regarding the idea of regulating broadband as an old-fashioned phone service. For decades now, the international consensus has been for governments to keep their hands off the Internet and to leave Internet governance decisions to time-tested non-governmental technical groups. Once that precedent is broken, it will become harder to make the case against more nefarious states that are meddling with the Internet in even more extensive ways than are contemplated here. In short, we will have lost the moral high ground. Again, a version of this scenario was foreseen by the Clinton Administration's Secretary of Commerce, William Daley, in 1997:

[W]e have been working with the private sector to convince other nations of the advantages of a user empowerment approach over cumbersome government regulation of the Internet.²⁹⁵

Analysts are counseling a wide variety of investors to withhold badly needed investment capital in fear of regulatory uncertainty and litigation risks. While Title II classification is being advanced in the name of furthering broadband deployment, it may have the unintended consequence of stunting growth in this sector. Or, as written this week on a business website:

But while it's business as usual now, capital investment will come down if Title II becomes a reality, said Credit Suisse telecom services director Jonathan Chaplin. He said the next place companies would look to capture some of the return is costs, which would mean jobs.²⁹⁶

In fact, one recent economist's study estimates that a net 1.5 million jobs could be put at risk by a Title II classification.²⁹⁷

These thoughts aren't coming just from Wall Street, but from those who represent America's small and disadvantaged businesses as well. Listen to last month's remarks of David Honig of the Minority Media and Telecommunications Council:

Lender and investor uncertainty stemming from potentially years of litigation over Title II reclassification could make it profoundly difficult for MBEs and new entrants to secure financing. MBEs, especially, continue to experience great difficulty securing access to capital in the

²⁹⁵ Remarks of the Honorable William M. Daley, Secretary, U.S. Dept. of Commerce, *Internet Online Summit: Focus on the Children* (Dec. 2, 1997).

²⁹⁶ *Street Talk*, CableFAX, June 14, 2010.

²⁹⁷ Coleman Bazelon, *The Employment and Economic Impacts of Network Neutrality Regulation: An Empirical Analysis* (Apr. 23, 2010).

broadband space.²⁹⁸

Members of Congress also are asking the Commission to abandon the Title II route citing the investment and economic risk that they fear will come with it. Here is a segment of a letter from 74 Democratic House Members:

The uncertainty this proposal creates will jeopardize jobs and deter needed investment for years to come. The significant regulatory impact of reclassifying broadband service is not something that should be taken lightly and should not be done without additional direction from Congress. We urge you not to move forward with a proposal that undermines critically important investment in broadband and the jobs that come with it.²⁹⁹

In fact, a large bipartisan majority of Congress – consisting of at least 291 Members – has weighed in asking the Commission to discard this idea or at least to wait for Congress to act. In other words, a commanding majority of the directly elected representatives of the American people do not want the FCC to try to regulate broadband Internet access as a monopoly phone service.

If my colleagues feel compelled to act, however, I hope that they would keep an open mind about an idea I have proffered for a couple of years now and that would certainly withstand appeal. In the absence of new rules, which already have started to create uncertainty and will be litigated in court for years, let us create a new role for the FCC to spotlight allegations of anti-competitive conduct while working with non-governmental Internet governance groups and consumer protection and antitrust agencies. In each of the small number of cases cited by proponents of network management rules, all were rectified quickly, without new rules. The recently announced technical advisory group could serve as a component of such an endeavor.

Additionally, it is my hope that instead of diverting precious resources towards creating new regulations, we focus on adopting policies that will help create abundance, competition and jobs. For instance, we could recapture the bipartisan and unanimous spirit of 2008 when the Commission approved the concept of unlicensed use of the television white spaces. This effort needs to be reenergized. American consumers will benefit tremendously from the unimaginable applications and devices that will use white spaces. Use of this spectrum also is an antidote to potential anti-competitive conduct by broadband providers as it will inject more competition into the “last mile.” For instance, if one last-mile broadband provider were to act in an anti-competitive way, it would risk losing its customer to a white spaces provider. Or, as the Commission unanimously stated in 2008:

We also anticipate that these new devices will have economic benefits for consumers and businesses by facilitating the development of additional competition in the broadband market.³⁰⁰

²⁹⁸ Letter from David Honig, Counsel, Minority Media Telecommunications Council, to Marlene H. Dortch, Secretary, FCC (May 7, 2010).

²⁹⁹ Letter from the Honorable Al Green *et al.*, U.S. House of Representatives, to the Honorable Julius Genachowski, Chairman, FCC (May 24, 2010).

³⁰⁰ *Unlicensed Operation in the TV Broadcast Bands: Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket No. 02-380, Second Report and Order and Memorandum Opinion and Order, 23 FCC Red 16807, ¶ 32 (Nov. 4, 2008); Erratum, 24 FCC Red 109 (Jan. 9, 2009).

In sum, the Commission has many avenues it can pursue to further the cause of more broadband deployment and adoption without having to take on the risks associated with a Title II classification. I respectfully ask my colleagues to listen to the growing chorus of a large and bipartisan majority of voices in Congress and consider these different paths in lieu of the course they are embarking upon now. In the meantime, I fundamentally disagree with the premise that has been offered to support this item. As a result, I respectfully dissent.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: Framework for Broadband Internet Service, GN Docket No. 10-127

Thank you Austin, and to your team for your superb work on this item. It is essential that we ask probing questions that enable us to gather the information required to make informed and sensible policy decisions. This Notice of Inquiry sets forth the leading theories about how we can accomplish our shared goals for broadband service in the wake of the D.C. Circuit's *Comcast* decision. It affords all interested parties – industry, public interest groups, public officials, and ordinary Americans – the opportunity to weigh in on the specific legal and policy merits of those proposals. The item succeeds in taking a difficult and combustible topic and presenting it in a way that should produce meaningful and fruitful discourse.

My fear, however, is that there are efforts underway designed to stifle at all costs our ability to engage in reasonable and productive discussion about these pressing issues. Indeed, it appears that we are a long way from a sincere debate on the merits of these proposals. There is, I believe, a great deal of misinformation being disseminated, which is creating misplaced anxiety.

Perhaps most notably, one of the current narratives being put forth is that proceeding with this inquiry – let alone a change in classification – would freeze investment in the networks. This argument, however, is specious. First, notable telecommunications analysts at firms such as Bank of America Merrill Lynch, UBS, and Goldman Sachs have each asserted that the *public* reaction by industry to the Chairman's proposal is overblown. In fact, they believe the current landscape presents a tremendous buying opportunity. As one well-regarded analyst stated:

[T]he FCC's "Third Way" reclassification largely keeps the status quo intact, with key points being: 1) no rate regulation, 2) no unbundling, to require Cable to share its networks, 3) the forbearance is difficult to overturn, 4) no inconsistent state regulation, [(5)] provides no competitive advantage to DBS or Telco vs. Cable and [(6)] Wireless has a similar "Third Way" reclassification, which has not negatively impacted the business model.³⁰¹

Second, the public relations campaign being waged by some may itself be the catalyst for doubts about investment. There should be no surprise when the all-out effort to spin the Chairman's proposal as one that entails extensive regulation scares off potential investors. If you yell "The sky is falling!" enough times, people will eventually take cover.

Third, as noted earlier, wireless voice communications are currently subject to a nearly identical regulatory regime, and that sector, as you know, has flourished. In fact, as some of my colleagues shared at the agenda meeting last month, the level of investment in the wireless sector has been mind-boggling. Investors and companies have poured billions and billions of dollars into an industry subject to Titles II and III. Massive investment has taken place – and continues to take place – under a parallel paradigm.

But I can understand why powerful companies balk at government oversight. They view any government authority as a threat to their unbridled freedom. Indeed, if it were up to them, we would not enact rules; but rather, rely on "voluntary organizations and forums" made up solely of industry personnel to give us advice on how to serve as a backstop for consumers. I suppose one benefit of this model is that

³⁰¹ Pull back is a buying opportunity, Cable/Satellite, Bank of America Merrill Lynch (May 6, 2010) (Jessica Reif Cohen).

I could significantly shorten my workday.

The problem for me, however, is that I truly care about ensuring that everyone has the opportunity to get broadband through our universal service program. I take seriously the threats to our cyber security. I know all too well the challenge the Internet poses to our privacy. I believe strongly that ISP speeds and bills should be transparent. And I am committed to ensuring that people with disabilities have meaningful access to all that broadband has to offer. There is no effort, no matter how well-funded and coordinated, that will undermine my belief in these essential goals.

Today's NOI is a positive step towards fulfilling some key aspects of the National Broadband Plan, among other things. I intend on working closely with those companies, organizations, and individuals who engage seriously and forthrightly with these difficult issues. By working together, I have no doubt that we can produce an outcome that both continues to foster investment and innovation and serves the American people.

Thank you, Mr. Chairman, for showing great leadership and vision. I am pleased to support this inquiry.

**DISSENTING STATEMENT OF
COMMISSIONER MEREDITH A. BAKER**

Re: Framework for Broadband Internet Service, GN Docket No. 10-127

The foundation of a strong national broadband policy is already in place, and we do not need to alter the regulatory classification of broadband Internet access service to achieve the important goals unanimously agreed to in the Joint Statement on Broadband.³⁰² We have a proven way forward under the existing “information services” classification by lawfully asserting our direct and ancillary authority to address universal service reform, disability access, and other consensus policy goals.³⁰³ I greatly appreciate the Chairman’s inclusion of a robust and balanced discussion of how the Commission could proceed based upon the existing classification, and hope this demonstrates a good faith effort to reach a true bipartisan solution.

Unfortunately, I am compelled to dissent because there are significant consequences to even initiating this far-reaching proceeding. Although I generally support building robust public records to bolster the Commission’s work and asking questions that lead to a developed analysis of all sides of an issue, this is the rare case where opening a proceeding creates so much regulatory uncertainty that it harms incentives for investment in broadband infrastructure and makes providers and investors alike think twice about moving forward with network investments under this dark regulatory cloud. This outcome can only harm consumers who need better, faster, and more ubiquitous broadband today. For those that suggest the D.C. Circuit forced our hand, I respectfully disagree. Nothing in the recent *Comcast* decision requires the Commission to revisit broadband’s classification.

I also have significant concerns that the outcome in this proceeding has been prejudged. The Chairman has publicly endorsed the so-called “Third Way” approach in the days leading up to this Notice, and I cannot support such a conclusion. At the outset, I reject the effort to re-brand a Title II classification with forbearance as a middle ground, it is not. There will be time to address all of the legal and factual infirmities of a Title II approach for broadband, and its adverse impact on capital markets, consumer welfare, and international regulatory norms. Today, I will limit my initial comments to the central question of legal and regulatory predictability. This approach will subject the Internet and consumers to years of litigation and uncertainty. I acknowledge that retaining our Title I framework is not without some legal risk too—no approach is. It is, however, substantially less risky than reclassifying broadband and overturning forty years of Commission precedent codified by Congress, and affirmed by the courts. And, if legal certainty is paramount, only Congress has the ability to provide the Commission with clear jurisdictional footing and direction to move forward to tackle the challenges of the broadband age.

It is also important to view this proceeding in context of other recent statements in which the Commission has conveyed a pessimistic view of competition and market conditions. First, we had the National Broadband Plan that did not conclude that having more than 80 percent of Americans living in markets with more than one provider capable of offering download speeds in excess of 4 Mbps was a success. Last month, the Commission was silent as to whether a wireless market in which 91.3 percent of

³⁰² *Joint Statement on Broadband*, GN Docket No. 10-66, FCC 10-42 (Mar. 16, 2010).

³⁰³ Remarks of Commissioner Meredith Attwell Baker at Broadband Policy Summit VI, *The Proven Way: A Regulatory Approach to Promote the Public Interest by Creating Jobs, Fostering Investment, and Driving Broadband Opportunity* (June 10, 2010).

Americans can choose from four or more providers is competitive. Then, in releasing consumer survey results this month, the Consumer & Governmental Affairs Bureau's headline was that 80 percent of households do not know their broadband speeds. The more important and positive fact to me was that 91 percent of consumers are satisfied with their broadband speed, yet that finding received significantly less attention. The next test will be the section 706 report in which the Commission will have to evaluate whether broadband deployment is timely and reasonable, a finding that has been made in the affirmative in every prior report. Taken as a whole, I have concerns that these statements represent a view that government should try to engineer better results, and a Title II classification would certainly provide a stronger platform from which to take a more intrusive regulatory approach. I recognize that industry alone will not solve every challenge and no commercial market is perfect, but I fear that a more proactive broadband regulatory approach would adversely affect consumers, competition, and investment.

