

**PRESENTATION OF THE OFFICE OF GENERAL COUNSEL ON
NOTICE OF INQUIRY
FRAMEWORK FOR BROADBAND INTERNET SERVICE
GN DKT. No. 10-127**

**FCC OPEN MEETING
JUNE 17, 2010**

Presentation of Austin Schlick, General Counsel

Good morning, Mr. Chairman and Commissioners. I'm joined at the table this morning by Deputy General Counsel Julie Veach and Special Counsel David Tannenbaum, who will join me in presenting the proposed Notice.

The item before you today asks hard questions. Some have urged that the Commission should avoid even asking these questions. They suggest that the Commission should ignore, at least for now, basic issues about its ability to fulfill a decade of promises concerning broadband, including the Joint Statement on Broadband you unanimously adopted just three months ago.

Staff recommends that the Commission forthrightly face these important issues, without prejudging the outcome of the inquiry. The Notice of Inquiry that is before you today would commence a thorough, balanced agency examination of a topic that is being debated on the pages of the press, in the blogosphere, and at industry conferences. That topic is the sufficiency of the Commission's existing legal classification of broadband Internet services such as cable modem and DSL, given the change in the legal landscape that occurred on April 6, when the U.S. Court of Appeals for the DC Circuit issued its opinion in *Comcast v. FCC*.

Julie will describe the *Comcast* opinion more fully. In brief, the Court of Appeals adopted a narrower view of the Commission's so-called ancillary authority than the one on which the Commission has based its key broadband

decisions. The *Comcast* case puts in doubt the Commission's continued ability to rely on its ancillary authority as the legal grounds for protecting the public interest in the broadband area. The Notice of Inquiry on which you will vote acknowledges this doubt, and simply asks how the Commission should respond.

Before Julie and David describe the Notice and the relevant historical background and legal precedent, I'd like to focus on Section 1 of the Communications Act. Section 1 establishes the FCC "for the purpose of regulating interstate and foreign commerce in communication by wire and radio" – which includes broadband communications. Section 1 then tells the Commission how it is to exercise its powers under the Act. These powers are to be used:

so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications

In a series of consistent decisions since the early 2000s, the Commission has committed itself to fulfilling Section 1's charge in the Broadband Age.

So, for example, the Joint Statement on Broadband reaffirms that "[e]very American should have a meaningful opportunity to benefit from the broadband communications era" and the universal service program "should be

comprehensively reformed to . . . encourage targeted investment in broadband infrastructure.”

Also to make communications services available to all Americans, the Commission committed in 2005 to promote access to broadband Internet services for persons with disabilities, consistent with Section 255 of the Act.

In the same 2005 order, the Commission highlighted its belief that the pre-*Comcast* ancillary authority doctrine provided sufficient legal authority for rules addressing broadband “network reliability, emergency preparedness, national security, and law enforcement.”

Other consumer concerns, such as the privacy of communications, also have been recognized as a proper subject of Commission action in the broadband area, under the FCC’s ancillary authority.

Comcast casts doubt on the *legal approach* the Commission chose in its decisions over the last decade. But the *Comcast* Court did not consider, much less question, either the Commission’s *policies* or the Commission’s authority to support them with other legal approaches. In preparing the item before you, the staff therefore has assumed that the Commission will hold to the substantive policies described in Section 1 of the Act and its own prior broadband orders.

The questions framed in the Notice of Inquiry are directed at one narrow issue: How, after *Comcast*, can the Commission best establish a strong but

appropriately limited legal foundation for broadband policies that promote competition, encourage investment and innovation, and protect consumers?

Julie will discuss the historical and legal background for the NOI, and David will then describe the specific questions asked in the document.

Presentation of Julie Veach, Deputy General Counsel

Thank you, Austin. The history leading up to this proceeding is familiar to many here, and it reflects a consistent belief that the Commission could generally treat broadband Internet services with a light regulatory touch while at the same time retaining its authority to step in to address specific issues that arise.

The Commission's attention to communications involving computers goes back more than four decades to the beginning of the *Computer Inquiries*. In 1966, the Commission saw that, quote, "[t]he modern-day electronic computer is capable of being programmed to furnish a wide variety of services, including the processing of all kinds of data and the gathering, storage, forwarding, and retrieval of information." Over the years, the *Computer Inquiries* resulted in the distinction that exists today between "basic services," or simple transmission, and "enhanced services," or services that combine basic services with computer processing applications that act on the user's information. When facilities-based common carriers offered enhanced services, they were required to separate out and offer the

basic transmission service on a common carrier basis. Dial-up Internet access services, then broadband Internet services such as telephone company DSL, began under this regime.

Fast forward to 1996. In its amendments to the Communications Act, Congress essentially codified the Commission's distinction between basic and enhanced services. "Telecommunications services" are analogous to "basic services," and "information services" to "enhanced services."

Broadband Internet service emerged in the 1990s, offered most predominantly by cable operators. The Commission took an initial look at Internet access services in the 1998 Stevens Report, and concluded that non-facilities-based providers should not be required to contribute to the universal service fund, like carriers must do. The statutory classification of this service was next addressed by the courts. In 2000, the Ninth Circuit held in *AT&T v. City of Portland* that facilities-based cable modem service is a telecommunications service to the extent that the cable operator provides Internet transmission, and an information service to the extent the cable provider acts as a conventional ISP.

