FCC'S BROADBAND QUARTET: A STATE-FEDERAL FUGUE OR FEUD?

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The states care about broadband. California and Kentucky regulators have developed creative legal theories to extend their jurisdiction to regulate broadband services. The Colorado, Washington, and Michigan legislatures, among others, created incentive programs to promote broadband investment within their states. And municipalities themselves are getting into the business of providing broadband services where private companies are not serving their communities. Though not growing at the initially predicted rates, broadband use continues to grow steadily and impressively. In fact, little noticed over all the noise of the tech crash, broadband use quietly keeps growing, with cable and phone companies adding the most subscribers last year of any year ever.[1] Many states view the deployment of broadband networks as important to

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1. By most accounts, 2002 was a record year for broadband growth. Nick Wingfield, *The Best Way to Surf at Top Speed – Rival Internet Services Step Up Broadband Deals; Does Cable Beat DSL?*, WALL ST. J., Apr. 1, 2003, at D1 (reporting results of Leichtman Research Group). High-speed Internet lines, defined as greater than 200 kbs/sec in at least one direction, increased in homes and businesses by 55% in 2002. Federal Communications Commission Releases Data on High-Speed Services for Internet Access, 2003 FCC LEXIS 3272 (June 10, 2003). Though growing steadily, and now at around 15% of households, broadband adoption rates in the United States have fallen behind other countries including South Korea, Canada, and Sweden. Scott Woolley, *FCC Ruling Pummels DSL Competitors*, FORBES.COM, Feb. 20, 2003, *at* http://forbes.com/2003/02/20/cz_sw_0220 broadband.htm. Broadband Access for Business, Working Party on Telecommunication and Information Services Policies, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2002) DSTI/ICCP/TISP(2002)3/FINAL, Dec. 4, 2002, *available at* http://www.olis.oecd.org/olis/2002doc.nsf/LinkTo/dsti-iccp-tisp(2002)3-final; The Development of Broadband Access in OECD Countries, Working Party on Telecommunication and Information Services Policies, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT DSTI/ICCP/TISP(2001)2/FINAL, Oct. 29, 2001, *available at* http://www.oecd.org/ dataoecd/48/33/2475737.pdf. Although record numbers are signing up for broadband, the rate of growth may be leveling off.

economic development, in part by linking thinly populated areas with the rest of the state and the world economy, and in part to promote locally based high tech sectors of the state economy. In addition, many states share with the federal government a recognition that broadband-based technologies still hold out one of the greatest hopes for economic growth. They also share a concern that we not fall behind in innovation in this area.

Today, states' power over broadband rests more on political pressure than on any clear reserved legal authority, because the Federal Communications Commission and Congress already largely have preempted much state jurisdiction, and courts largely have affirmed this. At the federal level, the FCC is moving toward removing regulations that impose various forms of access to broadband facilities and services. But nature abhors a vacuum, and it appears that as federal regulators back away, some states' regulators will try to find ways to retain or acquire some policymaking authority in this area. Their ability to do so will vary with the particular issue and depends in large part on the degree to which the FCC expressly preempts states' efforts. At the political level, states have been strikingly successful recently in obtaining a role in telecommunications regulation and even perhaps in the recent furor over broadcast concentration. Congressional response to the FCC's controversial relaxation of television and radio ownership rules certainly reflects a complicated policy and political calculus, but included in proposed legislation was a surprisingly greater role for states in reaction to the federal agency pulling back.[2] However, as this article analyzes, the courts are likely to strike down state agency efforts to regulate broadband in the face of express federal agency preemption.

Reflecting on the relationship between federalism and regulation of broadband brings to mind the comparison of Europe's and the United States' approach to regulation. There is an obvious, if imperfect, analogy between federalism in the United States and the European Union, with the relationship between the FCC and state regulators similar in some respects to that between the European Commission and the European Member State regulators. In 1999 and 2000, based on my meetings with European Union and Member State government officials, it was clear that they were concerned with catching up with the United States in Internet development and broadband deployment. The individual

2. Senator Stevens proposed an amendment to proposed legislation to roll back FCC deregulation of broadcast-newspaper ownership that would grant state agencies authority to review and make recommendations to the FCC regarding proposed newspaper-broadcast deals in the smaller markets. Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003, S. 1046, 108th Cong., Senate Commerce Committee (2003).

country regulators were promoting infrastructure development by giving the incumbent carriers a head start to develop and invest in broadband, with the theory that only incumbents would invest and even they would not if they had to share their facilities. Competitive carriers looked to Brussels for help. Jumping forward in time, there is currently a deregulatory agenda in Washington, and the FCC is saying many of the same things about the need to give incumbents the room to invest. Competitors are now turning to state regulators for help. It is ironic. Or inevitable. Or both.

In Part I of this article, I outline four FCC proceedings that present the agency with the opportunity to fundamentally reshape the regulatory approach to broadband. In addition, I analyze the likelihood that the FCC's preemption of a state role in regulating broadband facilities and services will be upheld by the courts. In the "Triennial Review Order," the Commission determined which elements of the incumbent telephone companies' network, including those making up broadband transmission, the incumbents must make available to competitive local carriers.[3] In a pair of classification proceedings, the Commission is determining what statutory category to apply to cable and wireline residential broadband services and what regulatory obligations to impose.[4] Currently, the provision of broadband Internet access is regulated very differently depending on whether it is provided by a cable company offering cable modem service or a telephone company offering high speed service over its copper lines to the home, and the FCC is considering whether this different regulatory regime is justified in the current environment. Finally, the FCC will rule on whether to continue to treat incumbents as dominant in their provision of advanced services.[5] Although the FCC has not identified it as part of the broadband quartet, another set of proceedings addressing the regulatory treatment of Internet telephony using the Voice Over Internet Protocol ("VOIP") will also play an important role in determining the longer term regulatory landscape for communications.

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3. Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecomms. Act of 1996; and Deployment of Wireline Servs. Offering Advanced Telecomm. Capability, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 2003 FCC LEXIS 4697, (Aug. 21, 2003) [hereinafter *Triennial Review Order*].

4. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798 (2002) [hereinafter *Cable Broadband Classification Proceeding*]; Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, *Notice of Proposed Rulemaking*, 17 F.C.C.R. 3019 (2002) [hereinafter *Wireline Broadband Classification Proceeding*].

5. Review of Regulatory Requirements for Incumbent LEC Broadband Telecomm. Servs., *Notice of Proposed Rulemaking*, 16 F.C.C.R. 22,745 (2001) [hereinafter *Nondominance Proceeding*].

If the Commission adopts at least some aspects of the approach it has proposed under these proceedings, it will have moved a long way toward replacing the traditional vertical regulatory regime that applied obligations and rights in large part depending upon the type of physical network that carried the service—phone networks, wireless, satellite, or cable—with a horizontal framework that should better equip the agency to regulate (and deregulate) in a world where broadband networks of all types carry the full set of electronic communications services—voice, video programming, and data. If the agency goes far enough, this could resemble the approach recently adopted by the European Union, and could help rationalize an increasingly fragmented and ultimately unsustainable system. To completely rationalize the regulatory regime in light of convergence and the digital migration might at the end of the day require rewriting the Communications Act. This is not on the horizon. But the Commission would be able to accomplish a great deal even operating under the current statute by reclassifying broadband services as Title I information services and regulating from the "bottom up" as discussed later in this article. However, as discussed later, this is a risky legal strategy because it is not clear that the courts will uphold the FCC's ancillary jurisdiction to impose regulations under Title I. Therefore, the more prudent course, and one that may also tie the agency closer to an analysis of the real competitive conditions, is for the agency to exercise its statutory forbearance authority under Title II and to deregulate from the "top down," eliminating unnecessary regulations and reducing the disparity in the regulatory treatment of different broadband service providers.

In Part II, I analyze four implications of this set of proceedings of particular concern for the states. This discussion is informed in part by conversations with state regulators. First, if broadband services are reclassified as Title I as the FCC has proposed, this will further reduce state jurisdiction over broadband services, particularly when combined with the deregulation and preemption of broadband wireline facilities.

Second, although the FCC's wireline broadband classification proceeding will have the most immediate and direct impact on independent Internet service providers, there are larger, longer term implications. FCC decisions in combination with industry deployment of new facilities and services could convert the nation's wired communication networks from a historically open, highly regulated system into a closed, private network largely outside the reach of state or federal regulators. If the Bells take advantage of the Triennial Review deregulation of new high speed networks, if the FCC classifies broadband transmission as a Title I service without invoking its ancillary jurisdiction in a way that eventually encompasses these new networks, if

VOIP takes off in a serious way as a voice service bundled with other broadband services, and if the FCC maintains its hands-off policy on VOIP, the combination of government and industry action could transform a highly regulated to essentially an unregulated industry. Granted, these are a lot of "ifs." And opposition from consumer groups, some scholars, state regulators, and the high tech industry, as well as the FCC's own sense of caution may keep the agency from going this far. But the agency may have to pull back from its earlier regulatory proposals to keep from stepping over the line, and if it does not, it could take Congress to put the genie back in the bottle. If there were full facilities competition, this would not raise concern. However, if the federal government gets it wrong, and full competition does not develop, then regulation over certain aspects of the information network and services may remain necessary.

Third, and of key concern to the states, this set of proceedings will affect the future of universal service in ways that are not yet fully understood. The universal service system funds telephone service for low-income persons, high cost (largely rural) areas, and Internet access for schools, libraries and hospitals. States are already concerned about the shrinking base for universal service contributions because of the declining revenue from long distance service, and are alarmed about the impact of further contracting the pool of contributing services that might come from reclassifying certain broadband services.

Finally, and of greatest interest, some states are concerned that the reclassification could stifle innovation and adversely affect free speech values. The ACLU and consumer groups have joined some members of the high tech community and content providers to warn against regulatory action (or inaction) that could lead to closing a network whose defining feature, and many would argue key to success, has been its openness. Some state regulators are more receptive to this argument than is the FCC, but one question will be what role states will be left or will seek if the FCC, as is likely, declines to adopt any safeguards in this area. State experimentation may be beneficial as a policy matter, primarily because at this stage it is impossible confidently to assess the risk to innovation of the government declining to impose safeguards. But as a legal matter, states will have a difficult time imposing their own safeguards if the FCC preempts state action. If the FCC declines to adopt even general safeguards, there should be further study of the potential gains and harms of allowing state regulation in this area.

I. THE BROADBAND PROCEEDINGS

A. Triennial Review: The Network and the Relationship Between Incumbents and Competitive Local Phone Companies

In the Triennial Review Order, the FCC dealt squarely and fairly radically with the Bells' obligations under section 251 of the 1996 Telecommunications Act to make their broadband facilities available at regulated rates to competing carriers. The agency very significantly deregulated broadband facilities. To understand this ruling requires a brief review of U.S. telecommunications regulation and wireline broadband technology.

1. The History

Until recently, the nation's telephone system was considered a natural monopoly, and regulated as a public utility, with the FCC overseeing interstate service and state agencies in charge of intrastate service.[6] The Justice Department and the courts introduced competition into the interstate, long distance market through an antitrust action filed in 1974 against AT&T. In 1982, AT&T agreed to settle the case under a consent decree that, among other things, required it to divest the local Bell Operating Companies into seven companies providing local telephone service.[7] The government's introduction of competition into the long distance market is given credit for establishing conditions that allowed for creation of the nation's Internet backbone systems. At the same time, however, local phone service was still viewed as a natural monopoly because the local network facilities, particularly the copper wires connecting homes and offices to the network—the "local loop" or "last mile"—were considered too expensive for competitors to replace.

A little over ten years later, Congress sought to introduce competition into the local market. It passed the Telecommunications Act of 1996,[8] which overhauled the nation's telecommunications law and altered the relationship between state and federal regulators. In the name of deregulation, Congress created an elaborate system of regulation that provided three methods of opening the local markets: companies

6. This, of course, oversimplifies. For a more complete picture of the complexity see PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW 1-78 (2nd ed. 1999); AT&T Corp. v. Iowa Utils. Bd. 525 U.S. 366 (1999); LA Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986).

7. United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

8. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 15, 18, and 47 U.S.C.).

building their own networks which would be interconnected to the incumbents' networks;[9] companies using the "network elements" that would be "unbundled" from the incumbents' local networks;[10] and companies reselling the services offered by the incumbent local providers.[11] In each case, the government was to establish a pricing regime for the incumbents' services and facilities that would be made available to competitors. Thus, under the Act, in return for allowing them to enter the long distance market, incumbents were required to allow their competitors to use the "last mile" of phone wire that runs to customers' houses, as well as certain other facilities. Not surprisingly, the Act spawned much litigation, including six trips to the Supreme Court, including over issues of state versus federal jurisdiction.[12] The Supreme Court first upheld the FCC's jurisdiction, as against state jurisdiction, both to define which network elements should be unbundled and to establish a pricing regime for their lease, but it determined that the FCC had improperly applied the statutory "necessary and impair" standard to identify the list of unbundled network elements.[13]

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9. 47 U.S.C. § 251(c)(2) (2000) (duty to interconnect).

10. § 251(c)(3) (duty to sell individual elements unbundled from the incumbent's network). The Act defines a " network element" as

> a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

§ 153(29).

11. § 251(c)(4)(A) (duty to resell at wholesale rates any telecommunications service that carrier provides at retail to subscribers who are not telecommunications carriers).

12. AT&T Corp. v. Iowa Utils. Bd. 525 U.S. 366, 358, 388 (1999) (upholding FCC's jurisdiction to determine both network elements and pricing); Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002) (upholding FCC's rate setting principle "total element long-run incremental cost" or TELRIC); Nat. Cable & Telecomm. Ass'n v. Gulf Power Co., 534 U.S. 327 (2002) (upholding the FCC's determination that pole attachment provisions of the Telecommunications Act apply to attachments that provide high-speed Internet access combined with cable television); Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 648 (2002) (no 11th Amendment bar to suit by Verizon against state commissioners). The Supreme Court has agreed to hear two additional cases next term. Trinko v. Bell Atl. Corp., 305 F.3d 89 (2nd Cir. 2002), *cert. granted*, Verizon Communications Inc. v. Trinko, 123 S.Ct. 1480 (2003) (issue of whether certain actions, which violate the Telecommunications Act, constitute a claim under the Sherman Act); Mo. Mun. League v. FCC, 299 F.3d 949 (8th Cir. 2002), *cert granted,* Nixon v. Mo. Mun. League, 123 S.Ct. 2605 (2003) (whether states may prohibit cities from offering telecommunications service).

13. To guide the Commission in deciding which network elements are to be unbundled, the Telecommunications Act specifies:

> In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether –
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> (A) access to such network elements as are proprietary in nature is necessary; and

Following the Supreme Court's remand on the "impairment" standard, the Commission once again faced the task of identifying which network elements the incumbents must unbundle, adding some new elements and eliminating a couple.[14] In a separate order, the Commission further refined unbundling in a way to provide more competition in wireline broadband facilities. In the "Line Sharing Order," the FCC required incumbents to unbundle the high frequency portion of their copper local loop spectrum, making it available to competitive carriers that wanted to provide high speed Internet access through DSL (digital subscriber line) technology.[15]

In a strikingly undeferential opinion, *FCC v. USTA*, the D.C. Circuit harshly criticized and remanded both orders.[16] It criticized the Commission's identification of unbundled network elements as insufficiently granular and the line sharing order as failing to take into account the relevance to competition in broadband services coming from cable and satellite.

2. The Triennial Review Order

The agency announced its decision in the wake of much intrigue, drama, money, and emotions. Much of the drama centered on the issue of the role of the states, particularly in determining the unbundled network elements for voice traffic that major competitors used. In what was characterized as a palace coup, one Republican commissioner sided with two Democratic colleagues to give the states a significant role in applying the statutory "impairment" test to determine what elements the incumbents must provide to competitors at the lower regulated rates. The irony of the Democrats providing a greater role to the states was not lost on the Republican Chairman Powell, who opposed giving the states

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> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

47 U.S.C. §251(d)(2).

14. Implementation of the Local Competition Provisions of the Telecomms. Act of 1996, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 F.C.C.R. 3696 (1999).

15. Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order and Fourth Report and Order*, 14 F.C.C.R. 20912 (1999). Copper loops have a range of spectrum, and analog telephone service uses only the lower frequencies. DSL technology allows high-speed Internet access over the unused high-frequency portion of the spectrum. For an overview of DSL, cable, and other broadband technologies, *see* James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. ON REG. 39 (2000).

16. United States Telecom Ass'n. v. FCC, 290 F.3d 415 (D.C. Cir. 2002) (*USTA*).

such a role.[17] This in effect retains, at least for some period, viable non-facilities based competition to the incumbents' residential voice service, which the incumbents claim is causing them serious financial harm.[18] This portion of the Commission's decision was particularly controversial and will certainly be challenged on a number of grounds, including that it constituted impermissible delegation to state agencies.