I want to thank the staff for the hard work that went into this item, and I truly appreciate that this *Notice* does not close the door on Title I. I agree with the Chairman that we share many of the same policy goals, and I commit to working with my colleagues constructively on a consensus broadband agenda. Reclassifying and regulating an entire sector of the Internet is not necessary to achieve this. I am hopeful that this proceeding will not divert the agency's or industry's resources and attention away from addressing the core spectrum, broadband adoption, and broadband deployment challenges facing our nation in the months to come.



Michael J. Copps
Commissioner

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

May 5, 2010

The Honorable Henry A. Waxman
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Waxman:

Attached please find my responses to the written questions for the record following my appearance before the Subcommittee on Communications, Technology, and the Internet on March 25, 2010, at the hearing entitled "Oversight of the Federal Communications Commission: The National Broadband Plan."

Warm regards,

A handwritten signature in black ink that reads "Michael J. Copps".

Michael J. Copps

Enclosure

Questions for the Record from the Honorable John D. Dingell

- 1. On page 92, the National Broadband Plan states, "If the FCC does not receive authorization to conduct incentive auctions, or if the incentive auctions do not yield a significant amount of spectrum, the FCC should pursue other mechanisms." Will these "other mechanisms" be completely voluntary, as the plan makes patently clear will be the case for spectrum incentive auctions? Please explain your response.**

Connecting America: The National Broadband Plan is a document created by Federal Communications Commission staff. Thus I cannot speak with certainty about the full range of what "other mechanisms" were envisioned in their deliberations. I do note that Chairman Genachowski has emphasized several times that he views this undertaking as voluntary.

Broadcasting is uniquely situated to serve the public interest by reflecting local communities and providing a platform for diverse voices. Sadly, reckless decisions by both the private sector and the public sector have wreaked havoc on our broadcasters and, more importantly, on American viewers. I certainly understand the call in the National Broadband Plan to examine the possibility of reallocation and auctioning of some of the broadcasting spectrum, and the importance of additional spectrum to expand competition and innovation in wireless broadband. That said, I believe that much work still needs to be done. First and foremost, I have encouraged a thorough examination of what spectrum is being used and for what purpose, to what extent it is being used, and whether any higher public interest use would be served by reallocation. When it comes to broadcast spectrum, I believe we need to understand whether an individual station is serving its public interest obligations before any decision is made about reallocation and auction of that spectrum, whether such action is voluntary or otherwise.

- 2. Does the Commission possess the authority, whether under the Communications Act of 1934, the Telecommunications Act of 1996, or otherwise, with which to require broadband network owners to unbundle access to their networks? Please explain your response, including relevant citations of statute if you believe the Commission does indeed possess the authority required to unbundle access to broadband networks.**

Yes, the Commission does possess the authority to require broadband network owners to unbundle access to their networks. Section 251(c)(3) of the Telecommunications Act of 1996 placed a duty on incumbent local exchange carriers to provide unbundled network elements to requesting telecommunications carriers. It is difficult to find any ambiguity in this provision.

- 3. Do you believe unbundling access to broadband networks will have a chilling effect on further private investments in broadband infrastructure? Please explain your response.**

As an initial matter, I would note that the National Broadband Plan does not propose the kind of unbundling the question posits. That being said, I do not believe that unbundling access to broadband networks would have a chilling effect on further private investments in broadband infrastructure. I believe that the demand for broadband is great and growing, and that there can be many and diverse lucrative business models for broadband deployment.

- 4. Does the Commission eventually intend to require unbundled access to broadband networks? Please explain your response.**

I cannot speak for the membership of the Commission. Speaking as one Commissioner, I would be interested in a robust dialogue concerning such a requirement.

- 5. Chapter Five of the National Broadband Plan mentions Wireless Communications Services (WCS) band as a source of new spectrum. On February 16, 2010, I sent a letter to the Commission highlighting my concern that opening this spectrum for mobile broadband services may result in interference with satellite radio signals, which reflects a 1997 declaration by Commission engineers that this would likely be the case. Please indicate unequivocally (“yes” or “no”) whether there will be interference with satellite radio signals if WCS spectrum is opened for use by mobile broadband devices. Further, please describe what specific actions the Commission will take to ensure there is no interference, including the safeguards the Commission will require to stop any interference that may arise.**

The proceeding to establish rules on interference protection among Wireless Communications Service (WCS) devices, Satellite Digital Audio Radio Service (SDARS) receivers and aeronautical flight testing equipment has been pending for too long. While we clearly need to unleash the mobile broadband potential of the WCS spectrum, we must ensure that incumbent operators are not subject to any harmful interference. Testing to see what kinds of interference may or may not exist has been a challenging process, to say the least. I am heartened by the inclusion in the draft rules of protective guard bands of 2.5 MHz each, reduced out-of-band emissions and other technical safeguards already included in the draft rules to safeguard satellite radio subscribers and other users from interference. I am also pleased that the draft rules duly acknowledge the fact that satellite radio is the incumbent service—and that, should interference occur, the new WCS entrants would have to correct it. These draft rules have been out for public comment, and I look forward to reviewing the record to maximize the use of the people’s spectrum and to safeguard against interference.

- 6. Will the Commission provide advance notice of the WCS rules, publish them, and allow for public comment prior to their implementation?**

Yes, the Commission released a public notice seeking comment on the rules related to interference protection among WCS, SDARS (satellite radio) and aeronautical flight testing. Included in the public notice is the text of the draft rules. I look forward to reviewing the full record to ensure that the rules provide a sound approach to facilitating mobile broadband operations in the WCS spectrum, while ensuring protection against harmful interference to the existing operators.

- 7. As you may be aware, I am a long-time supporter of public broadcasting, or what the National Broadband Plan refers to as “public media.” As such, I appreciate the plan’s acknowledgment that public media play a vital and unique role in our democracy. On page 92, however, the plan call for “a trust fund for digital public media that is endowed by the revenues from a voluntary auction of spectrum licensed to public television,” which I believe is something that cannot be done with out an act of**

Congress. I would imagine our country's public television stations would be cautious about this approach. If no public television station volunteers for this proposed auction, will the Commission reallocate spectrum anyway? Please explain your response.

As explained in my response to Question 1, the public interest serves as my guide in decisions related to the allocation of the people's spectrum resource. I understand the call in the National Broadband Plan to examine the possibility of reallocation and auctioning of some of the broadcasting spectrum, and the importance of additional spectrum to expand competition and innovation in wireless broadband. That said, I believe that much work still needs to be done. First and foremost, I have encouraged a thorough examination of what spectrum is being used and for what purpose, to what extent it is being used, and whether any higher public interest use will be served by reallocation. When it comes to broadcast spectrum, I believe we need to understand whether an individual station is serving its public interest obligations before any decision is made about reallocation and auction of that spectrum.

- 8. The National Broadband Plan also notes that public media are at a crossroads with respect to content delivery. Though there is a plethora of digitally distributed content, our public media system is structured predominantly around broadcast-based communications. To implement the National Broadband Plan, will the Commission propose amendments to the Public Broadcasting Act? If so, please provide those amendments and detailed explanations of them, including why they are necessary.**

I am not aware of the Commission's plans to offer any recommendations to Congress regarding public media beyond what is already included in the National Broadband Plan.

- 9. What is the exact number of recommendations the National Broadband Plan makes to the Congress? Please provide a complete list of those recommendations. In addition, please provide a list of the items in the plan that require congressional action or additional authority from the Congress, including an explanation of such action and/or additional authority.**

Please see the response submitted by Chairman Genachowski for the requested lists and explanations.

Questions for the Record from the Honorable Anna Eshoo

1. AWS-3 Spectrum Deployment

The Commission and its staff have demonstrated a sense of urgency in drafting this Report. I'm convinced, based on the testimony presented here, that the Commission recognizes the need for speed. But I continue to have some concerns, especially when it comes to spurring competition with new and innovative uses of the spectrum. Too many entrenched interests seem to be able to stop new ideas from taking root through delaying tactics that keep spectrum concentrated in the hands of larger carriers.

The Commission has to work together in an expeditious fashion to deploy already available spectrum. If we're going to see that 100 megabits reach 100 million homes the FCC has to begin to complete rulemakings faster so that we see immediate action. I am disappointed that the Advanced Wireless Spectrum (3) was not recommended for immediate deployment – that's a proceeding that was teed up years ago. Businesses can't be expected to participate in a hackneyed process that leaves them wondering and losing money for years.

Also, I have heard that the Department of Defense's (DOD) 1755-1780 MHz spectrum band that the National Broadband Plan is considering pairing with AWS-3 is currently jam packed with vital systems including drones for air strikes in Afghanistan and Pakistan and border security here at home, and that the systems in that band cost over \$100 billion and cannot be relocated until 2030. Could you comment on this matter?

I have always supported putting the public spectrum resource to the best public interest use for the American people, and have encouraged expeditious resolution of the outstanding issues related to the AWS-3 spectrum. Commission staff has had discussions with the National Telecommunications and Information Administration, as the spectrum representative for Executive Branch agencies, to explore the possibility of making more spectrum available in the 1755-1850 MHz band. This exploration was undertaken to provide maximum options to the Commission for making the most effective use of the spectrum, including the possibility of globally harmonized paired spectrum. I look forward to hearing from the staff, as well as the Executive Branch, on whether such a possibility exists—and, if so, whether it should be pursued.

2. Since there is no evidence or data in the National Broadband Plan supporting this possible pairing, did anyone at the Commission contact DOD officials to get the real picture on reallocating DOD's spectrum during the preparation of the National Broadband Plan?

If so, please make available to me and my colleagues the data from the DoD or the Administration suggesting the possibility of reallocating federal spectrum to pair with the AWS-3 band.

Commission staff, in collaboration with NTIA staff, have been looking into whether there is a possibility of reallocating federal spectrum to pair with the AWS-3 band. I understand that they continue to look at and discuss this matter.

- 3. I want to know what you will do individually to move us forward. If you don't find paired spectrum by the October deadline outlined in the report, will you actually auction the spectrum and put it in use as soon as possible?**

I believe we need to move forward expeditiously to make the AWS-3 spectrum, in whatever form maximizes the public interest, available quickly. I will continue to work with my colleagues to prevent delay.

- 4. With this in mind, I did not see any immediate, specific recommended actions in the Plan that would have the FCC create new broadband competition through the use of spectrum. What specific actions will you be taking in the short term, say in the next 3 months, that will provide spectrum so we can help create new entrants to the broadband market?**

Competition serves a critical role in safeguarding the interests of American consumers in terms of price, service quality and innovation. I have long been critical of the increasing consolidation in the wireless market, and believe the Commission needs to quickly take steps to expand competitive opportunity and to ensure consumer protection. The Commission recently released a schedule to provide targets for implementation of many recommendations in the National Broadband Plan. As part of that, the Commission will soon resolve the long-outstanding issue of interference protection between Wireless Communications Service (WCS) broadband devices and satellite radio – to unleash the mobile broadband potential of the WCS spectrum while ensuring existing operators are not subject to harmful interference. This is the first of many actions that I hope will expand competitive pressure in the wireless market. The Commission will also soon address the state of competition in the U.S. wireless industry in the 14th Annual Wireless Competition Report. I will continue to push for the most robust and granular analysis possible, to help inform the agency's decision-making.

- 5. Next Generation 911**

I was pleased to see a specific reference to funding for Next Generation 911. As you know, I joined with my colleague, John Shimkus, the Co-Chair of the E911 Caucus, to offer bipartisan, bicameral legislation to renew grants for 9-1-1 call center technology, and to move that technology into the next developmental phase. Have you had the opportunity to review the legislation and could you give me your opinion about the need for H.R. 4829?

I have always appreciated your strong commitment to public safety, and welcome your proposed legislation. It mirrors, in many ways, the key aspects of the National Broadband Plan's vision for Next Generation 911. As recommended in the Plan, your legislation would reauthorize the 911 grant program, as well as the 911 Implementation Coordination Office. I particularly commend those provisions that would authorize grants for Enhanced 911 and NG 911 implementation, condition receipt of grants on use of 911 funds for their intended purposes, and address 911 caller location issues with respect to operators of multi-line telephone systems.