Later that year, the Commission issued a Notice of Inquiry to consider the statutory classification of cable modem service. After reviewing a lengthy record, the Commission determined in 2002 that cable modem service is an information service. The Commission went on to decide that cable modem service does not

also include a separate offering of telecommunications service, and the Commission declined to require cable operators to make their underlying transmission available on a common carrier basis, as phone companies offering DSL were required to do under the *Computer Inquiry* rules.

While this decision created a disparity between cable operators and telephone companies, this disparity was short-lived. The Supreme Court reviewed the Commission's cable modem order in 2005. In *Brand X*, a majority of the Court held that the Commission had reasonably interpreted an ambiguous statute in finding that cable modem service was an information service and did not contain a separate telecommunications service. Thirty-nine days after the Supreme Court's decision, the Commission brought its treatment of DSL-provided broadband Internet services in line with cable modem services. It followed in 2006 and 2007 with similar decisions for broadband over power lines and wireless broadband services.

In so doing, however, the Commission and its Chairmen never thought they were surrendering meaningful authority to achieve consumer protection goals and adopt policies to promote innovation and investment. Before the cable modem order, Chairman Kennard said that the Commission would "step in" to protect consumers and fair competition. Chairman Powell offered assurance at the time the cable modem order was adopted that the classification of cable modem service

as an information service did not leave the Commission “powerless to protect the public interest.” And Chairman Martin agreed that the Commission has “ancillary authority to impose regulations as necessary to protect broadband Internet access.”

The Commission’s comfort in its authority is plain on the face of the classification decisions themselves. When the Commission adopted its cable modem order in 2002, it included a Notice of Proposed Rulemaking that sought comment on whether the Commission needed to exercise its Title I ancillary authority with regard to the provision of cable modem service. Among other things, the Commission asked whether it should require cable modem providers to make their transmission services available to competing ISPs.

Similarly in the DSL Order, the Commission held that it had the authority – as well as the duty – to ensure that consumers are protected. The Commission then too issued a notice of proposed rulemaking to seek comment on using ancillary authority for a variety of purposes, including protecting consumers’ privacy and ensuring truth-in-billing.

But in April of this year, the Commission’s understanding of its ancillary authority was shaken when the D.C. Circuit issued its opinion in the *Comcast* case. In the order reviewed by the court, the Commission had addressed the network management practices of Comcast, which had been caught secretly degrading its own customers’ lawful broadband traffic. The Commission ordered Comcast to

disclose its past and planned practices and to submit a compliance plan detailing how it would transition away from its unreasonable practices. The Commission relied for these actions on its ancillary authority.

The D.C. Circuit rejected the Commission's exercise of ancillary authority. The court held that ancillary authority must be tied to a specific statutory delegation of regulatory authority. The Court concluded that the Commission had failed to link its decision sufficiently to any express delegation of authority in Titles II, III, or VI, which are the specific sections of the Communications Act that govern telecommunications, users of spectrum such as wireless providers, and cable operators. Therefore, the court overturned the Commission's enforcement order against Comcast.

Comcast represented the Commission's first concrete effort to implement the legal framework created in the 2002 cable modem order. The decision shows that the Commission's existing approach is unlikely to work as it was envisioned, but the court left the Commission with options. David will describe several possible approaches as they are outlined in the proposed Notice of Inquiry before you. Nothing the courts have said forecloses any of those approaches. To the contrary, in the *Brand X* case affirming the Commission's cable modem decision, the majority held that the Act does not establish a classification for broadband Internet services, and that makes it this Commission's role to determine the classification

consistent with its view of telecommunications policy. The Court also said that an agency must consider the wisdom of its policies on a continuing basis. Moreover, if, after careful examination of the record, the Commission decides to change course, it has the legal freedom to do so. The Supreme Court's *Fox* decision makes clear that in this situation an agency need only acknowledge that it is changing course and explain why it believes the new approach to be better than the status quo.

The Court has left the door open for the Commission to evaluate its options. David will describe how the Notice of Inquiry would begin the process of doing that.

Presentation of David Tannenbaum, Special Counsel

Thank you, Julie. The purpose of the Notice of Inquiry before you is to initiate an open, public process to identify the best legal framework for promoting investment and innovation in broadband Internet services, and for protecting the consumers who use those services.

The item identifies three potential frameworks to achieve these goals and seeks comment on the legal and policy implications of each:

1. The first option on which the item seeks comment is to maintain the current legal framework, which treats broadband Internet service as a single information service.
2. The second option included in the item is for the Commission to identify a separate broadband Internet telecommunications service that would be subject to *all* provisions in Title II of the Communications Act.
3. The third option on which the item seeks comment is to identify a broadband Internet telecommunications service and apply to that service only the bare minimum of Title II provisions that are necessary to implement widely supported broadband policies.

Although the item specifically identifies these options for comment, it also asks the public to suggest other legal frameworks that might be better than any of these three.

