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BRAND X AND THE FEDERAL COMMUNICATION COMMISSION'S ADOPTION OF THE WIRELINE BROADBAND INTERNET ACCESS ORDER – WHAT NOW?*

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Abstract

On September 25, 2005, just thirty-nine days after the Supreme Court's decision in National Cable & Telecommunication Ass'n v. Brand X Internet Services, the Federal Communications Commission issued the Wireline Broadband Internet Access Order dropping regulations requiring Bell Operating Companies to offer broadband access on a common carrier basis. Although the FCC believes that the Wireline Broadband Order, designed to help level the playing field between cable modem service providers and DSL providers, will promote marketplace competition, many holes exist which could ultimately harm the availability and accessibility of advanced communication to all Americans. This comment explores both the positive and negative implications of the Wireline Broadband Order including the effect on marketplace competition, the lack of clearly defined enforcement measures, and the viability of the Universal Service Fund.

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I. INTRODUCTION

In today’s society the need for high-speed Internet is found everywhere from commerce to the medical profession. Simple narrowband, otherwise known as “dial-up” connections, at speeds of 56kbs, are not enough to support individuals’ needs which span anywhere from downloading music to shopping to communicating via the Internet. Rather, many individuals and companies opt for broadband connections providing higher speeds. The two most common types of broadband are cable modem service and digital subscriber line (“DSL”), with the use of technologies such as wireless, satellite, fiber-optic, and powerline emerging rapidly.

Cable modem service transmits data between the Internet and users’ computer via the network of television cable lines owned by the cable company. DSL, on the other hand, uses high-speed wires


5. Both large bandwidth and the availability of cable have made offering cable modem service appealing to cable TV companies.

Cable Internet works by using [cable] TV channel space for data transmission, with certain channels used for downstream transmission, and other channels for upstream transmission. Because the coaxial cable used by cable TV provides much greater bandwidth than telephone lines, a cable modem can be used to achieve extremely fast access to the Web. This, combined with the fact that millions of homes are already wired for cable TV, has made cable Internet service something cable TV companies have really jumped onboard with.
owned by local telephone companies.\textsuperscript{6} Cable is known for its ability to support download speeds of "almost always at least 1-1.5 Mbps and sometimes faster depending on how many users are logged on.\textsuperscript{7} But like DSL, there are many factors, including general Web traffic that can add to slower speeds, not just the amount of users online."\textsuperscript{8} With cable modem service, the number of users in each neighborhood simultaneously accessing the service limits the speed of the signal.\textsuperscript{9} DSL connection speeds, made through copper telephone lines, are "comparable with cable speeds (1-2 Mbps usually), however because they are distance sensitive, the farther you live from your service provider’s central office, the slower your connection will be."\textsuperscript{10}

II. HISTORY OF BROADBAND REGULATION

The Communications Act of 1934 ("1934 Act") created the Federal Communications Commission ("FCC")\textsuperscript{11} and ultimately gave the FCC jurisdiction over telegraph and telephone companies.\textsuperscript{12} As

\begin{itemize}
  \item[6.] See Worldcom, Inc. v. FCC, 246 F.3d 690, 692 (2001) (describing DSL).
  \item[8.] Id.
  \item[9.] Although it is frequently suggested that cable internet is much faster than DSL in all circumstances, the truth of this statement is circumstantial.
  \begin{itemize}
    \item In practice, cable’s speed advantage over DSL is much less than the theoretical numbers suggest. Why? Cable modem services can slow down significantly if many people in your neighborhood access the Internet simultaneously. Both cable modem and DSL performance vary from one minute to the next depending on the pattern of use and traffic congestion on the Internet. DSL and cable Internet providers often implement so-called "speed caps" that limit the bandwidth of their services. Some home networks cannot match the speed of the Internet connection, lowering your performance.
  \end{itemize}
  \item[10.] See BroadbandInfo.com, supra note 7.
  \item[11.] Both the creation of the Federal Communications Commission and its purpose were set forth in the Communications Act of 1934.
  \begin{itemize}
    \item For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all 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, . . . there is created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.
  \end{itemize}
  \item[47 U.S.C. § 151 (1934)].
  \item[12.] See Am. Tel. & Tel. Co. v. U.S., 299 U.S. 232 (1936).}

discussed below, amendments were made to the 1934 act in 1996 to address Internet policy, as the Internet did not exist in 1934.

Following the 1934 Act, in Computer I and Computer II, the FCC distinguished telecommunications and information services based on how the consumer perceived the service being offered.13 The purpose of this distinction was to restrain the local telephone companies, or incumbent local exchange carriers ("ILECs"), from exerting monopoly power with regard to "enhanced" or "information" services, as opposed to "basic" telecommunications services.14

The Computer II rules separated services into basic and enhanced categories, where a "basic service" was defined as "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information,"15 and an "enhanced service" was defined as a service in which "computer processing applications [were] used to act on the content, code, protocol, and other aspects of the subscriber's information."16 Basic services, where no processing or storage is needed to convert message, were subject to Title II common-carrier regulations,17 and were similar to what the Telecommunications Act of 1996 ("Telecommunications Act" or "1996 Act") would later deem "telecommunications services."18 An enhanced service, which combines "basic service" with computer processing, is not subject to Title II regulations, and is similar to what the Telecommunications Act later would classify as "information services."19

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15. In re Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), 77 F.C.C. 2d 384, ¶ 96, at 420 (1980) [hereinafter Computer II Order].
16. See id. ¶ 97 at 420.
17. Statutory restrictions on common carriers focus on unreasonable discrimination in providing communication services, more specifically 47 U.S.C. § 2-202(a) states that:

   It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

   47 U.S.C § 202(a) (2005).
19. "The decision sets forth the regulatory scheme for basic and enhanced services. The common carrier offering of basic transmission services are communications services and
In the Second Computer Inquiry, the FCC set forth a regulatory regime that would permit Bell Telephone companies to enter the enhanced service market while protecting the enhanced services from unfair competition by the dominant telephone monopolies. The FCC’s policy decision in the Computer Inquiry proceedings, that computer applications offered over the network were not subject to regulations, helped give rise to the unregulated growth of the Internet. As technology has continued to evolve over time, questions have arisen as to the appropriateness of classifications set-up in the Computer Inquiry.

Twelve years after the break-up of AT&T, which led to competition between long distance carriers, Congress decided to amend the 1934 Act for the first time in sixty-two years in an attempt to move all telecommunications markets towards competition. With the Telecommunications Act of 1996, the federal government’s goal was to finally remove the monopolistic impact seen as early as 1910 in the passage of the Mann Elkins Act which did not require telecommunication companies to carry the signals of competing companies over their lines. Ultimately, the 1996 Telecom Act seeks to (1) allow competitors to enter the marketplace without building their own network; (2) reduce costs to increase opportunities for competitive entry; and (3) increase competition by reducing prices and increasing innovation.