- 6. Special Access**

I was glad to see that the Plan includes several references to making sure that special

access rates are just and reasonable. As we all know, these circuits provide critical connections for wireless services – including backhaul for wireless providers to small businesses using ATM's, to the largest retail chains placing orders with their vendors. I have LONG advocated that the Commission look into the pricing and competition of special access services and I'm glad to see that it is a priority. Are you confident that you have the legal authority to move ahead?

Special Access is an issue requiring Commission attention and action. It has been pending here for many years, so I am pleased that the Commission now seems to be moving forward. I hope we will truly expedite whatever data-collection is deemed appropriate and move then toward some final resolution. Yes, I do believe we have adequate legal authority to undertake this consideration.

7. Affordability

The National Broadband Plan doesn't provide specifics on how to achieve bringing more broadband connectivity to low income and rural homes in this country, other than through use of the Universal Service Fund. Will the FCC work more closely with HUD to expand this needed technology?

I am pleased with the emphasis of the National Broadband Plan on working closely with all relevant government agencies in building broadband infrastructure out to the entire country and also to work with these agencies, and many other stakeholders, to encourage adoption of these technologies and services by all our citizens.

8. I'm concerned that low income homes will get hooked up, but the residents will be unable to maintain monthly payments. Once low income and rural households do acquire broadband technology, what can be done to assure that the monthly service charge is kept to a minimum so that the service may be maintained?

As you reference above, the National Broadband Plan does recommend, as I have advocated before, expanding the Lifeline Assistance to provide subsidies to low-income households to apply to monthly broadband service fees.

9. Competition Questions

The National Broadband Plan observes that there is not a coherent and effective framework governing the Commission's wholesale competition regulations, including wireless roaming policies. Indeed, the FCC's current wireless roaming rule expressly permits the nation's largest wireless carriers to discriminate or exclude large geographic areas altogether in providing wholesale roaming services to their competitors. As the Plan notes, such conduct undermines longstanding competition policy objectives by limiting the ability of smaller carriers to gain access to the necessary inputs to compete. How do you intend to address this important wholesale competition issue in the context of wireless roaming services?

I agree that the FCC's rule excluding wireless roaming in a requesting carrier's home market from roaming obligations discouraged competition, hampered innovation and investment, and harmed consumers. That is why I voted with my colleagues at our Open Meeting last month to remove the exclusion. I believe that technologically compatible carriers should

deal with each other in good faith and without discrimination when negotiating voice roaming. Our rules now clearly do that.

- 10. The National Broadband Plan acknowledges the importance of data roaming to entry and competition for mobile broadband services. But the FCC’s present voice roaming rule contains an “in-market” exclusion that expressly permits carriers to deny roaming service to their competitors’ customers in large portions of their licensed territories. This exclusion, if replicated in the data roaming context, would appear to severely undercut the Commission’s stated goal in the Plan of achieving “wide, seamless and competitive coverage.” How does the Commission intend to address this problem?**

In the recent decision wherein we eliminated the in-market exclusion for voice, the Commission also moved forward with a further examination of the critical issue of access to data roaming. As we all know, not many Americans buy a mobile phone these days only for the voice service. Consumers rely upon their mobile handsets to provide a dizzying array of data services, and the National Broadband Plan clearly demonstrates that consumer demand is only growing stronger. I would have preferred to go further in our recent decision to actually establish the data-roaming obligation, but I can support the proposed review of the wireless data market, providing it is accomplished in a timely and expeditious manner. Consumers want data now and we need to open this door to ensure wider, seamless and competitive coverage as quickly as we can.

- 11. Public Television – Broadcast Spectrum Issue**

As you know, public television stations are very different from commercial television stations with respect to their funding, their programming, their mission and the efficient manner in which they use spectrum to serve the public interest. Public television stations also have been confronting extraordinary fiscal challenges during the past 18 months. As the Commission looks ahead to rulemakings announced in the National Broadband Plan to reclaim 120 MHz of spectrum from broadcasters, can you give us assurances that public television stations will be protected from involuntary reallocations of spectrum?

I have often said that public broadcasting is the jewel of America’s media landscape. It so often appeals to the better angels of our nature and brings us programming responding to the ways the public airwaves should be utilized in order to serve the public interest. Public interest criteria always serve as my guide on decisions related to the allocation of the people’s spectrum, and this approach applies to both commercial and public broadcasting spectrum. Broadcasting is uniquely situated to serve—in a free-to-all, over-the-air format—the public interest by reflecting local communities and providing a platform for the diverse voices of this nation. I am pleased that public broadcasting has led the way in dedicating so much of its digital multi-cast capacity to the development of programming targeted to local community audiences and to our nation’s diversity.

I can understand the importance of additional spectrum to expand competition and innovation in wireless broadband as indicated in the National Broadband Plan and its suggestion that we examine the possibility of reallocating and auctioning some of the broadcasting spectrum, perhaps including that utilized by public broadcasting. That said, I believe that much work still needs to be done. First and foremost, Congress would have to authorize such an

approach. But before we get that far down the road, I have encouraged a thorough examination of what spectrum is actually being used, for what purpose, and whether any higher public interest use would conceivably be served by reallocation. When it comes to public broadcast spectrum, I believe we need to recognize the public interest service already performed by so many of these stations and factor this reality into our evaluation of the best public interest use of this spectrum *vis a vis* potential competing uses.

- 12. Would you elaborate on the sequencing of the rulemakings for reclaiming the broadcast spectrum and the creation of incentive auctions in the National Broadband Plan? As you know, only the Congress can authorize the creation of incentive spectrum auctions in which the contributors of spectrum could receive some of the proceeds. I am particularly interested in the proposal for the creation of a digital media trust fund to be created from the proceeds of incentive auctions of spectrum contributed by public television stations. If Congress does not authorize such incentive auctions, will these other rulemakings go forward in any event?**

The scope and timing of FCC proceedings are, as you know, generally guided by the Office of the Chairman. Recently that Office shared with us a chart of “Proposed 2010 Key Broadband Action Agenda Items,” and that information has been made public online here: <http://www.broadband.gov/plan/broadband-action-agenda-items.html>. The schedule beyond general time periods has not been announced.

Questions for the Record from the Honorable Mike Rogers

1. **A group of cable and satellite companies recently weighed in with Congress and the FCC complaining about the so-called retransmission consent process. Congress established retransmission consent as a free market negotiation between distributors and broadcasters. These distributors are asking for the government to meddle in these negotiations with broadcasters. It is concerning for me to hear appeals for the Federal government to intervene and affect potential progress at the negotiation table. Government intervention can make it much more difficult for private parties to determine the fair-market value of the property in question.**

- a. **Do you share my concern about the unintended consequences of the government even considering intervention in the marketplace?**

I do have concerns about the unintended consequences of both government action and inaction and have always urged that the Commission try to comprehend these consequences prior to acting on the various proceedings before us.

- b. **Do you believe you that the Communications Act grants the Commission the authority to intervene in these private negotiations?**

This is a question the Commission is currently asking as we solicit comments through the March 19, 2010 Public Notice issued by the FCC's Media Bureau (DA 10-474 in MB Docket No. 10-71). I would be reluctant to opine further on this question until the Commission has a complete record in front of it.

2. **As we all know, broadband is central to our economic recovery and we are grateful to have the benefit of a plan to guide us. While the Plan recognizes the strides we have made in deploying broadband to Americans, it also discusses areas that the Commission believes is impeding that deployment. In particular, the broadband plan discusses the special access market.**

- a. **Would you please discuss your vision on the way forward with the special access market?**

It is my understanding that, upon review of the special access data collected as part of the current proceeding, the Commission will determine whether it is appropriate to amend the pricing flexibility Order addressing special access rates. I support moving forward on all special access matters before the Commission—they have been pending for too many years. Furthermore, I support Chairman Genachowski's mission to ensure that the rulemaking process is fact-based and data-driven.

- b. **When discussing the wire line competition recommendations in Chapter 4 of the National Broadband plan, did you have in mind any specific type of customer?**

When considering any issue before the FCC on competition, my first concern is with the consumers, both residential and enterprise, to whom these services are being delivered and who in the final analysis pay for them.

- c. **Does Chapter 4 of the National Broadband plan impose any restrictions or limitations as to the class of customer for which these services would be made available?**

The National Broadband Plan provides recommendations for actions by the FCC, government agencies and the Congress. The document itself does not create law, adopt rules or implement any action.

The Honorable John D. Dingell

1. On page 92, the National Broadband Plan states, "If the FCC does not receive authorization to conduct incentive auctions, or if the incentive auctions do not yield a significant amount of spectrum, the FCC should pursue other mechanisms." Will these "other mechanisms" be completely voluntary, as the plan make patently clear will be the case for spectrum incentive auctions? Please explain your response.

I have called for any auction of broadcast spectrum to be completely voluntary. In addition, I have asked that the Commission explore our existing authority under Section 336 of the Communications Act to provide television broadcasters an incentive to lease their spectrum. Focusing on this statutorily permissible and voluntary mechanism for leasing parts of the airwaves may be an easier path to accelerating deployment of advanced wireless services, as opposed to the more coercive means referred to in the National Broadband Plan.

2. Does the Commission possess the authority, whether under the Communications Act of 1934, the Telecommunications Act of 1996, or otherwise, with which to require broadband network owners to unbundle access to their networks? Please explain your response, including relevant citations of statute if you believe the Commission does indeed possess the authority required to unbundle access to broadband networks.

It is my opinion that, on the whole, the Commission lacks the authority to require broadband network owners to unbundle access to their networks.

3. Do you believe unbundling access to broadband networks will have a chilling effect on further private investments in broadband infrastructure? Please explain your response.

Yes, if history is our guide. As part of the 2003 *Triennial Review Order (TRO)*, the Commission established a deregulatory policy regarding new broadband infrastructure. The Commission rules that this infrastructure should not be burdened by unbundling access requirements. The *TRO* was subject to much debate and litigation, which ultimately resulted in the deregulatory policy being upheld. In the meantime, the telecommunications companies continued to make significant investment in deploying fiber throughout our nation. In reality, the policy of not requiring newly laid broadband infrastructure to be subject to unbundling access rules encouraged this investment in these new networks.

It does not make sense to re-regulate an industry that has already invested billions of dollars in deploying broadband. Such a move would lead to years of rulemakings and litigation. And, as recent history teaches us, the imposition of unbundling rules on broadband infrastructure would discourage future investment in the network. This outcome would be directly contrary to the stated goals of the National Broadband Plan.

4. Does the Commission eventually intend to require unbundled access to broadband networks? Please explain your response.

Respectfully, I cannot predict the Commission's course regarding this issue, but I hope the Commission does not pursue such policies.

5. Chapter Five of the National Broadband Plan mentions Wireless Communications Services (WCS) band as a source of new spectrum. On February 16, 2010, I sent a letter to the Commission highlighting my concern that opening this spectrum for mobile broadband services may result in interference with satellite radio signals, which reflects a 1997 declaration by Commission engineers that this would likely be the case. Please indicate unequivocally ("yes" or "no") whether there will be interference with satellite radio signals if WCS spectrum is opened for use by broadband mobile devices. Further, please describe what specific actions the Commission will take to ensure there is no interference, including the safeguards the Commission will require to stop any interference that may arise.

I regret that I do not yet have the answer to this question because this is an issue that is currently under active discussion. I am pleased that the Commission will address this longstanding matter at our meeting on May 20. Be assured that as, part of my preparation for this meeting, I am fully engaged in analyzing and discussing these and other questions with our in-house engineers, my colleagues, and interested parties. I applaud Chairman Genachowski for taking up not only the technical rules about which you have inquired, but also the rules pertaining to license renewal and performance requirements, each of which has been pending for some time. I understand that we will handle these issues in a comprehensive manner and in short order. I am hopeful that the Commission's actions will bring needed certainty to these licensees.

6. Will the Commission provide advance notice of the WCS rules, publish them, and allow for public comment prior to their implementation?

Yes, on April 2, the Commission staff released a *Public Notice* seeking comment on proposed rules in this area. Those comments were due on April 16.

