

A THIRD-WAY LEGAL FRAMEWORK FOR ADDRESSING THE COMCAST DILEMMA

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Chairman Genachowski has asked me to describe the legal thinking behind the narrow and tailored approach to broadband communications services that he introduced for public discussion today. It springs from a longstanding consensus about how the FCC should approach Internet access services; from a recent court decision that casts serious doubt on the FCC's current strategy for implementing that consensus; and from a belief that Congress's laws and the Supreme Court's decisions provide a way to overcome this new challenge.

The Policy Consensus. As the Chairman explains in his statement, general agreement has developed about the agency's light-touch role with respect to broadband communications. This bipartisan agreement spans the FCC Chairmen and Commissioners, Congress, and industry, and has three elements:

1. *The Commission does not regulate the Internet.* The policy of preserving the Internet as a generally unregulated, free-market forum for innovation, speech, education, and job creation finds expression in (among other provisions) section 230 of the Communications Act, which states Congress's conclusion that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." (47 U.S.C. § 230(a)(4))
2. *Dial-up Internet access service (used by about 5 million American households essentially to "call" the Internet) is subject to the regulatory rules for telephone service.* This policy protects the 5.6 million American households that depend on ordinary telephone service to reach the Internet.
3. *For the broadband access services that a majority of on-line consumers use to reach the Internet, the Commission refrains from regulation when possible, but will step in when necessary to protect consumers and fair competition.* This balanced approach to broadband access services was expressed most clearly on September 23, 2005, when a unanimous Commission released two companion decisions addressing broadband Internet access service. The first decision that day, generally known as the *Wireline Broadband Order*, "established a minimal regulatory environment for wireline broadband Internet access services to benefit American consumers and promote innovative and efficient communications." (Para. 1) It reclassified telephone companies' Internet access offerings as indivisible "information services" subject only to potential regulation under the doctrine of ancillary authority. ("Ancillary authority" refers to the Commission's discretion under the statutory provisions that establish the agency (Title I of the Communications Act) to adopt measures that are "reasonably ancillary to the effective performance of the Commission's various responsibilities." *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1962).) The companion decision, known as the *Internet Policy Statement*, adopted principles for an open Internet and expressed confidence that the Commission had the "jurisdiction necessary to ensure that providers of telecommunications for Internet access . . . are operated in a neutral manner." (Para. 4) As recently as March 16 of this year, the current Commission—again unanimously—adopted a Joint Statement on Broadband reaffirming that "[e]very American should have a meaningful opportunity to benefit from the broadband communications era." (Para. 3)

These three basic principles reflect the Commission's commitment to a policy that promotes investment in the Internet and broadband technologies, and ensures basic protections for businesses and consumers when they use the on-ramps to the Internet.

The Comcast Case. A month ago, the United States Court of Appeals for the D.C. Circuit issued an opinion that raises serious questions about the Commission's ability to implement the consensus policy effectively, absent some responsive administrative action. That case is *Comcast v. FCC*, the so-called Comcast/BitTorrent case. The case began in 2007, when Internet users discovered that Comcast was secretly degrading its customers' lawful use of BitTorrent and other peer-to-peer applications. In 2008, the FCC issued an order finding Comcast in violation of federal Internet policy as stated in various provisions of the Communications Act and prior Commission decisions.

The D.C. Circuit held that the Commission's 2008 order lacked a sufficient statutory basis, because it did not identify "any express statutory delegation of authority" for putting an end to Comcast's undisclosed interference with its own customers' communications. The narrow holding is that because the Commission, in 2002, classified cable modem offerings entirely as "information services" (a category not subject to any specific statutory rules, but only the agency's ancillary authority under Title I of the Act), it could not, in 2008, enforce Title II's nondiscrimination and consumer protection principles in the cable modem context. The underlying legal principle is that, when the Commission classified residential broadband services as solely and entirely information services despite their substantial transmission component, the Commission unintentionally went too far in limiting its ability to protect consumers and small businesses.