The incumbents scored a very significant victory on broadband facilities. In the U.S., like Japan but unlike Europe, for example, the Commission had required the Bells to make the local loop available without regard to the technology of the loop. Phone companies will gradually replace at least portions of certain of their traditional copper lines with new fiber-optic networks, which have even greater speeds and capacity than current high speed networks serving corporations. In the Triennial Review, the FCC ruled that fiber (as opposed to the traditional copper) loops generally would be exempt from any type of unbundling.[19] This conclusion is based on the premise that the original unbundling regime was meant to track the essential facilities doctrine in antitrust law and is also expressly designed to promote investment by incumbents in broadband networks. Second, the Commission eliminated the line sharing rule, which required incumbent carriers to make the high frequency portion of the copper loop available at lower regulated rates to competitive data network providers such as Covad, which in turn sold their DSL capacity to independent ISPs. All in all, this gives the incumbents even more than they had sought to accomplish in a massive

17. *See Triennial Review Order*, *supra* note 3, Separate Statement of Chairman Michael K. Powell Dissenting in Part, at 5 ("To explain their decision, the majority has cloaked itself in the drape of 'State's Rights' (a classic conservative mantra not generally associated with a majority of democrats)").

18. The FCC adopted a presumption that competitors were not impaired in their ability to provide service to business customers served by high-capacity loops, and therefore ruled that incumbents do not have to offer unbundled switching in those cases. State agencies were given 90 days to rebut the national finding. For small business and residential customers, the FCC adopted the presumption that competitors are impaired without access to unbundled switching. State agencies have nine months to determine whether competitors face economic and operations impairment in their jurisdictions.

19. The only exception to this general rule is that in "overbuild" FTTH deployment situations (*i.e.*, where incumbents construct fiber facilities to replace their copper loops), ILECs will have to provide unbundled access either to an alternative copper loop facility or, if the copper loop has been retired, to a 64 kbps transmission path for carrying voice traffic over the fiber facility. "Hybrid" copper-fiber loops—which have fiber part way to the home, and then copper the rest of the way, and which are far more common than pure fiber—received mixed treatment. The FCC imposed no broadband unbundling for "packetized" systems, but required that competitors be given access to loops using TDM/circuit-switched systems.

lobbying campaign in Congress to pass the Tauzin-Dingell bill[20] and largely gives them the "new lines, new rules" regime they promoted.[21]

3. State Preemption and Delegation

The Order raises a number of state-federal issues regarding preemption and delegation. The incumbents will challenge the FCC's delegation of authority to the states in analyzing whether competitors are impaired without access to incumbents' switches for voice service. And states, consumer groups, or competitive carriers are likely to file appeals challenging the FCC's preemption of any state role in broadband facilities. A number of states have indicated that they would have preferred to maintain line sharing as well as unbundling obligations on some hybrid loops.[22] But, so long as the courts uphold the underlying substantive FCC rules, the FCC likely will be successful in preempting state actions to reinstate broadband unbundling obligations.

The core preemption issue is whether, once the FCC removes the Bells' obligation to unbundle a particular network element, the states may retain or reimpose the obligation under state law. Some states and some competitive carriers argue that section 251(d)(3) of the 1996 Act provides them authority to establish additional unbundling obligations. Section 251(d)(3) provides:

> Preservation of State Access Regulations. – In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –
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> (1) establishes access and interconnection obligations of local exchange carriers;
> (2) is consistent with the requirements of this section; and
> (3) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[23]

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20. Internet Freedom and Broadband Deployment Act of 2001, H.R. 1542, 107th Cong. (2002).

21. *See* Tom Tauke, A New Principle for a New Era: The Courage to Let Broadband Grow, Address at NARUC/NECA National Broadband Summit (Apr. 28, 2003) (referencing his 2001 "Old Wires, Old Rules/New Wires, New Rules" speech in Aspen, CO) (on file with author).

22. In addition to competitive data companies, such as Covad, making use of low-cost line sharing, there are (admittedly isolated) examples of local cooperatives in rural areas not otherwise served by phone or cable broadband service which have launched their own high-speed internet service using line sharing. *See, e.g.*, Julia Angwin, *FCC's Ruling Could Deal Blow to Rural ISP's*, WALL ST. J., Feb. 25, 2003, at B1.

23. Telecommunications Act of 1996, *supra* note 8, at § 251(d)(3)

Some competitive carriers argued that state unbundling requirements may not be preempted. As one put it, "The issue here is whether there can be *local* competition with the incumbents, and while there is a clear federal interest in this matter, State commissioners have jurisdiction over these issues as well."[24] They in effect interpret 251(d)(3) and 251(d)(2) as authorizing the FCC to establish a floor, but not a ceiling on the list of elements that must be made available to competitors. Equally predictably, the incumbents now argue that the FCC may not delegate to the states any latitude in adding elements to the federal list, and if the states attempt to do so, the courts should not permit it. Although the states' and competitors' arguments may have been a fair reading of the statute at one time, intervening case law has given the incumbents the better of the argument.

Initially, the FCC expressly left it to the state agencies to add, but not subtract network elements from the list established by the FCC.[25] But subsequent Supreme Court and the D.C. Circuit cases are best interpreted as establishing that section 251(d)(2) set limits on both the state and the federal regulators' ability to impose unbundling obligations on incumbents. In *Iowa Utilities Board*, the Supreme Court interpreted the 1996 Act to confer jurisdiction upon the FCC to enact rules to implement the unbundling provision of the Act. It further interpreted section 251 as imposing a limitation on the extent to which the FCC could impose unbundling obligations.

> But we do agree with the incumbents that the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act, which it has simply failed to do. . . .We cannot avoid the conclusion that, if Congress had wanted to give blanket access to the incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included section 251(d)(2) in the statute at all. It simply would have said (as the Commission in effect has) that whatever requested element can be provided must be provided. [26]

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24. Ex Parte filed by AT&T in CC Docket Nos. 01-338, 96-98, 98-147, *In re* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, filed Nov. 14, 2002, at 5.

25. FCC Interconnection Rule, Specific Unbundling Requirements, 47 C.F.R § 51.319 (1997); Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, *First Report and Order*, 11 F.C.C.R. 15,499, 15,624, 15,683 (1996) (state agencies may identify elements that must be unbundled by local incumbents in addition to those identified by the FCC); Implementation of the Local Competition Provisions of the Telecomms. Act of 1996, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 F.C.C.R. 3696, 3768, ¶¶ 156, 157 (1999) (confirming that states may add but not subtract elements).

26. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 388-90 (1999).

In reviewing the FCC's revised unbundling analysis, the D.C. Circuit in *USTA* further elaborated on the nature and purpose of the limitation. According to the court's interpretation of section 251 and *Iowa Utilities Board*, "unbundling is not an unqualified good," because it "comes at a cost, including disincentives to research and development by both [incumbents] and [competitors] and the tangled management inherent in shared use of a common resource."[27] The court interpreted section 251 as a Congressionally imposed limit to reflect a balance of competing values at stake in implementation of the Act.

Taken together, these cases establish that in applying the "necessary and impair" standard of section 251, the FCC must determine whether the benefits of unbundling outweigh the costs. If the agency finds they do not, and if it thus keeps an element off the list, then it is not up to the states to overturn that assessment and add the element back on the list. In effect, the *USTA* court established that the FCC's UNE list constitutes both a floor and a ceiling. The FCC's earlier rule, 47 CFR section 51.317, which allowed states to add more elements to the incumbents' unbundling obligations cannot stand, because it fails to take into account the costs of unbundling that the D.C. Circuit ruled must be recognized in interpreting section 251. To be clear, the analysis applies only when the FCC has properly and completely conducted its "necessary and impair" analysis. If the Commission leaves the job incomplete and expressly carves out a role for the states, as it did with some aspects of the Triennial Review, the preemption analysis obviously does not apply. Or if a court later finds the Commission's application of the statutory standard was faulty, for example, because its analysis did not support a national finding of lack of impairment, then the preemption analysis does not save it. But the remedy would be for the agency to redo its analysis, not for the states to fill in the interstices.

The particular procedural vehicle the Commission established for challenging state actions combined with the peculiar vote on the issue of line sharing creates complexity for the ultimate outcome on at least this issue. The Commission ruled that parties could challenge a state decision to add additional elements. The Commission's standard of review would be whether a state action is inconsistent with federal policy. The fact that three of the five commissioners actually supported retaining line sharing could mean that the Commission's analysis could favor a finding that the state action is not inconsistent with federal policy. However, as a general matter, unless a reviewing court completely discredits the *USTA* court and the FCC's policy of promoting facilities based competition, the court should uphold an FCC determination that

27. *USTA*, 290 F.3d 415, 429 (D.C. Cir. 2002) (citation omitted).

the states are preempted from adding broadband facilities to the list of unbundled network elements.

The core broadband policy question in the Triennial Review was whether the regulator should leave the incumbents unencumbered and trust that this will lead to broadband deployment and rely on inter-modal competition from cable and other platforms, such as satellite and wireline or power utilities, rather than continuing to try to force intra-modal wireline competition. The Commission opted for the former. Given the current state of the capital markets, and in light of the FCC's preemption of contrary state action, in effect all the country's eggs are in the basket of inter-modal competition for developing the next generation of broadband networks.

The FCC opted for not allowing state experimentation on the question of whether inter-modal or intra-modal competition would create more development of broadband networks. But there may nevertheless be some indirect effects of state agency decisions. At least one incumbent has strongly suggested that it will invest in advanced networks in those states where the regulators are not aggressive on the terms they require the incumbents to make the traditional networks available to competitors. I do not mean to suggest that the FCC deliberately opted for a policy of state-by-state experimentation on the issue of unbundling the traditional network. For all the factors that went into that outcome, that was not likely one of them.

B. Broadband Classification Proceedings: Can Network Owners Discriminate Against Network Use

For as long as many of us can remember, the federal government has required telephone companies to make their networks available on a nondiscriminatory basis to entities that use those networks to provide computer or data processing services of various sorts, including now the Internet. And the federal government, in furthering its industrial policy of supporting growth of computer technology and services, adopted a policy framework early on of fairly heavy regulation of the telephone network and no regulation of the computer services that ride over the phone network. This is the second government action that is given credit for setting the stage that allowed the Internet to develop. In marked contrast, though of much more recent vintage, the government has not imposed equivalent safeguards on the other main network that carries Internet traffic, the cable system.

The FCC opened a pair of rulemaking proceedings that reexamine its regulatory treatment of broadband transmission and Internet access offered over the cable and telephone networks. The agency rather

summarily invokes the policy goals of "encouraging the ubiquitous availability of broadband to all Americans," creating a "minimal regulatory environment that promotes investment and innovation in a competitive environment," and creating a "rational framework for the regulation of competing services that are provided via different technologies and network architectures."[28] The issues that are directly raised by the Commission and those that may be indirectly affected by its decisions could have profound consequences for the future development of communications services.

1. Common Policy Issues.

To better establish the policy framework before discussing the individual proceedings, I briefly identify three themes or issues that are common to each.

a. Statutory Classification of Broadband Services

The two broadband classification proceedings first pose the question of what statutory category applies to residential cable and wireline broadband Internet access services. And second, the agency asks what regulatory obligations should be imposed. The classification issues posed in both proceedings date back to concepts developed in a series of FCC decisions commenced in the 1960's that considered how to regulate computer services that are carried over the telephone network.[29] In the "Computer Inquiry" series, discussed in somewhat more detail below, the Commission distinguished common carrier transmission from computer services that ride over the common carrier network. The FCC continued to regulate heavily the "basic" telephone service as a common carrier under Title II of the Communications Act, but refrained from regulating the "enhanced" computer data services carried over the telephone facilities.[30]

28. *Cable Broadband Classification Proceeding*, *supra* note 4, at ¶¶ 4-6. *See also Wireline Broadband Classification Proceeding*, *supra* note 4, at ¶¶ 3-6.

29. For a contextualized history of the development of the Computer Inquiry decisions, see Robert Cannon, *The Legacy of the Federal Communication Commission's Computer Inquiries*, 55 FED. COMM. LAW J. 167 (2003).

30. The FCC defined "basic transmission service" as the offering of "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384, ¶ 96 (1980). "Enhanced services" are those "offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or

Congress endorsed this general approach in the Telecommunications Act of 1996 by distinguishing between Title II common carrier "telecommunications services," and Title I "information services." Congress defined "telecommunications service" as "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." [31]

"Telecommunications" in turn is "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."[32] Congress defined "information service" as: "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."[33] The Commission has concluded that the statutory terms "telecommunications service" and "information service" are essentially synonymous with the FCC's earlier terms "basic service" and "enhanced service."[34]

As a general matter, if Congress or the FCC categorizes a service as a Title II common carrier, it will be fairly heavily regulated, particularly if it is deemed to be dominant, unless the FCC exercises its statutory "forbearance" authority under Section 10 of the Act to deregulate.[35] In contrast, if Congress or the FCC classifies something as a Title 1 service, for example, by classifying it either as an "information service" or as "telecommunications," (as opposed to "telecommunication *service*") it will

involve subscriber interaction with stored information." FCC Common Carriers Rules, Furnishing of Enhanced Services and Customer Premises Equipment, 47 C.F.R. § 64.702(a) (2003). Or as one commentator succinctly explains, "This generally means that what goes into the network is different than what comes out of the network." Cannon, *supra* note 29, at 186.

31. 47 U.S.C. § 153(46).

32. *Id.* at § 153(43).

33. *Id.* at § 153(20).

34. Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Report and Order*, 16 F.C.C.R. 7418, ¶ 2, n.6 (2001); Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 21905, ¶ 102 (1996).

35. Communications Act of 1934 § 10, 47 U.S.C. § 160 (2000). In the 1996 Act, Congress directed the FCC to "forbear from applying" any portion of the Act and its rules, so long as the application of the statute or rule was not necessary to ensure just and reasonable rates and practices, to protect against nondiscrimination, or to protect consumers, and forbearance was in the public interest. The Court of Appeals for the D.C. Circuit recently interpreted key terms of this statute in a way that does not require the agency to apply the stringent test urged by the industry in order to retain a rule. Cellular Telecomms. & Internet Ass'n v. FCC, 330 F.3d 502 (D.C. Cir. 2003).

not be regulated unless the FCC exercises its "ancillary jurisdiction" to impose regulations.

The Commission has ruled that broadband cable modem service is an "interstate information service," and it tentatively concluded that wireline broadband transmission is as well. The significance of the classification is that it removes broadband transmission and telecom and cable modem broadband internet access services, which make up 97% of the country's broadband services, from either common carrier or cable regulation, and places them within the largely unregulated statutory Title I category.

b. Competitor Access to the Networks

As discussed in more detail below, the major immediate and direct significance of the classification proceedings are the effect they will have on the long-standing policy and law governing whether competitive enhanced or information service providers ("ESP/ISP"), particularly independent Internet service providers ("ISP), will have regulated access to the underlying transmission they need to provide services to their customers. ISPs and other information service providers have a right of nondiscriminatory access to the telephone network. But as a general matter, ESP/ISPs currently have no legal right of access to the cable network, which, with two-thirds share of the residential market, is the leading broadband connection to most people's homes.[36] The FCC has asked for public comment on whether it should promote the policy goals of deregulation and regulatory "parity" by eliminating the ISP right to access to the telephone network.

c. Consumer Access to the Networks or "Network Neutrality"

Traditionally those seeking to offer a service over a communications network had to negotiate with the network owner to offer a service over the owner's network. But, increasingly, goods or services, such as those of Amazon.com, eBay and VOIP, can be offered from the "edge" of the network without negotiation or payments to the platform provider. Broadband transmission will make it increasingly viable in coming years to sell voice and video services such as VOIP, Wi-Fi, movies, and games,

36. *Wireline Broadband Classification Proceeding, supra* note 4, n.91 (Verizon ex parte, in Wireline Classification Proceeding, citing UPS Warburg, *Wireline Services: DSL Loses Share to Cable Again*, Mar. 12, 2003). *See also Federal Communications Commission Releases Data on High-Speed Services for Internet Access*, FCC NEWS, June 10, 2003 (reporting that as of year end 2002, there were 6.5 million broadband wireline DSL lines, and 11.4 million cable modem lines), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235274A1.docs.

from the edge of the network.[37] Thus, a major policy issue is whether Bell and cable companies can use their networks to limit or control competitive applications offerings.