More specifically, in section 230(b) of the 1934 Act, as amended by the Telecommunications Act of 1996, Congress described its national Internet policy as to “preserve the vibrant and competitive free market that presently exists for the Internet... and to promote the continued development of the Internet.” In addition, in its amendment to section 706(a) of the 1934 Act, Congress charged the

regulated as such under traditional Title II concepts.” Computer II Order, supra note 15, ¶ 7, at 387.

20. See id.
25. Id. § 230(b)(1) (incorporating section 706 of the Telecommunications Act, supra note 23).
FCC with "encouraging the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," where "advanced telecommunications" is broadband.26

Most important to the outcome of whether cable companies and DSL providers are required to provide competitors access to their networks for broadband is the 1996 Act's creation of two categories of regulated entities — "information services" and "telecommunication services."27 As set forth in the 1996 Act, an "information service" is classified as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ."28 Information service providers are not subject to mandatory common carrier regulations by the FCC under Title II, but the FCC does have jurisdiction to impose additional regulatory obligations under their Title I ancillary jurisdiction.29 Information services are similar to the Computer Inquiry classification of "enhanced services."30 Conversely, "telecommunication services" are defined 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" 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 A key classification difference between an "information service" and "telecommunication service" is that with a telecommunication service there is no change in the form or content of the information sent.33 Telecommunications service providers are subject to mandatory Title II common carrier regulations and are analogous to "basic service" as provided in the Computer II rules.34 Therefore, under the 1996 Act services that fall under "telecommunication carriers" are regulated as common carriers, while services classified as "information service" providers are not.

26. Id. § 157 (incorporating section 706 of the Telecommunications Act, supra note 23).
27. Id. § 153(44) (defining "telecommunications carrier").
28. Id. § 153(20).
30. Id. at 2697.
32. Id. § 153(43).
33. Id.
34. Id. §§ 151-161.
In distinguishing between a "telecommunication service" and an "information service" the key difference is whether or not the service is deemed a common carrier and subject to Title II regulations by the FCC. Mandatory common-carrier regulation under Title II of the 1996 Act requires that common carriers must charge just and reasonable, non-discriminatory rates to their customers, design their systems so that other carriers can interconnect with their communication networks, and contribute to the federal "universal fund." Although these provisions are mandatory, the FCC must forebear from applying them if it determines that the public interest requires it.

A. Classification of DSL vs. Cable Modem Service

Under the 1996 Act, DSL was classified as a "telecommunications service" or Title II service, which means that it is subject to the stringent common carrier regulations that the FCC has imposed on other wireline services such as telephones. Telephone companies, whether offering dial-up or DSL, were required to abide by common carrier regulations in selling access to Independent Service Provider (ISPs) who wanted to offer connections to the Internet. Unlike DSL, cable modem service was not classified under the 1996 Act. Cable modem service’s lack of classification continues to be a point of contention between DSL and cable modem service providers even after the Supreme Court’s recent ruling in the National Cable & Telecommunications Association v. Brand X Internet Services ("Brand X") case. Incumbent carriers or Regional Bell Operating Companies [DSL providers] were not satisfied with the fact that although cable modem service providers were essentially providing the same types of services as them, they were not subject to the same stringent regulations of the FCC. Cable modem service

35. Id. §§ 201-209.
36. Id. § 251(a)(1).
37. Id. § 254(d).
38. Id. § 160(a)-(b).
39. Id. §§ 151-161.
40. Id. § 157 (incorporating section 706 of the Telecommunications Act, supra note 23).
42. Those providers classified as telecommunications carry added restrictions and requirements.

Because telecommunication carriers are regulated as common carriers they must charge just and reasonable, nondiscriminatory rates to their customers, 47 U.S.C. §§ 201-209, design their systems so that other carriers can interconnect with their communications networks, § 251(a)(1), and contribute to the federal ‘universal
providers were not required to abide by common carrier restrictions in allowing ISPs to offer connections to the Internet over cable lines.\textsuperscript{43}

The FCC's silence on the issue of classification of cable broadband services forced the Ninth Circuit Court of Appeals ("Ninth Circuit") in \textit{AT&T Corp. v. City of Portland} to determine cable broadband service's status.\textsuperscript{44} During the AT&T and TCI merger, regulatory approval was needed from the local franchising authorities, which voted to approve the transfer subject to an open access condition, or a condition that the cable companies provide competitors access to its broadband platform.\textsuperscript{45} AT&T "refused the condition, which resulted in a denial of the request to transfer the franchises."\textsuperscript{46} AT&T then brought an action claiming that the open access requirement violated the 1996 Act.\textsuperscript{47} After the district court rejected all of AT&T's claims, AT&T appealed and the Ninth Circuit interpreted the statute in absence of an FCC interpretation of the classification of cable modem services.\textsuperscript{48} The Ninth Circuit concluded that cable modem service incorporated both a telecommunication and an information service, and therefore was subject to regulations imposed by both classifications.\textsuperscript{49} As a result, because cable broadband is a "telecommunication service" under the Telecommunications Act, the local franchise authority could not regulate it.\textsuperscript{50}

After \textit{AT&T}, the FCC attempted to clarify the status of cable broadband, and in doing so disregarded the Ninth Circuit's holding in \textit{AT&T}.\textsuperscript{51} On September 28, 2000, the FCC issued a notice of inquiry\textsuperscript{52}
which was followed in 2002 by a declaratory ruling that cable modem service was solely an information service and not a telecommunication service, and therefore not subject to Title II common-carrier regulations.\textsuperscript{53} In making this determination, the FCC relied on the \textit{Universal Service Report}, which classified "non-facilities-based" or those ISPs that do not own the transmission facilities they use to connect to the Internet, solely as information providers.\textsuperscript{54} Although cable companies own the cable lines they use to provide Internet access, in the \textit{Declaratory Ruling}, the FCC found no difference between them and "non-facilities-based" ISPs because both offer a "single, integrated service that enables the subscriber to utilize the Internet access service... and to realize the benefits of a comprehensive service offering."\textsuperscript{55} Therefore, the FCC determined cable modem service to be an information service. Further, the FCC determined that because of the integrated nature of Internet access and the high-speed wires used to provide the access, cable companies providing Internet service were not to be classified as telecommunications services.\textsuperscript{56}

\textbf{B. The Supreme Court's Opinion: Brand X}

Following the FCC's 2002 Declaratory Ruling, several parties challenged the FCC's conclusion that cable Internet service is not a "telecommunications service."\textsuperscript{57} Brand X, an independent ISP based out of Santa Monica, California was one of the challengers. Bound by its previous decision in \textit{AT&T}, the Ninth Circuit ruled in favor of Brand X, thereby requiring the cable company to open its broadband network to competitors.\textsuperscript{58} Subsequently the FCC appealed to the Supreme Court.\textsuperscript{59} In \textit{Brand X}, the Supreme Court addressed both whether the \textit{Chevron} framework applied to the FCC's interpretation interest to carry out the provisions' of the Act." Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services, 125 S. Ct. 2688, 2699 (2005).