7. As you may be aware, I am a long-time supporter of public broadcasting, or what the National Broadband Plan refers to as "public media." As such, I appreciate the plan's acknowledgement that public media play a vital and unique role in our democracy. On page 92, however, the plan calls for "a trust fund for digital public media that is endowed by the revenues for a voluntary auction of spectrum licensed to public television," which I believe is something that cannot be done without an act of Congress. I would imagine our country's public television stations would be cautious

about this approach. If no public television station volunteers for this proposed auction, will the Commission reallocate spectrum anyway? Please explain your response.

Although I support efforts to explore opportunities for broadcasters to voluntarily lease or relinquish some or all of their spectrum, I do not favor coercive reallocation of broadcast licensees' spectrum (regardless of the licensee's status as noncommercial or commercial).

8. The National Broadband Plan also notes that public media are at a crossroads with respect to content delivery. Though there is a plethora of digitally distributed content, our public media system is structured predominantly around broadcast-based communications. To implement the National Broadband Plan, will the Commission propose amendments to the Public Broadcasting Act? If so, please provide those amendments and detailed explanations of them, including why they are necessary.

It is my understanding that the Commission does not have a proposal before it concerning recommendations for amending the Public Broadcasting Act. I respectfully defer to Chairman Genachowski with respect to future plans for any such initiative.

9. What is the exact number of recommendations the National Broadband Plan makes to the Congress? Please provide a list of those recommendations. In addition, please provide a complete list of the items in the plan that require congressional action or additional authority from the Congress, including an explanation of such action and/or additional authority.

I respectfully defer to Chairman Genachowski and the team of the Office of Broadband Initiative concerning the precise number and nature of the recommendations that they included in the National Broadband Plan.

The Honorable Anna G. Eshoo

1. AWS-3 Spectrum Deployment

The Commission and its staff have demonstrated a sense of urgency in drafting this Report. I'm convinced, based on the testimony presented here, that the Commission recognizes the need for speed. But I continue to have some concerns, especially when it comes to spurring competition with new and innovative uses of the spectrum. Too many entrenched interests seem to be able to stop new ideas from taking root through delaying tactics that keep spectrum concentrated in the hands of larger carriers.

The Commission has to work together in an expeditious fashion to deploy already available spectrum. If we're going to see that 100 megabits reach 100 million homes the FCC has to begin to complete rulemakings faster so that we see immediate action. I am disappointed that the Advanced Wireless Spectrum (3) was not recommended for immediate deployment – that's a proceeding that was teed up years ago. Businesses can't be expected to participate in a hackneyed process that leaves them wondering and losing money for years.

Also, I have heard that the Department of Defense's (DOD) 1755-1780 MHz spectrum band that the National Broadband Plan is considering pairing with AWS-3 is currently jam packed with vital systems including drones for air strikes in Afghanistan and Pakistan and border security here at home, and that the systems in that band cost over \$100 billion and cannot be relocated until 2030. Could you comment on this matter?

I regret that I do not have information on any use(s) of the spectrum located in the 1755-1780 MHz band by the Department of Defense. I respectfully defer to Chairman Genachowski on this matter.

2. Since there is no evidence or data in the National Broadband Plan supporting this possible pairing, did anyone at the Commission contact DOD officials to get the real picture on reallocating DOD's spectrum during the preparation of the National Broadband Plan?

Neither I nor my staff has been in touch with DOD officials regarding this matter. I respectfully defer to Chairman Genachowski on this matter.

If so, please make available to me and my colleagues the data from the DoD or the Administration suggesting the possibility of reallocating federal spectrum to pair with the AWS-3 band.

3. I want to know what you will do individually to move us forward. If you don't find paired spectrum by the October deadline outlined in the report, will you actually auction the spectrum and put it in use as soon as possible?

I respectfully defer to Chairman Genachowski on this matter.

4. With this in mind, I did not see any immediate, specific recommended actions in the Plan that would have the FCC create new broadband competition through the use of spectrum. What specific actions will you be taking in the short term, say in the next 3 months, that will provide spectrum so we can help create new entrants to the broadband market?

Here again, I respectfully defer to Chairman Genachowski.

5. Next Generation 911

I was pleased to see a specific reference to funding for Next Generation 911. As you know, I joined with my colleague, John Shimkus, the Co-Chair of the E911 Caucus, to offer bipartisan, bicameral legislation to renew grants for 9-1-1 call center technology, and to move that technology into the next developmental phase. Have you had the opportunity to review the legislation and could you give me your opinion about the need for H.R. 4829?

Yes, I have reviewed the Next Generation 9-1-1 Preservation Act of 2010. I commend you and Congressman Shimkus on your leadership in this area for co-sponsoring the E911 bill in the 108th Congress and for pursuing efforts to reauthorize the E911 grant program during this Congress. It is critical that public safety answering points have the proper tools to pinpoint the location of an emergency when someone calls 911, and your work on this legislation will help.

I notice that the reauthorization calls for the grants to be managed solely by the National Telecommunications and Information Administration (NTIA) rather than jointly by both NTIA and the National Highway Traffic Safety Administration. I commend your commonsense proposal because it would provide the public safety community with a streamlined process for grant applications and would avoid needless confusion that often arises when two or more agencies are involved in jointly managing a grant program.

Finally, upon enactment of the legislation, I am prepared to work with Chairman Genachowski and all of my colleagues to seek and review analyses regarding current and potential 911 location capabilities of multi-line telephone systems.

6. Special Access

I was glad to see that the Plan includes several references to making sure that special access rates are just and reasonable. As we all know, these circuits provide critical connections for wireless services – including backhaul for wireless providers to small businesses using ATM's, to the largest retail chains placing orders with their vendors. I have LONG advocated that the Commission look into the pricing and competition of special access services and I'm glad to see that it is a priority. Are you confident that you have the legal authority to move ahead?

Generally speaking, the Commission has exercised legal authority over special access pursuant to 47 U.S.C. §§ 201 and 202. One question that remains, however, is whether Commission action to re-regulate special access would be upheld in court absent a strong factual basis supporting such a decision.

With the rollout of more and more new communications technologies coming over the horizon, especially wireless technologies, the special access market will become even more important than it is today as the primary means for backhaul. Debates over policy, and the important subsequent decisions that often emerge, should be firmly grounded not only in law but in solid facts as well. Rendering rules on an unsure factual foundation is

akin to building a house on quicksand. As the General Accounting Office (GAO) and others have observed in the past, the Commission needs a more complete record of where special access and other comparable facilities are located before we can determine the appropriate level of regulation – or deregulation – for special access services.

For several years I have proposed that the Commission collect granular data on the state of the special access market from all providers to allow the Commission to move forward in this important area. I commend Chairman Genachowski for issuing a public notice last fall to seek comment on what analytical framework the Commission should use. Subsequently, the Commission has received input in response, which is currently under consideration in the Wireline Competition Bureau. I look forward to working with my colleagues on next steps as we review the record.

7. Affordability

The National Broadband Plan doesn't provide specifics on how to achieve bringing more broadband connectivity to low income and rural homes in this country, other than through use of the Universal Service Fund. Will the FCC work more closely with HUD to expand this needed technology?

I respectfully defer to Chairman Genachowski on any potential FCC inter-agency interaction.

8. I'm concerned that low income homes will get hooked up, but the residents will be unable to maintain monthly payments. Once low income and rural households do acquire broadband technology, what can be done to assure that the monthly service charge is kept to a minimum so that the service may be maintained?

Currently, Lifeline and Link Up universal service programs provide discounts for provision of telephone service to low-income consumers. The Commission recently sent a referral to the Federal-State Joint Board on Universal Service (Joint Board) seeking guidance on a number of issues regarding these programs. As part of that referral, the Commission sought guidance from the Joint Board regarding potentially expanding the current programs to support broadband. I look forward to hearing back from the Joint Board on this topic.

9. Competition Questions

The National Broadband Plan observes that there is not a coherent and effective framework governing the Commission's wholesale competition regulations, including wireless roaming policies. Indeed, the FCC's current wireless roaming rule expressly permits the nation's largest wireless carriers to discriminate or exclude large geographic areas altogether in providing wholesale roaming services to their competitors. As the Plan notes, such conduct undermines longstanding competition policy objectives by limiting the ability of smaller carriers to gain access to the

necessary inputs to compete. How do you intend to address this important wholesale competition issue in the context of wireless roaming services?

On April 21, I joined my colleagues in unanimous support for a modification of our roaming rules. I am pleased that this new rule balances a number of other competing interests such as promoting competition among multiple wireless carriers, encouraging new entry into the wireless market, and providing incentives for all carriers to invest and innovate.

In our August 2007 order on roaming, which I supported, the Commission ruled that automatic voice roaming is a common carrier service subject to Title II of the Act. At the same time, however, the Commission did not extend that decision to those carriers that were requesting voice roaming in geographic areas where they held spectrum licenses to provide wireless services. In making this exclusion for "home roaming," we reasoned that imposing an automatic roaming obligation in home markets might discourage build-out in these markets and, therefore, undermine facilities-based competition. Nevertheless, we recognized the importance of roaming and encouraged wireless carriers to continue to negotiate and reach automatic roaming contracts in those home markets.

In the intervening years, through numerous meetings with an array of interested parties, I learned that the great majority of carriers seeking regulatory relief in this area were successfully continuing to strike new roaming deals in the marketplace. On the other hand, I also learned that, in some instances, the home roaming exclusion unintentionally created confusion. The rule led some to conclude that a carrier effectively had no right to request roaming in any market where it held spectrum, and the would-be host carrier had no obligation to negotiate roaming arrangements for those markets. Carriers also complained that they had no rights under Title II to seek relief from the Commission for those disputes arising from roaming requests in home markets. As a result, for several years now, interested parties have sought to modify the home market exclusion in a number of cumbersome ways.

The good news is that the entire Commission agreed on a new course. Specifically, we recognized that the better, simpler path is to eliminate the home market exclusion completely. We also clarified that wireless carriers have statutory rights to complain to the Commission, even if they seek automatic voice roaming arrangements within a home market. By setting forth factors that the Commission would consider in the event of a complaint, we provided a framework that will provide both sides – the host and the requesting carriers – with greater incentives to succeed in negotiating roaming agreements based on reasonable terms and conditions. We allowed market forces to drive flexible deals among market players to give consumers the benefit of seamless, nationwide voice services.

10. The National Broadband Plan acknowledges the importance of data roaming to entry and competition for mobile broadband services. But the FCC's present voice roaming rule contains an "in-market" exclusion that expressly permits carriers to deny

roaming service to their competitors' customers in large portions of their licensed territories. This exclusion, if replicated in the data roaming context, would appear to severely undercut the Commission's stated goal in the Plan of achieving "wide, seamless and competitive coverage." How does the Commission intend to address this problem?

Also on April 21, I joined with my colleagues to support a Further Notice of Proposed Rulemaking seeking additional comment on data roaming. For some time now, I have requested that interested parties submit for our consideration a legal analysis setting forth the means to this end. The question is simple: Given that, in 2007, the Commission classified wireless broadband services as Title I without dissent, is there a legally sustainable path to mandate automatic data roaming? I have sought this analysis well before the D.C. Circuit's recent ruling in the *Comcast* case, which casts even more doubt on our jurisdiction in this area. I am hopeful that commenters will give us their analyses of how the Comcast decision affects our ability to regulate data roaming. I look forward to learning more.

In the meantime, I will continue to strongly encourage parties to continue to enter into roaming deals, including those that include data. As the Further Notice states, "in the two years since our 2007 Further Notice on data roaming, the wireless broadband industry has experienced a rapid evolution, with significant economic, technological, and regulatory developments, including developments in network and device technologies, spectrum use and availability, market participants, network deployments, and consumer demand and usage patterns." I highlight these positive developments to point out that they have occurred even without an FCC mandate for automatic data roaming.

11. Public Television – Broadcast Spectrum Issue

As you know, public television stations are very different from commercial television stations with respect to their funding, their programming, their mission and the efficient manner in which they use spectrum to serve the public interest. Public television stations also have been confronting extraordinary fiscal challenges during the past 18 months. As the Commission looks ahead to rulemakings announced in the National Broadband Plan to reclaim 120 MHz of spectrum from broadcasters, can you give us assurances that public television stations will be protected from involuntary reallocations of spectrum?