Consumer groups, the ACLU, state regulators, some high tech and content companies, and at least one legal scholar, Lawrence Lessig, have warned of the need to protect the principles of network openness that allowed for the development of the Internet and that will permit continued innovation in applications. [38] In effect, these advocates have shifted the policy debate from the rhetoric of competitor access to the network to consumer access. [39]

Apart from limited access requirements imposed as merger conditions, cable companies have complete control over the use of their systems and both the technical and legal ability to restrict use. Some warn that deregulation of broadband wireline transmission, if combined with a significant rise in unregulated VOIP, could convert the country's telecom network into a private, closed system outside the reach of federal or state regulation. The National Association of Regulatory Utility Commissioners last November passed a resolution opposing "unreasonable discrimination" by broadband network providers on users' access to lawful content, including applications.[40] Supporters of these "consumer connectivity" or "network neutrality" principles invoke the tradition of "Carterphone," in which the FCC required AT&T to allow

37. *See* Blair Levin, *Beyond UNE-P: The Edge vs. the Network – a/k/a "Open Access II,"* Legg Mason Research Report, Dec. 5, 2002, filed as attachment to ex parte by Coalition of Broadband Users and Innovators, in Cable Modem Classification and Wireline Broadband Classification Proceedings, Dec. 13, 2002.

38. *See, e.g.*, LAWRENCE LESSIG, THE FUTURE OF IDEAS (2001); Presentation at Silicon Flatirons Telecommunications Program Conference, The Regulation of Information Platforms, (Jan. 27, 2002); ACLU White Paper, *No Competition: How Monopoly Control of the Broadband Internet Threatens Free Speech*, *available at*, http://archive.aclu.org/issues/cyber/NoCompetition.pdf (Summer 2002) [hereinafter *ACLU White Paper*]; NARUC Resolution Regarding Citizen Access to Internet Content, Adopted NARUC Convention, (Nov. 12, 2002), *available at* http://www.naruc.org/Resolutions/2002/annual/telecom/citizen_access.shtml [hereinafter *NARUC Resolution*].

39. Admittedly, the distinction between competitor and consumer access can blur, as both can involve products or services sold directly to consumers that utilize the broadband platform. And indeed, it is by controlling consumers' access to certain content, products or services that the platform owners could affect the ability of those providers to compete with the platform owners' own voice or content services. The key difference (and perhaps only useful distinction) is that competitor access, which really encompasses only competition in complementary applications such as Internet access or programming and is not meant to include competition in the physical platform, requires the competitor to be able to negotiate with the platform provider to supply transmission that is bundled with the complementary application. For products or services associated with "consumer access," there may still be a direct relationship between the customer and the good or service, and the service utilizes the broadband platform, but the company providing the service generally need not negotiate directly with the platform operator to resell the transmission or pay the platform provider.

40. *NARUC Resolution*, *supra* note 38.

consumers to connect devices to the network,[41] rather than AOL's efforts, prior to its merger with Time Warner, to convince the government to require cable operators to offer "open access" to *competitor* ISPs.[42]

There is some debate, even sometimes among those advocating the network neutrality position, regarding the precise nature of the harm as well as the best remedy. The ability of network owners to discriminate according to amount of capacity used or service quality is not really at issue. There is general agreement that network owners should be able to charge customers more who use the network more or who demand a higher guaranteed level of service quality. Nor is there any quarrel with the general principle that network owners should be able to restrain use that could harm the network. Advocates generally criticize cable service contracts that prohibit virtual private networks because they discriminate against *types* of service. The same would be true for restrictions on connecting Wi-Fi equipment or using VOIP over the network, assuming no case could be made that there was network harm.

The debate gets more complex regarding the ability and incentive of network owners to take actions that affect users' access to certain content. Advocates of network neutrality principles did not agree among themselves on the recent agreement between SBC and Yahoo, which granted preferential front page placement to Yahoo. Amazon.com and Yahoo found this a perfectly reasonable business practice. The Consumer's Union found this just another example of discriminatory action by the network owner.[43] Other examples could include a network owner that makes it quicker or easier for an Internet user to find a web site of a particular hotel in return for a fee paid by the hotel to the network owner. Or in a more extreme case, the network owner might block or discourage streaming video in order to protect its competing content business. Or in the most extreme case, the network owner might have an exclusive deal with one content provider that keeps users from being able to access competitors' content. Opponents of increased

41. Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420 (1968) (holding that AT&T could not prevent the use of a device that facilitated connections between different networks, and announcing a broad protection for users to connect foreign devices to the telephone network).

42. *See* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and American Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee, *Memorandum Opinion and Order*, 16 F.C.C.R. 6547 (2001); American Online, Inc., and Time Warner, Inc., 2000 WL 1843019 (FTC), Docket No. C-3989, *Decision and Order* (Dec. 14, 2000) [hereinafter *FTC AOL Time Warner Merger Order*] (requiring access for small number of unaffiliated ISPs and prohibiting interference with the content of unaffiliated ISPs).

43. "Net Neutrality or Net Neutering: Should Broadband Internet Service be Regulated," Progress and Freedom Foundation Conference (June 27, 2003).

regulation argue that first, there is no evidence that any sort of content related discrimination has occurred, and second, that granting network owners complete control over their systems can lead to better products and services.

Thus, this is about the ability and incentive of monopoly (or duopoly) broadband providers to leverage market power in the provision of broadband services into a closely complementary activity. Current mainstream antitrust doctrine generally presumes that such vertical agreements are unobjectionable. Telecommunications policy, in contrast, has preferred an open architecture based on modularity as opposed to an integrated proprietary system, which, as Farrell and Weiser note, has in certain situations, including the development of the Internet, the development of the computer industry, and the development of competition in telecommunications, seemed to facilitate innovation.[44]

The question for regulators is how to determine when platform monopolists (or duopolists) will efficiently conclude whether to allow applications competitors to access their platforms to provide competing complementary services and when they will instead fully integrate and keep others off. Farrell and Weiser provide a subtle analysis of the various exceptions to the general rule of "internalizing complementary efficiencies" or "ICE" and its implications for the open access debate. According to the ICE principle, a monopoly platform provider that sticks with its core platform business will prefer that applications be cheaply and abundantly supplied because this increases demand for platform transmission. And, under some circumstances, even where the monopoly platform provider gets into the business of supplying applications for its platform, and where it has the ability to hinder applications rivals, it may still act efficiently in deciding how to treat applications competitors, and where competition in the applications market is efficient, the platform monopolist will protect competition. However, Farrell and Weiser go on to identify situations where this general principle may not apply, including where the platform provider is subject to regulation but the applications market is not, and in certain contexts of price discrimination. One example is particularly relevant to the network neutrality discussion:

> Because modern economic thought is not hostile to price discrimination, some commentators categorically discount price

44. Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. (forthcoming 2003), *available at* http://repositories.cdlib.org/iber/cpc/CPC02-035/.

> discrimination as an exception to the logic of ICE. But this is a mistake. Even where the price discrimination itself *enhances* efficiency, the platform monopolist may impose highly inefficient restrictions on applications competition in order to engage in price discrimination, particularly where there is a history of consumer willingness to pay for products in a certain manner. A possible example is the unwillingness of cable providers to allow streaming video applications to use their cable modems. ICE would suggest that cable providers should happily endorse this usage of their platform, as it would raise the potential profits available from this platform. The hole in the argument is that a cable provider who allows video streaming will find it harder to engage in the profitable and customary price discrimination that sets high markups for premium cable programming, leading them to consider banning (or disadvantaging) this method of distribution altogether.[45]

Another possible exception is what Farrell and Weiser call "incompetent incumbents." "As a prediction of business strategies, ICE can and will fail if the platform monopolist fails to understand ICE itself . . . . In our experience, businesspersons often find it counterintuitive to help outside firms compete against internal supply in applications."[46] The platform provider with monopoly power may keep new applications off its network to deter future innovation that may compete either with its platform or with complementary products.

2. Cable Broadband Classification Proceeding: The Relationship Between Cable Companies and Information Service Providers

When AT&T began to pursue its strategy to enter the residential broadband services market by buying cable companies, some ISPs argued that the FCC should require cable companies to allow competing ISPs onto their network. The FCC declined to do so and also declined to classify the cable broadband service as a Title VI cable service, a Title II telecommunications service, a Title I information service, or something else altogether.[47] But some local governments, stepping in to fill a

45. *Id.* at 27.

46. *Id.* at 33.

47. Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor to AT&T Corp., Transferee, *Memorandum Opinion and Order*, 15 F.C.C.R. 9816, 9866-73, ¶¶ 116-28 (2000) (noting AT&T commitment to provide unaffiliated ISPs with access to cable systems, and the Department of Justice consent decree requiring AT&T to divest MediaOne's ownership of RoadRunner and to seek DOJ approval before entering into certain types of agreements with Time Warner or AOL relating to the provision of high-speed Internet access services); Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee,

perceived vacuum created by the federal government, conditioned their cable franchise transfer approvals on the cable operators making their networks available to competing ISPs. The courts, however, had the next say.

The Ninth Circuit in *AT&T Corp v. City of Portland*[48] ruled that federal law barred Portland from imposing open access conditions on a cable franchise transfer. The court ruled that cable modem service was not a cable service, and therefore was outside the jurisdiction of the local franchise authority. Along the way, the court stated that cable modem service is a combination of the Internet access service, which is an "information service," transported over the cable broadband facility, which the court found to be a "telecommunications service."[49] This latter classification rattled the cable industry, which had no appetite for having its broadband facilities swept within the highly regulated ambit of common carrier telecommunications services. They had otherwise avoided industry-wide regulation, with the only open access obligations imposed by the Federal Trade Commission as conditions of the specific merger between AOL and Time Warner.[50]

The FCC subsequently departed from the court's conclusion and in the Cable Broadband Classification Proceeding ruled instead that cable modem service is an "interstate information service."[51] In this Proceeding, the FCC also ruled that although the cable modem service includes a "telecommunications component," there is no separate offering of a common carrier "telecommunications service" to either ISPs or to end user customers, thus effectively both removing cable broadband from local jurisdiction and, at the federal level, placing it outside the more highly regulated classifications of cable or telecom service. The FCC further waived any Computer Inquiry requirements that might be applied to cable operators providing local phone service over the cable plant.[52]

Memorandum Opinion and Order, 14 F.C.C.R. 3160, 3205-07, ¶¶ 93-96 (1999) (no requirement imposed).

48. 216 F.3d 871 (9th Cir. 2000).

49. *Id.* at 878. The Fourth Circuit struck down a Virginia county open access requirement in *MediaOne Group v. County of Henrico,* 257 F.3d 356 (4th Cir. 2001). In contrast to the Ninth Circuit, the Fourth Circuit declined to reach the question of how to classify cable broadband services, deferring instead for the time being to the FCC's administrative process. The court held that, regardless of how cable modem service is classified, Henrico County had violated 47 U.S.C. 541(b)(3)(D) by forcing MediaOne to provide its telecommunications facilities to any ISP as a condition for the county's approval of a cable franchise transfer. *Id.* at 362-64.

50. *FTC AOL Time Warner Merger Order*, *supra* note 42 (requiring access for small number of unaffiliated ISPs and prohibiting interference with the content of unaffiliated ISPs).

51. *Cable Broadband Classification Proceeding*, *supra* note 4, at 22-27, ¶¶ 33-41.

52. *Id.* at 28-29, ¶ 45.

Brand X (an unaffiliated ISP), EarthLink, the State of California, and Consumer Federation of America appealed the classification ruling in various jurisdictions. The case is back before the Ninth Circuit on the basis of a multidistrict litigation lottery.[53] If the court adheres to its original view that the underlying transmission is a "telecommunications service," the FCC has signaled it would use its forbearance authority to avoid imposing common carrier obligations on broadband transmission, but an adverse court ruling would open a long period of uncertainty and unravel the larger package of proceedings.[54] It would be exceedingly difficult for the agency to find that broadband services provided by telecommunications carriers are not a "telecommunications service" in the face of a court holding that broadband services provided by cable companies are a "telecommunications service." And it may not be possible for the FCC to satisfy the statutory criteria to forbear from each and every Title II obligation.

The FCC Order included a Notice of Proposed Rulemaking inviting public comment on whether it should require multiple ISP

53. The appeal raises the relationship between *stare decisis* and Chevron deference to an administrative agency's statutory interpretation, and the judges dwelled on this issue at oral argument. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). The FCC relied on *Mesa Verde Constr. v. Northern. California Dist. Council of Laborers,* 861 F.2d 1124 (9th Cir. 1988) (en banc), to support its claim that the Ninth Circuit should defer to the agency's subsequent classification of cable broadband services. In *Mesa Verde,* the Ninth Circuit held that if prior panel decisions "constitute only [a] deferential review of NLRB interpretations of labor law, and do not decide that a particular interpretation of [a] statute is the only reasonable interpretation, subsequent panels of this court are free to adopt new and reasonable NLRB decisions without the requirement of en banc review." *Id.* at 1134-35 (citation omitted). That case is distinguishable, however, because unlike in *Mesa Verde*, the *Portland* court's decision did not constitute a deferential review of an agency interpretation. Rather, the *Portland* court noted expressly that the FCC declined to give any interpretation. "We note at the outset that the FCC has declined, both in its regulatory capacity and as amicus curiae, to address the issue before us. Thus, we are not presented with a case involving potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine." *Portland*, 216 F.3d at 876. It makes more sense for a court not to be bound by *stare decisis* when its decisions involve deference under the Chevron doctrine to an agency's statutory interpretation. In both cases, it is not the court's decision that controls, but rather the agency's. In contrast, when, as here, the initial court decision is its own independent statutory interpretation, the claim to *stare decisis* is stronger.

54. As a Title II carrier, the cable companies could be required to comply not only with Computer Inquiry access, but general interconnection obligations, the duty to carry traffic without unreasonable discrimination, the duty to furnish service upon reasonable request, the duty to offer service on terms and conditions that are just and reasonable, to install network equipment that meets the requirements of the Communications Assistance to Law Enforcement (CALEA), to contribute to federal universal service fund, and to obtain FCC approval prior to exiting a market, unless the FCC exercised its statutory forbearance authority under section of the 1996 Act to remove certain Title II obligations. The Ninth Circuit noted the FCC's authority to forbear from regulation, *Portland*, 216 F.3d at 879, and the FCC tentatively concluded that Title II regulation would not be appropriate and that it should forbear from it. *See Cable Modem Classification Proceeding*, *supra* note 4, at 35, ¶ 58 n. 219.

access under its Title I ancillary jurisdiction. The ACLU and other network neutrality advocates subsequently have argued that important First Amendment principles are compromised if the Internet network owners can discriminate against or in favor of certain speech. But unless cable operators are found to have acted egregiously and denied access, the FCC likely will find the threats too hypothetical and not sufficiently proximate and will instead warn that they will keep an eye on everyone. The fear of explicit regulation could lead cable to operate under an implicit rule similar to what the high tech community and the states have proposed. By raising the issue, these advocates led the cable companies to state publicly that they do not discriminate, which makes it more difficult for them to do so in the future and makes it easier for government to impose nondiscrimination requirements on them if they do. Weiser's proposal—that the FCC should mandate a general requirement of nondiscriminatory access but provide network providers the opportunity to justify discrimination on a case-by-case basis—deserves serious consideration.[55]

The Commission also raised questions regarding which government agencies, if any, have jurisdiction to regulate cable modem service including questions of consumer protection, privacy, and rights-of-way. The FCC is likely to be reluctant to preempt the states or local governments in regulating in these areas because the government in general cannot ignore these issues, but the FCC has little appetite for taking them over. If the states or localities retain jurisdiction over these issues, it could provide some fodder for their seeking to impose consumer connectivity principles. The Commission could, however, as it did in the Triennial Review impose some general guidelines and delegate implementation to the local governments. But without the dual jurisdiction established by statute as with the case of local loop unbundling, such delegation might be vulnerable to challenge, unless they allow the local authorities to opt out.[56]

3. Wireline Broadband Classification: The Relationship Between Incumbents and Information Service Providers

The FCC also initiated a proceeding to examine whether and how to regulate broadband access to the Internet provided over wireline

55. *See* Philip J. Weiser, *Toward A Next Generation Regulatory Regime*, 49 LOY. L. REV. (forthcoming 2003).

56. *Cf.* New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997) (federal government may not "commandeer" the states); Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1571, 1501ff (2000) (establishing a procedure for consideration of bills that would impose unfunded mandates on state and local governments).

facilities.[57] The FCC tentatively concluded that when a company provides wireline broadband Internet access service over its own lines, the bundled Internet access-broadband transmission service is an "information service," and the underlying transmission is not a common carrier "telecommunications service" but rather "telecommunications." The FCC went on to ask for comment on a prior agency ruling that if a company provides wholesale or retail broadband transmission, uncoupled with Internet access, that service is a common carrier "telecommunications service."[58]

The precise scope of the Wireline Broadband Classification proceeding is unclear. It appears that the Commission intends its decision to apply only to Internet access, but it may be difficult and I believe it is undesirable for the Commission to confine its analysis in a way that does apply to other information service providers. The proceedings may also not apply to new fiber networks. If this holds, then the FCC is dealing with the world of today, but not tomorrow. The express (though buried in a footnote) exclusion of "all-fiber networks" may represent an effort by the FCC to limit to the copper plant any decision to classify broadband transmission as Title I so that it will be free to reconsider the regulatory framework as the networks migrate to fiber.[59] Again, however, it may be difficult for the FCC to confine the reach of its analysis to DSL. It is difficult to imagine what analysis would apply to lead to the conclusion that DSL broadband is an information service that would not also apply to conclude the same for fiber.