\textsuperscript{52.} See \textit{In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities}, 15 F.C.C.R. 19287 (2000).

\textsuperscript{53.} See \textit{In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities}, 17 F.C.C.R. 4798, 4799-4800 (2002) [hereinafter Inquiry Concerning High-Speed Access].


\textsuperscript{55.} Inquiry Concerning High-Speed Access, \textit{supra} note 53, ¶ 38, at 4823.

\textsuperscript{56.} \textit{Brand X Internet Services}, 125 S. Ct. at 2699.

\textsuperscript{57.} \textit{Id.} at 2698.

\textsuperscript{58.} \textit{Id.} at 2699.

\textsuperscript{59.} \textit{Id.} at 2688.
of the term “telecommunication service,” and whether the FCC’s construction of the definition of “telecommunication service” is a permissible reading of the Telecommunications Act under the *Chevron* framework.\(^{50}\)

In *Chevron*, the Supreme Court found that when a court reviews an agency’s decision it must first look to whether the statute is ambiguous.\(^{61}\) If the statute is ambiguous, the court will look to an agency’s interpretation as long as it is based on a permissible construction of the statute.\(^{62}\) The Supreme Court in *Brand X* found that the application of *Chevron’s* framework to the FCC’s interpretation of the term “telecommunication service” was valid, and that the Ninth Circuit should have applied *Chevron* instead of following the construction of the term as set forth in *AT&T*.\(^{63}\) Therefore, since the Court determined that §153(46) was ambiguous regarding the term “telecommunication services,” the Court deferred to the FCC’s interpretation.\(^{64}\)

In constructing the classification of cable modem service, the FCC made two conclusions. The first conclusion was unchallenged; that cable modem service is an “information service” because it provides consumers with a comprehensive capability for manipulating information using the Internet via high-speed telecommunication.\(^{65}\) The second conclusion, that cable modem service is not a “telecommunications service,” was challenged by the FCC in *Brand X*.\(^{66}\) The FCC’s argument was that, like all information-service providers, cable companies used “telecommunications” to provide consumers with Internet services; cable companies provide such service via the high-speed wire that transmits signals to and from an end user’s computer.\(^{67}\) Where “telecommunication service” is defined in section 153(46) as the “offering of telecommunications for a fee directly to the public,” the FCC focuses on the nature of the function.

\(^{50}\) Id. at 2699.


\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) Brand X Internet Services, 125 S. Ct. at 2699.

\(^{55}\) "[i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

\(^{56}\) Id.

\(^{57}\) Id.
the end-user is offered, rather than on the particular type of facilities used, to determine if Internet providers "offer" telecommunications.68

In looking at it from the end user's perspective, the FCC determined that cable modem service is not a telecommunications offering because the consumer *always* uses the high-speed wires in connection with the information-processing capabilities provided by the Internet access.69 Essentially, the FCC was saying that "telecommunications" is a part of the cable modem service and that a user would not be able to use the Internet without the wire. Due to this, the FCC concluded that cable modem service is not stand-alone, but rather integrated with telecommunications, and therefore is not a telecommunication service.70 The FCC noted that cable companies offering broadband Internet access are not offering the end use of the "telecommunications service," but merely using telecommunications to provide end users with cable modem service.71 Although the FCC noted the word "offering," as used in section 153(46), could have many reasonable readings including the meaning of a "stand-alone" offering of telecommunications, the FCC concluded that this was not the only viable meaning.72 In addition, in evaluating the Telecommunication Act's regulatory history, as far back as the Computer Inquiry's distinction between basic and enhanced services, ambiguity has existed as to whether cable companies "offer" telecommunications with cable modem services.73

Under the first step of the *Chevron* test the court must ask whether the statute's plain terms "directly address[s] the precise question at issue."74 The Supreme Court found that the FCC's application of § 153(46) was permissible at step one of the *Chevron* analysis due to both the common meaning of "offering" and the Telecommunication Act's regulatory history.75 *Chevron*'s second step requires that the agency's construction was a reasonable policy choice for the agency to make.76

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68. *Id.*
69. *Id.*
70. *Id.* at 2703-04.
72. *Brand X Internet Services*, 125 S. Ct. at 2704.
73. *See Computer II Order, supra note 15, ¶ 96, at 420.*
75. *See id.* at 2704.
76. *See id.* at 2708.
After passing the first step of Chevron, the Supreme Court evaluated whether or not the FCC’s construction was a reasonable policy choice for the FCC to make. Many arguments were made to the contrary, claiming that the Commission’s construction was unreasonable because it allowed any communications provider to “evade” common-carrier regulations by bundling information services with telecommunications. Respondent MCI, Inc. claimed that the treatment of cable modem service is inconsistent with the FCC’s treatment of DSL service and that it was therefore an arbitrary and capricious deviation from agency policy.

Ultimately, the Supreme Court held that because the Commission provided a reasonable explanation for the differentiation of the treatment of DSL and cable modem service, the FCC’s classification of cable modem service as solely an information service was just. Thus the FCC had the freedom to change its course as long as it justified the change. Although the Court said that it supported the FCC’s classification of cable modem service, in the opinion the Supreme Court explicitly choose not to comment on whether DSL was properly classified. Rather, the Supreme Court believed, or maybe just hoped, that this was the FCC’s first step in an effort to reshape how the Commission regulated information-service providers. Conveniently, for both DSL providers and the Supreme Court, the wait was not long. On August 5, 2005 the FCC adopted the Wireline Broadband Order eliminating open access requirements for DSL providers.

III. THE WIRELINE BROADBAND ORDER

Only thirty-nine days after the Supreme Court decided Brand X, the FCC adopted the Wireline Broadband Order (“Order”) where the FCC decided to drop the regulations that required Bell Operating Companies to offer broadband access on a common carrier basis. The FCC’s Order released on September 25, 2005 was designed to level the playing field between cable modem service providers and

77. See id.
78. See id. at 2709.
79. See id. at 2710.
80. See id. at 2710-11.
81. “[W]e [the Supreme Court] express no view on how the Commission should, or lawfully may, classify DSL service.” Id. at 2711.
83. Id.
DSL providers. Establishing a new regulatory framework for wireline broadband, the FCC reclassified DSL service from a telecommunication service to an information service. This new classification eliminates the common carrier requirements, previously a major point of contention among DSL providers.