While I support efforts to explore opportunities for broadcasters to voluntarily lease or relinquish some or all of their spectrum, I do not favor coercive reallocation of broadcast licensees' spectrum (regardless of the licensee's status as either noncommercial or commercial).

12. Would you elaborate on the sequencing of the rulemakings for reclaiming the broadcast spectrum and the creation of incentive auctions in the National Broadband Plan? As you know, only the Congress can authorize the creation of incentive

spectrum auctions in which the contributors of spectrum could receive some of the proceeds. I am particularly interested in the proposal for the creation of a digital media trust fund to be created from the proceeds of incentive auctions of spectrum contributed by public television stations. If Congress does not authorize such incentive auctions, will these other rulemakings go forward in any event?

Chairman Genachowski sets the agenda for the Commission's work on rulemaking proceedings. I respectfully defer to him as to the sequencing of proposals concerning broadcast spectrum or implementation of any incentive auction authority that Congress may grant to us.

The Honorable Cliff Stearns

1. The FCC has not had much success in predicting market developments and setting technology mandates. Does the broadband plan's proposal to create retail gateway device mandates worry you?

I have raised a cautionary note about this proposal, which is the subject of a newly launched Commission inquiry dubbed the "All Video" ("AllVid") proceeding. My concern at this point is not that the idea necessarily lacks merit on policy grounds – at least if the development and deployment of such devices were voluntary – but because the government does not have a great track record in fashioning detailed technical mandates that actually operate as intended. Moreover, it appears that the marketplace already is moving rapidly, without any government push, toward the stated objective of the AllVid proceeding: the rapid delivery of Internet-based services through the TV screen.

The Honorable Mike Rogers

1. A group of cable and satellite companies recently weighed in with Congress and the FCC complaining about the so-called retransmission consent process. Congress established retransmission consent as a free market negotiation between distributors and broadcasters.

These distributors are asking for the government to meddle in these negotiations with broadcasters.

It is concerning for me to hear appeals for the Federal government to intervene and affect potential progress at the negotiation table. Government intervention can make it much more difficult for private parties to determine the fair-market value of the property in question.

- a. Do you share my concern about the unintended consequences of the government even considering intervention in the marketplace?

Yes.

- b. Do you believe you that the Communications Act grants the Commission the authority to intervene in these private negotiations?

The Communications Act grants the Commission only limited authority to intervene in disputes concerning retransmission consent. Section 325 of the Act expressly states that the Commission may take action only in cases in which either a broadcaster or a multichannel video provider fails to "negotiate in good faith." The statute goes on to state that requests for "different to terms and conditions" does not constitute bad faith when those requests "are based on competitive marketplace considerations." In my view, therefore, the Commission lacks legal authority to interject itself into most retransmission disputes, which typically center on price terms.

2. As we all know, broadband is central to our economic recovery and we are grateful to have the benefit of a plan to guide us. While the Plan recognizes the strides we have made in deploying broadband to Americans, it also discusses areas that the Commission believes is impeding that deployment. In particular, the broadband plan discusses the special access market.

- a. Would you please discuss your vision on the way forward with the special access market?

With the rollout of more and more new communications technologies coming over the horizon, especially in the wireless area, the special access market will become even more important than it is today as the primary means for backhaul.

Debates over policy, and the important subsequent decisions that often emerge, should be firmly grounded not only in law but in solid facts as well. Rendering rules on an unsure factual foundation is akin to building a house on quicksand. As the General Accounting Office (GAO) and others have observed in the past, the Commission needs a more complete record of where special access and other comparable facilities are located before we can determine the appropriate level of regulation – or deregulation – for special access services.

For several years I have proposed that the Commission collect granular data on the state of the special access market from all providers to allow the Commission to move forward in this important area. I commend Chairman Genachowski for issuing a public notice last fall to seek comment on what analytical framework the Commission should use. Subsequently, the Commission has received input in response, which is currently under consideration in the Wireline Competition Bureau. I look forward to working with my colleagues on next steps as we review the record.

- b. When discussing the wire line competition recommendations in Chapter 4 of the National Broadband plan, did you have in mind any specific type of customer?

The National Broadband Plan was not drafted by my office, and the Plan was not voted on by the Commissioners. Therefore, I respectfully defer to the Chairman and the Office of Broadband Initiative on this question.

- c. Does Chapter 4 of the National Broadband plan impose any restrictions or limitations as to the class of customer for which these services would be made available?

The National Broadband Plan was not drafted by my office, and the Plan was not voted on by the Commissioners. Therefore, I respectfully defer to the Chairman and the Office of Broadband Initiative on this question.

The Honorable Marsha Blackburn

1. Can you expand upon the notion that Net Neutrality rules could complicate efforts to enforce laws against illegal content online? I am concerned with language in the plan that recommends expanding Fair Use.

I agree with you that the proposed Net Neutrality rules may complicate efforts to reduce the distribution of illegal content online. While it is true that the proposed rules try to carve out protected content, the mere existence of such rules could have a chilling effect on providers as they try to work with the content community in the marketplace to find the most effective ways to thwart the illegal distribution of content.

Recommendations 15.7 and 15.9 of the National Broadband Plan collectively call upon Congress to amend the Copyright Act to provide "digital public media" and others a broader exemption under the "fair use" provision of the statute for various "noncommercial" uses of the works of others. The Plan notes that the Copyright Act was amended to promote greater noncommercial uses of copyrighted material in the pre-digital era, when the act of making and distributing unauthorized copies was considerably more difficult than it is today. I am concerned that the Plan's recommendations do not appear to address the new legal ramifications created by digital technology and the Internet. We live in an era when the ease of copying and distributing a creator's work electronically, even if initially done with good intent for valid purposes, can set off a chain of infringements that could undermine the marketplace value of a work. The Plan's recommendations for copyright law amendments seem to ignore the balance of interests engaged in fierce and ongoing policy debates about how the fair use provision should work in today's digital environment.

2. Would you agree that broadening this definition would make it easier for the work of artists to be used by others without fair (or any) compensation?

Because copyright is outside the expertise of the Commission, I am concerned that the National Broadband Plan has offered recommendations that may not be the result of a full balancing of the issues created by today's technologies, particularly the easy copying and dissemination of protected works for unauthorized uses. I respectfully defer to the expertise of Congress in striking the appropriate balance for copyright protection of works in electronic form.

3. The National Broadband Plan suggests that data broadband deployment should be collected at the census block level. With more than eight million census blocks in the U.S., reporting at this level would be exceptionally granular and burdensome to broadband providers. Do you think these proposals go too far? Wouldn't the cost of these obligations outweigh their benefit?

Until 2008, the Commission collected data from wireline providers on a zipcode-by-zipcode basis as part of a process commonly referred to as "Form 477" data collection. Starting with the June 2009 data collection, the Commission began collecting the number of broadband subscribers by Census Tract, broken down by speed tier and technology type. It is my understanding that the Chairman will circulate a Notice of Proposed Rulemaking in the fourth quarter of this year exploring whether the Commission should collect broadband availability data at the Census Block level. While I generally believe it is helpful for the Commission to have access to data on as granular basis as possible, I understand the concerns of some who think that requiring too much detailed information could force providers to expend resources on data collection to the detriment of deployment efforts. I intend to keep these concerns in mind when this debate continues later this year.



Mignon L. Clyburn
Commissioner

FEDERAL COMMUNICATIONS COMMISSION

May 5, 2010

The Honorable Henry A. Waxman
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Waxman:

Please find enclosed my written responses to questions from certain Members of the Committee regarding the hearing held March 25, 2010, before the Subcommittee on Communications, Technology, and the Internet entitled "Oversight of the Federal Communications Commission: The National Broadband Plan."

Please contact me at (202) 418-2100 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Mignon L. Clyburn".

Mignon L. Clyburn
Commissioner

Enclosure

**RESPONSES OF FCC COMMISSIONER MIGNON L. CLYBURN TO
QUESTIONS FOR THE RECORD FOLLOWING MARCH 25, 2010**

The Honorable John D. Dingell

1. On page 92, the National Broadband Plan states, "If the FCC does not receive authorization to conduct incentive auctions, or if the incentive auctions do not yield a significant amount of spectrum, the FCC should pursue other mechanisms." Will these "other mechanisms" be completely voluntary, as the plan makes patently clear will be the case for spectrum incentive auctions? Please explain your response.

Answer: My understanding is that the Plan only recommends incentive auctions that are completely voluntary. As I read it, there is nothing in the Plan that suggests that such auctions would be mandatory. At this point I am unaware of any "other mechanisms," as I believe the Plan was written with the full confidence that voluntary auctions would be successful.

2. Does the Commission possess the authority, whether under the Communications Act of 1934, the Telecommunications Act of 1996, or otherwise, with which to require broadband network owners to unbundle access to their networks? Please explain your response, including relevant citations of statute if you believe the Commission does indeed possess the authority required to unbundle access to broadband networks.

Answer: I understand that the term "unbundle" may have different meanings for different people. There are several provisions in the Communications Act of 1934, as amended, that specifically address unbundling of networks. First, Section 251(c)(3) requires incumbent local exchange carriers to provide nondiscriminatory access to network elements on an unbundled basis, at any technically feasible point at just and reasonable rates, terms, and conditions. In addition, Section 271(c)(2)(B) provides further duties for Bell Operating Companies to unbundle their network elements on a nondiscriminatory basis.

Section 10 of the Communications Act allows the Commission to forbear from certain Title II regulations for a telecommunications carrier or class of carriers. Section 10(a) requires that the Commission grant forbearance where it determines that enforcement of the regulation is unnecessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; enforcement is unnecessary to protect consumers; and forbearance is consistent with the public interest, in that it "will promote competitive market conditions" and "enhance competition among providers of telecommunications services." The Commission has forborne from certain Title II regulations for certain network elements used to provide broadband services pursuant to Section 10 of the Communications Act and Section 706 of the Telecommunications Act of 1996, which is now codified at 47 U.S.C. § 1302.

3. Do you believe unbundling access to broadband networks will have a chilling effect on further private investments in broadband infrastructure? Please explain your response.

Answer: As stated at the beginning of Chapter 4 of the National Broadband Plan, broadband has played a significant role in driving the creation of a wide variety of products and services in recent years. Moreover, that Chapter states that competitive forces are an essential key to driving investment and innovation in the broadband ecosystem and are crucial for promoting consumer welfare. However, the Plan notes that the Commission currently lacks the detailed information it needs to examine fully the competitive state of the broadband ecosystem. As such, the Plan recommends that the Commission collect “more detailed and accurate data on actual availability, penetration, prices, churn and bundles offered by broadband service providers to consumers and businesses, and should publish analyses of these data.”

The Plan also observes that various inputs from incumbents are used by competitors to provide broadband service, and it recommends that the Commission comprehensively review its wholesale competition regulations, in addition to its ongoing review of recent petitions concerning certain inputs purchased from incumbents that are used by competitors.

This data is essential for us to understand whether there is sufficient competition in the market on an ongoing basis and whether or not that competition is producing the optimal innovation and investment in networks. We must also be mindful that, at the end of the day, we must do what is best for American consumers. I will consider all of these elements as we move forward.

4. Does the Commission eventually intend to require unbundled access to broadband networks? Please explain your response.

Answer: Please see my responses to questions 3 and 4 above.

5. Chapter Five of the National Broadband Plan mentions Wireless Communications Services (WCS) band as a source of new spectrum. On February 16, 2010, I sent a letter to the Commission highlighting my concern that opening this spectrum for mobile broadband services may result in interference with satellite radio signals, which reflects a 1997 declaration by Commission engineers that this would likely be the case. Please indicate unequivocally ("yes" or "no") whether there will be interference with satellite radio signals if WCS spectrum is opened for use by mobile broadband devices. Further, please describe what specific actions the Commission will take to ensure there is no interference, including the safeguards the Commission will require to stop any interference that may arise.

Answer: The FCC's Office of Engineering Technology has informed me that, with the adoption of appropriate technical standards, the risk of interference to Satellite Digital Audio Radio Service (SDARS) from WCS mobile operations is negligible and that the Commission can adopt standards that are effective in preventing harmful interference.