What is most directly at stake in the classification is the continuation of the Computer Inquiry safeguards. As discussed above, in a series of decisions initiated in the 1960's, the FCC declined to regulate the data processing services carried over the monopoly telephone network. But out of concern that the telephone industry could exploit its monopoly over the phone lines to prevent competition from developing in the enhanced services industry, by discriminating in favor of its own enhanced services in providing access to the telephone transmission facilities, the FCC developed a system of safeguards ensuring access to the "basic" network services. If the FCC reclassifies the underlying network as an information service, the legal predicate for granting enhanced service providers nondiscriminatory access to the network will be gone.

57. *Wireline Broadband Classification Proceeding*, *supra* note 4.
58. *Id.* at 11, ¶ 17, 15-16, ¶ 26.
59. *Id.* at 2, n.1.

a. Computer Inquiry Safeguards of Enhanced Service Providers' Access to the Network

The core Computer Inquiry requirement is that if a facilities based common carrier provides Internet access service (or any enhanced or information service) it must give unaffiliated ISPs (or any other enhanced or information service providers) nondiscriminatory access, both in terms of price and provisioning, to the basic underlying telecom transmission used in the provision of information services. This applies to both dial-up and broadband transmission.

The nature of the safeguards changed over time. In the beginning, the FCC adopted a severe structural approach, forbidding the platform monopolist from participating in the applications sector. In *Computer I*, the FCC decided not to regulate data processing, and relied on an earlier consent decree that limited AT&T to providing regulated common carrier services.[60] This turned out to be difficult to implement because it required the FCC to classify all services as either "telecommunications" or "data processing," which proved increasingly difficult as computer and communications technology continued to merge and called into question some of the basic underpinnings of the regulatory approach.

In *Computer II*, the Commission developed a new set of categories, distinguishing between "basic" telecommunications services and "enhanced" services and ordered the incumbents to provide the basic transmission services under tariff on an equal basis to all customers and required Bell companies to form separate companies to provide their own enhanced services.[61]

In *Computer III,* the FCC revisited this system of structural separation safeguards after AT&T divested its local Bell Operating Companies pursuant to the antitrust consent decree.[62] The agency

60. *See generally* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Servs. & Facilities, *Final Decision and Order*, 28 F.C.C.2d 267 (1971), *aff'd in part, modified sub nom.* GTE Serv. Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973), decision on remand, *Order*, 40 F.C.C. 2d 293 (1973) [hereinafter *Computer I*].

61. Amendment of Section 64.702 of the Commission's Rules and Regs. (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384 (1980) [hereinafter Computer II], on reconsideration, *Memorandum Opinion and Order*, 84 F.C.C. 2d 50 (1980) and *Memorandum Opinion and Order on Further Reconsideration*, 88 F.C.C. 2d 512 (1981), *aff'd sub nom.* Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C.Cir. 1982) (*CCIA*) (the incumbents' enhanced service subsidiaries were required to maintain separate physical facilities, personnel, and accounting records).

62. Amendment of Section 64.702 of the Comm'n's Rules and Regs. (Third Computer Inquiry), *Report and Order*, 104 F.C.C.2d 958 (1986) [hereinafter *Computer III*]; on reconsideration, *Memorandum Opinion and Order on Reconsideration*, 2 F.C.C.R. 3035 (1987); *Memorandum Opinion and Order on Reconsideration*, 3 F.C.C.R. 1135 (1988) and *Memorandum Opinion and Order on Further Reconsideration and Second Further Reconsideration*, 4 F.C.C.R. 5927 (1989), *vacated in part*, California v. FCC, 905 F.2d 1217

recognized the cost of structural separation and reasoned that it was less necessary in light of the divestiture and increased competition. However, because the Bells continued to have monopoly power over the local phone lines, the FCC determined that nondiscrimination safeguards were still necessary. It replaced the structural separation requirement with nonstructural or conduct safeguards to prevent anticompetitive activity by the monopoly platform provider against competing applications provider. Thus, the monopoly providers were free to provide enhanced services without using separate affiliates so long as they satisfied the nonstructural or conduct safeguards.[63]

b. Possible FCC Classification Rulings and Analysis of Common Carrier Status

The FCC will likely at a minimum conclude that an integrated or bundled Internet access service provided over a third party's broadband facilities or over the carrier's own broadband transmission facilities on a retail basis should be classified as Title I information services.

The more challenging question is whether and how the FCC will tackle the issue of classification of broadband transmission itself. The agency has raised the issue in two ways, which together seem to encompass both methods by which the telephone companies provide broadband service. First, the FCC has proposed that the self-provisioned broadband transmission that underlies an integrated ISP service should be classified not as a separate common carrier telecommunications service, but rather as "telecommunications." This decision standing alone would remove a number of discrete regulatory

(9th Cir. 1990) (*California I*); Computer III Remand Proceedings, *Report and Order*, 5 F.C.C.R. 7719 (1990); on reconsideration, *Memorandum Opinion and Order on Reconsideration*, 7 F.C.C.R. 909 (1992); Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, *Report and Order*, 6 F.C.C.R. 7571 (1991), *vacated in part and remanded*, California v. FCC, 39 F.3d 919 (9th Cir. 1994) (*California III*); Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Servs., *Report and Order*, 14 F.C.C.R. 4289 (1999); on reconsideration *Order*, 14 F.C.C.R. 21,628 (1999).

63. In *Computer III*, the FCC adopted two regimes. Under "open network architecture" (ONA) the FCC required the Bells to unbundle the service components into "building blocks" or elements that would be made available to enhanced services providers to permit them to construct their own innovative services as easily as the Bells. As an interim measure, while the Bells were developing ONA plans, the FCC required them to file "comparably efficient interconnection" (CEI) plans for each enhanced service the Bells offered. The CEI plans were meant to ensure that competitors could connect to the Bell networks on equivalent terms that the Bells used for their own enhanced services. The ONA rules are still on review at the FCC after the Ninth Circuit remanded the order. California v. FCC, 39 F.3d 919 (9th Cir. 1994). The CEI requirements are still in effect, but have been pared back by the FCC in an effort to make them less burdensome.

obligations.[64] One less proximate, but more significant consequence could follow, as discussed below, if the FCC classifies the standalone broadband service as a common carrier, and a Bell does not offer broadband on a standalone basis, but offers it only when bundled with an information service.[65] If the FCC classifies the underlying transmission of the integrated service as Title I, then the Bells would have achieved regulatory parity with cable and would have moved broadband (or at a minimum, DSL) service outside regulation.

The FCC also raised the issue of how to classify and regulate the standalone broadband transmission that is sold both to end user customers and to independent ISPs and other information service providers. Although the FCC had previously ruled that this is properly classified as a common carrier service, it expressly opened for reconsideration its earlier decision.[66]

Formally, the Commission's classification decision should be guided by application of the standard set out in *NARUC v. FCC*.[67] Under the FCC's interpretation of the court's two-part test for common carriage, the Commission considers whether (1) the "carrier makes capacity

64. It would provide clarity to the industry that it need not file tariffs on the integrated ISP/DSL service. It should also establish that incumbents need not make DSL service available on a discounted, resale basis pursuant to 47 U.S.C. § 251(c)(4), if they do not otherwise make DSL services available on a retail basis, thereby resolving an issue the Commission left outstanding in its order granting SBC's application pursuant to section 271 to provide long distance services in Missouri and Arkansas. *See* Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri, *Memorandum Opinion and Order*, 16 F.C.C.R. 20,719, 20,759-60 (2001). The FCC can still consider separately whether to impose universal service fund obligations. Carriers currently make universal service contributions on the revenue from this integrated service provided on self-provisioned transmission, and reclassifying the service as Title I would call this obligation into question. The FCC stated that these contributions will remain in effect during the pendency of its overall universal service proceeding even if it reclassifies the underlying transmission as a Title I service.

65. Though the incumbents would need to file with the Commission under section 214 to discontinue the service, and this would give the Commission a jurisdictional predicate to assess the consequences, it is unlikely the agency would require the carriers to continue to provide standalone DSL. Not every Bell offers standalone retail DSL service to residential customers today. Some offer residential customers only a bundled information service and offer ISPs a wholesale DSL standalone transmission service, and business customers a retail standalone broadband service.

66. *See Wireline Broadband Classification Proceeding*, *supra* note 4, at 15, ¶ 26, (citing Classification Pro Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 F.C.C.R. 24,012, 24,029, ¶ 35 (1998) (finding that advanced services such as DSL constitute telecommunications services when offered to the public directly on a stand-alone basis).

67. Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C.Cir. 1976) (*NARUC I*). *See* Virgin Is. Tel. Corp. v. FCC, 198 F.3d 921 (D.C. Cir. 1999) (affirming the applicability of the NARUC standard after the 1996 Telecommunications Act).

available to the public indifferently" or (2) whether the "public interest requires common carrier operation of the proposed facility."[68] But as a practical matter, the FCC will be guided in its deliberations by the ultimate policy objectives it seeks to accomplish and will shape its legal analysis accordingly, where, as here, the legal standard is sufficiently malleable. Indeed, the Commission has concluded that a number of services that are either pure transmission or that have a transmission component need not be classified as a common carrier, including satellite,[69] submarine cables,[70] and a number of mobile services.[71] The first prong of the NARUC test, whether the carrier has served the public indifferently, should not be considered in light of the fact that the law required incumbents to do so (although this history of common carriage service might justify imposing a transition period to accommodate the fact that ISPs have relied on the availability of telephone transmission). The analysis should focus instead on the second prong, whether the public interest requires common carriage.

There are four major sets of regulatory obligations that attach to common carrier broadband transmission that are at stake and that should guide the FCC's analysis. In undertaking the *NARUC* analysis, the Commission should focus on both end user or consumer access to broadband services and access by companies, such as ISPs and other enhanced service providers such as Wi-Fi, VOIP, and content providers such as Amazon, which may compete with the network owners' complementary advanced services and which depend on access to the networks in order to provide their services. The collateral set of obligations that apply equally to telephone service providers, such as wire-tapping capability, consumer protection rules affecting privacy, access by persons with disabilities, and the issue of contributions to the universal service fund, raise separate issues and may be more easily

68. Cable & Wireless, PLC, 12 F.C.C.R. 8516, ¶¶ 14-15 (1997). The judicial standard is "first, whether there will be any legal compulsion . . . to serve [the public] indifferently, and if not, second, whether there are reasons implicit in the nature of [the] operations to expect an indifferent holding out to the eligible user public." *NARUC I*, 525 F.2d at 642.

69. Licensing Under Title III of the Communications Act of 1934 as Amended, of Non-Common Carrier Transmit/Receive Earth Stations Operation with the Intelsat Global Communications Satellite System, *Declaratory Ruling*, 8 F.C.C.R. 1387 (1993) (allowing most satellite services on a private carriage basis).

70. AT&T Submarine Systems, Inc., *Memorandum Opinion and Order*, 13 F.C.C.R. 21,585 (1998), *aff'd*, *Virgin Is. Tel.*, 198 F.3d 921; *In re* FLAG Pac. Ltd., 15 F.C.C.R. 22,064 (2000) (allowing submarine cable to be offered as private carriage).

71. Amendment of the Commission's Rules to Establish New Personal Communications Services, *Policy Statement and Order*, 6 F.C.C.R. 6601 (1991); Petition for Reconsideration of Amendments of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization, *Memorandum Opinion and Order*, 98 F.C.C.2d 792 (1984) (private carrier paging system may be offered either on a common or non-common carrier basis).

reinstated under the FCC's ancillary jurisdiction or jurisdiction over universal service.[72]

ISP and other enhanced service access is most directly raised in this proceeding. The Bells argue that they should be relieved of the Computer Inquiry obligations to provide nondiscriminatory access to independent ISPs and other enhanced or information service providers because the world has changed since the Computer Inquiry proceedings. The Bells argue that ISPs now have ample alternative platforms, and point in particular to the fact that cable has about two-thirds of the residential and small business broadband market and complain of the FCC regulating more heavily the second place contender. They argue that regulatory parity is now necessary to give them the same flexibility to control their network as their major competitor, the cable industry, has. (The need to act in certain ways in order to become a more effective competitor to cable is the same argument the satellite companies, EchoStar and DirectTV, made in their unsuccessful attempt to merge. There, although admittedly in a very different context—a merger rather than industrywide competitive safeguards—the FCC found a duopoly was insufficient to relax governmental controls.) The Bells further argue that asymmetric regulation distorts the market and creates disincentives to investment. Bells argue generally for "regulatory parity," with their first choice being deregulation, but the second choice of some is increased regulation of cable.

The problem with the Bells' argument regarding information and enhanced service providers' access is that it exaggerates their options. If the relevant market is not the end user market for bundled Internet access/broadband service, but instead is the wholesale ESP/ISP market for unbundled broadband transmission, then incumbent telephone companies currently have the largest market share. Although the Bells and the FCC itself often point to alternative platforms of wireless,

72. *See* Communications Assistance for Law Enforcement Act of 1994, Pub. L. No. 103-414, 108 Stat. 4279 (codified at 47 U.S.C. §§ 1001-1021) [hereinafter *CALEA*]; United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 18, 47, and 50 U.S.C.) [hereinafter *PATRIOT Act*]. CALEA requires telecommunications carriers to assist law enforcement by making sure carriers have the necessary capability and capacity to permit electronic surveillance. By statute, CALEA access obligations do not apply to entities engaged in providing information services. Nor do they apply to cable modem service. The PATRIOT Act, however, does apply to ISPs and cable Internet providers. The FBI and DOJ have filed comments arguing against classifying wireline broadband as Title I.

See also 47 U.S.C. § 222 (imposing a duty on telecommunications carriers to protect the confidentiality of customer information); 47 U.S.C. § 225 (requiring common carriers to provide certain services for the hearing impaired); 47 U.S.C. § 255 (requiring telecommunications service providers to ensure that service is available to persons with disabilities).

satellite, and competitive local carriers, in fact they are of little present and uncertain future consequence. Despite the hype of Wi-Fi and the perennial hope of satellite, in fact none today offers meaningful nationwide platforms. There is in effect at best a duopoly for end user access and for ISP access. Currently ISPs have no legal rights to access the cable broadband network, apart from the limited merger conditions imposed by the FTC, which will expire. And in fact cable companies have not yet provided meaningful access. Unless this changes as either a legal or a commercial matter, as a practical matter ISPs are restricted to the wireline network. The FCC's elimination of line sharing should make it even more difficult for the Commission to conclude there are adequate alternative wireline platforms. If the FCC eliminates nondiscriminatory access to the wireline broadband network, then the ISPs will be restricted to whatever commercial terms they can strike with the Bells and the cable companies. Without additional rules protecting end user access to the network, the ability of application and content providers to reach customers may be further affected if only cable and telephone-affiliated ISPs are left remaining. The cable and telephone companies will have the ability to restrict access to the network to favor particular content or to keep off competing services such as Wi-Fi or VOIP. The question is whether they will have the incentive to do so.

Consistent with the ICE principle, discussed above, the Bells may have an incentive to keep as much traffic and customers on their networks as possible, and they may conclude that in order to accomplish this, they should make their networks available to independent ISPs.[73] Qwest for example, reports that it provides its residential broadband customers a choice of over 400 independent ISPs because this increases the value of its broadband service. The most likely market outcome is that the Bells will maintain some ISPs, if for no other reason than to avoid re-regulation. Some may retain only those that are weak enough that they do not pose a serious threat to the incumbent's own ISP service, others may retain a few that are attractive enough that that they can capture additional customers, depending on their business strategy. Whether or not the Bells keep an open and "modular" system available to competing applications providers may be determined by the factors identified by Farrell and Weiser, discussed infra. The point is that it is not automatically or ineluctably the case that they will.

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73. *See* James Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. ON REG. 39 (2000) (strong indirect network externalities argue against imposing open access obligations on broadband networks, and the cable television model should be applied to all carriers deploying broadband information services).

The fact that there is a duopoly does not of course justify preserving the regulatory status quo. The point is simply that the incumbents' case for removing Computer Inquiry obligations is flawed. It certainly would be possible for the Commission to eliminate the specific Computer III ONA and CEI regimes, which are in many respects overly complicated and costly. But it will be more difficult for the agency to conclude both that (1) the underlying broadband transmission should continue to be classified as a common carrier service, and (2) that its forbearance authority justifies elimination of the core Computer Inquiry nondiscriminatory access obligation to information service providers or to further remove the core Title II prohibition against unreasonable discrimination in providing access to the network to end users.