The FCC's press release on August 5, 2005 raised more questions than answers. In the release, the FCC stated four principles designed to encourage broadband deployment and preserve and promote the open and interconnected nature of public Internet. These principles were:

1. consumers are entitled to access the lawful Internet content of their choice;
2. consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement;
3. consumers are entitled to connect their choice of legal devices that do not harm the network; and
4. consumers are entitled to competition among network providers, application and service providers, and content providers.

The policy statement left open one huge question for wireline providers and broadband providers in general — how does the FCC propose to implement and enforce these lofty goals? Chairman Kevin J. Martin, in his comments on the FCC’s policy decision, stated that “[t]he steps we take today to place all broadband internet access providers on a level playing field will make this marketplace only more competitive, further strengthening the forces that best deliver choice, affordability, innovation, and quality to consumers.”

Martin also stated, in response to the question of enforcement, that “[w]hile

[1]In 2002 the FCC launched a proceeding that would reclassify DSL as an information service. The FCC claims that deregulation of DSL services are necessary for deployment of broadband technology. One of the major justifications for this move is to “level the playing field” between cable broadband and DSL. Some people argue that the real solution would be to recognize that there is not much difference between cable and telephone services, which would require a complete overhaul of the 1996 Telecommunications Act.


[86] Id.

[the] policy statements do not establish rules nor are they enforceable documents, today's statement does reflect core beliefs that each member of this Commission holds regarding how broadband internet access should function." In regard to competition, Martin commented that he was confident that the marketplace would ensure that these principles are maintained. We should ask, will the marketplace drive competition or is there a need for more stringent implementation steps and enforcement?

The wireline broadband order was released on September 25, 2005 and although it answered many questions about how the FCC's policies would be implemented, its discussion of enforcement was lacking. As stated in the Wireline Broadband Order, the Order's goals included the ubiquitous availability of broadband for all Americans, the removal of outdated regulations, and the ability of facilities-based wireline broadband Internet access providers to effectively and efficiently respond to marketplace changes. The biggest change resulting from the Wireline Broadband Order is that in the past the FCC required facilities-based providers to offer the wireline broadband transmission component separate from their Internet service. Thus the Order eliminated its classification as a telecommunications service and the requirement for stand-alone service on a common-carrier basis. The FCC eliminated the

89. Id.
90. Id.
91. The Wireline Broadband Order specifically stated, that:

In this order, we establish a new regulatory framework for broadband Internet access services offered by wireline facilities-based providers. Our actions today are essential to attaining the goals set forth in the Wireline Broadband proceeding, and are reinforced by and consistent with the Supreme Court's recent opinion in NCTA v. Brand X. This framework establishes a minimal regulatory environment for wireline broadband Internet access services to benefit American consumers and promote innovative and efficient communications. First, this Order encourages the ubiquitous availability of broadband to all Americans by, among other things, removing outdated regulations. Those regulations were created over the past three decades under technological and market conditions that differed greatly from those of today. Second, the framework we adopt in this Order furthers the goal of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner, after a transitional period. Finally, the actions we take in this Order allow facilities-based wireline broadband Internet access service providers to respond to changing marketplace demands effectively and efficiently, spurring them to invest in and deploy innovative broadband capabilities that can benefit all Americans, consistent with the Communications Act of 1934, as amended (the Communications Act or Act).

Wireline Broadband Order, supra note 82, ¶ 1, at 14855.
92. See Martin Comments, supra note 1, para. 1.
transmission component-sharing requirement, which they had created over the past three decades under very different technological and market conditions, in hopes this would encourage vendors to develop and deploy innovations to consumers.\textsuperscript{93}

In deciding that the appropriate framework for the wireline broadband Internet access service, including its transmission component, was eligible for a "lighter regulatory touch," the Order dropped the application of the \textit{Computer Inquiry} requirements.\textsuperscript{94} The FCC supported the decision to drop the \textit{Computer II} requirements based on the fundamental changes in the technology used to build the networks, including DSL's wide deployment of technology "used to transmit data at high speeds over copper loops and [use of] these same copper loops for simultaneous provisions of voice and data services."\textsuperscript{95} As the technology changes, so do the purposes for which the networks were built as a "wide variety of IP-based services can be provided regardless of the nature of the broadband platform used to connect the consumer and the ISP."\textsuperscript{96} The Wireline Broadband Order noted that along with cable operators, mobile wireless providers and satellite providers were enhancing technology and infrastructure, and that therefore the wireline infrastructure was changing.\textsuperscript{97} With "[w]ireline networks ... now using digital, packet-based technology to deliver a wide range of services ... [f]rom the end user's perspective, the platforms that connect the end user to the ISPs are largely interchangeable and functionally the same."\textsuperscript{98} In dropping the \textit{Computer Inquiry} requirements the FCC separated the underlying transmission infrastructure from wireline broadband Internet access service offered on a common-carrier basis. The FCC agreed with numerous commenters who argued that the "obligations are inappropriate and unnecessary for today's wireline broadband Internet access market .... [because those] rules were developed before separate and different broadband technologies began to emerge

\textsuperscript{93} See Wireline Broadband Order, \textit{supra} note 82, ¶ 41, at 14875-76 (discussing why \textit{Computer Inquiry} requirements are no longer appropriate).
\textsuperscript{94} See id. ¶¶ 32-40, at 14872-75.
\textsuperscript{95} "Wireline providers now routinely deploy facilities and equipment, such as ATM switches, digital subscriber line access multiplexers (DSLAMs), and fiber optics in the local loop, that have continued this network advancement." \textit{Id.} ¶ 38, at 14875.
\textsuperscript{96} \textit{Id.} ¶ 40, at 14875.
\textsuperscript{97} See \textit{id.} ¶ 39, at 14875.
\textsuperscript{98} Wireline Broadband Order, \textit{supra} note 82, ¶ 39, at 14875.
and compete for the same customers . . . . [and] were adopted based on assumptions associated with narrowband services . . . .”

While wireline providers are now allowed the choice of whether or not to offer their services on a common carrier or non-common carrier basis, this raises concerns about unaffiliated ISPs who currently have contracts with or who wish to use the facilities of wireline providers to provide broadband service. It also raises concerns about how the Universal Service Fund (“USF”), which provides telecommunication access to those in need, will be affected. To ensure a smooth transition, the Wireline Broadband Order requires that facilities-based wireline broadband Internet access service providers continue to provide existing wireline broadband Internet access transmission offerings, on a grandfathered basis, to unaffiliated ISPs for a one-year transition period from the date of the order’s publication, or until September 25, 2006. This means that all contracts that DSL providers have with unaffiliated ISPs must be honored for at least one year. The question is what will happen after that. As will be discussed below, unless the FCC takes action, such as by offering incentives to opening up lines to independent ISPs, the likelihood of small, independent ISPs being able to compete is low. Thus, this creation of a duopoly of cable and DSL service providers will likely put many of these independent ISPs out of business.