The opinion recognizes the Commission's continued ability to adopt rules concerning services Congress specifically addressed in the Communications Act—wireline and wireless telephony, broadcasting, and cable and satellite TV—and those rules may incidentally benefit the Internet. But, under *Comcast*, the FCC's 2002 classification decision greatly hampers its ability to accomplish a task the Commission unanimously endorsed in 2005: "ensur[ing] that broadband networks are widely deployed, open, affordable, and accessible to all consumers." (*Internet Policy Statement*)

The Commission's Options. *Comcast* undermined only the particular legal foundation used in recent years to support the longstanding consensus regarding broadband policy, not the consensus itself. In particular, the case casts no doubt on the wisdom of the three-part framework that has encouraged the development of diverse and innovative Internet applications, content, and services, as well as faster and more widely available access connections. The Commission's focus is on putting the consensus approach back on a sound legal footing. The public debate surrounding the *Comcast* decision has focused on two principal options, but there is a third approach that may provide a more tailored and sustainable alternative.

1. *Title I: Stay the Course.*

Some big cable and telephone companies suggest the agency should stick with the information service classification, try to adapt its policies to the new restrictions announced by the *Comcast* court, and see how it goes. This is a recipe for prolonged uncertainty. Any action the Commission might take in the broadband area—be it promoting universal service, requiring accurate and informative consumer disclosures, preserving free and open communications, ensuring usability by persons with disabilities, preventing misuse of customers' private information, or strengthening network defenses against cyber-attacks—would be subject to challenge on jurisdictional grounds because the relevant provisions of the Communications Act would not specifically address broadband access services. Paradoxically, the FCC

would be on safe legal ground only to the extent its actions regarding emerging broadband services were intended to affect traditional services like telephone and television.

Even if the Commission won every case, there would be implementation delays of months or years while legal challenges worked their way through the courts—eons in what the Ninth Circuit has called the “quicksilver technological environment” of broadband. (*AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000)). The extended uncertainty would deprive investors, innovators, and consumers of needed clarity about the rules of the road. Because the stay-the-course proposal does not allow the Commission directly to promote broadband deployment and adoption or protect broadband competition and consumers, it would not support the consensus status quo that existed before *Comcast*.

2. Title II: Telephone-Style Regulation of Broadband Internet Services.

A second option is to reclassify broadband Internet access services as telecommunications services and apply the full suite of provisions established in Title II of the Communications Act, many of which were developed decades ago for telephone networks. That approach would put the Commission on a strong jurisdictional footing in future broadband rulemakings and adjudications, because broadband Internet services would be governed directly by Title II. But this full Title II approach would trigger a detailed regulatory regime (comprising 48 sections of the United States Code) that the Commission has successfully refrained from applying to broadband Internet services. Although there would be clear rules of the road for broadband, those rules would be inconsistent with the current consensus approach of regulatory restraint.

3. *A Third Way: Placing the Consensus Policy Framework on a Sound Legal Footing.*

There is a third legal path that fits better with the Commission’s settled, deregulatory policy framework for broadband communications services. It begins at the Supreme Court. In *National Cable and Telecommunications Association v. Brand X Internet Services, Inc.*, a majority of the Justices deferred to the Commission, and permitted its information service classification of cable modem offerings, because the Communications Act “leaves federal telecommunications policy in this technical and complex area to be set by the Commission.” Justice Scalia, joined by Justices Souter and Ginsburg, concluded in a strong dissent that the “computing functionality” and broadband transmission component of retail Internet access service *must be* acknowledged as “two separate things.” The former involves unregulated information services while the latter is a telecommunications service. The dissent therefore would have held that the Commission’s information service classification of cable broadband Internet access service was an unreasonable and unlawful interpretation of the Communications Act.

As discussed in detail below, adopting Justice Scalia’s bifurcated view of broadband Internet access service is entirely consistent with (although not compelled by) the *Brand X* majority opinion. This course would also sync up the Commission’s legal approach with its policy of (i) keeping the Internet unregulated while (ii) exercising some supervision of access connections. The provisions of Title II would apply solely to the transmission component of broadband access service, while the information component would be subject to, at most, whatever ancillary jurisdiction may exist under Title I.