The FCC could instead reclassify underlying broadband transmission as a Title I rather than a Title II common carrier service, but decide as a policy matter to impose some access (and other) obligations under its ancillary jurisdiction. There is much to recommend this approach from a policy standpoint. The structure of the Communications Act worked reasonably well so long as different platforms provided different service. This worked, not because the different platforms necessarily required different regulatory approaches (apart from spectrum issues), but because the need to regulate generally varied depending on the type of service. There are, for example, different policy imperatives for voice service than for television. If convergence finally occurs, which appears increasingly likely because of the coincidence of technological convergence and commercial pressure to bundle services, the Communications Act as currently structured will not facilitate the best regulation. It is unlikely, however, that Congress will undertake a wholesale rewriting of the Act any time soon. However, the Commission could in effect start from scratch, much as the EU has done, if it were to reclassify all broadband services as Title I, and then regulate from the ground up, asking questions of first principles regarding the need to regulate.

One weakness with this approach is that, given the current structure of the Communications Act, the Commission probably cannot avoid the need to evaluate whether a service should be regulated as a common carrier, a concept, that as currently defined, has either largely outlived its usefulness or must have some discipline and strictness reinstated either by the Commission or by the courts. And it may be difficult for the Commission to find—as it must in order to reclassify broadband transmission from a Title II to a Title I service—that there is sufficient competition in both the end user and the wholesale ISP market that the public interest does not require common carrier regulation, and then to reason—as it must to impose access requirements under its ancillary

jurisdiction—that the end user and wholesale ISP markets are insufficiently competitive that access or other competition related obligations are justified.

A second, and ultimately more serious problem, discussed in more detail in Section II, is that it is not at all clear that the courts would uphold the Commission's legal authority to impose competitive safeguards under its ancillary authority. Because the Commission could achieve much of the regulatory reform through its Title II forbearance authority, this may be a better, perhaps less elegant, but more disciplined and ultimately safer approach.

C. Nondominance Proceedings: Bells and All Customers

The FCC is also examining the appropriate regulatory treatment of incumbents' provision of broadband services that are regulated under Title II, looking in particular at what regulatory safeguards should apply when a carrier that is dominant in the local market also provides broadband service. Currently, the Bells are generally treated as dominant, including in the broadband market, and are thus subject to tariff filing, tariff support, and rate regulation, unless the Commission has found them to be nondominant, or lacking market power in a particular market, as it has in the long distance market.[74]

In this proceeding, the Commission has undertaken a competitive market analysis of broadband services. As usual, the outcome will depend in large part on the definition of the relevant markets. If the geographic market is defined more narrowly than a nationwide market, that would likely lead to a finding that there is a duopoly at best and in many places a monopoly, at least for residential service. And if the product market is defined as transmission services made available to

74. Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, 12 F.C.C.R. 15756 (1997) (finding Bells nondominant in provision of interLATA services). The FCC has adopted the definition of market power to include where a carrier can profitably raise and sustain prices above competitive levels and thereby exercise market power in two ways.

> First, a carrier may be able to raise prices by restricting its own output, which usually requires a large market share. Second, a carrier may be able to raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services. In assessing the first type of market power, the Commission traditionally has focused on certain well-established market features, including market share, supply and demand substitutability, the cost structure, size, and resources of the firm . . . . With respect to the second type of market power, the Commission has focused on the incumbent LEC's ability to exercise market power through its control of local bottleneck facilities.

Nondominance Proceeding, *supra* note 5, at 16-17, ¶¶ 28-29.

ESP/ISPs (as opposed to end user residential customers), then cable companies' market share would be trivial rather than majority. However, on the latter point, it would be difficult to justify continuing to regulate the Bells, but not their cable competitors because of the Bells' market share when their prevalence in that market is itself the product of regulatory asymmetry.

The significance of this proceeding has shifted somewhat over time. When it was initially pushed by SBC and others, its value was largely atmospheric. Incumbents were pursuing broadband unbundling relief both in Congress through the Tauzin-Dingell bill and later at the FCC through the Triennial Review. Being declared nondominant in the provision of broadband services would have helped set the stage for those efforts; it would have been more difficult for the Commission or Congress to continue to require the Bells to unbundle their broadband facilities once they found them to be nondominant in the provision of broadband services. The Bells having obtained the broadband relief they sought on that front, and then some, much of the wind is out of this sail, though there is still some immediate, practical relief the Bells would get by being declared non-dominant.[75]

It is worth noting that as a threshold matter, much of the nondominance proceeding would effectively be mooted if the Commission declares broadband services to be Title I information services rather than Title II common carrier telecommunications services. The nondominance proceeding assumes a telecommunications service statutory classification, because to be subject to dominant carrier regulation, the service must as a threshold matter be a telecommunications service. So a finding that residential broadband services are information services would eliminate most dominant carrier regulation.

State regulation is not directly affected by the FCC's determination, because the FCC is assessing the market in services it classified as interstate. Though of course the federal agency's findings and analysis could have some persuasive force in state proceedings. The significance of this proceeding is primarily as one building block in the larger move toward deregulating wireline broadband services and facilities.

75. Bells would get relief from the administrative costs of filing tariffs and providing cost support and responding to investigations, though this is relatively little as the cost support is not often scrutinized and tariff oppositions are rare. Bells stress the possibility of increasing revenues by being able to act more flexibly. Currently there is a 7 and 15 day waiting period before a tariff goes into effect, and Bells argue this hobbles their ability to act quickly in changing prices or offering new services. However, unless the FCC changes the current rules, being declared non-dominant would not relieve them of the core Computer Inquiry non-discriminatory access obligation as those apply to both dominant and nondominant providers.

D. VOIP: The Coda

Although not cited by the FCC as one of the broadband proceedings, the regulatory classification of voice over Internet protocol ("VOIP") is key to the final regulatory framework governing broadband communications. VOIP could be viewed as merely another enhanced service operated over the broadband network. But as the technology has improved, leading cable companies and traditional telephone companies have begun migrating to VOIP, and it appears increasingly likely that VOIP will eventually replace much of the circuit switched voice traffic that has been at the core of the common carrier regulatory regime. Thus the combination of how the FCC regulates VOIP and how it regulates underlying broadband platforms may determine the regulatory framework of information services and platforms in the future.

The issue of whether and how to classify and regulate VOIP has been percolating at the FCC for a number of years, and the agency deliberately and expressly has taken a position of benign neglect. It deliberately ducked the issue of how to regulate phone-to-phone internet telephony in the 1998 Stevens Report, the last time the Commission addressed the issue.[76] At the time, the agency's strategy was to defer ruling on VOIP until circuit-switched telephony regulations had been reformed, particularly access charges (the payments made by long distance carriers to the local carriers that originate and terminate a call) and contributions to the universal service fund. The European Union adopted a similar strategy, though using slightly different terms. The FCC was able to buy more time than officials originally expected in part because VOIP remained largely confined to international calls, where people were willing to accept lower quality of service in return for avoiding high international termination rates. However, as the quality of VOIP service has improved, the service has matured, so that large and established, rather then merely niche carriers, have begun to employ the technology. Thus, the issue of how to regulate VOIP is again before the Commission.[77]

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76. Federal-State Joint Board on Universal Service, *Report to Congress*, 13 F.C.C.R. 11,501 (1998) [hereinafter *Stevens Report*] (concluding that phone-to-phone IP telephony services "bear the characteristics of 'telecommunications services'" but finding that it is not "appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual offerings").

77. ATT resurrected the issue by filing a petition with the FCC seeking a declaratory ruling that VOIP is an information service. AT&T charges that some incumbent local carriers are imposing access charges and seeks a ruling that its VOIP services are exempt from access charges. Petition for Declaratory Ruling that AT&T's Phone-to-Phone Telephony Services are Exempt from Access Charges, WC Docket No. 02-361. In a separate proceeding, a VOIP provider that characterizes its services as computer-to-computer rather than phone-to-phone VOIP has filed a petition for a declaratory ruling that its service is unregulated. Petition for

The agency faces many of the same issues as it does in the broadband classification proceedings. It must decide as a threshold matter how to classify the service: whether to impose common carrier regulations under Title II and exercise forbearance authority to remove certain obligations, or deem it to be an information service under Title I and invoke ancillary jurisdiction to impose obligations. As before, the key regulatory obligations the Commission must consider as a policy matter are universal service, access charges, and the collateral obligations such as public safety, law enforcement capability and consumer issues such as disability access.

One state, Minnesota, has recently put a stake in the ground by classifying VOIP as a telecommunications service, requiring the service provider, Vonage, to obtain state certification and otherwise be subject to state common carrier regulations.[78] If the state agency sticks with this position, or if others follow suit, the FCC will have to address the regulatory status of VOIP sooner rather than later, and may square off directly with the states. If the FCC refrains from classifying the service before a challenge to the state law makes its way to the courts, the reviewing court will find itself in the same situation as the courts in the cable open access proceedings—ruling without the benefit of the expert agency determinations. And then the FCC will once again be regulating against the backdrop of a court decision.

E. Moving Toward a Horizontal Regulatory Regime

The Commission has the opportunity in this set of proceedings to reform its regulatory framework in a way that more closely matches the current state of telecommunications services. For some time now, many Commission staff and commentators have recognized the inadequacy of the "vertical" or "silo" approach of both the Communications Act and the resulting regulatory regime. As new technologies and new services developed, Congress and the FCC under a vertical approach, developed particular categories of obligations and rights for each type of platform, which traditionally corresponded to a particular service—broadcasting,

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Declaratory Ruling That pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunication Service, WC Docket 03-45. The FBI and DOJ urge the Commission to hold the petition in abeyance until the Commission completes the cable and wireline classification proceedings.

The FCC's decisions in the general, but largely dormant proceeding examining major reform of intercarrier compensation may affect VOIP depending on its ultimate classification. *See* Developing a Unified Intercarrier Compensation Regime, *Notice of Proposed Rulemaking*, 16 F.C.C.R. 9610 (2001).

78. Minnesota Public Utility Commission, Docket P6214/C-03-108, Issued Sept. 11, 2003, *available at* http://www.puc.state.mn.us.

common carrier telephony, cable television—and regulated each differently. This approach requires tortured and often unsatisfying definitional exercises, particularly as convergence developed, to decide in what category to place the service, and consequently what regulatory obligations to apply. Especially before Congress granted the FCC forbearance authority, all regulatory consequences turned on the results of this definitional exercise.

It has become popular more recently to call for a "horizontal" or "layered approach" to regulation.[79] This approach recognizes that a single technology or "platform," such as fiber, can provide multiple services, including voice, high speed data, and video programming. And that the same service, for example, voice telephone calls, can now be made using several different technologies, such as copper, fiber, radio spectrum, and cable plants. Generally, this approach divides the world into layers—physical and different applications or content—and takes a more functional approach to analyzing what regulatory treatment is appropriate. Thus, under this approach, voice traffic would be regulated the same regardless of the medium of transmission, unless there were some particular justification for particular treatment.

The European Union has adopted new legislation that restructured the regulation of electronic communications services and facilities in the Member States.[80] With a serious nod toward convergence of telecommunications, media, and information technology, the EU has adopted new laws that strive to impose a unified, single regulatory framework on all electronic communications and that rely more heavily on competition or antitrust law. Rather than linking regulation to particular services or technologies, the EU regulatory framework imposes remedies or safeguards "solely in markets where there are one or two undertakings with significant market power . . . and where national and

79. *See, e.g.*, Kevin Werbach, *A Layered Model for Internet Policy*, 1 J. ON TELECOMM. & HIGH TECH. L. 37 (2002); Douglas C. Sicker & Joshua L. Mindel, *Refinements of a Layered Model for Telecommunications Policy*, 1 J. ON TELECOMM. & HIGH TECH. L. 69 (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). Unfortunately, commentators have used opposite terms for the same concept, so for example, Werbach characterizes the layered model as "vertical," while Frieden calls the same model "horizontal." I see the traditional technology specific model as a vertical one, and the so-called layered approach as horizontal, and use the terms accordingly.

80. Directive 2002/20.ED of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, 2002 O.J. (L 108)(Framework Directive); Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities, 2002 O.J. (L 108), *available at* http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/text_en.htm#acc

Community competition law remedies are not sufficient to address the problem."[81] Now, to be sure, even this model cannot escape altogether the need to draw lines between and around certain sets of services; in order to determine which companies have "significant market power" requires, of course, defining the relevant market. For example, in determining whether to impose sector specific regulation (as opposed to relying on general competition or antitrust law) on companies providing wireless service requires a determination of whether the relevant market is telephone service generally or whether there is a separate market for wireless service. And, echoing the themes of this paper, one of the most difficult issues faced by proponents of the legislation was the debate over the proper role of the Member States regulators. Nevertheless, the European model has much to recommend it. It is probably the most interesting experiment in regulatory reform occurring now, in part because it takes a mature set of industries and nearly starts from scratch, largely ignoring legacy regulatory status.

As some have noted, Computer Inquiry II took an early step in the direction of horizontal regulation by differentiating between the underlying physical network and the data processing services that ride over that network. But this was limited because it dealt with the only platform relevant at the time, the wireline network. If the FCC were to continue down the path it has started in the broadband classification proceedings, and sidestep historical and political constraints, it would go far toward constructing a more encompassing horizontal model of regulation.

The underlying layer would be the cable and wireline facilities, which the Communications Act, as implemented by the FCC, requires the telephone incumbents but not the cable companies to unbundle. The FCC reduced this discrepancy in the Triennial Review Order by essentially treating new fiber wireline networks the same as upgraded, two-way, broadband cable networks, requiring unbundling in neither case. The next level would be broadband transmission services, which the FCC is considering how to regulate in the pair of broadband classification proceedings, and which it has at least proposed to classify the same. The second stage of that inquiry will be whether to then impose equivalent obligations on both. The next level is ISP access, which is an unregulated interstate information service, whether provided

81. Public Consultation on a Draft Commission Recommendation on Relevant Product and Service Markets within the Electronic Communications Sector Susceptible to Ex Ante Regulations in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communication Networks and Services, *Commission of the European Communities Working Document*, *at* http://www.oftel.gov.uk/ind_info/eu_directives/draft_rec_relmar.pdf (June 17, 2002).

by cable or telephone companies. The next level would be voice service. At least for now, circuit switched voice service, offered over both cable and telephone lines, is regulated as a Title II service, with both making universal service contributions. When the Commission rules on the appropriate regulatory treatment of VOIP, it should apply the result equally to VOIP over cable plant as VOIP over the telephone lines, absent a relevant, specific distinction between the two. The next level could be video services. It is at this level that one confronts the fact that moving toward a horizontal model of regulation does not remove all classification problems. Currently, of course, cable television is regulated under Title VI of the Act. Currently telephone companies do not provide video service, but the Commission has ruled that when incumbents provide video programming services to end users, they do not need to provide that programming on a common carrier basis.[82] In the cable modem classification NPRM, the FCC commented that "even if streaming video does achieve television quality, it would not be treated as a cable service unless it otherwise falls within the definition of 'cable service.'"[83] Throw in the historical and current political significance of over-the-air broadcasting, and this layer is apt to retain gerrymandered regulation for quite some time. But ultimately the agency should apply the same regulatory treatment absent a relevant difference, including any First Amendment considerations, between the platforms.

The largest obstacle to moving toward a fully horizontal and technology-neutral regulatory framework in the United States is, in fact, history and politics. And to be less cynical, a genuine desire on the part of policymakers to minimize regulation, even if it yields uneven regulatory treatment. One need only look to the FCC's rejection of an ISP's argument that Computer II nondiscriminatory access requirements should be imposed on cable to get a glimpse of the future. In the Cable Modem Classification Proceeding, Earthlink argued that it is irrelevant whether as an historical matter cable operators in fact offer transmission service on a stand-alone basis. EarthLink argued that the FCC *should* require them to offer a stand-alone transmission service and offer it to ISPs and other information service providers on a tariffed basis pursuant to the Computer II requirements. As the Commission characterized EarthLink's argument:

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82. Price Cap Performance for Local Exchange Carriers, *Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262*, 12 F.C.C.R. 16642, 16715 ¶182 (1997) ("LECs are now permitted to participate in video markets as cable operators, through provision of common carrier video services, or as operators of non-common carrier 'open video systems.'"), *aff'd in part and rev'd in part*, *USTA*, 188 F.3d 521 (D.C. Cir. 1999).

83. *Cable Broadband Classification Proceeding*, *supra* note 4, at 38, n. 236.