The Commission also plans to adopt procedures that will help identify any potential interference before it occurs and promptly correct any interference that may occur. The FCC staff issued a public notice on April 2, 2010, inviting comment on the specific draft rules, including both the technical standards and interference resolution mechanisms. Notably, the proposed rules include a requirement that "WCS licensees must select base station sites and frequencies, to the extent practicable, to minimize the possibility of harmful interference to operations in the SDARS 2320-2345 MHz band." We anticipate that we will receive comments proposing further refinements to the proposals and we will make adjustments as may be appropriate before adopting the final rules so that we address our nation's spectrum challenges while guarding against interference with existing services such as SDARS.

6. Will the Commission provide advance notice of the WCS rules, publish them, and allow for public comment prior to their implementation?

Answer: On April 2, 2010, Commission staff issued a public notice inviting comment on draft rules for the WCS and SDARS. In addition, on March 2, 2010, Commission staff met jointly with the WCS Coalition and Sirius-XM and provided considerable details on the rules the staff contemplated recommending to the Commission. Both parties provided *ex parte* responses that resulted in some modifications as reflected in the rules attached to the Public Notice. This proceeding has been ongoing for many years and there is a voluminous record that includes proposals from all of the interested parties. Our goal is to adopt rules in the very near future so that we address our nation's spectrum challenges while guarding against interference with existing services such as SDARS.

7. As you may be aware, I am a long-time supporter of public broadcasting, or what the National Broadband Plan refers to as "public media." As such, I appreciate the plan's acknowledgement that public media play a vital and unique role in our democracy. On page 92, however, the plan calls for "a trust fund for digital public media that is endowed by the revenues from a voluntary auction of spectrum licensed to public television," which I believe is something that cannot be done without an act of Congress. I would imagine our country's public television stations would be cautious about this approach. If no public television station volunteers for this proposed auction, will the Commission reallocate spectrum anyway? Please explain your response.

Answer: I, too, am a strong supporter of public media. I am not aware of any intention to require the reallocation of spectrum currently dedicated to public media. I would not support such a blunt instrument at this time.

8. The National Broadband Plan also notes that public media are at a crossroads with respect to content delivery. Though there is a plethora of digitally distributed content, our public media system is structured predominantly around broadcast-based communications. To implement the National Broadband Plan, will the Commission propose amendments to the Public Broadcasting Act? If so, please provide those amendments and detailed explanations of them, including why they are necessary.

Answer: Through the Commission's Future of Media project, public media will play an important role in our overall analysis of the news and information marketplace. Indeed, the Commission recently held a very productive workshop focused primarily on public media. Public media clearly plays an integral role in the way communities and the nation as a whole receives news and information, and I hope the Commission continues to encourage the viability and expansion of such outlets going forward.

9. What is the exact number of recommendations the National Broadband Plan makes to the Congress? Please provide a complete list of those recommendations. In addition, please provide a complete list of the items in the plan that require congressional action or additional authority from the Congress, including an explanation of such action and/or additional authority.

Answer: The Plan does not tally the exact number of recommendations nor have we been provided a complete and separate list of those recommendations outside of the Plan itself. My understanding is that the Chairman's office could produce the number and list for your office.

The Honorable Anna G. Eshoo

1. The Commission and its staff have demonstrated a sense of urgency in drafting this Report. I'm convinced, based on the testimony presented here, that the Commission recognizes the need for speed. But I continue to have some concerns, especially when it comes to spurring competition with new and innovative uses of the spectrum. Too many entrenched interests seem to be able to stop new ideas from taking root through delaying tactics that keep spectrum concentrated in the hands of larger carriers.

The Commission has to work together in an expeditious fashion to deploy already available spectrum. If we're going to see that 100 megabits reach 100 million homes the FCC has to begin to complete rulemakings faster so that we see immediate action. I am disappointed that the Advanced Wireless Spectrum (3) was not recommended for immediate deployment – that's a proceeding that was teed up years ago. Businesses can't be expected to participate in a hackneyed process that leaves them wondering and losing money for years.

Also, I have heard that the Department of Defense's (DOD) 1755-1780 MHz spectrum band that the National Broadband Plan is considering pairing with AWS-3 is currently jam packed with vital systems including drones for air strikes in Afghanistan and Pakistan and border security here at home, and that the systems in that band cost over \$100 billion and cannot be relocated until 2030. Could you comment on this matter?

Answer: My understanding is that FCC staff members met with staff members of the NTIA. Based on those preliminary discussions, the Chairman's office determined that it was worth pursuing the possibility of relocating some federal agency communications services from the 1755-1780 MHz band. The National Broadband Plan recommends a reasonable deadline for continuing discussions to pursue that possibility. The Plan also makes clear, however, that, if there is not a strong possibility of reallocation of federal spectrum, the FCC should proceed promptly to adopt final rules in 2010 and auction the AWS-3 spectrum on a stand-alone basis in 2011.

2. **Since there is no evidence or data in the National Broadband Plan supporting this possible pairing, did anyone at the Commission contact DOD officials to get the real picture on reallocating DOD's spectrum during the preparation of the National Broadband Plan? If so, please make available to me and my colleagues the data from the DOD or the Administration suggesting the possibility of reallocating federal spectrum to pair with the AWS-3 band.**

Answer: I was not privy to any such discussions with DOD. My understanding is that interagency discussions did take place as part of the Plan's preparation. I was pleased to see that a reasonable deadline was placed on any discussion of this sort so that we can move forward in a sensible manner should no pairing take place.

3. I want to know what you will do individually to move us forward. If you don't find paired spectrum by the October deadline outlined in the report, will you actually auction the spectrum and put it in use as soon as possible?

Answer: I share the view expressed in the Plan that if we do not find paired spectrum by the deadline, the spectrum should be auctioned and put to its highest and best use as soon as possible.

4. With this in mind, I did not see any immediate, specific recommended actions in the Plan that would have the FCC create new broadband competition through the use of spectrum. What specific actions will you be taking in the short term, say in the next 3 months, that will provide spectrum so we can help create new entrants to the broadband market?

Answer: The Plan recommends a number of relevant actions that the Chairman has indicated he will pursue in the near term. For example, at the Commission's May 20 agenda meeting, we will vote on whether to adopt an Order that would make available an additional 25 megahertz of spectrum for mobile broadband service in much of the United States. The Commission is also aiming to adopt in short order a Notice of Proposed Rulemaking that would propose changes to the rules for mobile satellite services (MSS), such as gating criteria before deployment of Ancillary Terrestrial Component services, that would enable MSS licensees to offer consumers additional choices for mobile broadband services.

5. I was pleased to see a specific reference to funding for Next Generation 911. As you know, I joined with my colleague, John Shimkus, the Co-Chair of the E911 Caucus, to offer bipartisan, bicameral legislation to renew grants for 9-1-1 call center technology, and to move that technology into the next developmental phase. Have you had the opportunity to review the legislation and could you give me your opinion about the need for H.R. 4829?

Answer: I support the goals of H.R. 4829. Consumers have every right to expect to be able to communicate with public safety agencies using the full range of applications that they use with others. I support statutory and regulatory measures that will add broadband capabilities such as texting, photo, video, email, location to existing 9-1-1 functionalities and provide more location information to PSAPs.

6. I was glad to see that the Plan includes several references to making sure that special access rates are just and reasonable. As we all know, these circuits provide critical connections for wireless services – including backhaul for wireless providers to small businesses using ATM’s, to the largest retail chains placing orders with their vendors. I have LONG advocated that the Commission look into the pricing and competition of special access services and I’m glad to see that it is a priority. Are you confident that you have the legal authority to move ahead?

Answer: As stated in the National Broadband Plan, special access circuits are typically sold by incumbent local exchange carriers to businesses and competitive providers to connect customer locations and networks, and they “play a significant role in the availability and pricing of broadband service.” National Broadband Plan at 48. Pursuant to the Commission’s authority under Sections 201 through 205 of the Communications Act, the FCC has an obligation to ensure that rates charged by telecommunications carriers are just and reasonable, and that they are nondiscriminatory. In addition to Sections 201 through 205, the Commission previously has cited Sections 1, 2, 4(i), 4(j), and 303 as its legal authority for implementing special access regulations. *See, e.g., Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶ 136 (2005) *citing* 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, and 303. As you note, the Commission currently is considering the appropriate analytical framework for its review of special access offerings, and the Plan recommends that the Commission ensure that special access rates, terms, and conditions are just and reasonable given their significant role in the provision of broadband service.

7. The National Broadband Plan doesn’t provide specifics on how to achieve bringing more broadband connectivity to low income and rural homes in this country, other than through use of the Universal Service Fund. Will the FCC work more closely with HUD to expand this needed technology?

Answer: The Plan acknowledges the importance of interagency work, including partnering with HUD on key initiatives. For example, the Plan recommends that NTIA should explore the potential for public-private partnerships to improve broadband adoption by working with other federal agencies, including HUD, that already serve communities with low adoption rates. The Plan states that a public-private partnership program specifically targeting people living in HUD-subsidized housing could reach more than nine million low-income people. The Plan also recommends that the federal government should develop regional and community broadband benchmarks within economic development planning and programs, including “HUD and USDA’s Empowerment Zone, Enterprise Community and Renewal Community programs [that] encourage the revitalization of impoverished urban and rural communities through economic, physical and social investments.” The Plan further provides that these programs should include a community technology assessment that measures broadband availability, prices, and rate of adoption and that HUD and USDA should require

community plans to establish goals for increasing broadband adoption and use in the communities they serve.

8. I'm concerned that low income homes will get hooked up, but the residents will be unable to maintain monthly payments. Once low income and rural households do acquire broadband technology, what can be done to assure that the monthly service charge is kept to a minimum so that the service may be maintained?

Answer: I understand this concern, and it is one that I share. The Plan discusses two specific ways to address this issue. First, it recommends that the Commission should expand Lifeline Assistance (Lifeline) and Link-Up America (Link-Up) to make broadband more affordable for low-income households. It specifically provides that the FCC and states should require eligible telecommunications carriers (ETCs) to permit Lifeline customers to apply Lifeline and Link-Up discounts to any service or package that includes basic voice service. Thus, Lifeline consumers could apply their monthly discount to bundled offerings of both broadband and voice services, helping to make broadband more affordable for low income consumers. The Plan also recommends that the consumer should be able to select any broadband service provider that meets minimum criteria no matter the technology offered in order to "maximize consumer choice and stimulate innovation in serving low-income users." Moreover, the Plan recommends that the Commission begin pilot programs to determine which parameters most effectively increase adoption among low-income users. Second, the Plan recommends that the Commission consider free or very low-cost wireless broadband as a means to address the affordability barrier to adoption. This could be achieved by the Commission licensing spectrum through an auction, conditioned on the offering of a free or very low-cost broadband service which would provide a basic package of broadband applications.

9. The National Broadband Plan observes that there is not a coherent and effective framework governing the Commission's wholesale competition regulations, including wireless roaming policies. Indeed, the FCC's current wireless roaming rule expressly permits the nation's largest wireless carriers to discriminate or exclude large geographic areas altogether in providing wholesale roaming services to their competitors. As the Plan notes, such conduct undermines longstanding competition policy objectives by limiting the ability of smaller carriers to gain access to the necessary inputs to compete. How do you intend to address this important wholesale competition issue in the context of wireless roaming services?

Answer: On April 16, 2010, the Commissioner adopted a Roaming Order on Reconsideration and Second Further Notice of Proposed Rulemaking. The Second Further Notice of Proposed Rulemaking seeks comment on a number of issues related to extending automatic roaming obligations to certain mobile data services, including mobile broadband Internet access, that are provided without interconnection to the public switched telephone network. This proceeding is intended to address the Plan's recommendation that the Commission should develop roaming policies that are consistent irrespective of the mobile services being offered to consumers.

10. The National Broadband Plan acknowledges the importance of data roaming to entry and competition for mobile broadband services. But the FCC's present voice roaming rule contains an "in-market" exclusion that expressly permits carriers to deny roaming service to their competitors' customers in large portions of their licensed territories. This exclusion, if replicated in the data roaming context, would appear to severely undercut the Commission's stated goal in the Plan of achieving "wide, seamless and competitive coverage." How does the Commission intend to address this problem?