The elimination of the common-carrier requirements raises questions about the viability of the Universal Service Fund. The Order stated that the status quo would remain regarding contributors to the universal service for a 270-day period pending the resolution of the USF Contribution Methodology. More specifically, facilities-

99. Id. ¶ 42, at 14876.
100. The FCC set up the Universal Service Fund, which is funded by providers of telecommunications services, to promote the availability of quality services at just, reasonable, and affordable rates; increase access to advanced telecommunications services throughout the Nation; advance the availability of such services to all consumers, including those in low income, rural, insular, and high cost areas at rates that are reasonably comparable to those charged in urban areas. See FCC.gov, http://www.fcc.gov/wcb/tapd/universal_service/ (last visited Nov. 12, 2006). See also 47 U.S.C. §254(b) (2000).
101. See Wireline Broadband Order, supra note 82, ¶¶ 5-6, at 14858-59.
102. Id. ¶ 6, at 14858. The USF Contribution Factor: “Telecommunications companies must pay a percentage of their interstate end-user revenues to the Universal Service Fund. This percentage is called the contribution factor. The contribution factor changes four times a year (quarterly) and is increased or decreased depending on the needs of the Universal Service programs.” FCC.gov, http://www.fcc.gov/web/tapd/universal_service/quarter.html (last visited
based providers were required to contribute to existing universal service mechanism based on their current levels of reported revenues for the DSL transmission, for a 270-day period after the effective date of the Wireline Broadband Order, or until the Commission adopted new contribution rules, whichever occurred earlier.\textsuperscript{103} If unable to complete the new contribution methods in this period of time, the FCC would take any action necessary to preserve the existing funding levels.\textsuperscript{104} On June 21, 2006, only fifty-five days prior to the enactment of the USF exemption for DSL carriers, the FCC ordered that Voice over Internet Protocol (VoIP) service providers contribute to the USF.\textsuperscript{105} Thus although the Wireline Broadband Order has many promising goals, it leaves some doors open which could hinder the FCC’s achievement of its goals.

\textsuperscript{103} See Martin Comments, \textit{supra} note 1, para. 6.

\textsuperscript{104} Id.

\textsuperscript{105} The Universal Service Contribution Methodology interim order included “rais[ing] the interim mobile wireless safe harbor from 28.5 percent to 37.1 percent... [and] establish[ing] universal service contribution obligations for providers of interconnected VoIP service.” In re Universal Service Contribution Methodology, 21 F.C.C.R. 7518, 7527 (2006) [hereinafter Universal Service Contribution Methodology].
A. Positive Aspects of the Wireline Broadband Order

Although the FCC’s wireline broadband order opened up many new questions, it is full of promise and has brought many positive items to light. Among these were the removal of outdated regulations, promotion of the 1996 Act’s goals, the building of a consistent regulatory framework, the furtherance of President Bush’s goals for America, and as the FCC claims an increase in competition, which will in turn benefit the end consumer. In addition, depending on what is decided for the Universal Service Fund, a high potential exists for an increase in contributions or further support for the fund’s goals.

Regulations that are outdated and useless do nothing but bog down a system that is trying to flourish and grow. In the past twenty years the Internet has grown from something used by few individuals to something used by many with approximately three-quarters of United States households having access to the Internet in one form or another. As discussed above, the FCC decided as part of the Wireline Broadband Order to remove Computer Inquiry regulations for wireline access providers. When the FCC originally considered the adoption of the Computer Inquiry rules, we lived in an era where the only type of Internet in the market place was narrowband provided largely by dial-up services.

In Brand X, the Supreme Court observed that the FCC’s regulatory treatment of wireline broadband Internet access service “is based on history rather than on an analysis of contemporaneous market conditions.” Unlike narrowband services provided over traditional circuit-switched networks, today’s broadband Internet services have never been “restricted to a single network platform provided by the incumbent LECs.” Bell Operating Companies (“BOCs”) and wireline commentators argue “their inability to integrate more efficient equipment into wireline networks in a timely and efficient manner limits their ability to offer innovative broadband Internet access services to customers.” Further, BOCs claim that in

107. See Wireline Broadband Order, supra note 82, ¶ 42, at 14876.
109. See Wireline Broadband Order, supra note 82, ¶ 47, at 14879.
110. Id.
111. Id. ¶ 66, at 14888.
order to use more efficient or innovative equipment they must "incur substantial additional costs and development time to have the vendor 'de-integrate' the more efficient, integrated equipment simply to comply with the Computer Inquiry requirements."[112] In the Wireline Broadband Order, the FCC does address the other sides' argument "that because of the BOCs' size and influence, they are well-positioned to demand that vendors meet their requirements that innovative broadband equipment and new functionalities comply with the Computer Inquiry obligations,"[113] but focus more on the fact that "the regulations' costs outweigh their benefits, or are no longer necessary to achieve the desired objectives."[114]

Statistics, showing disproportionate amounts of individuals receiving access to and subscribing to cable modem service compared to those who receive and subscribe to wireline access or DSL service, help to demonstrate that regulations make it costly and slow for wireline providers to expand and improve their services, but are likely not the only driving force.[115] The speed of cable modem service, much faster than that of DSL, is another huge factor as to why consumers chose cable modem service over DSL.[116] "While there is an increasing percentage of broadband users who receive DSL service, cable retains a relatively large share of the market."[117] With

112. "These increased costs and delays often deter a carrier from deploying new broadband technologies." Id.
113. Id. ¶ 67, at 14888.
114. Id. ¶ 69, at 14890.
115. Between 2002 and 2004 the gap between the percentage of customers receiving cable modem service and DSL service decreased.

As of December 31, 2002, facilities-based providers were providing approximately 17.4 million high-speed lines to American consumers and small businesses. Among these customers, 65 percent received cable modem service, while approximately 32 percent received DSL service and other broadband services provided by incumbent LECs and competitive LECs. As of December 31, 2004, the number of high-speed lines had more than doubled with facilities-based providers providing approximately 35 million high-speed lines to American consumers and small businesses. Among these customers, approximately 60.3 percent received cable modem service, while approximately 37.2 percent received DSL service and other broadband services provided by incumbent LECs and competitive LECs.

Id. ¶ 51, at 14881-82. In a report released on July 26, 2006 by the FCC, of the 50.2 million total high-speed lines available as of December, 31 2005 the difference between the percentages of cable modem service versus DSL service decreased by approximately 11% from 2004 with cable modem comprising 50.9% of the lines and ADSL comprising 38.3%. See Federal Communications Commission Releases Data on High-Speed Services for Internet Access, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266593A1.doc.

116. See supra note 9.
117. Wireline Broadband Order, supra note 82, ¶ 52, at 14882.
the elimination of the Computer Inquiry requirements, the FCC hopes, and it seems quite likely that the two market leaders, DSL and cable modem service, will continue to compete and penetrate the broadband market, thus increasing competition between the two platforms. On the other hand, if the consumer is choosing service solely based on speed, DSL may not be able to compete with cable modem service without technological advances that enable an increase in service speeds.