> The reality is that information services can only be provided to the public over a common carrier telecommunications facility. In support of its arguments, EarthLink points to a line of decisions in which the Commission has required common carriers that provide information services to offer the underlying telecommunications as a stand-alone service.[84]

The Commission's entire response to this argument is as follows:

> These decisions are inapposite. In the cases relied upon by EarthLink and others, the providers of the information services in question were traditional wireline common carriers providing telecommunications services (e.g., telephony) separate from their provision of information services. Computer II required those common carriers also to offer on a stand-alone basis the transport underlying that information service. The Commission has never before applied Computer II to information services provided over cable facilities. Indeed, for more than twenty year, Computer II obligations have been applied exclusively to traditional wireline services and facilities. We decline to extend Computer II here. As we have found above, cable modem service providers currently offer subscribers an integrated combination of transmission and the other components of cable modem service. EarthLink invites us, in essence, to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act. Such radical surgery is not required.[85]

Or, in other words, "because I never said so."

Again, to be clear, criticizing an asymmetric regulatory regime says nothing about whether the correct direction is to increase or decrease regulation. Cable has never sold a wholesale transmission service, and arguably it would be wrong to impose a new service obligation on them. But the Bells sold transmission to ISPs under legal compulsion. Under the second prong of the NARUC common carrier test, one could make a case that there are few factors that would require a conclusion that the public interest requires the wireline broadband network be regulated as a common carrier, but not the cable broadband network.[86] But, again, as a matter of history and current politics, this probably will not happen.

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84. *Id.* at 27, ¶42 (internal citations omitted).

85. *Id.* at 28, ¶43 (internal citations omitted).

86. Indeed, Verizon has raised a First Amendment argument that may gain more force if telephone companies put more company selected content over their pipes. It argues that

> Broadband transmission (together with the facilities used to provide it) constitutes a medium through which telephone companies are able to deliver a form of speech – the companies' own Internet and other content and services, possibly packaged with content from other sources or with commercial advertising and solicitations – to

One possible implication of moving to a horizontal approach is that the same company will be subject to multiple regulators: the local government for cable TV services, the states for intrastate phone service, the FCC for content, interstate voice, and advanced services. This is not really that different than the current situation for a platform provider that has chosen to provide multiple services. But as that becomes increasingly the rule rather then exception, it may call for rethinking the regulatory architecture.

II. IMPLICATIONS FOR STATES

The stakes are high in this set of proceedings. As a policy matter, the Commission is faced with the task of trying to locate the right balance of regulation (or deregulation) to spur investment in broadband without quashing innovation. It is striking that balance at a time when provision of broadband services is at a stage between monopoly and full competition. The policy challenge is how best to regulate a cross-platform duopoly. As a legal matter, the agency has embarked down a path in this set of proceedings where the ultimate consequences of reclassification are unknown.

> their customers. It is no different in that regard from the pages of a newspaper, the screen at a movie theater or the bandwidth used by a cable operator to deliver its program guide and video programming . . . . Accordingly, if the Commission were to regulate cable operators under Title I while maintaining common carrier obligations on local telephone companies, both the Commission's reason for continued regulation *and* its reason for distinguishing between cable operators and local telephone companies would be subject to "intermediate scrutiny." A decision by the Commission maintaining Title II obligations on local telephone companies could not pass this exacting standard . . . . Nor could the Commission's decision to treat telephone companies differently from cable companies pass muster under the First Amendment. It is well settled that if a regulation affecting speech appears underinclusive, *i.e.*, where it singles out some conduct for adverse treatment, and leaves untouched conduct that seems indistinguishable in terms of the regulation's ostensible purpose, the omission itself is subject to heightened judicial scrutiny. It would be impossible for the Commission to justify a distinction between broadband services provided over the cable system platform and those using the telephone company wireline platform, given their relative market positions.

Ex Parte Comments of Verizon, filed in Cable Modem Proceeding, June 17, 2002, pp. 20-23 (internal quotation marks and citations omitted). However, it may be difficult for the companies to argue a First Amendment right for their broadband service at the same time they are asserting they exercise no editorial control over access to the Internet.

For discussions of platform-specific First Amendment review see Ellen P. Goodman, *Bargains in the Information Marketplace: The Use of Government Subsidies to Regulate New Media*, 1 J. ON TELECOMM. & HIGH TECH. L. 217 (2002); Jim Chen, *Liberating Red Lion from the Glass Menagerie of Free Speech Jurisprudence*, 1 J. ON TELECOMM. & HIGH TECH. L. 293 (2002).

The states had keen interest in the Commission's decisions regarding deregulation of local services and, for better or worse, achieved a policy role regarding narrowband facilities for voice service. But the FCC largely shut out the states from policy regarding broadband facilities. As the Commission turns to the classification of broadband services, states and local governments are identifying issues of concern. The concern in part goes to the fact that the states have been regulating (or not regulating) against the backdrop of certain longstanding federal regulatory schemes. Now some of those basic regimes are being called into questions. Based on interviews with a number of state commissioners, the concerns largely go to loss of state jurisdiction, full privatization of the telephone system, implications for universal service, and, finally, but probably of greatest interest, risk of loss of innovation.

A. Further Loss of State Jurisdiction Over Broadband

State regulators, who admittedly lack much legal jurisdiction under current law, but who have recently succeeded in flexing their political muscle in the context of the Triennial Review, support retaining Title II classification over wireline broadband transmission because they would have more arguments for retaining some residual jurisdiction over broadband services. Under current law, if the underlying broadband transmission service remains classified as Title II, and it has both an intrastate and an interstate component, the states can craft legal theories, under either their state telecommunications statutes, state consumer protection statutes, or through their authority under the Telecommunications Act of 1996 to arbitrate interconnection agreements, to seek to regulate broadband services, including the telecommunications services that may ride over them.

California asserts considerable jurisdiction under the heading of "service quality." For example, the state regulator considered a complaint filed by a coalition of independent ISPs, which alleged a violation of state service quality and nondiscrimination statutes. The incumbent telephone company, SBC, challenged the complaint on the ground that the state regulator lacks jurisdiction. The agency, however, ruled that it has jurisdiction because SBC's broadband affiliate is a "certificated CLEC" under the jurisdiction of the state.[87]

According to press reports, Kentucky and Louisiana regulators are stepping in where incumbents have cut off DSL service to customers who are using competitors' voice service. BellSouth argued that the state regulator lacks jurisdiction to regulate DSL, but the regulator ruled that

87. California ISP Assoc. v. Pac. Bell Tel., SBC, Advanced Solutions, *Complaint* C0107027, *available at* http://www.cpuc.ca.gov.

discontinuance of service under these circumstances thwarts local phone competition, which they regulate.[88]

States will lose most of those admittedly slender jurisdictional reeds if the FCC reclassifies the transmission portion of broadband service as Title I and continues to preempt the states in regulating those services. While states could retain jurisdiction over *intrastate* advanced services, DSL is interstate if a connection is made to the Internet.[89]

B. Falling Off the Cliff – Shift to a Private, Closed, And Unregulated Communications System

Some state regulators are even more concerned that the federal government is moving toward a regulatory regime that could eventually transform the nation's communications network, both facilities and services, into a private, closed, and largely unregulated one. As a result, the states could lose jurisdiction over even local voice service. Moreover, some states have been operating against the backdrop of protections afforded to enhanced service providers by the federal scheme and are concerned not only about lack of competition between network providers, but also lack of access to the remaining networks. For these regulators, their concern is that both end user consumers and intermediate enhanced service providers will have no regulatory protections and that full competition will not yet have emerged to provide the protections of a fully functioning market.

If the Commission's deregulatory broadband rulings in the Triennial Review ultimately are upheld, the end result will likely be further solidification of the broadband duopoly of cable and Bells.[90] This

88. *New Phone Twist: Switch Local Service, Lose DSL*, WALL ST. J. ONLINE, Jan. 30, 2003.

89. In some states, such as Oregon, the incumbent initially filed an intrastate tariff for DSL service. This would seem to acknowledge (or confer) state jurisdiction. However, the incumbent subsequently filed interstate tariffs with the FCC, and its DSL sales are made from its interstate, not the state tariff. In theory, the incumbent could sell DSL service from its state tariff if the service did not connect to the Internet, which in the view of the FCC makes it an interstate service. DSL without Internet connection is an unlikely situation, except for businesses that might wish to have a high speed connection available for its employees to connect to the company's local area network. But for the mass market, DSL without Internet is useless.

90. Much depends on how quickly and how extensively the Bells invest in new fiber networks. Their initial public response was lukewarm at best. But over time they will deploy fiber, even if selectively, because this is their best hope for competing with cable. Verizon more recently said that in light of an FCC clarification of one aspect of its Triennial review decision relating to state approval of Bells' retiring copper facilities, it planned aggressive deployment of DSL and fiber, with a focus on suburban and rural customers, areas where policymakers have a greater interest in promoting broadband services. State regulators no doubt noted Verizon's qualification that specific state-by-state deployment plans will depend on the particular investment environment in each state, which is code for the states' decision

means that the two main underlying facilities into the home, cable and incumbent telephone companies, may be unavailable to companies seeking to provide competitive service. If the FCC classifies both integrated Internet access/broadband transmission, and the telecommunications component of that service as Title I, then this places broadband services of both cable and wireline outside the reach of both state and federal regulators except to the extent that the FCC seeks to impose certain requirements pursuant to its ancillary jurisdiction.

However, the legal question of how far the FCC can go in imposing any obligations on broadband providers under its ancillary jurisdiction is far from settled once the FCC has declared the underlying transmission to be neither cable nor common carrier services. To be sure, courts were sometimes quite generous in interpreting the FCC's ancillary jurisdiction, but the trend appears to be a narrowing in the recognition of ancillary jurisdiction. Prior to Congress enacting laws governing cable television, the Supreme Court upheld the FCC's jurisdiction to regulate cable as "ancillary" to its authority to regulate (and protect) broadcasting. In *United States v. Southwestern Cable Co.*[91] the Supreme Court rejected the argument that the FCC lacked jurisdiction to regulate cable television systems, which were neither common carrier, and thus outside Title II, nor broadcasters, and thus outside Title III. The Court found that in 1934, Congress "acted in a field that was demonstrably 'both new and dynamic,' and it therefore gave the Commission 'a comprehensive mandate,' with 'not niggardly, but expansive, powers.'"[92] The Court concluded that the agency's authority in such circumstances is restricted to that "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," and, ironically from today's policy perspective, the Court upheld the FCC's jurisdiction over cable because the FCC had found that broadcasters were jeopardized by the "unregulated explosive growth" of a new competitor, cable television.[93] Thus, the court found that, even where it lacks precise and express statutory authority, the FCC has authority to regulate ancillary to a general statutory goal or policy.

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regarding whether they will make UNE-P available to competitive local carriers as a result of their analysis of unbundled network elements pursuant to the FCC's Triennial Review Order. Verizon Press Release, March 19, 2003. Fiber deployment will happen gradually and will not likely ever be available to all households because rewiring the country with fiber is so expensive. Corning, Inc. a major fiber maker, has estimated that it would cost $360 to $660 billion. *Despite Winning Ruling, Bells Shirk DSL Investment Pledge*, WALL ST. J. ONLINE, Feb. 21, 2003.

91. 392 U.S. 157 (1968).

92. *Id.* at 157 (quoting Nat'l Broad. Co. v. United States, 319 U.S. 190, 219 (1943)).

93. *Id.* at 158, 175.

In an even more proximate context, courts upheld the agency's ancillary jurisdiction in upholding certain of the FCC's Computer Inquiry rules. In *Computer and Communications Industry Assoc. v. FCC, ("CCIA")*,[94] the Court of Appeals for the D.C. Circuit upheld the FCC's ruling in Computer II to classify data processing services and consumer premises equipment as falling within Title I and to regulate them under the FCC's ancillary jurisdiction.[95] The court upheld the FCC's assertion of its ancillary jurisdiction over customer premises equipment, which the FCC had ordered must be sold separate from basic communications in a competitive market.[96] The court also upheld the FCC's assertion of ancillary jurisdiction over enhanced services as incidental transmissions over interstate telecommunications.[97]

In a recent case striking down the FCC's rules requiring "video description" services for the disabled community, however, the D.C. Circuit of Appeals rejected the agency's assertion of ancillary jurisdiction.[98] In *MPAA*, the court rejected each of the FCC's arguments for jurisdiction.[99] In particular, in rejecting the FCC's invocation of section 4(i) as a source of jurisdiction, the court quoted Chairman Powell's statement, dissenting in part from the FCC's order.

> Chairman Powell's discussion of this provision says it all:
>
> > It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a 'necessary and proper' clause. Section 4(i)'s authority must be 'reasonably ancillary' to other express provisions. And, by its express terms, our exercise of that authority cannot be 'inconsistent' with other provisions of the Act. The reason for these limitations is plain: Were an agency afforded *carte blanche* under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach.
>
> We agree.[100]

The court's opinion could reasonably be interpreted as confined to cases involving programming, which as the court emphasizes, raise First

94. 693 F.2d 198 (C.A.D.C 1982).
95. *Id.* at 213.
96. *Id.*
97. *Id.*
98. Motion Picture Assoc. of Am. v. FCC, 309 F.3d 796 (D.C. Cir. 2003) (*MPAA*).
99. *Id.* at 807.
100. *Id.* at 806 (internal quotations omitted), quoting 15 F.C.C.R. at 15,276 (Powell, dissenting).

Amendment concerns. But a more recent decision, involving telecommunications and not programming, can fairly be read as extending the *MPAA* court's narrow reading of the FCC's ancillary jurisdiction. In *AT&T Corp. v. FCC*,[101] the D.C. Circuit vacated an FCC forfeiture order imposing a fine against AT&T for "slamming" two customers. The court held that the Commission's requirement that carriers guarantee that the actual subscriber has authorized the service change order exceeded the Commission's statutory authority to prescribe procedures to verify that authorization. In a very narrow reading of the Commission's statutory authority, the court cited *MPAA* for the proposition that the FCC's interpretation of the Communications Act is not entitled to deference "absent a *delegation of authority* from Congress to regulate in the areas at issue."[102] However, during oral argument in *Cellular Telecommunications v. FCC*, when counsel for petitioners challenging the FCC's ancillary jurisdiction to impose wireless number portability cited *AT&T v. FCC* as evidence that *MPAA* applies outside the context of cases raising First Amendment issues, Judge Tatel, who authored *AT&T v. FCC,* said that is not what the case stands for.[103] This could suggest that *AT&T*'s reference to *MPAA* is confined to narrow constructions of a particular statutory delegation of authority, rather than to how close the link must be between ancillary authority and the particular statutory authority to which it is tied. But this could just be another way of phrasing the same issue—how expansive can the agency be in interpreting the scope of its delegated authority. Can it act pursuant to a general statutory goal or policy, as the Court permitted in *Southwestern Cable*, or must the agency link its action to a more precise and express statutory authorization as the court required in the more recent *MPAA* and *AT&T.*

Even in the earlier *CCIA* case, the court's opinion is best understood as requiring that the agency exercise its ancillary jurisdiction only when it is ancillary to another express statutory authority. The Court framed the analysis as posing only the issue of "whether the Commission's discretion extends to deciding *what regulatory tools to use in regulating common carrier services.*"[104] In upholding the FCC's exercise of ancillary jurisdiction over customer premises equipment and enhanced services, it specifically recognized that the assertion of ancillary jurisdiction was directly linked to the Commission's recognized specific jurisdiction under Title II to protect ratepayers who are paying for services whose rates were regulated under Title II and might be affected

101. AT&T v. FCC, 323 F.3d 1081 (2003).
102. *Id.* at 1086 (citing *MPAA*, 309 F.3d at 801) (emphasis in original).
103. Oral argument attended by author.
104. *CCIA*, 693 F.2d 198, 212 (D.C. Cir. 1982).

by AT&T's provision of enhanced services and customer premises equipment.[105]

Whether a reviewing court would uphold the FCC's exercise of ancillary jurisdiction to impose certain obligations on broadband services depends of course on the specific obligations the FCC would impose. Agency imposition of CALEA law enforcement obligations, for example, may be justified differently than Computer Inquiry access obligations. But it should also depend on whether the court adopts the approach of *Southwestern Cable* and permits agency action in pursuit of a general statutory goal or purpose or whether it instead requires the agency to identify an express statutory provision, as the courts seemed to require in *CCIA, MPAA* and *AT&T.* If the latter, it is not clear to which regulated service the FCC would be tagging its ancillary jurisdiction. The FCC could argue that its jurisdiction is ancillary to its responsibilities under 706 of the Act, which directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability . . . by . . . regulatory forbearance, measures that promote competition in the local telecommunications market or other regulating methods that remove barriers to infrastructure."[106] But if the FCC seeks to impose any access obligations on the Bells providing broadband services, this will be vulnerable because, in order to justify reclassifying broadband transmission from a Title II to a Title I service, the FCC will have to perform an analysis that concludes that the market is sufficiently competitive that it would not justify, under *NARUC*, imposing a common carrier classification. Having done so, it would then be difficult for the agency to construct a rationale for imposing access and certain other obligations related to competition concerns on the same network.