Answer: The Roaming Order on Reconsideration that the Commissioner adopted in April repealed the home market exclusion rule that the Commission had adopted in 2007. By repealing this home market exclusion, the Commission safeguards consumers' expectations of seamless coverage irrespective of whether they are calling from their carrier's home market or from the home market of another. Since the Commission's goals in the Second Further Notice of Proposed Rulemaking on data roaming include adopting consistent roaming policies, I expect that, if the Commission does impose roaming obligations on additional data services, such as mobile broadband Internet access services, it would not adopt a home market exception to roaming for such services.

11. As you know, public television stations are very different from commercial television stations with respect to their funding, their programming, their mission and the efficient manner in which they use spectrum to serve the public interest. Public television stations also have been confronting extraordinary fiscal challenges during the past 18 months. As the Commission looks ahead to rulemakings announced in the National Broadband Plan to reclaim 120 MHz of spectrum from broadcasters, can you give us assurances that public television stations will be protected from involuntary reallocations of spectrum?

Answer: I have no intention to subject public television stations to involuntary reallocations of spectrum. Public television plays an important role in our communities and is a key contributor to our mission to ensure that the public interest is served.

12. Would you elaborate on the sequencing of the rulemakings for reclaiming the broadcast spectrum and the creation of incentive auctions in the National Broadband Plan? As you know, only the Congress can authorize the creation of incentive spectrum auctions in which the contributors of spectrum could receive some of the proceeds. I am particularly interested in the proposal for the creation of a digital media trust fund to be created from the proceeds of incentive auctions of spectrum contributed by public television stations. If Congress does not authorize such incentive auctions, will these other rulemakings go forward in any event?

Answer: The Chairman has released a schedule of the Commission's projected proceedings for the remainder of 2010. As part of that schedule, the Chairman intends to produce a "Broadcast TV Spectrum Innovation NPRM" in the third quarter of this year. It is not yet clear exactly what will be included in this proposed rulemaking, but the Plan makes clear that Congress has an essential role to play in authorizing the Plan's proposed

incentive spectrum auctions. It is thus difficult to imagine that the Commission could adopt any rules to conduct such auctions without appropriate Congressional authority.

The Honorable Mike Rogers

1. A group of cable and satellite companies recently weighed in with Congress and the FCC complaining about the so-called retransmission consent process. Congress established retransmission consent as a free market negotiation between distributors and broadcasters.

These distributors are asking for the government to meddle in these negotiations with broadcasters.

It is concerning for me to hear appeals for the Federal government to intervene and affect potential progress at the negotiation table. Government intervention can make it much more difficult for private parties to determine the fair-market value of the property in question.

a. Do you share my concern about the unintended consequences of the government even considering intervention in the marketplace?

Answer: The Commission must always consider any proposed regulatory intervention very carefully. Any time we review a proposed action, we must weigh the benefits of such intervention against all possible costs. This is something we are called upon to do each and every day.

The case of retransmission consent is certainly no different. There is a complex regime that both Congress and the Commission have developed that governs the actions of broadcasters and MVPDs. There are many moving pieces that have created the marketplace in which such negotiations occur. The Commission will be mindful of all of these elements as it receives comments on the petition it has recently put out for public comment.

b. Do you believe you that the Communications Act grants the Commission the authority to intervene in these private negotiations?

Answer: I am looking forward to reviewing the comments we receive as a result of the retransmission consent review petition we recently put out for comment. The petition raises important legal questions, and I look forward to reading the comments and consulting with our Office of General Counsel to determine the range of authority granted by Congress to the Commission under the Act.

2. As we all know, broadband is central to our economic recovery and we are grateful to have the benefit of a plan to guide us. While the Plan recognizes the strides we have made in deploying broadband to Americans, it also discusses areas that the Commission believes is impeding that deployment. In particular, the broadband plan discusses the special access market.

- a. Would you please discuss your vision on the way forward with the special access market?**

Answer: The Commission currently is considering the appropriate analytical framework for its review of special access offerings. The Plan recommends that the Commission ensure that special access rates, terms, and conditions are just and reasonable given their significant role in the provision of broadband service. Commission staff is reviewing the record, and I look forward to hearing its recommendations in this proceeding.

- b. When discussing the wire line competition recommendations in Chapter 4 of the National Broadband plan, did you have in mind any specific type of customer?**

Answer: My understanding of Chapter 4 of the National Broadband Plan prepared by the staff is that competition in the broadband markets for both residential broadband services and enterprise broadband services are discussed, and the Plan provides recommendations to encourage competition in both areas.

- c. Does Chapter 4 of the National Broadband plan impose any restrictions or limitations as to the class of customer for which these services would be made available?**

Answer: Chapter 4 of the Plan states that special access circuits are used by both enterprises and competitive broadband providers “to connect customer locations and networks . . .” It is not my understanding that it proposes a restriction or limitation on the type of customer that can purchase special access circuits.

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Responses to
QUESTIONS FOR THE RECORD
From
COMMISSIONER MEREDITH A. BAKER
FEDERAL COMMUNICATIONS COMMISSION

May 5, 2010

The Honorable John Dingell

1. **On Page 92, the National Broadband Plan States, "If the FCC does not receive authorization to conduct incentive auctions, or if the incentive auctions do not yield a significant amount of spectrum, the FCC should pursue other mechanisms." Will these "other mechanisms" be completely voluntary, as the plan makes patently clear will be the case for spectrum incentive auctions? Please explain your response.**

I believe that any reallocation of broadcast spectrum, through incentive auctions or otherwise, must be voluntary. It can and should be a win-win situation for broadcasters, mobile broadband providers, and consumers. However, with respect to alternatives to incentive auctions, I would have to defer to the Chairman as to different approaches, and would hope that any alternatives would also be voluntary.

2. **Does the Commission possess the authority, whether under the Communications Act of 1934, the Telecommunications Act of 1996, or otherwise, with which to require broadband network owners to unbundle access to their networks? Please explain your response, including relevant citations of statute if you believe the Commission does indeed possess the authority required to unbundle access to broadband networks.**

No. Although section 251(c)(3) of the Communications Act of 1934, as amended (Act), gives the Commission limited authority to require unbundled access for provision of telecommunications services under certain circumstances, broadband Internet access services have been classified by the Commission as information services and not telecommunications services, and therefore, could not be subject to unbundling under the statute.

3. **Do you believe unbundling access to broadband networks will have a chilling effect on further private investments in broadband infrastructure? Please explain your response.**

Yes. I believe that we must avoid re-opening settled regulatory battles or changing our successful market-based regulatory framework mid-course in a manner that could chill the private investment we so desperately need in our broadband infrastructure. Specifically, we must reject any proposed regulation that seems to selectively forget our long and checkered history with government-manufactured competition.

4. **Does the Commission eventually intend to require unbundled access to broadband networks? Please explain your response.**

While I cannot predict what the Commission might do in the future, I would actively oppose efforts to impose an unbundling regime on broadband Internet access service providers—both because I believe we lack statutory authority, and it would have severe consequences for investment in broadband and innovation in the Internet to the detriment of consumers.

5. **Chapter Five of the National Broadband Plan mentions Wireless Communications Services (WCS) band as a source of new spectrum. On February 16, 2010, I sent a letter to the Commission highlighting my concern that opening this spectrum for mobile broadband services may result in interference with satellite radio signals, which reflects a 1997 declaration by Commission engineers that this would likely be the case. Please indicate unequivocally ("yes" or "no") whether there will be interference with satellite radio signals if WCS spectrum is opened for use by mobile broadband devices. Further, please describe what specific actions the Commission will take to ensure there is no interference, including the safeguards the Commission will require to stop any interference that may arise.**

I would defer to the Chairman's technical advisers in the Office of Engineering and Technology (OET) who advise that the answer is "No."

6. **Will the Commission provide advance notice of the WCS rules, publish them, and allow for public comment prior to their implementation?**

The FCC staff issued a public notice on April 2, 2010, inviting comment on the draft WCS rules, including both the technical standards and interference resolution mechanisms.

7. **As you may be aware, I am along-time supporter of public broadcasting, or what the National Broadband Plan refers to as "public media." As such, I appreciate the plan's acknowledgement that public media plays a vital and unique role in our democracy. On page 92, however, the plan calls for "a trust fund for digital public media that is endowed by the revenues from a voluntary auction of spectrum licensed to public television," which I believe is something that cannot be done without an act of Congress. I would imagine our country's public television stations would be cautious about this approach. If no public television station volunteers for this proposed auction, will the Commission reallocate spectrum anyway? Please explain your response.**

I agree that a trust fund for proceeds of the auction for noncommercial stations would require congressional action. I want to work collaboratively with the broadcast industry and other stakeholders to ensure that the broadcast spectrum licensing rules provide sufficient flexibility to leverage new digital technologies. We need to ensure that those rules account for the unique characteristics of both public broadcasting and commercial broadcasters going forward.

- 8. The National Broadband Plan also notes that public media are at a crossroads with respect to content delivery. Though there is a plethora of digitally distributed content, our public media system is structured predominantly around broadcast-based communications. To implement the National Broadband Plan, will the Commission propose amendments to the Public Broadcasting Act? If so, please provide those amendments and detailed explanations of them, including why they are necessary?**

Similar to the challenges faced by many industries today, Public Broadcasting is going through the transition from an analog to a digital world. Public Broadcasting in Michigan is taking promising steps to leverage these new technologies and platforms. Thanks to the DTV transition, Detroit Public TV (WTVS) and other PBS television stations in Michigan are providing high definition content and multiple multicast channels of additional content. Both public television and radio have also invested heavily in online presences with web-based content and podcasts. Michigan Radio has similarly invested in an iPhone application to provide broader access to its Michigan-based content. Nationally, the Corporation of Public Broadcasting (CPB) has recently announced funding for the National Public Radio (NPR)-administered Public Media Platform to help facilitate access to multimedia public broadcasting content to support efforts of Michigan Radio and other news outlets. While I defer to the Chairman as to whether or not specific proposed amendments will be forthcoming to facilitate these ongoing digital efforts, I will continue to work in close coordination with the CPB, Public Broadcasting Service (PBS), and NPR to ensure that valuable public broadcasting content continues to reach viewers on multiple platforms.

- 9. What is the exact number of recommendations the National Broadband Plan makes to the Congress? Please provide a complete list of those recommendations. In addition, please provide a complete list of the items in the plan that require congressional action or additional authority from the Congress, including an explanation of such action and/or additional authority.**

Of the 207 total recommendations in the National Broadband Plan, 51 are directed to the Congress. I defer to the Chairman and his team for a full catalogue of those recommendations. As we move forward with connecting the last five percent of U.S. households to terrestrial broadband services and encouraging greater broadband adoption in the third of households that choose not to subscribe to broadband today, the Commission will need to work closely with Congress and affected stakeholders to deliver successfully on the promise of affordable and universally available broadband. I look forward to working with you and your staff on the challenges ahead.

The Honorable Anna G. Eshoo**1. AWS-3 Spectrum Deployment**

The Commission and its staff have demonstrated a sense of urgency in drafting this Report. I'm convinced, based on the testimony presented here, that the Commission recognizes the need for speed. But I continue to have some concerns, especially when it comes to spurring competition with new and innovative uses of the spectrum.

Too many entrenched interests seem to be able to stop new ideas from taking root through delaying tactics that keep spectrum concentrated in the hands of larger carriers.

The Commission has to work together in an expeditious fashion to deploy already available spectrum. If we're going to see that 100 megabits reach 100 million homes the FCC has to begin to complete rulemakings faster so that we see immediate action. I am disappointed that the Advanced Wireless Spectrum (3) was not recommended for immediate deployment – that's a proceeding that was teed up years ago. Businesses can't be expected to participate in a hackneyed process that leaves them wondering and losing money for years.

Also, I have heard that the Department of Defense's (DOD) 1755-1780 MHz spectrum band that the National Broadband Plan is considering pairing with AWS-3 is currently jam packed with vital systems including drones for air strikes in Afghanistan and Pakistan and border security here at home, and that the systems in that band cost over \$100 billion and cannot be relocated until 2030. Could you comment on this matter?

I agree we need to provide businesses with clear direction and timely decisions on all agency matters, particularly spectrum availability. We must also ensure our short-term and long-term spectrum policies promote the most efficient use of spectrum for the betterment of U.S. consumers. I, therefore, support the Chairman's balanced approach of conducting a thorough review of available spectrum to pair with the AWS-3 spectrum with a corresponding clear deadline for final Commission decision.