It is important to emphasize that the item does *not* contemplate a change in the Commission's treatment of, or authority over, Internet content, applications, or services. Nor does it propose to consider or change the Commission's treatment of backbone services, content delivery networks, or other services outside the scope of the Commission's earlier classification decisions.

Under the first approach included in the item, the Commission would maintain the legal framework it first adopted in 2002. Under that framework,

broadband Internet service is treated as a single information service, unless the Internet service provider chooses otherwise. Under this approach, the Commission relies primarily on its ancillary Title I authority to support broadband policy. For some broadband policies going forward, the Commission might be able to find direct authority in specific provisions elsewhere in the Communications Act. For example, some commenters have proposed that the Commission could reform its universal service programs to include broadband by relying on section 254 of the Act and language in the Telecommunications Act of 1996.

The item asks commenters to evaluate this approach by addressing whether it would allow the Commission to achieve broadband policy goals, including: reforming universal service; empowering consumers to protect their privacy online; ensuring access for individuals with disabilities; protecting public safety and homeland security; and addressing harmful practices by ISPs, such as the ones addressed in the *Comcast* decision. The NOI also seeks comment on how the current framework – or other legal options – might facilitate alternative approaches to broadband policy, including standard-setting by third parties.

The second option on which the item seeks comment rests on Title II of the Communications Act. Title II provides the Commission express and direct authority to implement, for telecommunications services, broadband policies

including universal service, consumer privacy, access for persons with disabilities, and other basic consumer protections.

To allow the Commission to evaluate this option, the item asks commenters to refresh the factual record the Commission gathered nearly ten years ago so the Commission can determine whether broadband Internet service providers are currently offering consumers two distinct services: first, an Internet connectivity service that provides the “on ramps” to the Internet and which could be classified as a telecommunications service subject to Title II. And second, a bundle of information services, such as e-mail accounts and online storage, that is not and would not be subject to Title II.

If ISPs do currently offer a separate retail telecommunications service (or were required to offer such a service), under the second option the Commission would apply *all* of Title II’s provisions to broadband Internet connectivity service, including provisions that provide for tariffs, rate regulation, oversight of ISPs’ internal management, and resale and network access obligations.

To assess this option, the item asks for comment on how broadband Internet services are currently offered to consumers, how the Commission should define a broadband Internet telecommunications service if it went this route, and, importantly, whether applying *all* of Title II’s provisions would have negative effects on innovation and investment in broadband.

The third option presented for comment in the item is modeled on Congress's deregulatory framework for cell phone service. As you know, in 1993, Congress instructed the Commission generally to apply Title II to commercial mobile radio services, like cell phone service, but allowed the Commission to refrain from applying specific provisions of Title II. This ability to refrain from applying provisions of the Act is known as "forbearance," and the Commission has since forborne from applying most, though not all, Title II provisions to commercial radio services.

This deregulatory framework has allowed huge growth in the wireless market. For example, from 1993-2009 the number of commercial mobile wireless connections grew from approximately 16 million to over 285 million. And in 1996, when Congress extended the Commission's authority and responsibility to forbear to *wireline telecommunications services* it specifically identified forbearance as one of the tools the Commission should use to promote the deployment of advanced telecommunications capability to all Americans.

The item therefore seeks comment on whether the Commission should pursue a forbearance-based approach by first determining, based on a refreshed factual record, whether ISPs currently offer a telecommunications service along with a bundle of information services. If so, the Commission would recognize that service as a telecommunications service. This would hardly break new ground:

approximately 840 local telephone companies across the country currently offer broadband connectivity as a separate telecommunications service under Title II. But unlike under the second option, the Commission would simultaneously forbear from all but a small number of core Title II provisions necessary to achieve broadband policy goals. These provisions would include sections that would give consumers basic protections and that provide clear authority for the Commission to reform its universal service programs to include broadband, as recommended in the National Broadband Plan.

The Commission would lock-in its forbearance decisions to the extent possible in order to increase predictability for investors and innovators. The item seeks comment on all aspects of this Third Way framework, with a particular emphasis on the provisions from which the Commission should and should not forbear; on approaches to applying the criteria that allow the Commission to forbear; and on the Commission's options for locking in its forbearance decisions.

Finally, the item seeks comment on a number of questions that apply to each of these three options and to any other approaches that commenters may propose.

These include questions on:

- How the Commission should treat terrestrial wireless and satellite broadband Internet services

- How the Commission should treat non-facilities-based ISPs
- The implications for state and local regulation under each approach
- The effective date that would allow providers sufficient time to implement a new framework if the Commission altered its current approach
- And whether the Commission should close a proceeding it opened in 2002 to seek comment on pursuing open access for cable modem service.

Although the Administrative Procedure Act does not require that this inquiry follow notice and comment procedures, the item seeks public input and will be published in the Federal Register in order to ensure that the Commission's decision-making process is as transparent and fact-based as possible. The deadline for initial comments is July 15, 2010, and the reply comment deadline is August 12, 2010. The public may also respond to the item via the Commission's blog and its IdeaScale web application.

The Office of General Counsel recommends that you vote to adopt this Notice, and we request editorial privileges.