The Wireline Broadband Order supports the 1996 Act in that its main purpose is to allow Internet access service providers to respond to changing marketplace demands effectively and efficiently while spurring the investment and deployment of innovative broadband. In increasing incentives for innovation and likely improving time-to-market, the Wireline Broadband Order fits the Telecommunication Act's goals "to preserve the vibrant and competitive free market that presently exists for the Internet" and "to promote the continued development of the Internet." In addition, the FCC is fulfilling its responsibility set forth in Telecommunications Act to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans..." The elimination of the Computer Inquiry requirements helps carriers who "argue that compliance with the... obligations requires costly redundant systems and duplicative processes that result in operational inefficiencies," which in turn supports the goals of the Telecommunications Act. In support of the 1996 Act, the dissolution of the Inquiry requirements will allow wireline Internet providers,

118. FCC data collection released on July 26, 2006 shows that in 2005 that the availability of high-speed connections to the Internet increased by 33 percent or 12.3 million lines. In addition, for the first time in FCC collection history the increase in asymmetric DSL (ADSL) lines surpassed that of cable modem connections where "ADSL increased by 5.7 million lines compared to an increase of 4.2 million lines for cable modem service." Of the 50.2 million total high-speed lines reported as of December 21, 2005, cable modem service represented 57.5% of these lines while 40.5% were asymmetric DSL (ADSL) lines, 0.3% were symmetric DSL (SDSL) or traditional wireline connections, 0.5% were fiber lines to the end user premises, and 1.2% used other types of technology including satellite, terrestrial fixed or mobile wireless (on a licensed or unlicensed basis), and electric power line.


119. See Martin Comments, supra note 1, para. 1.


121. Id. § 706(a).

122. Wireline Broadband Order, supra note 82, ¶ 68, at 14889.
"like their competitors, [to] produce new or improved services in response to consumer demands."\textsuperscript{123}

In dropping the \textit{Computer Inquiry} requirements for wireline access services providers, the FCC is building a consistent regulatory framework that treats cable modem service and DSL equally. The FCC argues that the reduction of regulations supports President Bush's goals for America, which include nationwide broadband availability by 2007.\textsuperscript{124} As addressed below in the section called "Issues with the Wireline Broadband Order," the major issue with the FCC's argument is that this model rests on duopoly competition between cable and DSL, while cutting out competition by independent ISPs. The FCC essentially argues that less regulation requirements will allow DSL providers to spend more time and money on expanding and enhancing their networks.\textsuperscript{125} Although fewer regulations will likely make more time and money available to DSL providers, the question remains whether time and money is all that is needed to spur innovation.

The FCC claims that by dropping mandatory regulations, the marketplace will flourish based solely on competition, and in turn this competition will benefit the end consumer.\textsuperscript{126} According to the Wireline Broadband Order, "the characteristics of the broadband market, as well as evidence that facilities-based wireline carriers have incentives to make, and indeed already make, broadband transmission capacity available to ISPs, absent regulation,"\textsuperscript{127} justifies eliminating

\textsuperscript{123.} Id. \textsuperscript{71}, at 14890.
\textsuperscript{125.} The Wireline Broadband Order addresses the impact that regulation could have on future development of broadband capabilities.

[T]his regulation can have a significant impact on the ability of wireline platform providers to develop and deploy innovative broadband capabilities that respond to market demands. The record shows that the additional costs of an access mandate diminish a carrier's incentive and ability to invest in and deploy broadband infrastructure investment.

\textit{Wireline Broadband Order, supra} note 82, \textsuperscript{44}, at 14877-78.
\textsuperscript{126.} In the Wireline Broadband Order, the FCC states confidence that the Order will, on its own, promote competition.

\textit{We [the FCC] are confident that the regulatory regime we adopt in this Order will promote the availability of competitive broadband Internet access services to consumers, via multiple platforms, while ensuring adequate incentives are in place to encourage the deployment and innovation of broadband platforms consistent with our obligations and mandates under the Act.}

\textit{Id.} \textsuperscript{3}, at 14856.
\textsuperscript{127.} Id. \textsuperscript{44}, at 14877.
mandatory open access. Although competition may flourish, this "wait and see approach" is not guaranteed. We will revisit the issue of competition below, including arguments that claim the lack of regulations and enforcement guidelines will prevent independent ISPs, which make up the largest portion of service providers, from competing at all.

Finally, there is a very high probability that the Universal Service Fund will expand and grow stronger from the changing of common-carrier requirements due in part to a potential increase in contributors. In the Wireline Broadband order, the FCC makes a commitment that the USF will experience no negative impact due to the dropping of mandatory common-carrier regulations for wireline service providers. On June 21, 2006, prior to elimination of DSL contributions to the USF on August 14, 2006, the FCC ordered interim changes to the USF to ensure viability of universal service access for the short term until they could examine a more fundamental reform. These interim changes included an increase of the wireless safe harbor fees from 28.5% to 37.1% and the establishment of universal service obligations for interconnected voice of Internet Protocol (VoIP) service providers. One question that will need to be answered in the future is how, if at all, cable modem service providers will be able to take advantage of the USF.


129. See Martin Comments, supra note 1, para. 6.

130. See Universal Service Contribution Methodology, supra note 105, ¶ 1, at 7519.

131. The safe harbor was established after [wireless telecommunication providers asserted that they could not identify, without substantial difficulty, the amount of their revenues that [were] interstate as opposed to intrastate . . . .] In 1998, the Commission established suggested, or safe harbor, percentages to approximate the percentage of interstate revenue generated by each category of wireless telecommunications provider. The Commission stressed that the safe harbor for each category of carrier was intended as guidance and that a wireless carrier could report a percentage of interstate revenue that was less than the safe harbor, provided it could document the computation method used and retained the supporting information. Id. ¶ 9, at 7523 (defining wireless safe harbor). See also id. ¶¶ 34-35, at 7536-37 (discussing the interim contribution of interconnected VoIP service providers and the current lack of classification of VoIP providers as neither telecommunications nor information services). Wireless carriers and VoIP service providers have the option of using safe harbor percentages (37.1% for wireless and 64.9% for VoIP), utilizing traffic studies, or reporting actual interstate and international revenues, in calculating their USF contributions. See Statement of Commissioner Robert M. McDowell (June 21, 2006), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266030A6.doc.
Overall, the Wireline Broadband Order contains many positive features, which are very likely to benefit both wireline access providers and the end consumer.