2. Since there is no evidence or data in the National Broadband Plan supporting this possible pairing, did anyone at the Commission contact DOD officials to get the real picture on reallocating DOD's spectrum during the preparation of the National Broadband Plan?

If so, please make available to me and my colleagues the data from the DOD or the Administration suggesting the possibility of reallocating federal spectrum to pair with the AWS-3 band.

I defer to the Chairman on particular contacts with DOD or other administration officials on the potential availability of spectrum to pair with the AWS-3 spectrum.

3. I want to know what you will do individually to move us forward. If you don't find paired spectrum by the October deadline outlined in the report, will you actually auction the spectrum and put it in use as soon as possible?

I commit to working with the Chairman and the other Commissioners on evaluating the possibility of pairing federal spectrum with the AWS-3 band. I also pledge to work towards licensing and auction rules for the AWS-3 band that promotes the flexible and dynamic use of that spectrum, and will support efforts to schedule the auction as expeditiously as possible.

4. With this in mind, I did not see any immediate, specific recommended actions in the Plan that would have the FCC create new broadband competition through the use of spectrum. What specific actions will you be taking in the short term, say in the next 3 months, that will provide spectrum so we can help create new entrants to the broadband market?

I agree that mobile broadband services, particularly next generation 4G services, provide a viable competitive broadband option for consumers and can serve as a broadband entry point for new adopters. The Plan outlined the need for a comprehensive and long-term spectrum framework that will ensure mobile broadband providers have sufficient spectrum and flexible licensing rules to provide the most robust services possible. Taking steps to implement those recommendations in a timely manner is critical, and I will support all Commission efforts that allow for more flexible and efficient use of spectrum resources.

5. Next Generation 911

I was pleased to see a specific reference to funding for Next Generation 911. As you know, I joined with my colleague, John Shimkus, the Co-Chair of the E911 Caucus, to offer bipartisan, bicameral legislation to renew grants for 9-1-1 call center technology, and to move that technology into the next developmental phase. Have you had the opportunity to review the legislation and could you give me your opinion about the need for H.R. 4829?

I commend your leadership on ensuring our public safety infrastructure is not constrained to the analog world. Next generation technologies and services will provide new means to promote public safety, improve call center operations, and facilitate enhanced emergency response.

6. Special Access

I was glad to see that the Plan includes several references to making sure that special access rates are just and reasonable. As we all know, these circuits provide critical connections for wireless services – including backhaul for wireless providers to small businesses using ATM's, to the largest retail chains placing orders with their vendors. I have LONG advocated that the Commission look into the pricing and competition of special access services and I'm glad to see that it is a priority. Are you confident that you have the legal authority to move ahead?

I supported the staff's recent public notice to seek comment on the appropriate analytical framework for evaluating the special access market. I have committed to work with my Commission colleagues to evaluate the state of the special access market and need for regulatory changes, if any, based on the competitive data developed in the record evidence of the proceeding.

7. Affordability

The National Broadband Plan doesn't provide specifics on how to achieve bringing more broadband connectivity to low income and rural homes in this country, other than through use of the Universal Service Fund. Will the FCC work more closely with HUD to expand this needed technology?

I defer to the Chairman on particular contacts with HUD or other administration officials but I generally support coordination across the federal government to ensure that we are getting the most efficient and effective results for federal efforts in extending broadband connectivity to all Americans.

8. I'm concerned that low income homes will get hooked up, but the residents will be unable to maintain monthly payments. Once low income and rural households do acquire broadband

technology, what can be done to assure that the monthly service charge is kept to a minimum so that the service may be maintained?

The Commission should continue to foster a regulatory environment that encourages competition among service providers because consumers generally, and low-income consumers in particular, benefit from the lower prices and better quality of service that results from a choice of broadband providers.

9. Competition Questions

The National Broadband Plan observes that there is not a coherent and effective framework governing the Commission's wholesale competition regulations, including wireless roaming policies. Indeed, the FCC's current wireless roaming rule expressly permits the nation's largest wireless carriers to discriminate or exclude large geographic areas altogether in providing wholesale roaming services to their competitors. As the Plan notes, such conduct undermines longstanding competition policy objectives by limiting the ability of smaller carriers to gain access to the necessary inputs to compete. How do you intend to address this important wholesale competition issue in the context of wireless roaming services?

The Commission last month updated its voice roaming rules to address the "home market" exception by establishing a market-driven approach to ensure that voice services are available to consumers in all parts of the country, regardless of their service provider. We will review on a case-by-case basis any denials of reasonable requests for voice roaming services.

10. The National Broadband Plan acknowledges the importance of data roaming to entry and competition for mobile broadband services. But the FCC's present voice roaming rule contains an "in-market" exclusion that expressly permits carriers to deny roaming service to their competitors' customers in large portions of their licensed territories. This exclusion, if replicated in the data roaming context, would appear to severely undercut the Commission's stated goal in the Plan of achieving "wide, seamless and competitive coverage." How does the Commission intend to address this problem?

The Commission last month addressed the "home market" exception in the context of voice roaming as described in response to Question 9 above. At the same time, the Commission sought additional comment on data roaming rules, which is a distinct and separate market. I support this cautious approach on data roaming that reflects important statutory authority questions as well as operational concerns that our data roaming rules could inadvertently stifle the evolution of data roaming relationships that already exist or inhibit further buildout, investment and innovation.

11. Public Television – Broadcast Spectrum Issue

As you know, public television stations are very different from commercial television stations with respect to their funding, their programming, their mission and the efficient manner in which they use spectrum to serve the public interest. Public television stations also have been confronting extraordinary fiscal challenges during the past 18 months. As the Commission looks ahead to rulemakings announced in the National Broadband Plan to reclaim 120 MHz of spectrum from broadcasters, can you give us assurances that public television stations will be protected from involuntary reallocations of spectrum?

I believe that any reallocation of noncommercial broadcast spectrum, through incentive auctions or otherwise, must be voluntary. It can and should be a win-win situation for broadcasters, mobile broadband providers, and consumers.

12. Would you elaborate on the sequencing of the rulemakings for reclaiming the broadcast spectrum and the creation of incentive auctions in the National Broadband Plan? As you know, only the Congress can authorize the creation of incentive spectrum auctions in which the contributors of spectrum could receive some of the proceeds. I am particularly interested in the proposal for the creation of a digital media trust fund to be created from the proceeds of incentive auctions of spectrum contributed by public television stations. If Congress does not authorize such incentive auctions, will these other rulemakings go forward in any event?

I agree that a digital media trust fund for proceeds of the auction for noncommercial stations would require congressional action. I defer to the Chairman on the sequencing of specific proceedings.

The Honorable Cliff Stearns

1. The FCC has not had much success in predicting market developments and setting technology mandates. Does the broadband plan's proposal to create retail gateway device mandates worry you?

I agree that the Commission should be careful not to mandate particular technological solutions that would freeze into place the current state of technology. In considering retail gateway proposals, we must craft flexible rules that foster continued investment and innovation both on the network and device level, and avoid locking in today's technology.

2. I am pleased to see that the broadband plan recommends making another 500 MHz available for wireless broadband. Still, this does us little good if we don't have the right auction rules. In light of the problems auction conditions have caused recently, would you agree we should not adopt any more conditions on business models in the future, such as the free tier requirements and other restrictions that special interests like M2Z have been advocating?

Our spectrum policy should provide for flexible use of spectrum resources and our auction and licensing rules should avoid mandating particular technologies or businesses plans. A flexible approach will help ensure the most efficient use of our finite spectrum resources, and ensure that tomorrow's entrepreneurs are not hamstrung by limits artificially imposed on spectrum resources today.

The Honorable Mike Rogers

1. A group of cable and satellite companies recently weighed in with Congress and the FCC complaining about the so-called retransmission consent process. Congress established retransmission consent as a free market negotiation between distributors and broadcasters.

These distributors are asking for the government to meddle in these negotiations with broadcasters. It is concerning for me to hear appeals for the Federal government to intervene and affect potential progress at the negotiation table. Government intervention can make it much more difficult for private parties to determine the fair-market value of the property in question.

a. Do you share my concern about the unintended consequences of the government even considering intervention in the marketplace?

We should be careful to avoid dictating the terms of private retransmission consent contracts or interfering with how commercial negotiations proceed. Our focus should be on what additional rules, if any, are appropriate to ensure that consumers are not adversely affected or confused by these private negotiations. I am hopeful that affected stakeholders can develop industry best practices to better inform consumers about these negotiations.

b. Do you believe you that the Communications Act grants the Commission the authority to intervene in these private negotiations?

In creating the retransmission consent rules, Congress gave the Commission limited authority to ensure that these private negotiations are conducted in good faith. We will need to evaluate whether any proposed reforms would be consistent with this limited oversight role.

2. As we all know, broadband is central to our economic recovery and we are grateful to have the benefit of a plan to guide us. While the Plan recognizes the strides we have made in deploying broadband to Americans, it also discusses areas that the Commission believes is impeding that deployment. In particular, the broadband plan discusses the special access market.

a. Would you please discuss your vision on the way forward with the special access market?

The staff recently sought comment on the appropriate analytical framework for evaluating the special access market. I have committed to work with my Commission colleagues to evaluate the state of the special access market and need for regulatory changes, if any, based on the competitive data developed in the record evidence of the proceeding.

b. When discussing the wire line competition recommendations in Chapter 4 of the National Broadband plan, did you have in mind any specific type of customer?

I have expressed concerns about the recommendations of the Plan addressing competition in wholesale broadband markets. As we consider the Plan's recommendations in detail, we should build upon the strong regulatory foundation that we have before us, harnessing private investment, encouraging entrepreneurs and inventors to drive better broadband to more people, wherever they are and wherever they live.

We have the opportunity for incremental and targeted steps to drive broadband deployment to the 7 million unreached households identified in the Plan. We should, therefore, avoid re-opening settled regulatory battles, as recommended in Chapter 4, or changing our market-based regulatory framework

mid-course in a manner that could chill the private investment we so desperately need in our broadband infrastructure.

c. Does Chapter 4 of the National Broadband plan impose any restrictions or limitations as to the class of customer for which these services would be made available?

As discussed above, I have concerns about re-opening the settled regulatory battles, as recommended in Chapter 4, or changing our market-based regulatory framework mid-course in a manner that could chill the private investment, in turn negatively affecting all classes of customers.

The Honorable Marsha Blackburn

1. Studies indicate broadband providers invest three-to-four times as much as the content providers, and that each dollar invested by broadband providers creates about twice as many jobs as each dollar invested by the content providers. Given that fact and the current condition of our economy wouldn't you agree that the FCC should promote these investments in every way it can and not propose policy changes which could weaken the incentives for those investments?

Yes. As we consider the Plan's recommendations in detail, our broadband policy should be focused on those efforts directly tied to promoting adoption, deployment, and facilities-based competition. We should build upon the strong regulatory foundation that we have before us, harnessing private investment, encouraging entrepreneurs and inventors to drive better broadband to more people, whoever they are and wherever they live.

2. To its great credit, the National Broadband Plan is what you had hoped for – a very data driven document. However, there is a stark contrast between all that rhetoric and the fact you have not used that approach in your Open Internet proceeding. Twenty members of the House wrote you in support of undertaking a market analysis prior to proposing these regulations. Your own report acknowledges the U.S. market structure is relatively unique in that people in most parts of the country have been able to choose from at least two wireline, facilities-based broadband platforms for many years. What is the exact problem that justifies this kind of regulation? At the very least, I don't understand all this talk of data driven analysis that appears abandoned the first time the results might be inconvenient to fulfilling a campaign promise.

I have serious reservations about moving forward on the course set out in the *Open Internet Notice of Proposed Rulemaking*. I support the open Internet and the free flow of lawful content over the Internet, and I do not think that we can tolerate anticompetitive conduct that harms consumers. It is not clear to me, however, that there is a systemic failure that warrants government intervention in the market to achieve those goals. I have grave concern that net neutrality regulation risks distorting the market and creating effects we cannot predict. Most importantly, I am worried that a shift in regulatory direction at this stage could be detrimental to investment in broadband and innovation on the Internet.