In addition to narrowing the applicability of Title II, the Scalia approach enables the Commission to use the powerful deregulatory tool Congress provided specifically for tailoring Title II’s requirements to the Internet Age, and thereby establishing appropriately confined boundaries for regulation. When Congress amended the Communications Act in 1996, most consumers reached the Internet using dial-up service, subject then (as it is now) to Title II. Cable modem service was emerging, though, and telephone companies were beginning to offer DSL broadband connections for Internet access under Title II. Aware of the changing landscape, Congress gave the FCC authority and responsibility via section 10 of the

Communications Act to “forbear” from applying telecommunications regulation, so that the new services are not subject to needlessly burdensome regulations. And in section 706 of the Telecommunications Act of 1996 (47 U.S.C. § 1302), Congress directed the FCC to use its new forbearance power to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”

The upshot is that the Commission is able to tailor the requirements of Title II so that they conform precisely to the policy consensus for broadband transmission services. Specifically, the Commission could implement the consensus policy approach—and maintain substantively the same legal framework as under Title I—by forbearing from applying the vast majority of Title II’s 48 provisions to broadband access services, making the classification change effective upon the completion of forbearance, and enforcing a small handful of remaining statutory requirements. As few as six provisions could do the job:

Sections 201, 202, and 208. These fundamental provisions collectively forbid unreasonable denials of service and other unjust or unreasonable practices, and allow the Commission to enforce the prohibition. Long before the *Comcast* decision, access providers supporting an information service classification made clear that they did not seek to avoid enforcement of these fair-dealing principles:

- In December 2000, Cox commented in the *Cable Modem* docket that “a Title I classification ensures that the Commission has ample ability and authority to implement rules to correct any market failures or other policy concerns about cable data services that might develop in the future.”
- In May 2002, Verizon agreed in the *Wireline Broadband* proceeding that “classification of broadband under Title I [would not] lead to any erosion of the consumer protections provisions of the Communications Act.”
- In July 2003, SBC (now AT&T) noted in the same docket that Title I classification of broadband Internet access services would allow the Commission “to intercede at some later point if necessary to protect consumers.”

After *Comcast*, the commonsense consensus that there should not be unreasonable conduct by broadband access service providers remains. In the Commission’s pending Open Internet Proceeding, for example, Comcast has urged “a standard based on ‘unreasonable and anticompetitive discrimination.’” Sprint Nextel has commented that “[t]he unreasonable discrimination standard contained in Section 202(a) of the Act contains the very flexibility the Commission needs to distinguish desirable from improper discrimination.” And AT&T has concurred that the “unreasonable discrimination” prohibition in section 202(a) “is both administrable and indispensable to the sound administration of the nation’s telecommunications laws.”

Applying sections 201, 202, and 208 to broadband access service would hold broadband access providers to standards they agree should be met and would address the specific problem that sparked the *Comcast* case—secret interference with subscribers’ lawful Internet transmissions. Applying a few other sections of Title II would allow the Commission to address other recognized issues as well.

Section 254. Section 254 requires the Commission to pursue policies that promote universal service goals including “[a]ccess to advanced telecommunications and information services . . . in all regions of the Nation.” In the Joint Statement on Broadband issued earlier this year, the Commission called for reform of the universal service program to “emphasize the importance of broadband.” The Title I/information services model used by the Commission actually undermines accomplishment of this goal, because universal service support is generally available only for telecommunications services: The law defines

“universal service” as “an evolving level of *telecommunications services* the Commission shall establish periodically” (emphasis added). Industry agrees this is a problem. AT&T (in a January 2010 white paper) and the cable industry (in a March 2010 letter) have both proposed untested theories they think might permit universal support for broadband under Title I. Recognizing broadband transmission as a separable telecommunications service would definitively solve the problem.

Section 222. Title II requires providers of telecommunications services to protect the confidential information they receive in the course of providing service. These protections are another part of the consensus policy framework for broadband access. A unanimous Commission addressed privacy in the 2005 *Wireline Broadband Order*, stating that “[c]onsumers’ privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on [telephone] services” (para. 148), and that it had jurisdiction to enforce this norm (para. 146). As early as 1987, “long before Congress enacted section 222 of the Act, the Commission had recognized the need for privacy requirements associated with the provision of enhanced [i.e., information] services” and established rules for telephone companies to protect “legitimate customer expectations of confidentiality” as well as other companies’ confidential business information. (*Id.* para. 149 and n.447).