B. Issues with the Wireline Broadband Order

Although the Wireline Broadband Order is very promising, many flaws and potential issues still exist. The three major problem areas created by the Wireline Broadband Order are discussed below and include competition, enforcement, and the Universal Service Fund. Although the FCC claims that the decreasing regulations on wireline access providers will increase competition, the question remains as to the effect on the small-unaffiliated ISPs. As far as enforcement, the Wireline Broadband Order seems to lack any guidelines whatsoever as to how the FCC will enforce the policies in the Order. Is this "wait and see" approach of enforcement the most efficient and effective way to deal with such a large policy decision? Finally, the future of the USF is currently in the hands of the FCC. Whether allowing the FCC to shape the future of the USF is good or bad at this point can be left only to speculation thus leaving many questions unanswered.

In the Wireline Broadband Order the FCC claims that marketplace competition will flourish after the decrease of regulations. Although this may be true to some extent, the question is whether this competition will only result in a duopoly? What about all the small unaffiliated ISPs to whom the wireline access providers are no longer forced to open up access to on a common-carrier basis? Without incentives to entice cable modem service providers or wireline broadband access providers to allow independent ISPs to use their infrastructure, why would they feel compelled to do so? It is more likely that they will keep the entire market share for themselves.

Although in the Wireline Broadband Order the FCC claims that by dropping regulations competition will grow, there are indicators

133. *Id.*
134. *Id.*

[O]ur reasoned judgment tells us [the FCC] that sufficient marketplace incentives are in place to encourage arrangements with innovative ISPs. Indeed, the incentives are growing as cable modem and wireline providers compete head-to-head with one another and other platform providers such that wireline platform providers will find it necessary and desirable to negotiate arrangements with unaffiliated ISPs for access to their broadband networks in order to grow the base of users of their broadband infrastructures.
that in fact competition will diminish based on the history of very few network-sharing agreements with cable companies.\footnote{Id. ¶ 79, at 14895-96.} A duopoly, commonly defined, as “[a]n industry in which two companies control the market,”\footnote{In response to Wireline Broadband Order, consumer groups suggested that DSL customers could have fewer choices of providers if the Bells aren’t required to share their networks. “Changing these rules is . . . anticompetitive and will lead to fewer choices in the marketplace, which means higher prices and worse service,” said Kenneth Degraff, a policy advocate at Consumers Union. Degraff predicted small ISPs would have a difficult time offering DSL after the line-sharing rules are phased out, pointing to few network-sharing agreements with cable companies. “They can still hope for negotiations, but how well did that work for ISPs getting on cable networks?” he said. Grant Gross, \textit{FCC Removes DSL Network-Sharing Rules}, NETWORKWORLD, Aug. 5, 2005, http://www.networklifemag.com/edge/news/2005/080505-fcc-dsl.html.} is inevitable when DSL and cable modem service providers together own the majority of the market share, which they do today with approximately 90 percent,\footnote{See http://www.freespace.virgin.net/brendan.richards/glossary/glossary.htm (last visited Mar. 7, 2007).} and there are no mandatory common-carrier regulations to enforce opening their lines to unaffiliated ISPs. With a duopoly, or a bottleneck monopoly, between cable and wireline, competitive pricing, innovation and development are all compromised. The FCC’s high hopes of DSL and cable modem service providers having excess capacity which they are willing to share with independent ISPs have yet to be proven.\footnote{See \textit{Availability of Advanced Telecommunications Capability in the United States}, Fourth Report to Congress, in Dkt. No. 04-54, FCC 04-208 (2004), at 16.}

No data exists to support the FCC’s belief that competition will flourish and that cable and DSL services providers will be motivated by competition and available broadband capacity to open up access to unaffiliated ISPs. The FCC may use decisions by large companies; Yahoo and Bell-South who have recently made an agreement to sell

\begin{quote}
Those expecting the phone companies to act as good stewards with their new power should read the quotations from Rick Lindner, SBC’s chief financial officer. At an investors’ meeting in New York, Lindner clarified that SBC’s recent cuts in the monthly price of DSL service are really just a temporary grab for market share that “suddenly takes you from . . . being a $15 product to being a $65 or a $70 customer.” He summed up his company’s objective as being “to pillage and plunder the industry.”
\end{quote}

broadband together, SBC and AT&T’s decision to merge, or America Online’s (AOL), the largest U.S. ISP with 19.1% of the market share, agreement with Time Warner, to represent a trend of ISP telecommunication cooperation. What the FCC fails to address is how the ISPs that do not rank in the top 22 in the U.S. by subscriber, but that together make up 23.6% of the market share will be affected. The issue is not whether the large ISPs such as AOL, Comcast and SBC will flourish, but rather how smaller Brand X type providers, who will be denied access, will be affected. Although the FCC or the government may not see the importance of these smaller ISPs, the consumer may disagree with this. Some ask why chose a smaller local ISP? Surveys have shown that customers do not mind paying slightly higher fees in order to support a local ISP and also to receive better customer support. The FCC should be trying to protect unaffiliated ISPs and the consumers who depend on them. By failing to promote competition, they are in fact doing the opposite.

Additionally, the Wireline Broadband Order expresses some great policy goals but lacks clearly defined enforcement measures. While the FCC does a great job of laying out its policy goals and the reasoning behind these goals, it does little more than offer a “wait and see” approach to enforcement. It seems risky that the FCC hopes that marketplace competition will take care of any problematic competition issues that may arise. In the end it may cost less to put in place specific guidelines and enforcement measures now, rather than scramble to pick up the pieces after the damage has already been done. A few simple enforcement measures could end up saving not only the FCC, but also consumers and numerous unaffiliated ISPs.

Finally, the USF must be a high priority. With DSL service providers alone contributing upwards of $350 million a year to the

140. SBC’s acquisition of AT&T “[c]ombines AT&T’s national and global IP-based networks and expertise with SBC’s strong local exchange, broadband and wireless assets.” SBC Communications, Inc., http://sbc.merger-news.com/materials/am.html (last visited Nov. 12, 2006).
143. See supra note 139.
USF, loss of their participation will result in a large funding deficit.\textsuperscript{145} Even following the 270-day status quo period established to assist in maintaining the USF, the FCC failed to make permanent modifications to the USF Contribution Methodology that would recapture lost revenue.\textsuperscript{146} Instead, the FCC offered interim steps that include an increase in the wireless safe harbor from 28.5 percent to 37.1 percent, and the establishment of a USF contribution requirement from interconnected VoIP providers.\textsuperscript{147} Although these modifications should offset some funds lost by DSL providers’ non-participation, ending mandatory DSL participation on August 14, 2006 with only these temporary provisions seems risky for the future of the fund.\textsuperscript{148} The USF is a legal and social concept that dates back decades and was developed to ensure that the public retained access to fundamental services that use public right of ways.\textsuperscript{149} In modern times, “universal service means ensuring that high-quality telecommunications services are available at affordable rates to all Americans, including low-income consumers and those living in rural, insular, and other high-cost areas... [and] that the types of services and the rates for those services should be reasonably comparable in urban and rural areas.”\textsuperscript{150} Currently, we are still unsure

\textsuperscript{145} See Universal Service Contribution Methodology, supra note 105, at 7663-65 (statement of Commissioner Michael J. Copps) [hereinafter Copps Statement].