If the FCC gambles on this approach of reclassifying broadband services as Title I and imposing obligations under ancillary jurisdiction, and then loses in court, the agency will be boxed into a corner if it later seeks to reverse course and argue that broadband transmission should be classified as common carrier service after all. If the Commission makes this bet and loses, *and* if it classifies VOIP as a Title I service, then the "jeremiad" vision of a telecommunications platform largely outside of either state or federal regulation might come to pass, and it would take

105. *Id.* at 213 (Regulation of enhanced services is necessary "to prevent AT&T from burdening its basic transmission service customers with part of the cost of providing competitive enhanced services . . . . Likewise we believe the Commission acted reasonably in ordering, pursuant to its ancillary jurisdiction, that CPE be removed from tariff. The Commission found that bundling CPE charges into transmission rates has a direct effect upon rates for interstate transmission services.").

106. Pub. L. No. 104-104, Title VII, § 706, 110 Stat. 153 (reproduced in notes at 47 U.S.C. § 157) (Section 706).

Congress to step in and pass new legislation to re-regulate the telecom industry.[107] Given all the factors that would have to align, this is, at the end of the day, probably a remote possibility, and the FCC would try to avoid this outcome or step in to re-regulate. However, it is not certain that the courts would let them once they classified the underlying transmission as Title I.

C. Impact on the Universal Service Fund.

The states are concerned about the impact of the classification proceedings on the universal service program. The federal program is funded through contributions based on a percentage of end-user revenues from interstate (including international) telecommunications services.[108]

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107. This scenario depends on VOIP finally emerging as a mainstream rather than a niche domestic phone service; an emergence that has been predicted for many years, but has not yet materialized. *See supra* note 78 and accompanying text (there is some evidence that the service may be maturing). And a public statement by former U.S. Representative Tom Tauke, who now leads Verizon's public policy, may be even more indicative of the future of VOIP. He is quoted as advocating that if competitors such as AT&T, Microsoft, or Earthlink offer VOIP as part of bundled broadband package, it should not be regulated as a telecommunications service, even if that means a regulatory disparity between his company and the VOIP upstarts. MULTICHANNEL NEWS, *NCTA Weighs in on IP Telephony*, Feb. 3, 2003. It seems fair to assume that Verizon would not accept this disparity for long, and instead expects to migrate to VOIP service.

The apocalyptic vision has been dismissed by some who claim that state regulators would retain jurisdiction over VOIP providers because the VOIP providers need access to phone numbers and this requires them to become "certificated" carriers under the jurisdiction of state regulators. This is not necessarily true, however, as VOIP providers can and do buy phone numbers from other telecommunications carriers, avoiding the need to register with the state.

Some have argued that the government could lose jurisdiction of the communication system even without the rise of VOIP. Professor Rob Frieden and MCI have argued that companies may be able to exploit the FCC's reclassification of the wireline broadband network to Title I by bundling traditionally regulated common carrier voice service with an unregulated information service. Under the FCC's tradition of treating hybrid enhanced/basic services as enhanced, unregulated services, and its "subordination" of the telecommunications functionality when coupled with an information service, Professor Frieden warns that this appears to offer "telecommunications service providers the ability to free themselves of any and all common carrier burdens that otherwise would apply to broadband telecommunications service simply by characterizing these offerings as information services." *See* Frieden, *supra* note 79, at 234; MCI ex parte, Wireline Classification Proceeding, July 21, 2003. Although the Commission is likely to go to great lengths to avoid this result, its tradition of treating "information service" and "telecommunications service" as mutually exclusive categories of service, *see Stevens Report*, *supra* note 76, at 11,520, ¶39, combined with the cable and telephone industries' move toward bundling services into integrated packages, will make the Commission's task more difficult.

108. 47 U.S.C. § 254. The states are also concerned about the impact of VOIP on universal service. The association of state regulators, National Association of Regulatory Utility Commissioners, Board of Directors adopted a resolution cautioning that "A decision by the FCC . . . to declare all phone-to-phone calls over IP networks to be information services by virtue of the technology could have negative effects on various telecommunications policies,

As with the nation's social security system, the universal service program, which subsidizes rural telephony, service to low income persons, and Internet access for schools, libraries, and rural health care, is running out of money. The immediate threat to the fund is that it is supported primarily by declining long distance revenues. The Commission has initiated a proceeding to consider various ways to reform the program to maintain its viability.[109]

Currently, cable companies make contributions based on revenues from circuit-switched telephone service provided over the cable network, but they do not contribute on revenues from cable modem Internet access. In contrast, telephone companies contribute to USF based on revenues from their broadband services, including integrated internet access and DSL service, and from standalone DSL transmission provided to affiliated or unaffiliated Internet service providers and to end-users.[110]

Reclassifying wireline broadband from Title II to Title I would raise the issue of the continued obligation of wireline broadband providers to contribute to universal service, and would throw into sharp relief the disparate treatment of Internet access provided over cable versus the telephone network.[111] The problem facing the FCC is as much one of policy and politics as of law, but even so, the agency will have to justify different treatment of different Title I services.

Although section 254 is part of Title II, and it directs telecommunications carriers that provide interstate "telecommunications services" to contribute to universal service, the FCC has interpreted section 254(d) to provide it authority to collect contributions from "[a]ny other provider of interstate telecommunications" [112] if the public interest so requires. The statute should be interpreted as providing the FCC the

including universal service, and might be inconsistent with the 1996 Act." NARUC, *Resolution Relating to Voice Over the Internet Telecommunications*, Feb. 26, 2003, *available at* http://www.naruc.org/Resolutions/2003/winder/telecom/voice_over.shtml.

109. Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, *Notice of Proposed Rulemaking*, FCC 01-145 (May 8, 2001); FCC Takes Next Step To Reform Universal Service Fund Contribution System, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, *News Release*, FCC 02-43 (Feb. 14, 2002).

110. *See Wireline Broadband Classification Proceeding*, *supra* note 4, at 33, ¶72.

111. As of 2001, about one-third of states report requiring contributions to a state universal service fund based on revenues from advanced services. Federal classifications may affect states' abilities to impose state universal service contributions. *See* National Regulatory Research Institute, *State Regulatory Commission Treatment of Advanced Services: Results of a Survey*, March 2001, *available at* http://www.nrri.ohio-state.edu/.

112. *See Wireline Broadband Classification Proceeding*, *supra* note 4, at 33, ¶71, quoting § 254(d).

necessary legal authority to broaden its base of universal service contributors to include revenue from broadband services.[113]

Even so, if the Commission reclassifies wireline broadband transmission as Title I and retains the USF contribution under its permissive authority, it will have to justify why it imposed USF obligations on some Title I providers and not others. This may be particularly difficult to do if we get to a point where both cable and telephone companies are providing broadband transmission services on a standalone basis to unaffiliated ISPs and only one is saddled with a USF obligation. It will also force the Commission to justify why it imposes USF obligations on broadband service providers, but not other information services such as airline reservation systems, instant messaging, and web hosting providers. The agency will have to uphold such distinctions against challenges that they are arbitrary and therefore impermissible. The more difficult question for the FCC will be whether to remove broadband internet access provided over the telephone network from the contribution base for USF or whether to extend USF obligations to other providers of broadband services, particularly cable, but also to Wi-Fi or satellites.

D. Threat to Innovation and Speech.

States are also monitoring the network neutrality or consumer connectivity issue.[114] An ACLU White Paper dramatically warns:

> The Internet as we have known it is going to change – the only question is how. There's a fight going on over that question, and at stake is nothing less than the Internet's potential as a medium for free expression, civic involvement and economic innovation. Driving the change is the ongoing conversion by consumers from a dial-up Internet (based on slow modem connections over phone lines) to far faster "broadband" connections (mostly using cable modems). With dialup, Internet access is provided over a medium that provides open, equal access to all: the telephone system. But with the shift to cable,

113. *See Stevens Report*, *supra* note 76, at 11,541, ¶81 (concluding that facilities-based ISPs that provide no stand-alone telecommunications services could be required to contribute to universal service under the agency's permissive authority). *See also* Federal-State Joint Board on Universal Service, *Report and Order*, 12 F.C.C.R. 8776, 9183-84, ¶¶ 794-97 (1997) (requiring payphone aggregators to contribute to universal service).

114. *See, e.g.* LESSIG, *supra* note 38; LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999); No Competition: Now Monopoly Control of the Broadband Internet Threatens Free Speech, ACLU White Paper, (rel. summer 2002), *available at* http://archive.aclu.org/issues/cyber/NoCompetition [hereinafter *ACLU White Paper*]; Ex Parte, Coalition of Broadband Users and Innovators, Jan. 28, 2003, Wireline Broadband Classification Proceeding and Cable Broadband Classification Proceeding.

> Internet access must be adapted to a medium that has been far more subject to centralized control.[115]

An ACLU and Center for Digital Democracy sponsored study reports various ways a cable company providing Internet access could interfere with online activities, often in ways that they claim are invisible to customers, including control over applications (such as VOIP and virtual private networks), control over access to content (such as slowing access to sites that have no financial arrangement with the cable company), ability to promote certain content (presumably its own), and the ability to violate privacy (citing Comcast's short-lived practice of tracking customers' web browsing without their consent).[116] Although the ACLU emphasizes cable networks, the same applies to the wireline network, although currently perhaps with less force from the standpoint of the ACLU because, unlike cable broadband providers, incumbent telecos generally do not now carry their own content over their broadband networks.

One coalition promoting network neutrality, the Coalition of Broadband Users and Innovators (CBUI), has warned against the danger that "the longstanding principles of network neutrality and consumer connectivity, which have existed for decades in the wireline context, may not be carried forward into the broadband era."[117] They express concern that innovation will be stifled if content and equipment providers are uncertain whether their new offerings will be accessible on the Internet. Although they cannot document any evidence that discrimination has occurred, they point to technology that allows network operators to discriminate and to restrictive provisions that appear in broadband subscriber agreements. (Network owners in turn have pointed to similar restrictions in some of the coalition members' own agreements.) Network neutrality advocates claim that broadband providers may discriminate in favor or against certain content or restrict subscribers' ability to use technologies such as VOIP or Wi-Fi that may compete

115. *ACLU White Paper*, *supra* note 114, at 1. The ACLU would probably have cited a subsequent short-lived flap over cable network Comcast's refusal to air a commercial protesting going to war in Iraq during CNN's coverage of President Bush's State of the Union speech. According to press reports, the company said it rejected the ad, which charged that the war would be a violation of international law for being conducted by mercenaries, because it could not substantiate the claims in the ad, inviting the obvious question of how many of the claims in their other ads the cable company could substantiate. *See FCC Chairman Ho-hums Anti-War Ad Controversy*, ADAGE.COM, *at* http://www.adage.com (Jan. 29, 2003).

116. *ACLU White Paper*, *supra* note 114, at 4-6.

117. Ex Parte filed in Wireline Broadband Classification Proceeding and Cable Modem Classification Proceeding, Covington & Burling, January 29, 2003. Identified members of the Coalition of Broadband Users and Innovators include Microsoft, Amazon.com, Yahoo!, Consumer Electronics Association, Media Access Project, and eBay.

with core revenue sources of the cable or telephone companies. CBUI urges the FCC "endorse" four principles of consumer connectivity:

> (1) Consumers should have unrestricted access to their choice of Internet content using the bandwidth capacity of their service plan.
>
> (2) Consumers should be able to run applications of their choice, as long as they do not harm the network, enable theft of service, or exceed the bandwidth limits of their subscribed-to service.
>
> (3) Consumers should be permitted to attach any devices they choose, without prior permission, to the network, so long as they do not harm the network, enable theft of service, or exceed the bandwidth limits of their subscribed-to service.
>
> (4) Consumers have a right to meaningful information regarding technical limitations of their service.[118]

The CBUI position represents a shift from the ISP's call for government mandated open access to *competitors* to a call for government mandated open access for *consumers*. This places the debate on grounds that may give states some more arguments for jurisdiction.

States weighed in on the policy debate when NARUC adopted a resolution that echoed the themes of the importance of open broadband access to citizens' access to information. The NARUC Resolution recognizes the technical capability of broadband service providers to direct customers to preferred content, and advocated that "all Internet users, including broadband wireline and cable modem users should: (1) Have a right to access the Internet that is unrestricted as to viewpoint and that is provided without unreasonable discrimination as to lawful choice of content (including software applications); and (2) Receive meaningful information regarding the technical limitations of their broadband service."[119] Alternatively, if the broadband provider allows

118. Ex Parte filed in Wireline Broadband Classification Proceeding and Cable Modem Classification Proceeding, CBUI, Mar. 31, 2003, p. 3 of attachment. Amazon.com and another coalition, the High Tech Broadband Coalition, have proposed different solutions, including continued nondiscriminatory ISP access for a limited period of time or the cable and wireline owner electing either to assure that its ISP observe certain principles ensuring access and neutrality or making available at least three independent ISPs to their subscribers. *See* Reply Comments of High Tech Broadband Coalition, filed in Cable Modem Classification Proceeding, July 1, 2002; Ex Parte, Cable Broadband Access Proceeding, Amazon.com, filed Dec. 2, 2002.

119. *NARUC Resolution*, *supra* note 38.

nondiscriminatory ISP access, the affiliated ISP may promote particular content.

As discussed above, the FCC is unlikely to impose "consumer connectivity" rules on the cable industry in the absence of a record that establishes that the conceived harms are real rather than speculative. In deciding whether to maintain or impose consumer access safeguards for the telephone network, the agency is not required to choose between its goals of deregulation and regulatory parity. In this case, they could coincide.[120] The Commissioners are likely to issue a warning that they will keep an eye on the situation and consider imposing consumer safeguards if a pattern of discrimination develops. Of course, having concluded that sufficient competition in broadband platforms exists to justify classifying cable or wireline broadband transmission as non-common carrier might reasonably lead the agency to conclude that the network providers should be free to discriminate as they see fit. This, however, is not a good headline.

In the absence of federal action, some states, particularly following the NARUC resolution, will consider their appropriate role. They may well conclude that the level of attention given by public interest groups and federal policymakers will serve as a sufficient deterrent, at least in the short run, to significant action to discriminate in favor or against particular applications or content.[121] They may also refrain from acting in an area where their jurisdiction is incomplete; even if they succeed in arguing for jurisdiction to impose consumer access safeguards on one platform, such as wireline broadband, they may fail in others, such as cable and satellite. Finally, some consumer access advocates may persuade states not to act because they may prefer a loss at the national level that results in a uniform (although negative) result than to win in some states if that means uneven results. Alternatively, some states may consider replicating the approach some local governments took

120. Locating the precise source of existing consumer access safeguards is not a simple or certain matter. Integrated transmission/Internet access service is probably now and soon shall expressly be declared to be a Title I service, with no concomitant consumer access rights. For dial up Internet access services, end user customers have the benefit of common carrier access rights under Title II to the phone line. For broadband internet access, consumer access safeguards would be grounded in the Computer Inquiry rules, which arguably apply to all users, not just enhanced or information service providers. If the Commission eliminates the Computer Inquiry safeguards in the wireline classification proceeding and declares the underlying transmission a Title I service, it could eliminate the only source of consumer access to broadband internet access.

121. If the ACLU study, *infra* note 114, is correct and the cable companies have the ability to discriminate without subscribers knowing it, then it raises the question of how the FCC will be able to monitor the situation, vigilantly or otherwise. But if this is so, then rules prohibiting discrimination may have limited impact because enforcement will be difficult.

(ultimately unsuccessfully) with competitor access to the cable network and seek to impose safeguards at the state level.

Arguably, this may be precisely one of those areas where we should encourage or at least permit experimentation at the state level. The nation's economic growth will continue to depend on information services and as our networks migrate to broadband, ensuring innovation in this area will be a necessary condition for economic growth. And the principles of free expression and civic involvement articulated by the ACLU, if a bit hyperbolically, are appropriate subjects of state consideration. What is uncertain at this point is whether a government mandated consumer access obligation will promote any of these goals.

To the degree this is an empirical question, we may be better off permitting the states to act as social and economic laboratories of democracy.[122] What we are talking about is the health of a competitive market and the predicates for innovation, and arguably where there is so much uncertainty regarding the risks associated with both government action and government inaction, the optimal response would be to allow different approaches to develop until we gain better knowledge.

Lemley and Lessig's argument for requiring ISP access applies equally, or perhaps more forcefully here:

> A . . . problem with the 'wait and see' approach in this context is that it is not at all clear that we will see the costs of eliminating ISP competition. It may be impossible to measure the loss of innovation that results from stifling ISP competition and regularizing innovation along the lines of what cable companies think is optimal. Any ex post assessment will face the difficult problem of evaluating a negative – what things didn't happen as a result of this change.[123]

One way to ask the question is whether the risk of a "Type I" (false positive) error is worse than a "Type II" (false negative) error—in other words are we worse off forcing network access or neutrality when there was no risk of harmful discrimination or are we worse off failing to identify a true harm that results from allowing network owners to

122. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

123. Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 956-57 (2001); *see* California v. FCC, 4 F.3d 1505, 1515 (9th Cir. 1993) ("[T]he FCC is entitled to adopt a wait and see approach" to potential problems that may or may not materialize.).

discriminate. Which is worse—a false alarm, or a failed alarm. And what is the likelihood of each.