Section 255. Telecommunications service providers and providers of telecommunications equipment or customer premises equipment must make their services and equipment accessible to individuals with disabilities, unless not reasonably achievable. The *Wireline Broadband Order* addressed this requirement as well. Again, although the Commission was there adopting the Title I legal framework, it held fast to the Title II rule, promising to “exercise our Title I ancillary jurisdiction to ensure achievement of important policy goals of section 255.” (Para. 123) The Joint Statement on Broadband similarly provides that disabilities should not stand in the way of Americans’ access to broadband. (Para. 3)

The Wireless Experience. Although it would be new for broadband, this third way is a proven success for wireless communications. In 1993, Congress addressed the minimum safeguards necessary for then-emerging commercial mobile radio services (CMRS), such as cell phone service. Congress specified in a new section 332(c) of the Communications Act that Title II applies to CMRS, but the Commission may forbear from enforcing any provision other than the core requirements of sections 201, 202, and 208. This forbearance framework for wireless has been so successful that in 2001, Tom Tauke, Verizon’s Senior Vice President for Public Policy and External Affairs, told the House Judiciary Committee that “this approach produced what is arguably one of the greatest successes in this industry in the last twenty years—the growth of wireless services” — and it “will work” for wireline broadband as well.

(Aside from this statutory history, wireless broadband may be distinguishable from cable and telephone company broadband access services on account of differences in the technical and consumer aspects of wireless broadband service, as well as the Commission’s direct jurisdiction over licensing of wireless services under Title III of the Communications Act. On the other hand, telecommunications classification of a distinct transmission component within wireless broadband service might be essential to supporting deployment and wider adoption of wireless broadband under section 254.)

A Stronger Legal Foundation. Applying a few foundational sections of Title II to the transmission component of broadband Internet access service would establish a strengthened legal basis on which to implement the consensus policy for broadband access. If broadband access service is found to contain a separate telecommunications service, as Justices Scalia, Souter, and Ginsburg believed was the only plausible view, then the Commission may protect broadband consumers by grounding its authority in Title II directly as well as in Title I as ancillary authority. This belt-and-suspenders approach—relying on direct statutory authority in addition to ancillary authority—puts the Commission in an inherently more secure position than the Title I approach, which allows only assertions of ancillary authority.

The legal issue surrounding the third way is not whether the Commission can sufficiently protect consumers in a particular context, as it is under the information service classification and the *Comcast* opinion, but whether the Commission's decision to adopt Justice Scalia's classification of broadband access would be permissible. *Brand X* all but answers that question.

Brand X involved a challenge by independent Internet service providers (ISPs), long distance carriers, consumer and public interest groups, and states to the *Cable Modem Declaratory Ruling*. In that 2002 decision, the Commission had concluded that cable modem service then was being provided as "a single, integrated service that enables the subscriber to utilize Internet access service," with a telecommunications component that was not "separable from the data processing capabilities of the service." The Commission held that cable modem service "does not include an offering of telecommunications service to subscribers" and, accordingly, no portion of it triggered Title II duties or protections. (*Cable Modem Declaratory Ruling* paras. 38-39)

When the case was briefed at the Supreme Court, all the parties agreed with the Commission that cable modem service either *is* or *includes* an information service. The Court therefore addressed whether the Commission permissibly applied the Communications Act in choosing to conclude that cable modem service providers offer only an information service, rather than a telecommunications service and an information service. The Court's opinion unequivocally reaffirms the principle that courts must defer to the implementing agency's reasonable interpretation of an ambiguous statute. Justice Thomas, writing for the six-Justice majority, recited that:

In *Chevron [U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)]*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. 467 U.S., at 865-866. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.

(545 U.S. at 980) Furthermore, "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis." (*Id.* at 981 (quoting *Chevron*))

Turning to the Communications Act, Justice Thomas wrote:

The entire question is whether the products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes). That question turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance. . . . [T]he statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission.