\textsuperscript{146} See id. ¶ 1, at 7519.

\textsuperscript{147} See supra note 105.

\textsuperscript{148} Commissioner Michael J. Copps addressed his view of both the future and current stability of the Universal Service Fund in his 2006 statement regarding the Universal Service Contribution Methodology:

At a somewhat more granular level, I think the jury may still be out on whether today’s action actually puts enough additional funds into the universal service fund as DSL’s non participation takes out. By some accounts DSL providers contribute $350 million a year to the fund, perhaps more. Recall that last summer, when the Commission announced its broadband recusal approach, we pledged to “take whatever action is necessary to preserve existing funding levels” (emphasis added) before releasing providers from their contribution obligations. I don’t see with slam-dunk certainty that contributions from interconnected VoIP (which is, for all its impressive growth, still a relatively nascent industry) and from wireless carriers (whose possibly increased use of traffic studies could lead to unforeseen consequences) offset the funds lost by DSL’s nonparticipation. Surely it would be an intolerable result to end up with the fund having less revenue, not more, for the foreseeable future. Last summer we pledged this result would not happen. Nine months later we seem to accept the possibility of a diminished fund.

Copps Statement, supra note 145, para. 6.

\textsuperscript{149} Wireline Broadband Order, supra note 82, ¶ 3, at 14856.

\textsuperscript{150} Abernathy, Preserving Universal Service, supra note 128, at 410 (citing 47 U.S.C. § 254(b) (2000)).
of the ultimate effect that the Wireline Broadband Order will have on the USF. A couple of different scenarios highlight the Order's potential negative impacts. One possibility is that the FCC will eventually require that DSL providers re-contribute to the USF because their non-participation results in severe funding cuts, while cable modem service providers might be allowed to remain non-contributors. If only DSL providers are required to contribute to the USF, prices for DSL will continue to rise above cable modem service prices, which will cause more users to gravitate towards cable modem service and thus lower total contributions to the USF. Another scenario is that cable modem service providers will be required to contribute to USF, which could cause a rise in cable modem service prices. This would leave open the question of how, if at all, cable modem service providers should benefit from the Universal Service Fund. The Universal Service Fund's future is in the hands of the FCC. And although it is likely that the FCC will enact changes that will result in the strengthening of the fund, their actions thus far are not encouraging. In the end, there is always a chance that the public interest will be harmed by whatever decision the FCC makes.

IV. PROPOSALS

The first issue is how to ensure or direct competition in a manner that protects consumer and unaffiliated ISPs. I propose that incentives should be offered to cable modem service and wireline broadband access providers to open up their lines to unaffiliated ISPs. These incentives should be based on a combination of factors including market-share, how many users the unaffiliated ISP supports, how many ISPs the service provider allows access to, and how much the service provider is charging the ISP. By weighing these factors, service providers can be rightfully compensated for encouraging competition with less stringent regulations, monetary reimbursements, or tax cuts. In addition, if these incentive-based programs fail to foster the requisite levels of competition, the FCC could institute a forced minimum open-access requirement based on the same types of factors as those listed above.

Regardless of the route the FCC chooses, offering incentives should result not only in cable and DSL service providers becoming more apt to allow unaffiliated ISPs to access their lines, but also lead to flourishing marketplace competition stemming from the increasing consumers freedom. In the end, consumers, who should be of the utmost importance to the FCC, will benefit from lower prices and
better services. Competition is important in our society and should be preserved to protect consumers.

Next I propose that a more effective enforcement framework be put into place. The Wireline Broadband Order offers thorough support for the FCC's policy changes, but fails to include any concrete enforcement measures. It is highly unlikely by taking the "wait and see" approach that the FCC feels that the public will benefit in the long run. Even if research shows that it is very likely that the marketplace can effectively self regulate, the consequences of failure make this proposition prohibitive. Unraveling a duopoly after-the-fact will be much more painful and costly than anticipating the issues and preventing their creation. If not prevent, duopoly power and exclusionary tactics may eliminate many competitive ISPs.

Finally, in regards to the USF, the key goal of any change is that the USF should not suffer. The concept of universal service, with the purpose to allow equal access to services that use public resources, was originally introduced with the Communications Act of 1934 and codified in the Telecommunications Act. My proposal is that the FCC should structure the USF contribution model such that all broadband service providers, including cable modem and wireline access providers, contribute to and benefit from the fund. In doing so the FCC should consider multiple factors, as it should do with incentive-based open-access discussed above, in determining how much each service provider should contribute. For instance, many wireline service providers are already contributing for their phone lines. If the wireline service provider were the same as the phone company, they should not have to make multiple redundant contributions. The FCC may even choose to extend mandatory USF contributions proportionally to ISPs based on their market share.

By requiring both cable modem and wireline service providers to contribute to the USF, the burden of contribution is shared and the USF becomes stronger. As our country becomes more technologically advanced, broadband internet access will become to us what the telephone was in the past and broadband internet providers should have the responsibility to ensure availability of their services.

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152. As discussed by Commissioner Copps,

In the century just past, we got universal service about right for plain old telephone service. Those who were serving the more affluent and profitable markets were charged with the responsibility to contribute towards the provision of reasonably comparable service in more difficult telecom markets. It worked. Now, as we march blithely into the twenty-first century with all its wonderful
However, further research is needed to determine how, if at all, cable modem service providers will benefit from the USF. When wireless cellular phone providers contribute to the USF, they also become eligible USF carriers so consumers could choose to use their wireless services instead of previous landline phone to receive USF subsides. If cable companies are required to contribute to the USF they should also become eligible to benefit from the USF. With the Internet becoming such an important aspect of this nation's society, coupled with President Bush's goal for nationwide Internet access by 2007 and the many municipal wireless programs popping up around the country, the use of the USF for broadband Internet access could achieve the goal of promoting the availability of advanced communications and its accessibility to a wider range of Americans.

V. CONCLUSION

In conclusion, although the Wireline Broadband Order recently adopted by the FCC holds much promise, some holes still exist. In looking towards the future, the FCC's highest goal should be to protect the consumer by ensuring competition in the marketplace. Although enforcement might not be necessary, the risk of what non-enforcement could result in is too high for the FCC to not take some type of action, even if temporary in nature. Further, as uncertainty continues to surround the future of the Universal Service Fund, the FCC must determine some permanent solution to ensure the viability of the fund and the availability of services to the public. Lastly, by being innovative with contributions to and use of the Universal Fund, the FCC has the power to increase the availability and accessibility of advanced communications to a wide range of Americans.

See Copps Statement, supra note 145, para. 4.