Failing to detect and address the risk that cable and telecom broadband providers will restrict broadband use and thus stifle innovation poses a greater harm than imposing an unnecessary governmental rule. It is the innovation that does *not* happen that is the cost of government inaction. If the rule merely proves to be unnecessary because the companies owning the two main paths into the home do not now and would not in the future discriminate in user access, then safeguarding against the risk may be the wiser policy choice. If, however, imposing the consumer access provisions chills investment by the companies providing broadband access or somehow leads to higher prices to consumers, which in turn deters broadband adoption, then it would be more difficult to justify allowing state experimentation. However, if companies fail to invest (or keep prices high) because they will not reap the rewards of making selective (that is, discriminatory) decisions regarding how their network is used, including the packages of services provided over the network, then this does not lead to the conclusion that policy makers should keep an eye on the situation and act only where they see real examples of discrimination. Instead, it may suggest that the government should fix its gaze elsewhere because network owners should be allowed to control or discriminate in the use of their networks. This of course applies to regulation at both the state and the federal level.

The difficulty comes in part from the fact that most would accept that if this were truly a fully competitive market, and if ISPs and users and content providers had recourse to multiple platforms, then we should perhaps allow those platform owners to discriminate to their hearts' content. Conversely, if there is a monopoly in the ability to access the home, as there was when the FCC conducted the original Computer Inquiry proceedings, then access safeguards make more sense. The situation is far less clear when, as now, there is a duopoly.

Congress created a regulatory regime that allows a role for both federal and state regulators. One commentator has developed the theme of cooperative federalism, arguing that in the context of telecommunications policy, complete uniformity across states on certain issues may be both an "undesirable and unattainable goal."[124] In Section 706, the provision of the 1996 Act that specifically addresses the role of agencies in promoting broadband services, Congress looked to both the FCC and state agencies to promote broadband development, though

124. Philip J. Weiser, Chevron, *Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 4 (1999).

with a set of tools that probably does not include consumer access rules.[125]

However, it may be undesirable to create a legal system that allows for so much fragmentation. One of the reasons to require decisions of nationwide applicability for rules affecting the Internet may be the economies of scale that are necessary to promote hardware and software research and development. CBUI argues that companies will not invest in research of Internet applications if they cannot be assured of Internet access. But if only California and a handful of other states ensure, for example, that customers can attach Wi-Fi equipment or use VOIP software, it may be the safeguards are insufficient to support commercial investment. This only means, however, that the state safeguards were insufficient, not necessarily that they were harmful. Regarding access to content, many will no doubt argue that state variability could lead to an unworkable system if consumers in some states, but not others, are legally entitled to unrestricted access to their choice of content. Although, on the other hand, nothing now prevents different countries from approaching this or other issues in different ways, and the Internet is a global, not a national network. Some may argue that the Internet would function even better globally if there were uniform international rules. But for many of the differences that are causing consternation, such as particular countries prohibiting certain content, the situation would not be improved by a harmonized rule that restricted access to the content. Nevertheless, of course, if a compelling (and not just theoretical) case could be made that a patchwork system of regulation in itself causes significant harm, a theoretical risk of harm to innovation from discriminatory access would not justify state governmental action.[126]

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125. Section 706(a) of the Telecommunications Act of 1996 provides:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular elementary and secondary schools and classrooms) 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.

If state agencies were to invoke 706 as the basis of jurisdiction in imposing some form of consumer connectivity rules, as opposed to jurisdiction under their own state laws, they would have to make an argument that removing the ability of private network owners to control their networks somehow removed a barrier to infrastructure investment, and this would be an exceedingly difficult argument to make.

126. By way of comparison, many observers are critical of the agency's decision in the Triennial Review to leave sufficient fact-finding and perhaps policy-making authority in the hand of state agencies, in part because the inevitable result is different treatment from state to state regarding whether competitive local carriers can provide local phone service over a platform available at the cheaper regulated rates. However, uneven results in this context may

Before the FCC expressly preempts the states from taking action and before individual states regulate in this area, there should be additional study, preferably with input from economists, network providers, and the academic community to identify the ramifications of state by state regulation.

As a legal matter, however, the states face an uphill battle if they seek to regulate in this area without the FCC carving out room for state experimentation. Apart from section 706 of the 1996 Act, and in contrast to the federal-state role in determining unbundling of and access to the local telephone network at issue in Triennial Review, Congress did not give states a role in developing policy or implementing federal law regarding broadband.[127] States could argue that their jurisdiction does not require an express grant from Congress. But they then face the obstacle that the FCC, largely with the approval of the courts, has largely preempted the states from regulating "information services."

In a series of cases reviewing the FCC's Computer III orders,[128] the Ninth Circuit analyzed the FCC's preemption of state regulation of enhanced services. In *California I,* the court reviewed the FCC's preemption of state regulations that required the Bells to provide enhanced services through a separate affiliate. The court applied the Supreme Court's preemption doctrine of *Louisiana Public Service Commission v. FCC ("Louisiana PSC").* [129] In *Louisiana PSC,* the Supreme Court, acknowledging the tension between the broad jurisdiction given to the FCC in section 151 and the express reservation

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be more problematic for investment decisions than whether states may differ in imposing consumer access obligations, given that many in the industry are arguing that they do not discriminate anyway. This is not to minimize the danger of unanticipated consequences from regulation; but that risk needs to be evaluated and balanced against the risk of not allowing any safeguards be imposed anywhere.

127. Section 230, which has been invoked as a basis for FCC jurisdiction to impose some form of consumer access provisions, when read in isolation cuts both ways. Section 230(b) provides that "[i]t is the policy of the United States . . .to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." Depending on whether one gives primacy to the clause that says the Internet should be "unfettered by Federal or State regulation" or the clause that calls for preserving a "vibrant" Internet, one would find a basis for arguing for or against regulation at any level of government. The fact that this provision is taken from a section in the statute that deals with "Protection for Private Blocking and Screening of Offensive Material" should limit its relevance to either camp. 47 U.S.C. § 230(b).

128. *California I*, 905 F.2d at 1217; *California III*, 39 F.3d at 931-933. *See also*, *CCIA*, 693 F.2d 198 (C.A.D.C. 1982) (upholding FCC's preemption of state regulation of customer premises equipment in *Computer II*); N.C. Utils. Comm'n v. FCC, 537 F.2d 787 (4th Cir. 1976); N.C. Utils. Comm'n v. FCC, 552 F.2d 1036 (4th Cir. 1977) (upholding FCC preemption of state regulations barring use of customer provided telephone equipment for intrastate service because it conflicted with FCC rules allowing customer provided equipment for interstate service).

129. 476 U.S. 355 (1986).

of state authority in section 152(b), particularly in areas where intrastate and interstate services are both affected, cut back on the FCC's authority to preempt state regulators in matters over which Congress had given states authority. The Court, however, further recognized an "impossibility exception" that applies where it is not possible to separate the federal and the state spheres. In such a situation, the FCC's authority is supreme.[130] In *California I,* the Ninth Circuit declared that the "impossibility exception" should be narrow and that the only limitation on a state's authority over intrastate telephone service is "when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communications."[131] The Court found that the FCC had failed to meet its burden of showing that all state regulation of enhanced services would make the FCC's policy goal of deregulating enhanced services impossible because at least some services could be offered on a purely intrastate basis. It remanded several preemption provisions of Computer III to the FCC as insufficiently justified.

The FCC subsequently narrowed the scope of its preemption, acknowledging that "[p]reemption of state regulation in this area should be as narrow as possible to accommodate differing state views while preserving federal goals."[132] In its Remand Order,[133] the FCC modified its ruling so that it preempted only state structural separation requirements that affected services that include both interstate and intrastate communications. In *California III*, the Ninth Circuit considered state agency appeals to the FCC's Remand Order. It rejected a state argument that the FCC may preempt state action only when the FCC is acting under its Title II authority, and that the FCC may not preempt when it is acting to implement the more general goals of Title I. The court held that the FCC has preemptive authority when it acts under Title I as well as Title II. "The difficulty with *Computer III* was the FCC's failure to justify the breadth of the preemption in that order, not its jurisdiction to order any preemption."[134]

FCC preemption of state regulation will more likely be upheld if the FCC's actions include three components. First, if the agency classifies broadband transmission as an "interstate information service," and if that classification survives court challenge, that would increase the

130. *Id.* at 375-376, note 4.

131. *California I,* 905 F.2d 1217, 1244 (9th Cir. 1990).

132. *California III*, 39 F.3d 919, 932 (9th Cir. 1994) (quoting Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, *Report and Order*, 6 F.C.C.R. 7571, 7631 (1991)).

133. *Computer III* Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, *Report and Order*, 6 F.C.C.R. 7571 (1991).

134. *California III*, 39 F.3d at 932.

FCC's ability to preempt state regulations. Second, the FCC must be able to demonstrate that even if the transmission is deemed to have both interstate and intrastate components, under *Louisiana PSC* and *California I and III,* it is not possible to separate them. Under the FCC's view that any connection to the Internet constitutes an interstate service, only a narrow set of services would qualify as purely intrastate and few if any would implicate the policy goals of innovation and speech that animate the consumer access proponents. Third, because the courts would have to find that the FCC's preemption was narrowly tailored to preserve federal goals, the FCC, in declining to adopt on a national level the consumer connectivity principles, must conclude (and provide some evidence to support) that the national policy goal of promoting deployment of broadband networks would be impeded by imposing consumer connectivity principles on either a state or a national level. Presumably it would do this by arguing that fragmentation across different states would deter infrastructure investment. This ties agency action closer to what Congress directed both states and federal agencies to consider—deployment of broadband transmission facilities. But, depending on the tendency of the reviewing court, the agency would need to provide something beyond mere conclusory assertions.

The ability of state or local governments to impose consumer access obligations on *cable* broadband services is also vulnerable to FCC preemption, and there may be no reason to believe state and local governments would be any more successful in imposing consumer access obligations than they were in imposing competitor ISP access obligations. The preemption analysis would be similar in most respect to that for wireline broadband, with the following differences. If the Ninth Circuit persists in its classification of the underlying transmission as a "telecommunications service," the local franchise authorities would lack jurisdiction under 47 U.S.C. 541(b)(3)(A)(i) which provides that cable operators "shall not be required to obtain a franchise . . . for the provision of telecommunications services." The state public utility commissions may be able to assert jurisdiction to the extent the services are intrastate, along the lines discussed above. If the courts uphold the FCC's classification of cable modem Internet access as an information service without an underlying telecommunications service, there is no express statutory language prohibiting either the states or the local franchising authorities from imposing a consumer access condition on cable broadband service. But the policy underlying 47 U.S.C. 541(b)(3)(B), which prohibits a franchising authority from imposing conditions on the provision of a telecommunications service by a cable operator may inform a court's analysis of a similar condition imposed by a local franchise authority on an information service.

In order to impose consumer access safeguards in either the wireline or cable broadband context, state agencies must have an independent basis of jurisdiction under state law. In other words, in addition to surviving a claim that the FCC's refusal to adopt such safeguards at the national level preempts state action—or in the highly unlikely event the FCC decides to delegate authority to the states to consider the issue on their own—the state agency must have authority to act under its own state laws.

Most state agencies that regulate broadband services have done so under the rubric of overseeing interconnection agreements, handling service quality complaints, or requiring state universal service contributions. Most states have an "unfair and deceptive practices" statute that mirrors the Federal Trade Commission Act. Attorneys general and private class action plaintiffs have invoked these consumer protection statutes to move against wireless carriers, an area where the Telecommunications Act of 1996 expressly preempts state action. How far they are able to take this in the wireless context will become clearer when the joint state attorneys general investigation concludes. The FCC's Local and State Government Advisory Committee has advised the Commission that it should reverse its plan to reclassify broadband services, noting that "state and local government have authority to impose customer service requirements to address anticompetitive actions by cable modem service providers."[135] A number of states assert jurisdiction over broadband services through their jurisdiction over interconnection agreements, though a recent decision by the Ninth Circuit circumscribed the scope of policymaking authority that state agencies can claim through its authority under § 252 of the Telecommunications Act of 1996.[136]

One approach would be for the federal agency to adopt the same procedural approach to preemption that it adopted in the Triennial Review and allow parties to challenge state actions on a case-by-case basis to determine if they are inconsistent with federal policy. This could serve to curb the more intrusive or extreme state actions that are more likely to impair nationwide development of broadband services and yet allow for more restrained state experimentation in a way that could permit some experience to accumulate.

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135. LSGAC ex parte, filed in Wireline and Cable Broadband Classification Proceedings, Feb. 10, 2003.

136. Pac. Bell v. Pac-West Telecomm, 325 F.3d 1114 (9th Cir. 2003). The court overturned California PUC orders requiring reciprocal compensation provisions in interconnections agreements be applied to calls made to ISPs. The court ruled that the state agency lacked jurisdiction under § 252 of the Telecom Act to issue such "generic orders."

III. CONCLUSION

This is about the future. Despite the travesty of the dot-com moment, people in the United States and in many places around the world are taking broadband at steady rates. And innovation in this area is important for U.S. economic growth. Regulators at both the state and federal level must reckon with how to make legal sense of broadband services and facilities and develop a regulatory framework that makes sense.

Some states will continue to push for a policy role. Some will act in sympathy with the belief that whatever innovation is down the road, we need to protect the next AOL or the next Microsoft, and at a minimum these need access to broadband networks; some because their own economies are tied so closely to high tech development; and some, with significant rural populations, because they recognize the need to link their geographic outposts to commercial and educational centers.[137]

As the battles shift to the state agencies, some legislatures are curbing their agencies' wings. Anticipating the possibility of an adverse ruling on broadband issues in the Triennial Review, SBC and other incumbents backed legislation in a number of states, including Indiana, Kansas, Missouri, and Texas to deregulate broadband services and to strip state commissions from jurisdiction over any broadband services or providers. One aspect of the relationship between the federal, state, and local governments in broadband will be decided by the Supreme Court as it reviews state statutes barring municipalities from providing telecommunication services.[138]

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137. In addition to the ones mentioned earlier, a number of states are considering legislation to promote broadband deployment, including Colorado (SB-105, allowing local governments to help private telecom carriers finance broadband infrastructure through municipal bonds or guaranteed loans); Virginia (SB-1347, authorizing state broadband development authority to buy property, issue bonds and take other steps to extend reach of broadband services in southwestern part of state); Arkansas (SCR-3 would authorize state officials to work with telecom providers and school administrators to improve distance learning to reduce consolidation of school districts); Iowa (SF-386 permits retail rate increase but requires that resulting revenue increase be applied to broadband facilities investment in places where broadband is not available); Mississippi (SB-2979 provides state tax credits to telecom companies deploying broadband facilities); a number of states use an "anchor tenancy" arrangement and demand aggregation to promote deployment. The National Regulatory Research Institute conducted a survey in 2000-2001 to provide the Federal-State Joint Conference on Advanced Services, the NARUC Committee on Telecommunications, and state agencies with information on the regulatory status of broadband telecommunications services at the state level. The survey reports state programs to encourage deployment of broadband services and facilities as well as state agencies' regulatory treatment of advanced services.

138. The Supreme Court will review an Eighth Circuit decision overturning an FCC order declining to preempt a Missouri state barring municipal provision of telecommunications services, Nixon v. Mo. Mun. League, 123 S.Ct 2605 (2003). The D.C. Circuit had previously

Even without legislative hobbling, it will be tough for state agencies to inject themselves into broadband policy because legally, the deck is stacked against their asserting much jurisdiction. And as an institutional matter, they may be too absorbed in the UNE impairment analysis delegated to them by the FCC, as well as their energy regulation responsibilities, to undertake a vigorous challenge to the FCC's preemption on broadband issues. But some will continue to be aggressive, and out of that may emerge, in addition to the inevitable false starts, some good policy initiatives that may lead us back to the future.

ruled in favor of the FCC's decision not to preempt in *City of Abilene v. FCC*, 164 F.3d 49 (1999). At issue is the interpretation of § 253, which prohibits a state from prohibiting "any entity" from providing a telecommunications service. The question is whether this applies to a state's political subdivisions. Although the Missouri statute did not prohibit cities from providing Internet services, most municipalities that have begun to provide their own services have done so largely to provide broadband services and most state statutes that forbid cities from providing services do not exclude Internet services from the prohibition. If, however, the FCC reclassifies wireline broadband services as an information service, states could certainly prohibit cities from providing such services, as is currently true for cable modems.