(*Id.* at 991) "The questions the Commission resolved in the order under review," Justice Thomas summed up, "involve a subject matter [that] is technical, complex, and dynamic. The Commission is in a far better position to address these questions than we are." (*Id.* at 1002-03 (internal citation and quotation marks omitted))

Justice Breyer concurred with Justice Thomas, stating that he “believe[d] that the Federal Communications Commission’s decision falls within the scope of its statutorily delegated authority,” although “perhaps just barely.” (*Id.* at 1003)

In dissent, Justice Scalia, joined by Justices Souter and Ginsburg, expressed the view that the Commission had adopted “an implausible reading of the statute[,] . . . thus exceed[ing] the authority given it by Congress.” (*Id.* at 1005) Justice Scalia reasoned that “the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on offer—especially when seen from the perspective of the consumer or end user.” (*Id.* at 1008)

These opinions collectively afford the Commission great flexibility to adjust its approach going forward—particularly by adopting an approach like the one suggested by Justice Scalia. The *Brand X* case put six Justices on record as saying that classification of cable modem service is a call for the FCC to make and that “the Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change” (*id.* at 1001); one of the six “just barely” accepted the FCC’s information service approach; and the three remaining Justices expressed the view that the agency *must* classify a separable telecommunications service within cable modem offerings. As many as all nine Justices, it seems, might have upheld a Commission decision along the lines Justice Scalia suggested. In any event, the lawfulness of a limited reclassification could be confirmed relatively quickly in a single court case, avoiding the prolonged and uncertain case-by-case testing that would follow from continuing down the Title I road.

An agency reassessment of the classification issue would have to include consideration of the policy impact of the *Comcast* case, as well as a fresh look at the technical characteristics and market factors that led Justice Scalia to believe there is a divisible telecommunications service within broadband Internet access. The factual inquiry would include, for instance, examination of how broadband access providers market their services, how consumers perceive those services, and whether component features of broadband Internet access such as email and security functions are today inextricably intertwined with the transmission component. If, after studying such issues, the Commission reasonably identified a separate transmission component within broadband Internet access service, which is (or should be) offered to the public, then the consensus policy framework for broadband access would rest on *both* the Commission’s direct authority under Title II *and* its ancillary authority arising from the newly recognized direct authority. This necessarily would allow a stronger legal presentation than the standalone ancillary jurisdiction arguments that the Commission made unsuccessfully in *Comcast*.

No New Unbundling Authority. In the wake of *Comcast*, representatives of the incumbent telephone companies have sometimes suggested that any deviation from the current information service classification of broadband Internet access would open the door to new network unbundling authority under section 251(c) of the Communications Act. That is not a credible concern. An incumbent telephone company’s network unbundling obligations under section 251 do not depend on the classification of the services the incumbent company is providing. The Commission’s adoption of its current information service classification accordingly did not lessen unbundling obligations or authority under section 251. In paragraph 127 of the 2005 *Wireline Broadband Order* (the order that extended the information-service classification to telephone companies’ broadband access) the Commission specifically explained that “nothing in this Order changes a requesting telecommunications carrier’s [unbundling] rights under section 251 and our implementing rules.”

Nor would identifying a separate telecommunications component of broadband access service afford competing ISPs any new rights to the incumbents’ networks on a wholesale basis under the old *Computer Inquiry* rules. The Commission “eliminate[d]” those requirements for wireline broadband access providers in 2005, no matter whether they provide a Title I or Title II access service. (*Id.* para. 80).

As for cable companies, there is currently an open rulemaking proceeding—begun by the Powell Commission at the same time it adopted the information services theory—that asks “whether it is necessary or appropriate at this time to require that cable operators provide unaffiliated ISPs with the right to access cable modem service customers directly.” (*Cable Modem Order* para. 72) The Commission has not taken any action to implement mandatory access to cable broadband networks, and a consensus seems to have developed that it should not be ordered. Should the Commission wish to formally confirm that consensus, it could close the 2002 proceeding.

No Rate Regulation. Nor would identification of a telecommunications service within broadband Internet access be a harbinger of monopoly-era price regulation, as some have suggested. Congress made mobile services subject to Title II in 1993, but under the model established for wireless services the Commission rejected rate setting. A wireless carrier’s success, the Commission explained, “should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs — and not by strategies in the regulatory arena.” (*Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1420 (1994)) There is no reason to anticipate the Commission would reach a different conclusion about prices or pricing structures for broadband access. Indeed, more than 800 incumbent telephone companies voluntarily provide broadband access as a Title II telecommunications service today, and while most have voluntary tariffs, the Commission expressly does not require tariffing. (*Wireline Broadband Order* para. 90)

Difficult To Overturn. Would a forbearance-based approach provide greater or lesser protection against future over-regulation of broadband access than today’s information service classification? Although neither approach would, could, or should absolutely prevent the Commission from adjusting its future policies in light of changed circumstances, the forbearance approach should provide greater, not lesser, protection against excessive regulation than the Title I approach.

As already discussed, the Commission’s information service approach was highly discretionary and, the Supreme Court instructed in *Brand X*, subject to review “on a continuing basis.” For both reasons, the current information service classification is inherently insecure. Justice Scalia made this point in *Brand X*. (545 U.S. at 1013) Forbearance determinations for broadband access transmission would be more difficult than the information service classification to reverse. That is because Section 10 *mandates* forbearance if:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

The initial determination to forbear from regulating broadband access would be straightforward under this test. Applying sections 201, 202, and 208 would directly address the first prong of the test. As for the second and third prongs (protecting consumers and consistency with the public interest), the critical fact is that Title II rules *currently do not apply* to broadband access service. Forbearing would preserve the status quo, not change it. To satisfy the statutory forbearance criteria, therefore, the Commission would

only have to conclude that consumers and the public interest are adequately protected today, without application of the Title II provision at issue. Consistent with the 2005 classification order, this analysis could be undertaken on a nationwide rather than market-by-market basis. (*See Wireline Broadband Order* paras. 91-93)

Unforbearing (that is, imposing Title II rules that have not been applied to broadband access services in many years, if ever) would be a different matter entirely. In order to overturn a grant of forbearance, the Commission would first have to compile substantial record evidence that the circumstances it previously identified as supporting forbearance had changed, and then survive judicial review under the Administrative Procedure Act's arbitrary-and-capricious standard. The difficulty of overcoming section 10's deregulatory mandate and a prior agency finding in favor of forbearance is illustrated by the fact that the FCC has never reversed a forbearance determination made under section 10, nor one made for wireless under the similar criteria of section 332(c)(1).

The Commission could further reinforce the certainty of forbearance in the text of any implementing order. For instance, the Commission might provide that in the event of an adverse court decision on forbearance the old unitary information service classification would spring back, or that there would be some other response by the Commission that is more consistent with the pre-*Comcast* status quo than full Title II regulation.

No Inconsistent State Regulation. Excessive state regulation is as threatening to the Internet as excessive federal regulation. The Commission, however, has broad authority to preempt inconsistent state requirements when they frustrate valid federal policies. Under today's information service classification, the Commission's general policy of not regulating information services means that states have little ability to regulate broadband Internet access services. The Commission has similar authority to preempt state regulation of interstate telecommunications services when the state regulation is inconsistent with federal regulation (or deregulation) and the state cannot limit the effect of its regulation to an intrastate portion of the service. Furthermore, section 10(e) of the Act specifically provides that no state may apply a provision of Title II that the Commission has nullified through forbearance. For these reasons, broadband access providers would have at least the same protection against unjustified state regulation as they enjoy today. Indeed, access providers arguably would have more protection under a tailored forbearance approach than under the Title I approach; because a permissible exercise of federal jurisdiction can effectively limit state jurisdiction, the *Comcast* decision's narrowing of federal ancillary jurisdiction might have the corollary effect of expanding the permissible scope of state regulation.

No Red Tape or Slippery Slopes. Finally, a third-way approach modeled on the successful framework used for wireless services would have to be administrable and lead to sensible results in practice. Administration should be a non-issue. Access providers would be free to define and redefine their transmission services to best meet operational and customer needs, without any need to file tariffs (given forbearance from the rate-setting provisions of the Act). The fact-specific inquiry involved in a tailored forbearance approach, moreover, would address only facilities-based providers that offer access transmission to the public at large. Providers of Internet content, applications, and services would remain unregulated under the first prong of the Commission's consensus framework, while providers of negotiated ("private") carriage services—on the Internet or elsewhere—are not telecommunications service providers subject to Title II. (*See Communications Act* section 3(46) ("The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.") A narrow and tailored forbearance approach to solving the *Comcast* problem appears workable in this respect as well.

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Whether, all things considered, the legal response to *Comcast* sketched out here is the best one for the Commission to adopt would be for the five FCC Commissioners to answer after an opportunity for public comment and private study. In my judgment, it's a question worth asking.